The 28th Annual Fordham Intellectual Property, Media & Entertainment Law Journal Symposium presents

Free Speech in the Modern Age

March 8, 2021
9:15 a.m. - 2:30 p.m. EDT
Zoom Webinar
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9:45 am – 10:45 am Banned Books: Prepublication Review in the Intelligence Community (1hr)

Dr. Christopher E. Bailey, Associate Professor, National Intelligence University

Dr. Christopher E. Bailey is an Associate Professor at the National Intelligence University (NIU) in Bethesda, Maryland specializing in national security law, international law, and professional ethics. Dr. Bailey is licensed to practice law in California and the District of Columbia, and is a member of the American Bar Association and the American Society of International Law. He has an LLM degree in National Security & U.S. Foreign Relations Law, as well as an SJD degree in International and Comparative Law, from the George Washington University School of Law. As a government employee, he is widely published and with many personal experiences with the government’s prepublication review process over the past 15 years. He published a 2017 article, calling for Reform of the Intelligence Community Prepublication Review Process, in George Mason’s National Security Law Journal and is currently serving as the prepublication review officer for the NIU. During this academic year, Dr. Bailey is serving as a Senior Visiting Fellow (Non-Resident) at the Stockdale Center for Ethical Leadership at the U.S. Naval Academy. All statements of fact, analysis, or opinion are the author’s and do not reflect the official policy or position of the National Intelligence University, the Director of National Intelligence, or the U.S. government.

Ramya Krishnan, Staff Attorney, Knight First Amendment Institute at Columbia University

Ramya Krishnan is a staff attorney at the Knight First Amendment Institute at Columbia University, where she works on issues related to government transparency, surveillance, and social media. Krishnan joined the Knight Institute as its inaugural legal fellow. She is a graduate of Columbia Law School and the University of Sydney, where she served as an editor of the Sydney Law Review. She previously worked at Australia’s Attorney-General’s Department, where she litigated several high-profile constitutional and administrative law cases, including in the High Court of Australia. From 2013-2014, she served as a law clerk for the Hon. Robert Beech Jones of the Supreme Court of New South Wales. She has been published or quoted in the New York Times, Washington Post, CNN, NBC News, The Intercept, Columbia Journalism Review, and Just Security.

Mary-Rose Papandrea, Samuel Ashe Distinguished Professor of Constitutional Law, University of North Carolina Law School

Mary-Rose Papandrea is the Associate Dean for Academic Affairs and Samuel Ashe Distinguished Professor of Constitutional Law at the University of North Carolina School of Law. After graduating from Yale College and the University of Chicago Law School, Papandrea clerked for U.S. Supreme Court Justice David H. Souter as well as Hon. Douglas H. Ginsburg of the D.C. Circuit and Hon. John G. Koeltl of the U.S. District Court for the Southern District of New York. She then worked as an associate at Williams & Connolly LLP in Washington, DC, where she specialized in First Amendment and media law litigation. Professor Papandrea is the co-author of the casebook Media and the Law (with Lee Levine, David Ardia and Dale Cohen). She has also written numerous law review articles and book chapters about various First Amendment and media law topics. She teaches First Amendment, Civil Procedure, Torts, Constitutional Law, Media Law, and National Security.

Abner S. Greene, Leonard F. Manning Professor of Law, Fordham Law (Moderator)
11:00 am – 12:00 pm **Hitting Back: SLAPP Suits & Anti-SLAPP Statutes** (1hr)

**Evan Mascagni**, Policy Director, Public Participation Project

Evan Mascagni is a former attorney turned documentary filmmaker and First Amendment rights advocate. Prior to moving to New York City, he was an attorney with the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California. He is passionate about protecting the free speech rights of filmmakers, journalists, and activists across the country. Mascagni has written extensively about SLAPPs, in scholarly journals such as the First Amendment Law Review, and for mainstream audiences. He has been quoted extensively in newspapers and websites across the globe, including cover stories for the *Washington Post*, *USA Today*, and the *San Francisco Chronicle*. He also serves as faculty for Lawline, providing legal education for attorneys on anti-SLAPP legislation. He graduated, summa cum laude, from the University of the District of Columbia, David A. Clarke School of Law, where he was Editor-in-Chief of the UDC Law Review.

**Laura Lee Prather**, Partner, Haynes and Boone LLP

Laura Lee Prather is a Partner in the Litigation Practice Group at Haynes and Boone, LLP in Austin, TX. Her practice includes First Amendment, intellectual property and media/entertainment litigation and appeals. She is an advocate at the Texas Legislature on First Amendment and open government concerns. Prather advises online and traditional newspapers, magazines, radio and broadcasters, television stations, production companies and music and sports entities. Prather was the lead draftsman and negotiator for the: reporters’ privilege, anti-SLAPP statute, and Defamation Mitigation Act. These laws are designed to promote and protect free speech rights in Texas. Prather is Board Certified in Civil Appellate law and is recognized by Chambers Nationwide for First Amendment Litigation.

**Kenneth Swezey**, Partner, Cowan, DeBaets, Abrahams & Sheppard LLP

Kenneth N. Swezey focuses on transactional counseling in copyright, corporate, digital media, entertainment, publishing and other intellectual property and commercial matters. He has substantial experience representing companies and individual clients in the emerging fields of digital media, social media and transmedia. He represents clients ranging from broadband television companies, well-known authors, publishers, entertainers, literary estates, visual arts agencies, as well as not-for-profit organizations in the areas of intellectual property and entertainment. Swezey is a frequent lecturer in intellectual property and digital media issues and has served as chair of the New York State Bar Association’s Entertainment, Art and Sports Law Section and Literary Works Committee. He is a graduate of UCLA Law School and UCLA Graduate School of Management.

**Olivier Sylvain**, Ph.D., Professor of Law, Director, McGannon Center for Communications Research, Fordham Law (Moderator)
12:15 pm – 1:00 pm **Keynote Speaker** (1hr)

**Katherine M. Bolger**, Partner, Davis Wright Tremaine LLP

Kate Bolger is an experienced First Amendment and media litigator who has represented news and entertainment companies in a broad spectrum of content-related matters, ranging from investigative journalism to coverage of celebrities. In addition to defending media clients in court, Bolger regularly counsels newspapers, magazines, and book publishers about prepublication issues, and advises authors on contract, electronic publishing, and intellectual property matters. Chambers USA reports that clients have described Bolger as "incredibly bright, very strategic, and an exceptionally strong writer" who is "a very effective litigator" and "the lawyer I would want the most in a New York state court street fight."

Before joining DWT, Bolger was a partner at Levine Sullivan Koch & Schulz LLP. Bolger is an adjunct professor at Fordham University School of Law, teaching Mass Media Law. She holds a J.D. from University of Chicago Law School and has been named as one of "America's Leading Lawyers for Business" in First Amendment Litigation (Nationwide) by Chambers USA, 2015-2020.

1:15 pm – 2:15 pm **Celebrity Paradox: Social Media & Paparazzi Photography** (1hr)

**Nancy E. Wolff**, Partner, Cowan, DeBaets, Abrahams & Sheppard LLP

Nancy E. Wolff is Co-Chair of CDAS’s Litigation group and has been named “Lawyer of the Year” by Best Lawyers in America 2020 for her work in trademark law. She was previously the president of the Copyright Society of the USA and serves as co-chair of the American Bar Association’s Copyright Section. Because of her in-depth knowledge of copyright, trademark, privacy, and publicity law, she provides guidance on best practices in using content and offers pre-publication review of books, documentaries, films, and television series. Wolff counsels on creative deal structuring, the acquisition and sale of properties and collections, and reviews licensing and services agreements. She represents trade associations in advocating for changes to Federal copyright law and the protection of various licensing industries under state publicity laws. She is a graduate of Rutgers University School of Law.

**Daniel A. Schnapp**, Partner, Nixon Peabody LLP

Daniel A. Schnapp is a trial lawyer with a focus on commercial and intellectual property litigation. He handles high-profile litigation, regulatory, and privacy matters for clients in a variety of industries, including entertainment, music, media, art, publishing, technology, advertising, and financial services, and has successfully tried numerous cases as lead trial counsel, including matters involving copyright, trademark, trade dress infringement, and defamation. He has nearly 20 years of legal and business experience successfully litigating complex intellectual property and commercial cases in federal and state courts and before arbitration tribunals. Daniel is also a member of the American Arbitration Association’s Roster of Neutrals. Schnapp is a graduate of Benjamin N. Cardozo School of Law.

**Ron Lazebnik**, Clinical Associate Professor of Law, Fordham Law (Moderator)
REFORM OF THE INTELLIGENCE COMMUNITY PREPUBLICATION REVIEW PROCESS:
BALANCING FIRST AMENDMENT RIGHTS AND NATIONAL SECURITY INTERESTS

Christopher E. Bailey*

Over the past 15 years, the American public has seen a spate of current and former intelligence officers publishing memoirs, articles, and academic works regarding U.S. national security and their own experiences working in government. In some respects, this new “cottage industry” has advanced public understanding of the important threats facing the United States and the government’s response to such threats. In other respects, however, these works have also raised a risk that such publications could impair U.S. national security by exposing intelligence sources, methods, and classified activities. Hence, the Director of National Intelligence (“DNI”) should examine the prepublication review process used by various intelligence agencies. In fact, a reform of the intelligence community (“IC”) prepublication review process would help advance U.S. national security while also ensuring minimal impairment of the First Amendment rights of government employees, military personnel, and contractors.

* Mr. Christopher E. Bailey is a faculty member at the National Intelligence University specializing in national security law, processes, intelligence ethics, and strategy. He is a 2008 graduate of NIU’s Denial & Deception Advanced Studies Program and the U.S. Army War College. He is licensed to practice law in California and the District of Columbia, and is a member of the National Security Law Committee, American Bar Association. He has LLM degree in National Security & U.S. Foreign Relations Law from the George Washington University School of Law where he is currently a candidate for the SJD degree. All statements of fact, analysis, or opinion are the author’s and do not reflect the official policy or position of the National Intelligence University, the Department of Defense or any of its components, or the U.S. government.
The DNI can remedy some of the current problems of overbroad and inconsistent regulations through clear regulatory guidance that helps management officials and employees alike meet both fiduciary and ethical obligations when it comes to protecting classified information. First, the DNI should publish a current, publicly available regulatory standard. Second, the DNI should establish a clearly articulated, dual-track approach for current and former employees. Next, the DNI should mandate that each agency establish—and publicize—an appropriate administrative appeals process. Finally, the DNI should conduct extensive outreach activities to ensure that employees understand prepublication review processes and procedures, as well as appropriate avenues for lodging whistleblower complaints.

INTRODUCTION

Imagine two persons who want the same unclassified government document from an intelligence agency, and both persons believe that the release of that document would serve U.S. national security interests through a better-informed citizenry. The first person is a current government employee who holds a top secret clearance and was the author of that document; the second person is an American citizen, perhaps a noted journalist.  

1 A government employee may have a proprietary interest in a manuscript or article, particularly if the material has been prepared after work hours or after leaving government service, while other products may reflect work in the
The two requestors will use two very different processes to obtain the document. The employee will use an administrative process, known as a request for prepublication review, which varies considerably by agency within the intelligence community and allows for considerable discretion on the part of the employee’s supervisory chain, either in requiring edits or blocking release. The employee may receive clearance for his or her product within weeks or a few months, but in the event of a denial will be obligated to bring a civil action in federal district court. The outside journalist will request that same document under the Freedom of Information Act ("FOIA"), and the government will be obligated to process that request under tightly controlled course and scope of government employment (e.g., an article prepared during a government sponsored education or training program). In the latter case, the government employee cannot profit from the publication, although he may have a personal interest in seeing the material published. Pfeiffer v. CIA, 721 F. Supp. 337, 339-40 (D.C. Cir. 1989). Jack Pfeiffer, a retired CIA historian, sought release of a report he had written—while working for the agency—dealing with the Agency's internal investigation of the 1961 Bay of Pigs Operation. Id. at 338. Initially, the agency denied declassification of that report under EO 12,356, as well as its release under the Freedom of Information Act (citing the deliberative process privilege under 5 U.S.C. § 552(b)(5)). Id. Pfeiffer then asked the agency to undertake a pre-publication review of the report, which the agency declined to do, stating that the procedure did not apply to a work created in the course of an employee’s official duties, as opposed to a work that had been prepared for nonofficial publication in a personal capacity but might reflect information acquired through his government employment. Id. The district court granted summary judgment, holding that Pfeiffer had no right to prepublication review or mandatory declassification under EO 12,356, and that his continued possession of a copy of that report was wrongful, thus obligating him to return it. Id. Subsequently, the Court of the Appeals affirmed that decision, holding that the pre-publication review process did not apply because the government had a property interest in the report and that Pfeiffer was compelled to return his copy as a matter of equity “for he obtained it only by violating his fiduciary duty to the CIA.” Pfeiffer v. CIA, 60 F.3d 861, 865 (D.C. Cir. 1995) (citing Snepp v. United States, 444 U.S. 507, 510 (1980)).

2 A government employee, as a prevailing party in a civil action to challenge a censorship action of the government, may receive an award of reasonable attorney’s fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Under the statute, an applicant for attorney’s fees must file an application within 30 days of the final judgment in the civil action. 28 U.S.C. § 2412 (d)(1)(B). Moreover, the federal district court must determine whether "the position of the United States was substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. §2412 (d)(1)(A).
The journalist might not receive a copy of that document until several years later, but in the event of a whole or partial denial will have the right to file a civil complaint against the government in federal district court. If the court decides in his or her favor, the journalist may also receive an award of attorney’s fees. In short, two distinct processes facilitate the release of an unclassified document held by the government. In a situation like the one proffered here, the processes can produce remarkably different results, both in terms of the timeliness and the content of the material that is released.


4 STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 1 (Jan. 2016) (describing a “culture of unrepentant noncompliance with Federal law and disrespect for the FOIA process, which resulted in the deletion of potentially responsive records and inexplicable delays,” sometimes as long as ten years, on the part of Executive branch departments and agencies). The Defense Intelligence Agency (“DIA”), for example, has reported that it has some requests that have been pending for 10-15 years, based upon the complexity and volume of material requested, but has been making significant efforts to reduce its backlog. DEF. INTELLIGENCE AGENCY, 2015 DoD CHIEF FOIA OFFICER REPORT 24, available in the agency’s FOIA Electronic Reading Room, http://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room. However, the Department of Defense (“DoD”) Chief FOIA Officer report for 2015 indicates that “[44] percent of the 32 DoD Component FOIA offices either reduced their backlogs or ended FY 2014 with a backlog of zero.” DEP’T OF DEF., CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT FOR 2015, at 27 (2015), http://open.defense.gov/Portals/23/Documents/2015_ACFO_Report_FINAL_REPORT.pdf. This DoD report demonstrates that some agencies experience a much higher volume of requests for release under the FOIA and that other agencies have a minimal backlog in processing such requests. Id.

5 In enacting the FOIA, Congress provided, as a means of encouraging the release of documents, that a federal district court could “assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552 (a)(4)(E).
While these two processes serve vastly different government interests, considerable evidence demonstrates problems with the prepublication review process that can be remedied either through an administrative regulation by the Director of National Intelligence ("DNI") or through the passage of new legislation by Congress. On one hand, the prepublication review process has been established by regulation (or directive) in many agencies based originally upon two federal appellate decisions.6 The process is designed to balance the government's national security interests, including the protection of intelligence sources and methods,7 with the employee's free speech rights under the First Amendment. Several recent cases, including Anthony Shaffer's 2010 publication of "Operation Dark Heart"8 and Matt Bissonnette's 2014 publication of "No Easy Day," 9

6 United States v. Marchetti (two cases), 466 F.2d 1309, 1313 (4th Cir. 1972) (holding that a former employee of the Central Intelligence Agency was bound by an employment agreement to submit any writings, fictional or non-fictional, to the agency for pre-publication review); Snepp v. United States, 444 U.S. 507, 514 (1980) (holding that a constructive trust is a proper remedy for disgorging the profits of one who abuses a confidential position by failing to submit material for pre-publication review).

7 Under 50 U.S.C. § 3024(i), the Director of National Intelligence is responsible for “[protecting] intelligence sources and methods from unauthorized disclosure.” Moreover, there is ample evidence that the unauthorized disclosure (leak) of classified information can do significant damage to national security. Tom Gjelten, Does Leaking Secrets Damage National Security?, NPR (June 12, 2012, 5:08 AM), http://www.npr.org/2012/06/12/154802210/does-leaking-secrets-damage-national-security.

8 ANTHONY SHAFFER, OPERATION DARK HEART: SPYCRAFT AND SPECIAL OPS ON THE FRONTLINES OF AFGHANISTAN—AND THE PATH TO VICTORY (2010). See also Kevin Gosztola, In First Amendment Case over Afghan War Memoir, Justice Department Asks Judge to End Lawsuit, SHADOW PROOF (May 1, 2013), https://shadowproof.com/2013/05/01/in-first-amendment-case-over-afghan-war-memoir-justice-department-asks-judge-to-end-lawsuit (claiming government abuses of the classification system).

9 MARK OWEN (MATT BISSONNETTE), NO EASY DAY: THE FIRSTHAND ACCOUNT OF THE MISSION THAT KILLED OSAMA BIN LADEN (2014). See also Adam Goldman, Justice Department Drops Second Criminal Investigation into Navy SEAL Matt Bissonnette, WASH. POST (May 31, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/05/31/justice-department-drops-second-criminal-investigation-into-navy-seal-matt-bissonnette (explaining that Bissonnette had been facing two separate criminal prosecutions, one related to his book No Easy Day which had not been submitted for pre-publication review and a second one accusing
suggest frustrations with the inconsistent management practices, delays, and allegedly politically-inspired censorship of the prepublication review process. In fact, congressional oversight committees have repeatedly called upon the DNI to issue new community-wide guidance and report on issues in the review process.

On the other hand, the FOIA is a 1966 statute passed by Congress to provide for the disclosure of previously unreleased government documents. The FOIA was designed to ensure accountability and transparency in government, promoting an informed citizenry. The Act defines the government records

him of illegal profits related to his work as a consultant for a video game company while on active duty). Bissonnette has recently pursued a legal action against the attorney who had advised him that he did not need to comply with the DoD pre-publication review requirements. Melissa Maleske, $8M Bin Laden Book Malpractice Suit Fails, Attys Say, Law360 (Jan. 23, 2015, 5:56 PM), http://www.law360.com/articles/614543/8m-bin-laden-book-malpractice-suit-fails-attys-say.


Compare FEINSTEIN, INTELLIGENCE AUTHORIZATION ACT FOR 2013, S. REP. No. 112-192 at 8 (2012) (calling upon the DNI in Section 507 to “prescribe regulations and requirements specifying the responsibilities of Intelligence Community personnel with access to classified information, including regulations and other requirements relating to contact with the media, non-disclosure agreements, prepublication review, and disciplinary actions.”), with NUNES, INTELLIGENCE AUTHORIZATION ACT FOR 2017, H.R. REP. NO. 114-573 at 7 (2016) (recognizing “the perception that the pre-publication review process can be unfair, untimely, and unduly onerous and that these burdens may be at least partially responsible for some individuals ‘opting out’ of the mandatory review process. The Committee further understands that IC agencies’ pre-publication review mechanisms vary, and that there is no binding, IC-wide guidance on the subject.”).

that are subject to disclosure, outlines a mandatory disclosure process, allows nine exemptions to disclosure, and provides for federal court jurisdiction to review agency denials, potentially awarding attorney’s fees and costs to the aggrieved requestor. Indeed, extensive federal case law dictates how FOIA cases should be handled, and the Department of Justice has authored a detailed guide for FOIA practitioners.13

A series of federal cases, as well as some public commentary, suggests problems in the prepublication review process with respect to employee obligations and the vague review standards used by the government.14 Critics of the review process include three former directors of the Central Intelligence Agency (“CIA”): Admiral Stansfield Turner,15 General Michael Hayden,16 and Leon Panetta.17 Panetta apparently became so frustrated with the process that he sent his book to his editor before it had completed the Publication Review Board (“PRB”) process—raising the issue of whether he violated his own nondisclosure agreement.18 One critic said:

Clearly, the government has a legitimate interest in preventing disclosure of classified information. But the current prepublication review process is too expansive,

14 SUSAN L. MARET & JAN GOLDMAN, GOVERNMENT SECRECY: CLASSIC AND CONTEMPORARY READINGS 98 (2009).
18 LEON PANETTA, WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE (2014).
slow and susceptible to abuse. The damage it does to First Amendment values is pervasive but nearly invisible to the public. In an era characterized by endless war and a bloated secrecy bureaucracy, the restrictions on commentary and criticism about government policies and practices pose an intolerable cost to our democracy.  

Thus, this article proposes that the current prepublication review process for intelligence community agencies can be reformed using lessons learned from the FOIA. Such reform would help balance the need to protect national security information with the right of government employees to seek release of documents that would promote a better-informed citizenry.

The DNI should issue new regulatory guidance to the intelligence community regarding the prepublication review process, perhaps similar to the current “DOJ Guide to the Freedom of Information Act.” The DOJ guide provides a “comprehensive legal treatise of the FOIA’s procedural requirements, exemptions, and litigation considerations. It contains a detailed analysis of the key judicial opinions issued on the FOIA.” This useful reference is readily accessible to the general public, providing important information for both lay persons and attorneys navigating what can be an arcane process for the uninitiated. Similarly, detailed regulatory guidance by the DNI would help eliminate some of the current problems with overbroad or vague prepublication review requirements, allowing both management officials and employees alike to meet their fiduciary and ethical obligations. Such guidance should provide clear submission requirements for


21 Id.
employees, including what types of documents must be submitted and to whom, while also requiring that each agency maintain some level of transparency and accountability in its processes. The DNI can adopt best practices from several agencies: the CIA, with its dual-track approach for current and former employees and its laudable outreach efforts to promote employee understanding of PRB process and procedures; the NSA, with its current, publicly available regulatory standard; and others.

I. THE PREPUBLICATION REVIEW PROCESS

A. Introduction

The prepublication review process is an important means by which the intelligence community protects its classified information while advancing national security interests. Some books, such as Herbert Yardley’s 1931 work about the government’s code breaking efforts and Phillip Agee’s post-Vietnam books that revealed the identity and location of about 2,000 intelligence officers operating abroad, have caused considerable damage and irreparable injury to U.S. interests. In Yardley’s case, the government considered various legal options to prevent the publication of his planned book, but executive branch officials concluded that existing law did not permit such a prior restraint on speech (e.g., the government did not then use nondisclosure agreements). Yardley’s book did, however, cause

22 Herbert O. Yardley, The American Black Chamber (1931).
24 David Kahn, The Reader of Gentlemen’s Mail: Herbert O. Yardley and the Birth of American Codebreaking 106–112 (2004) (chronicling the story of a man left unemployed by the decision of the Secretary of State to abolish the code breaking unit; lacking a government pension and needing a means to support his family, Yardley decided to write a book about his experiences).
Congress to pass a new statute prohibiting such disclosures of code material. In Agee’s case, the CIA had used nondisclosure agreements, but the government apparently decided not to enforce his agreement in federal court, likely because the books were first published abroad and Agee never returned to the United States. Eventually, the government found a more effective means of addressing the problem, largely through enforcement of the employee’s nondisclosure agreement in federal district court and through an invigorated prepublication review process.

Generally, the executive branch has sought to control classified information through Executive orders, as well as secrecy agreements in which employees agree to protect classified information and to submit materials for prepublication review. The federal courts have consistently upheld employee

25 Id. at 158-71.
27 See John Hollister Hedley, Secrets, Free Speech, and Pig Leaves, 41 STUD. IN INTELLIGENCE 75, 77 (2007) (noting that the CIA used a less systematic process before 1976, managed by the Office of Security rather than a formal PRB, for review of non-official publications authored by employees).
29 The government currently uses two non-disclosure agreements to protect information classified pursuant to Executive Order 13,526: Standard Form 312, which is prescribed by the Director of National Intelligence, and Form 4414. Standard Form 312, Classified Information Nondisclosure Agreement (last revised July 2013), https://fas.org/sgp/othergov/sf312.pdf [hereinafter SF 312]; Form 4414, Sensitive Compartmented Information Nondisclosure Agreement (last revised Dec. 2013), https://fas.org/sgp/othergov/intel/sf4414.pdf [hereinafter Form 4414]. Under the SF 312, the employee agrees that he will not divulge classified information unless he has verified that the recipient has been
agreements to submit materials for prepublication review, finding that such agreements serve as a reasonable balance between the government’s interest in protecting intelligence sources and methods\textsuperscript{30} and an employee’s First Amendment right to publish unclassified information. However, case law suggests problems with how the prepublication review process has been managed. This situation leaves government employees at risk in terms of what must be submitted for review and the manner in which the government must process that request.

Since 9/11, the publication of books and articles on U.S. national security has become a “cottage industry” for former intelligence officers.\textsuperscript{31} Thus, a failure to comply with obligations under a non-disclosure agreement can have very serious civil, properly authorized by the government to receive it, or that he has “been given prior written notice of authorization from the United States Government or Agency … responsible for the classification of information or last granting [him/her] a security clearance that such disclosure is permitted.” Under the Form 4414, ¶ 4, the employee agrees to submit materials—relating to SCI (Sensitive Compartmented Information)—intended for public disclosure, including works of fiction, for security review by the Department or Agency that last authorized his access to classified information or material. In the next paragraph, the employee also acknowledges that the purpose of such review is to give the government a “reasonable opportunity” to determine whether the submitted material contains classified information. The Form 4414 then states that the agency/department to which the employee has made his/her submission will act upon it, to include any interagency coordination within the intelligence community, and make a response within a reasonable time, “not to exceed 30 working days from date of receipt.” See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/NSID-91-106FS, INFORMATION SECURITY: FEDERAL AGENCY USE OF NONDISCLOSURE AGREEMENTS (1991) (explaining that the use of nondisclosure agreements began as a result of a now suspended 1983 National Security Decision Directive that had been issued by President Ronald Reagan and that such agreements are now widely used throughout government); see generally Michael L. Charlson, The Constitutionality of Expanding Prepublication Review of Government Employees’ Speech, 72 CAL. L. REV. 962, 966-70 (1984) (reviewing the expanding use of non-disclosure agreements and pre-publication review during the Reagan administration, and offering several alternatives to government review such as tightened security programs, post-publication sanctions, and administrative actions for current employees).


\textsuperscript{31} Rebecca H., The ’Right to Write’ in the Information Age, 60 STUD. IN INTELLIGENCE 15 (2016) (examining the broken process and recommending some practical reform steps).
criminal, and administrative consequences for current and former government employees.\textsuperscript{32} In one recent case, Matt Bissonnette, writing under the pen name Mark Owen, a former Navy SEAL who had written a first-hand account of the May 2011 mission that killed Osama bin Laden, agreed to forfeit over $6.6 million based upon his failure to comply with prepublication review requirements.\textsuperscript{33}

\textit{B. Case Law}

The modern prepublication review process is based primarily upon several federal appellate cases that established the fiduciary obligation of both current and former government employees to submit materials for government review prior to publication. Moreover, an employee who breaches his or her obligation is subject to the imposition of a constructive trust—without regard to whether classified information has been disclosed—against all proceeds of that publication. Nonetheless, some important questions regarding employee and government obligations remain unanswered, such as an employee’s obligation in cases requiring review by multiple agencies and whether employees can discuss previously leak documents.

The 1972 \textit{Marchetti} case represents the first effort by the executive branch to enforce a prepublication review agreement—

\begin{footnotesize}
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\item \textsuperscript{32} 18 U.S.C. §793(d) (2012) (making government employees who make unauthorized disclosures of classified information to persons not authorized to receive it, such as a magazine or book publisher, subject to criminal prosecution); \textit{see also} United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988) (the defendant had provided purloined imagery of a Soviet aircraft carrier under construction to \textit{Jane's Defense Weekly}; Morison was convicted under both the theft and espionage statutes, and was sentenced to two years in prison).
\end{footnotesize}
a prior restraint on free speech under the First Amendment—against a former intelligence officer in federal court.34 Victor Marchetti had worked for the CIA from 1955 to 1969, and he had signed a secrecy agreement pledging not to divulge any classified information.35 Later, when he terminated his employment, Marchetti signed an oath in which he acknowledged that the unauthorized disclosure of classified information was prohibited by law and agreed not to divulge “any information relating to the national defense and security” without prior written approval from the agency.36 Still, after his resignation and without prior approval, he published books and articles, appeared on television shows, and gave interviews to the press, all related to the policies and practices of the agency and his experiences as an intelligence officer.37

The government initiated a civil action in federal district court, seeking an injunction against Marchetti. A three-judge appellate panel acknowledged the government’s right to protect classified information, finding that Marchetti owed a fiduciary obligation to the government by operation of his employment agreement and imposing any burden of obtaining judicial review upon him.38 While the court granted the injunction sought by the government regarding any fictional or nonfictional writings related to the agency or intelligence matters, it also made several other critical points. First, the court observed that the government’s need for secrecy was such that the court probably would have found an implied agreement had one not been formally expressed.39 Second, the court said that it would have declined enforcement of an agreement “to the extent that it purports to prevent disclosure of unclassified information . . . .”40 Here, however, the court did not address the propriety of the classification system itself, leaving open the issue of whether

34 United States v. Marchetti, 466 F.2d 1309, 1311 (4th Cir. 1972).
35 Id. at 1312.
36 Id.
37 Id. at 1313. See Moran, supra note 26, at 255-60 (chronicling Marchetti’s background and experiences with the CIA’s PRB process).
38 Marchetti, 466 F.2d at 1316-17.
39 Id. at 1316.
40 Id. at 1317.
Marchetti could be prohibited from divulging information that had not been properly classified. Third, the court determined that “[Marchetti] may not disclose information obtained by him during the course of his employment which is not already in the public domain.” 41 This statement does not answer the question of whether current or past government employees can discuss previously leaked government documents without affirming or denying the accuracy of such materials. Finally, the court obligated the CIA to act promptly in its review of employee material, indicating in dicta that “the maximum period for responding after the submission for approval should not exceed thirty days.” 42

Like Victor Marchetti, Frank Snepp had been employed by the CIA, had executed a voluntary secrecy agreement as an express condition of his employment, and had breached his obligation to obtain prepublication review of his 1977 book “Decent Interval,” in which he discussed certain CIA activities in South Vietnam. 43 The government then brought a breach of contract action to enforce the secrecy agreement, seeking an injunction and an order imposing a constructive trust for the government’s benefit upon all profits that he might earn from the proceeds of his book. 44 The district court found that Snepp “had willfully, deliberately and surreptitiously breached his position of trust” by causing the publication of his book without prior approval from the agency. 45 Moreover, the court found that he had misled CIA officials into believing that he would submit the book for prepublication clearance. 46 The district court then

41 Id.
42 Id.
44 United States v. Snepp, 456 F. Supp. 176, 177 (E.D. Va. 1978). See Moran, supra note 26, at 266-73 (examining Snepp’s legal struggles with the CIA). Moran argues that Frank Snepp was a victim of circumstances, with his revelations about CIA wrongdoing coming on the heels of earlier damaging disclosures about the CIA. In fact, two prior CIA officers (Miles Copeland, 1974; Joseph Burckholder, 1976) had published books without approval and neither had been punished. Id. at 270
45 Snepp, 456 F. Supp. at 179.
46 Id.
enjoined future breaches of the agreement and imposed a constructive trust on Snepp’s profits.\(^{47}\) On review, the fourth circuit upheld the injunction, but concluded that the record did not support the imposition of a constructive trust.\(^{48}\) The court noted that the government had conceded for purposes of litigation that Snepp’s book did not contain any classified information, thus reaching the implicit conclusion that the fiduciary obligation extended only to safeguarding classified material.\(^{49}\)

Subsequently, the Supreme Court held in a 6-3 per curiam decision that Snepp had violated his fiduciary obligation to the agency and that the proceeds of that breach should be impressed with a constructive trust.\(^{50}\) In fact, the Court reasoned that “[w]hether Snepp violated his trust does not depend upon whether his book actually contained classified information.”\(^{51}\) Thus, Snepp’s failure to submit his book for prepublication review impaired the agency’s obligation to perform its statutory duty to protect intelligence sources and methods from unauthorized disclosure.\(^{52}\) In other words, former intelligence officers cannot rely on their own judgment about what information must be protected, but must allow their former employers the opportunity to determine for themselves what must be protected and what can be released.\(^{53}\)

The Court further reasoned that a traditional remedy, such as nominal, actual, or punitive damages, would not serve the government’s interests.\(^{54}\) Nominal damages would have been hollow and without deterrent effect; actual damages would have required the government to prove tortious conduct, possibly through the revelation of classified information; and punitive

\(^{47}\) Id. at 182. By one estimate, Snepp was obligated to surrender an estimated $140,000 to the government. Moran & Willmetts, supra note 10, at 240.

\(^{48}\) Snepp v. United States, 595 F.2d 926, 929, 935-36 (4th Cir. 1979).

\(^{49}\) Id.

\(^{50}\) Snepp v. United States, 444 U.S. 507, 510 (1980).

\(^{51}\) Id.

\(^{52}\) Id. at 509 (1980). See CIA v. Sims, 471 U.S. 159, 188 (1985) (allowing the Director of Central Intelligence broad discretion in protecting intelligence sources and methods in responding to requests made under the FOIA).

\(^{53}\) Snepp, 444 U.S. at 511.

\(^{54}\) Id. at 514-15.
damages would have been speculative and would not have provided a reliable deterrent against future breaches. The Court then summarily concluded that a constructive trust was the most appropriate means of protecting the government and the former intelligence officer from unwarranted risks.\(^{55}\) Thus, if an author seeks to publish a book without prior approval, even though that book contains no classified information, the government can go to court to block publication or seize the profits.

In dissent, Justice Stevens argued that a constructive trust was inappropriate. Snepp had not disclosed confidential information and the “profits from his book [were not] in any sense a product of his failure to submit the book for prepublication review.”\(^{56}\) Thus, according to Justice Stevens, even if Snepp had submitted his book for prior clearance, the government’s authority to censor it would have been limited to classified information and the government “would have been obligated to clear the book for publication in precisely the same form as it now stands.”\(^{57}\) Justice Stevens also argued that the agency did not have the authority to redact “unclassified information on the basis of its opinion that publication may be ‘detrimental to vital national interests’ or otherwise ‘identified as harmful.’”\(^{58}\) In any case, Justice Stevens objected to the Court’s decision in the absence of a full briefing and oral argument.\(^{59}\)

In *McGehee v. Casey*, a 1983 decision of the U.S. Court of Appeals for the District of Columbia, a former CIA officer challenged the agency’s classification and censorship scheme.\(^{60}\) Like Marchetti and Snepp before him, McGehee had signed a secrecy agreement when he was employed by the agency.\(^{61}\) Later, after he had submitted a draft article for prepublication review, he was informed that the draft contained classified information and

\(^{55}\) *Id.* at 515-16.

\(^{56}\) *Id.* at 521 (Stevens, J., dissenting).

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 522.


\(^{61}\) *Id.* at 1139.
that the agency was withholding permission to publish.\textsuperscript{62} Subsequently, he sought judicial review in federal district court, challenging the constitutionality of the agency’s classification scheme and the propriety of classifying portions of his article under that scheme.\textsuperscript{63} Here, both the district court and the U.S. Court of Appeals for the District of Columbia followed \textit{Snepp} and held that the secrecy agreement was a reasonable means of protecting important national security interests. However, unlike Snepp, McGehee had submitted his manuscript for prepublication review. Hence, both courts considered the substantive process and criteria by which the agency classified and censored the writings of former employees.

The U.S. Court of Appeals for the District of Columbia made two important holdings in this case. Initially, the court held that the agency’s censorship of classified information contained in the writings of former officers did not violate the First Amendment.\textsuperscript{64} In other words, as with Marchetti and Snepp before him, the court upheld the propriety of McGehee’s secrecy agreement and the prepublication review process itself. Next, the court noted that McGehee had a strong First Amendment interest in ensuring that agency censorship of his article was limited to material that had been properly classified by the government.\textsuperscript{65} The court then articulated a standard of review for prepublication review cases involving censored material. First, the court explained that “reviewing courts should conduct a \textit{de novo} review of the classification decision, while giving deference to reasoned and detailed CIA explanations of the classification decision.”\textsuperscript{66} Second, the court believed that “courts should require that CIA

\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 1140.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{McGehee}, 718 F.2d at 1148 (citing \textit{Alfred A. Knopf, Inc. v. Colby}, 509 F.2d 1362, 1367 (4th Cir. 1975), \textit{cert. denied}, 421 U.S. 992 (1975) for the proposition that material should be censored by the court only if it is found to be both classified and properly classifiable under the Executive order).
\textsuperscript{66} \textit{McGehee}, 718 F.2d at 1148. \textit{See also} \textit{Stillman v. CIA}, 319 F.3d 546 (D.C. Cir. 2003) (the trial court abused its discretion in finding that the plaintiff’s counsel, Attorney Mark Zaid, had a right to access to the classified manuscript so that he could challenge the classification decision; the case was remanded for an \textit{ex parte} assessment of the classification issue).
explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification." 67 Third, the court anticipated that an “in camera review of agency affidavits, followed if necessary by further judicial inquiry, will be the norm.” 68 Finally, the court held that in McGehee’s case, the material marked as “secret” could be reasonably expected to cause serious damage to national security, and censorship was thus warranted. 69

Shaffer v. Defense Intelligence Agency involved a former civilian employee of the Defense Intelligence Agency (“DIA”) who had obtained prepublication review in his capacity as an Army Reserve officer, but failed to obtain approval from either the DIA or any other intelligence agency. 70 Lieutenant Colonel Anthony Shaffer had worked as a civilian employee of the DIA from 1995 to 2006 while simultaneously serving in the Army Reserve. The Army Reserve mobilized him from December 2001 to June 2004, during which time he completed two tours in Afghanistan. 71 In 2007, after he had left the DIA and his clearance had been revoked, he teamed with a ghostwriter to prepare a memoir of his experiences entitled “Operation Dark Heart,” a book that was eventually accepted for publication by St. Martin’s Press. 72 In March 2009, Shaffer notified his Army Reserve chain-of-command of his pending book and received guidance on the prepublication review process. 73 Rather than submitting his book to the DIA for

67 McGehee, 718 F.2d at 1148.
68 Id. at 1149.
69 Id. at 1149-50.
72 See generally ANTHONY SHAFFER, OPERATION DARK HEART: SPIYCRAFT AND SPECIAL OPS ON THE FRONTLINES OF AFGHANISTAN—AND THE PATH TO VICTORY (2010). This September 2010 edition of the book is the heavily censored version that was eventually published after the book went through pre-publication review by the government.
73 Decl. of Anthony Shaffer, supra note 71, at 5-7.
clearance, he obtained prepublication approval through his Army Reserve command in January 2010.\textsuperscript{74}

The DIA learned about the planned publication of the book on May 27, 2010, but was unable to obtain a copy until July of that year.\textsuperscript{75} The DIA found that the book contained significant classified information related to the CIA, the National Security Agency (“NSA”), and the U.S. Special Operations Command.\textsuperscript{76} Subsequently, based upon an August 6, 2010, demand letter sent by the DIA Director, the Army Reserve command revoked its earlier approval of the book and the publisher agreed to delay distribution.\textsuperscript{77} Shaffer then began negotiating with DIA and Department of Defense (“DoD”) officials about possible changes to the manuscript. The DoD paid $50,000 to purchase and destroy the entire 10,000-copy first printing of the book, eventually allowing a second printing with 433 redacted passages to go forward.\textsuperscript{78} The publisher was unable to retrieve all copies of the unredacted book.\textsuperscript{79} Finally, on December 14, 2010, due to a difference of opinion over the censorship of certain passages, Shaffer filed a civil complaint alleging that the defendants had

\textsuperscript{74} Shaffer v. Def. Intelligence Agency, Civil Action No.: 10-2119 (RMC), filed Feb. 11, 2012 (memorandum opinion).


\textsuperscript{76} DIA Memorandum, supra note 75; see also Shane, supra note 75.

\textsuperscript{77} Decl. of Anthony Shaffer, supra note 71, at 8-9.


deprived him of First Amendment rights by classifying a substantial portion of his book.\textsuperscript{80}

On August 3, 2012, Shaffer submitted a formal request through the DoD’s Office of Security Review (“OSR”) for another classification review so that he could proceed with a foreign language edition of his book.\textsuperscript{81} Eventually, as a result of an OSR review and further negotiations, the government agreed that 198 of the 433 passages redacted in the September 2010 edition were properly declassified. Shaffer also agreed to use substitute language for 73 passages and delete 139 passages, with only 23 passages remaining in dispute. While Shaffer identified some material as available in open source publications, he could not provide pinpoint citations for certain disclosures in the book; in turn, the OSR claimed that it could not conduct a meaningful review without those citations.\textsuperscript{82} On January 19, 2013, the OSR concluded that none of the material in the 23 passages, Shaffer’s February 2006 testimony before the House Armed Services Committee, or Shaffer’s Bronze Star narrative had been officially declassified.\textsuperscript{83}

The defendants then filed a motion for summary judgment for ex parte, in camera review, but the court concluded that the briefing was inadequate as to both the classified nature of the congressional testimony and the Bronze Star narrative.\textsuperscript{84} The district judge decided the case using the standard of review in \textit{McGehee}. First, the judge explained that “when a manuscript contains information that is unclassified, wrongly-classified, or derived from public sources, the Government may not censor such material.”\textsuperscript{85} Second, she concluded that classified information

\begin{itemize}
  \item \textsuperscript{80} \textit{Shaffer}, 102 F. Supp. 3d at 5.
  \item \textsuperscript{81} \textit{Id.} at 6.
  \item \textsuperscript{82} \textit{Id.}
  \item \textsuperscript{83} \textit{Id.} at 7.
  \item \textsuperscript{84} \textit{Id.} at 7-8.
  \item \textsuperscript{85} \textit{Id.} at 9. Section 1.7 of Executive Order 13,526 precludes the classification of information “(1) to conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency,” further limiting an agency’s authority to censor the works of past or present employees. Exec. Order No. 13,526, supra note 28.
\end{itemize}
could be disclosed, despite an objection from the government, “if the information has been officially acknowledged, that is, if (1) the same, (2) specific information (3) already has been made public through an official and documented disclosure.” 86 The judge explained that a “plaintiff asserting a claim of prior disclosure bears the initial burden of pointing to specific information in the public domain that appeared to duplicate that being withheld.” 87 Finally, the judge held that the February 2006 congressional testimony had been officially released, 88 but that the Bronze Star narrative 89 and the material in the 23 contested passages had not. 90 Moreover, the judge sharply criticized the DIA for its delay in confirming that the congressional testimony had in fact been cleared for release several years earlier, 91 raising a serious question whether the agency had been negligent in its record-keeping. The judge emphasized that the ‘Defendants’ blinkered approach to the serious First Amendment questions raised here caused Defendants to take an erroneous legal position on

86 Shaffer, 102 F. Supp. 3d at 9; see also Exec. Order No. 13,526, supra note 29, at § 1.1(c) (“Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.”). This means that material that is in the public domain as a result of an unauthorized disclosure, such as WikiLeaks, cannot be cited or used by a past or present employee. A similar three-prong standard is used by the district courts in FOIA cases to determine when information in the public domain has been officially acknowledged. Compare Afshar v. Dep’t of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (noting that books published by former CIA employees, even though submitted to the agency for pre-publication review, do not constitute official release or acknowledgement for purposes of the FOIA), with Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (discussing a three-part test and also noting that even though certain information may already reside in the public domain it does not eliminate the possibility that additional disclosures could cause harm to intelligence sources, methods and operations). One interesting issue involves whether the publication of General Michael Hayden’s autobiography, which contains references to targeted killings and presumably went through pre-publication review, could constitute an official acknowledgment of such activities. Cody M. Poplin, ACLU Releases Letter in ACLU v. CIA Regarding Disclosures in Gen. Hayden’s New Book, LAWFARE (Feb. 16, 2016, 4:51 PM), https://www.lawfareblog.com/aclu-releases-letter-aclu-v-cia-regarding-disclosures-gen-haydens-new-book.

87 Shaffer, 102 F. Supp. 3d at 9 (citation omitted).

88 Id. at 12.

89 Id. at 14.

90 Id.

91 Id. at 12.
classification, wasting substantial time and resources of the parties and the Court.”

Thus, Shaffer could seek attorney’s fees and costs under the Equal Access to Justice Act.

Shaffer raises several critical practice points. First, the case illustrates that current or past government employees have a “one-stop” obligation for obtaining prepublication review pursuant to a non-disclosure agreement. Using either the Standard Form (“SF”) 312 or the Form 4414, the employee or former employee must submit material for clearance to the agency that last authorized his access to classified information or material. That agency then has an obligation to act upon that request, including any interagency coordination, and to respond within a reasonable time. In Shaffer’s case, it was apparent that he completed his book after he had left his employment with the DIA. Indeed, he submitted that manuscript to his Army Reserve command more than three years after the revocation of his top secret clearance and his departure from the agency. Thus, one could reasonably conclude—assuming that the Army Reserve was the last agency to grant him a security clearance—that he had met his prepublication review obligation. However, the Army Reserve approving officials failed to conduct appropriate interagency coordination before giving their approval, probably because of their inexperience in such matters. Still, the DIA acted in a timely manner with its demand that the Army Reserve command revoke its approval before the book could be widely distributed to purchasers.

Next, Shaffer highlights the importance of an author’s use of pinpoint citations (i.e., ample footnoting) throughout any work proffered for prepublication review. A plaintiff, as well as his attorney, has no “constitutional right” to review classified material as a means of challenging a classification decision, as

92 Id. Presumably, the trial judge was indicating that the defendants’ management of the prepublication review process with respect to Shaffer’s First Amendment interests, at least in relation to the previously released congressional testimony, was narrow-minded and inexcusable.


94 See SF 312, supra note 29; Form 4414, supra note 29.
attorney Mark Zaid tried to do in both the Stillman\textsuperscript{95} and Shaffer cases.\textsuperscript{96} Indeed, courts will give deference to the government’s classification decisions during in camera proceedings, and a plaintiff will likely have to argue his case from the unclassified material available to him. The case also demonstrates that the government can only censor properly classified material and may be obligated to pay attorney’s fees and costs to a prevailing plaintiff.

Finally, Shaffer leaves unanswered some questions regarding an agency’s obligation to conduct prepublication review within a reasonable amount of time. While the FOIA imposes a similar requirement for speedy processing of requests,\textsuperscript{97} an agency might have a backlog of work and might not be able to complete the review, particularly for lengthy or complex products, within 30 days. At least one commentator has noted that an agency’s failure to act in good faith in processing a request might constitute a waiver of its review rights.\textsuperscript{98}

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\textsuperscript{95} Stillman v. CIA, 319 F.3d 547 (D.C. Cir. 2003).
\textsuperscript{97} See 5 U.S.C. § 552(a)(6)(A) (imposing a 20-day requirement, extendable on written notice, for an agency to respond to a documentary request).
such a waiver could occur if there were evidence that an agency processed requests in other than a “first-in, first-out” manner, held a particular animus, or made unreasonable demands on the author. Still, an agency should not be limited to processing requests solely on a “first-in, first-out” basis; some requests may be time sensitive, such as a scheduled conference or an op-ed piece, and regular processing might deprive an employee of the opportunity. Thus, an agency should make best efforts to accommodate time-sensitive requests.

In general, case law indicates that courts will demand strict compliance on the part of a current or former employee with his or her obligations under a secrecy or nondisclosure agreement. As indicated by the Shaffer and Ishmael Jones cases, courts will require that the employee exhaust administrative remedies, as well as judicial review, before proceeding with a publication—regardless of whether that work contains classified information. But it also stands to reason that the government itself should be held to strict compliance standards, especially as it applies to materials that it claims to be either classified or classifiable.

of a constructive trust to prevent Jones from breaching his secrecy agreement and fiduciary duty with the CIA. United States v. Jones, No. 1:10-cv-00765-GBL-TRJ, at 1 (E.D. Va. Apr. 18, 2012).

99 In Shaffer’s case, he had made earlier allegations that DoD officials had mismanaged an important antiterrorist program, Able Danger, and he claimed reprisal—to include the September 2005 revocation of his security clearance—for certain disclosures that he had made about that program. By 2006, however, the DoD Inspector General had concluded that Shaffer’s allegations could not be substantiated. Office of the Inspector Gen., U.S. Dept. of Def., Case H05L97905217, Report of Investigation: Alleged Misconduct by Senior DoD Officials Concerning the Able Danger Program and Lieutenant Colonel Anthony A. Shaffer, U.S. Army Reserve (2006). Subsequently, Shaffer claimed a need to discuss classified information with his attorney (Mark Zaid) concerning both Able Danger and the report of the DoD Inspector General; here, the district court concluded that Shaffer had a First Amendment right to discuss information with his “attorney when such sharing is necessary for an attorney to advise his client of his rights.” Shaffer v. Def. Intelligence Agency, 601 F. Supp. 2d 16, 26 (D.D.C. 2009). Thus, by the time Shaffer attempted to publish his book in 2010, the parties were well acquainted with each other.
C. Current Intelligence Community Management of the Prepublication Review Process

By statute, the DNI has overall responsibility for establishing objectives, priorities, and guidance for the 17 agencies, offices, and elements that comprise the intelligence community, even if the DNI lacks full supervisory authority, direction, and control over the day-to-day policies and practices of people working in the community. Indeed, nine of the component members of the community, as well as over 80 percent of the personnel and budget, are assigned to the DoD. Thus, while the DNI can help shape community policies and practices, he also shares authorities and responsibilities with multiple cabinet-level officials. In any case, the current efforts of the DNI, the CIA, and the DoD likely provide a fair representation of PRB efforts in the community as a whole.

The current policy letter from the Office of the Director of National Intelligence (“ODNI”) applies to civilian and military personnel employed by the ODNI; personnel detailed or assigned to the ODNI from other government agencies are obliged to submit material through their home agency for prepublication review. In any case, this policy letter does not serve as a community-wide implementation policy. This broadly written policy letter, which does not except any category of non-official publication, clearly states that the “goal of pre-publication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI’s mission and the foreign relations or security of the U.S. are not adversely affected by publication.” While current employees are obligated to obtain supervisor approval before submitting the product for review, this policy letter makes

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100 See generally Responsibilities and Authorities of the Director of National Intelligence, 50 U.S.C. § 3024 (2015) (enumerating the responsibilities and budgetary, personnel and tasking authorities of the DNI).
103 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INSTRUCTION 80.04, ODNI PRE-PUBLICATION REVIEW OF INFORMATION TO BE PUBLICLY RELEASED 1, 3 (2014).
104 Id. at 1.
no distinction between the review standards applicable to current and former employees.\textsuperscript{105} The ODNI Information Management Division has, however, issued a set of frequently asked questions about the prepublication review process.\textsuperscript{106} This set of questions provides several examples of materials that must be submitted and indicates that works unrelated to intelligence and national security do not require review. Again, this set of questions does not differentiate between the standards applicable for current and former government employees, much less contractors.

The CIA has a full-time PRB that currently serves as the arbiter of manuscripts and materials submitted by current and former employees for public dissemination.\textsuperscript{107} The PRB operates under an agency regulation with the same dual-track approach that was initiated in 1976.\textsuperscript{108} On one hand, the currently available 2006 regulation states that it applies to “all intelligence-related materials intended for public dissemination.”\textsuperscript{109} On the other hand, the regulation explicitly provides that it does not apply to “materials unrelated to intelligence, foreign relations or CIA employment or contract matters . . . .”\textsuperscript{110} Also, while the PRB reviews a broad range of materials, including resumes and

\textsuperscript{105} See id.
\textsuperscript{107} See Central Intelligence Agency, CIA Prepublication Review in the Information Age, in 55 Stud. in Intelligence 9, 9-10 (2011) [hereinafter CIA Prepublication Review in the Information Age].
\textsuperscript{108} See id. at 13 (describing the standards for the review of products submitted by current and former employees). See also Central Intelligence Agency, Agency Prepublication Review of Certain Material Prepared for Public Dissemination (2006) [hereinafter CIA Prepublication Review]. This redacted copy of the CIA’s 2006 Prepublication Review regulation is filed with the federal district court in the case of United States v. Jones. Plaintiff United States’ Partial Motion for Summary Judgment as to Liability and Motion to Discuss Defendant Jones’ Counterclaim at Exhibit B, United States v. Jones, No. 1:10-cv-00765-GBL-TRJ (E.D. Va. Apr. 12, 2011). This detailed and useful regulation describes the organization and functioning of the PRB, as well as its processes and procedures for the review of products submitted by current and former employees.
\textsuperscript{109} CIA Prepublication Review, supra note 108, at 2.
\textsuperscript{110} Id.
academic products prepared by current employees, it apparently takes a more lenient approach to student theses or dissertations read only by professors or classmates.\textsuperscript{111} However, one CIA senior officer on assignment to the PRB noted that the PRB process is complicated by “opinions of managers equally ignorant of the prepublication rules or, in other words, all those exactly like [him] before [his] arrival at the CIA’s PRB.”\textsuperscript{112}

The DoD has two current regulatory documents, DoD Directive 5230.09 and DoD Instruction 5230.29, regarding the release of information to the public.\textsuperscript{113} DoD Directive 5230.09, effective March 16, 2016, provides that the release of DoD “information is limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate governmental interests . . . .”\textsuperscript{114} Moreover, in an effort to “ensure a climate of academic freedom and to encourage intellectual expression,” the directive makes an exception from the review process for academic materials that are “not intended for release outside the academic institution.”\textsuperscript{115} The directive also provides that “[c]learance shall be granted if classified information is not disclosed, DoD interests are not jeopardized, and the author accurately portrays official policy, even if the author takes issue with that policy.”\textsuperscript{116} This directive acknowledges that DoD personnel have a right—“while acting in a private capacity and not in connection with official duties”—to prepare information for public release, but defers to the prepublication review standards set in DoD Instruction 5230.29.\textsuperscript{117} In turn, DoD Instruction 5230.29 requires a security review of all speeches, briefings, technical papers, manuscripts, books, and other materials prepared by current employees for

\begin{thebibliography}{9}
\bibitem{111} CIA Prepublication Review in the Information Age, supra note 107, at 17.
\bibitem{112} Id. at 9-10.
\bibitem{113} See generally U.S. DEP’T OF DEF., DIRECTIVE NO. 5230.09, CLEARANCE OF DO
\quad INFORMATION FOR PUBLIC RELEASE (2008) [hereinafter DO DIREC
\quad TIVE NO. 5230.09]; U.S. DEP’T OF DEF., INSTRUCTION NO. 5230.29, SECURITY AND POLICY REVIEW OF DO
\quad INFORMATION FOR PUBLIC RELEASE (2014) [hereinafter DO DIRECTION
\quad NO. 5230.29].
\bibitem{114} DoD Directive No. 5230.09, supra note 113, at 2.
\bibitem{115} Id. at 2.
\bibitem{116} Id.
\bibitem{117} Id.
\end{thebibliography}
public release; it provides detailed guidance on clearance requirements, timelines for submission, review determinations, and appeals.\textsuperscript{118} In any case, the CIA regulation, DoD Directive 5230.09, and DoD Instruction 5230.29 make no exception for materials unrelated to a person’s government employment.

In spite of the DoD’s two relatively clear documents, the DoD Inspector General (“IG”) recently found that neither the directive nor instruction were uniformly applied across the Department.\textsuperscript{119} The IG surveyed policies and practices across 11 combatant commands and 4 intelligence agencies (the NSA, the DIA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency), but provided little specific information about any problems that it identified.\textsuperscript{120}

In sum, considerable variation exists across the intelligence community with respect to what materials a current or former employee must submit for prepublication review, and by what standards the government will process that submission. While some variation is a positive attribute, in that some agencies may have varying interests and requirements, it also leaves employees at risk for inconsistent and even discriminatory review at the hands of uninformed or hostile management officials.

\textbf{D. Legal Assessment}

The current prepublication review process leaves open many questions that should be clearly addressed in new ODNI

\textsuperscript{118} \textit{DoD Instruction} No. 5230.29, \textit{supra} note 113, at 6-9.

\textsuperscript{119} \textit{Office of the Inspector Gen., U.S. Dep’t of Def., Rep. No. DODIG-20160-101, Review of the Policies for Prepublication Review of DoD Classified or Sensitive Information to Ensure no DoD Sensitive or Classified Information is Released to the Media} I (2016).

regulatory guidance to the intelligence community, much like the “DOJ Guide to the Freedom of Information Act.” 121 Such a repository of policy guidance and best practices across the intelligence community would help management officials address problems that are new, at least to them. The ODNI should provide clear guidance on the extent of employee obligations. Thus, the ODNI should clarify whether the obligation applies to unclassified material that is clearly unrelated to the government work, such as cookbooks, certain works of fiction, resumes, Facebook postings, blogs, e-mails, and academic works submitted directly to a professor. 122 Moreover, the ODNI should clarify employee obligations in multi-agency cases. For instance, while the DIA undoubtedly had a right to review Anthony Shaffer’s manuscript in the prepublication review process, it is not clear whether Shaffer or the Army Reserve command had the obligation to send that manuscript to the agency.

The ODNI guidance should require each agency to maintain some level of transparency and accountability in its processes, through publicly available policy guidance or the use of status letters, so that requestors know when delays are related to a work backlog or the complexity of the submission. Additionally, the CIA PRB has engaged in laudable efforts to educate its workforce through articles in the agency’s in-house publication “Studies in Intelligence.” The outreach activities of the CIA PRB offer a value-added service to both managers and employees alike in terms of ensuring that the workforce understands what must be reviewed, the appropriate standards of review, and how employee can appeal an adverse decision. The DNI guidance should clearly articulate the legal basis for a dual-track approach

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121 DOJ Guide to FOIA, supra note 13.
122 Spy fiction can obviously be problematic in that some authors, such as John LeCarre or Graham Greene, have written works that are either semi-autobiographical or use true stories to illustrate intelligence sources and methods under the guise of fiction. In the case of the resumes, e-mails and academic works, an employee should not be required to submit such material for review unless there is some reason to believe that it might have national security implications or receive broader dissemination outside the intended recipients. Still, an agency could reduce its own backlog and help employees by posting guidance for employees in preparing such material, and then allowing the employee some latitude in whether to request an actual review.
to review (current and former employees), as well as the standards and appeal rights applicable to each track. Each agency should have an expedited process for reasonable time-sensitive requests.

Additionally, the mosaic theory should be limited in the classification of employee material.\textsuperscript{123} This method of classification, a practice subject to abuse through over-classification, is sharply limited in FOIA cases to prevent government officials from obstructing document releases through unjustifiable claims that material is classified, when in fact officials might simply seek “to conceal violations of law, inefficiency, or administrative error . . . [and] prevent embarrassment to a person, organization, or agency . . . .”\textsuperscript{124} Hence, an agency should also apply that “reasonably segregable” standard to prepublication cases, requiring supervisory officials to classify only the minimum amount of material possible and allowing the employee the greatest amount of discretion.\textsuperscript{125}

Employees contemplating the submission of material to a prepublication review board would be well advised to keep

\textsuperscript{123} See generally David E. Pozen, Note, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 YALE L. J. 628 (2005). According to Richards J. Heuer, a former CIA expert with extensive experience in intelligence analysis, the mosaic theory permits an analyst to collect small, possibly even isolated pieces of unclassified information “that, when put together like a mosaic or jigsaw puzzle, eventually enable analysts to perceive a clear picture of reality.” RICHARDS J. HEUER, PSYCHOLOGY OF INTELLIGENCE ANALYSIS 62 (1999). Thus, the government may sometimes argue that the aggregation of unclassified information in an author’s otherwise unclassified work should not be released because such aggregation would allow an outsider to reach classified (classifiable) conclusions. In that respect, a PRB should properly consider whether material is already classified or classifiable, as the CIA apparently concluded in the case of Ishmael Jones’ book. See generally George Levey, supra note 97.

\textsuperscript{124} Exec. Order No. 13,526, supra note 28.

several practice points in mind. Initially, all employee work product should be amply sourced, to ensure that the information is unclassified or publicly acknowledged, and submitted through the employee’s supervisor to the PRB well in advance of any scheduled publication dates or speaking engagements. Some language can be caveated or generalized to avoid any appearance that the author is offering a classified view or attempting to speak for the government. If faced with classified material, the employee could request release of the source documents through the FOIA, or if the classified material involves older sources, the employee could request a Mandatory Declassification Review pursuant to Executive Order 13,526.126 It may well be, as claimed by Ishmael Jones in his fight with the CIA over the publication of his book “The Human Factor,”127 that the government sometimes seeks to block a planned publication because it contains information that spotlights violations of the law or is otherwise embarrassing to the government.128 Nonetheless, the current or former employee cannot ignore his obligations under the nondisclosure agreement; an employee must pursue administrative relief and judicial review before proceeding with any publication.

Currently, an aggrieved employee can file a complaint in federal district court under the Administrative Procedures Act seeking judicial review of the agency action.129 Here, the attorney representing a government employee should have access to

126 Exec. Order No. 13,526, supra note 28, at § 3.5 (permitting the submission of requests for the declassification of all information that was classified under it or its predecessor orders with the exception of materials subject to pre-publication review pursuant to an approved nondisclosure agreement); Id. at § 5.3 (permitting the appeal of agency decisions, within certain limitations, that were made in response to these review requests); see Mandatory Declassification Review Appeals, NAT’L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/declassification/iscap/mdr-appeals.html.

127 ISHMAEL JONES, THE HUMAN FACTOR: INSIDE THE CIA’S DYSFUNCTIONAL INTELLIGENCE CULTURE (2008) (painting an unflattering portrait of the National Clandestine Service, often describing senior officials as “Mandarins” who were risk-adverse and more interested in advancing their career goals than in accomplishing the organizational mission).


129 5 U.S.C. § 706(1) (2012) (showing that a reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed”).
classified information, at least with respect to pending employment law issues and scheduled hearings, but such an attorney probably does not need routine access to classified information to assist his client with prepublication issues (i.e., with respect to the judge’s in camera review of the government’s classification decision). In fact, the plaintiff should have ample unclassified source material—readily available in the public domain—to support his manuscript.

Finally, three different types of sanctions are available in prepublication review cases. First, as the Court indicated in Snepp, the use of a constructive trust can be an effective deterrent.\(^{130}\) The fact that Matt Bissonnette has had to pay the government over $6.6 million in a high publicity case involving his book “No Easy Day” should act as a deterrent to other government employees contemplating publication without first approaching an agency PRB. Second, a person could be subject to criminal prosecution, as the government originally sought in 1931 with Herbert Yardley \(^{131}\) and eventually obtained in 1984 with Samuel Morison.\(^{132}\) In fact, even the threat of criminal prosecution could have a chilling effect on the willingness of government employees to assume a litigation risk in publishing works without prior approval. Third, the government can pursue administrative sanctions against a current employee, including a revocation of clearance, reprimand, reduction in grade, or reassignment of duties.

Next, there are questions about the propriety of additional civil sanctions, such as the surrender of government contributions to a person’s federal pension benefits.\(^{133}\) This remedy seems both onerous and vindictive considering the absence of executive or ODNI guidance on the standards for agency review, the risk of inconsistent review of works commenting unfavorably on

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\(^{132}\) United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988) (including convictions under both the theft and espionage statutes).

government activities, and the absence of evidence that current remedies have been ineffective in compelling compliance with nondisclosure obligations. In other words, evidence does not suggest that an ineffective sanctions regime has been a causal factor in recent employee non-compliance with nondisclosure obligations.

II. WHAT SHOULD THE DNI DO?

Government officials should seek an equitable, timely review process for employee submissions that ensures the protection of intelligence sources, methods, and activities while permitting the greatest latitude to employee publications. Indeed, the intelligence community has a “highly, culturally attuned, increasingly youthful workforce” that expects to express views and opinions in traditional (e.g., books, journals, and newspapers) and non-traditional (e.g., Twitter, Facebook, and blogs) fora. In turn, the government has an obligation to ensure the timely, consistent, and fair processing of requests made by current and former employees.

The ODNI can remedy some of the current problems with overbroad and inconsistent regulations through clear regulatory guidance that helps management officials and employees alike meet both fiduciary and ethical obligations. First, the ODNI should publish a current, publicly available regulatory standard, much like that used by the NSA. This standard should be applicable

134 See Kevin Casey, Till Death Do Us Part: Prepublication Review in the Intelligence Community, 115 COLUM. L. REV. 417, 440-51 (2015) (examining the discretion accorded to prepublication review officials and anecdotal evidence from various authors suggesting discriminatory enforcement based upon whether or not the writer is viewed as critical or supportive of his agency). See also Jack Goldsmith & Oona Hathaway, The Scope of the Prepublication Review Problem, and What to Do About It, LAWFARE (Dec. 30, 2015, 10:00 AM), https://lawfareblog.com/scope-prepublication-review-problem-and-what-do-about-it (citing one former senior intelligence official as saying that “if the agency doesn’t like a manuscript, there’s a good chance an excuse will be found to delay or redact it. If the substance is favorable from the agency’s perspective, an author might get preferential treatment.”).
135 CIA Prepublication Review in the Information Age, supra note 107, at 9.
across the intelligence community, particularly with respect to civilian employees, military personnel, and contractors serving in billets funded through the National Intelligence Program. This standard should be readily available to current and former employees on the agency’s unclassified website, perhaps in the Electronic Reading Room that each agency is required to maintain under the FOIA.\footnote{137} Clearly, the lack of a current and publicly available policy directive can only inhibit and frustrate current and former employees.

Second, the ODNI should establish a clearly articulated, dual-track approach, much like that used by the CIA.\footnote{138} The DNI should limit the use of the mosaic theory as a means of classifying material in employee works submitted for prepublication review. Instead, the DNI should require the use of the “reasonably segregable” standard used in FOIA cases.\footnote{139} Current employees should be subject to reasonable restrictions, beyond what is considered classified or classifiable by Executive Order 13,526, but such restrictions should be tightly circumscribed to prevent abuse by management officials. In that respect, employees should submit draft products through their supervisory chain to ensure that it will not impair the author’s duty performance, interfere with agency function, or have an adverse impact on U.S. foreign relations. Such restrictions, however, should be spelled out in agency regulations. Moreover, PRB officials should apply a strict scrutiny standard to protect against overbroad claims that an otherwise unclassified work might be objectionable, thus allowing some latitude for employees to comment on matters of legitimate public interest in connection with their employment.\footnote{140} In other


\footnote{138} See CIA Prepublication Review in the Information Age, supra note 107, at 9-12.

\footnote{139} 5 U.S.C. § 552(b).

\footnote{140} Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (rejecting the position that public employees “may be constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on
words, if a management official objects to the publication of otherwise unclassified information, he should be required to explain the problem with specificity in relation to the organizational mission.

Next, the ODNI should mandate that each agency establish—as well as publicize—an appropriate administrative appeals process. While the 30-day standard provided for in Marchetti141 and in Form 4414142 is likely unworkable in practice for many agencies facing a backlog of lengthy and complex requests, the process should have some level of transparency to protect against managerial abuse directed at perceived malcontents who want to publish embarrassing commentary or expose violations of the law.143 In fact, the agency IG should have a role in overseeing prepublication procedures to reduce managerial abuse.144 Indeed, an aggrieved employee or former employee who wants to “whistleblow” should have a protected means to do so without facing recriminations from his or her supervisory chain.

Finally, the ODNI should conduct extensive outreach activities to ensure that employees understand the prepublication review processes and procedures, as well as appropriate avenues for lodging whistleblower complaints. Here, the CIA, through its in-house publication “Studies in Intelligence,” has conducted laudable efforts to educate its workforce that could be replicated by other agencies.
III. CONCLUSION

The current standards and processes used by the intelligence community to manage prepublication reviews is a patch-work of regulations, rules, and managerial practices, with varying application by agency and probably even by managers within a single agency. This undoubtedly creates room for employee error and managerial abuse. The DNI can, and indeed should, create clear and consistent standards and processes across the community, even if allowing some variation for unique intelligence community entities. Doing so would likely expedite required reviews while promoting employee confidence in the fairness and timeliness of the overall review process.
Thanks to a leak to the press, we all now know that John Bolton has written an explosive account of President Trump’s fateful decision to withhold hundreds of millions of dollars in security assistance from Ukraine. But it is far from clear how much of this story the public will be permitted to read, and when.

Like millions of others who once held a security clearance, Mr. Bolton, President Trump’s former national security adviser, is barred from publishing a book or blog post about his experience in government without first submitting it to official censors. As a result, what the public will see of Mr. Bolton’s account of malfeasance and corruption in the White House is, to a disturbing extent, up to the White House itself to decide.

The logic behind the requirement of prepublication review is easy to understand. Public servants with security clearances have access to classified information. The review system allows agencies like the Central Intelligence Agency and Defense Department to ensure that former employees who write books and other public materials don’t disclose secrets inadvertently. (Those who actually intend to disclose classified information don’t submit their manuscripts for government review, of course — and they can be prosecuted for revealing secrets.)

The system amounts to a prior restraint on speech, because it gives the agencies the chance to censor manuscripts before their publication. Though prior restraints are usually unconstitutional, including in the national security context, the government argues that they are justified because they are imposed through nondisclosure agreements signed by employees.

But as our organization, the Knight Institute, and the American Civil Liberties Union argue in a case before a federal court in Maryland, the review system is far more sweeping than the government’s argument admits, and lacks the limits and safeguards that courts have required of prior restraints in other contexts.

All 17 intelligence agencies now require prepublication review for at least some former employees, and in many agencies, even for those who never had access to classified information. Submission requirements are vague and confusing and leave former employees uncertain of their obligations.
Review standards are similarly difficult to pin down. There are no real deadlines. The agencies’ censors don’t usually explain their decisions. When they do, authors are afforded no meaningful opportunity to challenge them. Those who file lawsuits learn quickly that the courts almost always defer to the agencies’ decisions.

All this means that the prepublication review system provides government agencies with unchecked power to suppress speech. And as we and others have documented, the agencies frequently use their power not to protect national security secrets, but to protect officials from embarrassment, public scrutiny and accountability.

If the past is any guide, this is very likely how the White House will exploit the review system now. We have seen intimations of this already. Despite the obvious importance of Mr. Bolton’s account to the public’s understanding of Mr. Trump’s actions, the White House has not offered Mr. Bolton any assurance that his book will be reviewed quickly, or even before the publication date this spring.

The National Security Council’s records office, which is coordinating the review, apparently intends to scour the book not just for classified material but for information implicating executive privilege — a privilege that Mr. Trump and his lawyers have construed expansively in other contexts — though executive privilege is decidedly not a permissible basis for prior restraint. The White House has sent Mr. Bolton a letter expressly warning him against publishing the book.

Of course Mr. Bolton’s case is unusual, and it is possible that public and congressional pressure will force the White House to review his manuscript promptly and fairly. (Prominent Republicans, for their part, seem to be focused on persuading Mr. Bolton to “withdraw” his book, or failing that, on limiting the book’s audience to the senators hearing the impeachment case against Mr. Trump.)

But the spectacle of White House censors deciding, without any real constraint, whether to permit a former government official to publish a manuscript critical of the president should nonetheless provoke alarm.

The necessary changes to this process have been obvious for years: Prepublication review should apply to fewer people and fewer secrets. There should be narrower submission requirements, clearer censorship standards, enforceable deadlines and a meaningful right of judicial review. Mr. Bolton’s case surely underscores the urgency of these reforms.

It’s not just Mr. Bolton’s rights at issue here. Former government officials often have unique insights about the operation of government. When censors suppress these voices, they inflict a constitutional injury on the public as well. As Justice Sonia Sotomayor wrote for a unanimous Supreme Court in 2014, “Speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”

Mr. Bolton is an unlikely standard-bearer for the public’s right to know, having worked at the highest levels of an administration notorious for its hostility to the First Amendment. But everyone who values an informed public, and an accountable government, should be troubled that the fate of
Mr. Bolton’s book is in the hands of the White House, and that government censors have so much control over what we will read, and when we will read it.

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FILED UNDER ANALYSIS
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U.S. intelligence agencies prohibit their former employees from writing or speaking about their government service without first obtaining government approval. The system, established after the Second World War to prevent the inadvertent disclosure of national security secrets, was initially modest in scope, but over a period of decades it has metastasized. Today, every intelligence agency imposes a lifetime prepublication review requirement on at least some of its former employees. Many agencies impose prepublication review obligations without regard to whether the covered employees ever had access to sensitive information, and without regard to how long ago those employees left government service. Submission requirements and review standards are vague, confusing, and overbroad. In the absence of concrete deadlines, manuscript review frequently takes weeks or even months, which means that books, articles, and blog posts cleared for publication are published long after the debates they seek to engage have subsided. Agencies’ censorial decisions are often arbitrary, unexplained, unrelated to national security concerns, or influenced by authors’ viewpoints.

The dysfunction of the prepublication review system has far-reaching effects, as the ongoing dispute over former National Security Advisor John Bolton’s book has highlighted—and as the Knight Institute and ACLU argue in Edgar v. Ratcliffe, a case now before the Fourth Circuit. Most significantly, the system impoverishes public discourse about foreign policy, national security, and war. Former intelligence agency employees often have unique insight into the operations and policies of the agencies for which
they worked. Because their manuscripts draw on their personal knowledge and experience of government, their voices are not fungible or replaceable. The prepublication review system, at least in its current form, deprives the public of information and insight that is important to its ability to understand government policy, advocate for change, and hold government officials accountable for their decisions.

The system is in dire need of reform, but what would reform look like? Professors Jack Goldsmith and Oona Hathaway sketched some ideas in a series of blog posts and op-eds published several years ago (and, more recently, the two updated their recommendations for Just Security’s Good Governance Papers). Perhaps inspired by their suggestions, the House and Senate Intelligence Committees instructed the Director of National Intelligence in May 2017 to prepare a new prepublication review policy by October 2018 that would apply to all intelligence agencies and “yield timely, reasoned, and impartial decisions that are subject to appeal.” The new policy, the Intelligence Committees said, should require each intelligence agency to develop and maintain its own prepublication review policy identifying the individuals whose work is subject to prepublication review; providing guidance on the types of information that must be submitted for review; mandating timely responses; establishing a “prompt and transparent” appeals process; supplying guidelines for the assertion of “interagency equities”; and summarizing the measures agencies may take to enforce their policies.

All of this was promising. Implementation of the Intelligence Committees’ instructions might not have addressed all of the prepublication review system’s problems, but it would have addressed many of them. Three years after the Committees’ deadline, however, no new policy has been produced, and there is no evidence that one is forthcoming. Perhaps there is more going on behind the scenes, but from all appearances the Office of the Director of National Intelligence (ODNI) seems simply to have disregarded the Committees’ instructions.

The new administration, and the new Congress, should act more decisively to reform this broken system. As part of a broader effort to strengthen transparency and accountability in the national security sphere, President Joe Biden should issue an executive order that clarifies and narrows submission and review criteria, establishes new procedural safeguards, and mandates transparency about the prepublication review system’s operation. To ensure that future administrations do not backtrack on these reforms, and to impose additional safeguards against arbitrary and politicized decision making, Congress should reinforce the executive order with legislation. Between them, the executive order and legislation would ensure that the prepublication review system strikes a more defensible balance between the government’s legitimate national security interests, the First Amendment interests of would-be authors, and the First Amendment and larger democratic interest of the public in ensuring that public debate about national security policy is fully informed.

Below, building on the Intelligence Committee’s instructions, we propose 10 guideposts for reform.
Streamline the System

1. **The president and Congress should narrow the universe of former employees on whom the intelligence agencies can impose submission obligations.**

One major problem with the current system is that it subjects far too many people to prepublication review obligations. When the system of prepublication review was first established, it applied to only a relatively small number of intelligence agency employees who had had access to the government’s most closely held secrets. Even when President Ronald Reagan briefly extended the system across the nation’s intelligence agencies, he extended it only to employees who had had access to sensitive compartmented information (SCI)—at the time “a very small fraction of Government employees who [had] access to classified information generally,” as former Deputy Assistant Attorney General Richard Willard testified to Congress. (The General Accounting Office reported that 119,000 agency employees had SCI access at the time.) Today, however, many agencies impose lifetime prepublication review obligations even on employees who have never had access to SCI, or even (in some cases) to classified information of any kind. The result is that millions of former government employees—more than 1.5 percent of the U.S. population, according to one estimate—are now subject to some sort of prepublication review requirement.

The president and Congress should limit the universe of former employees on whom the intelligence agencies may impose prepublication review requirements. Specifically, they should bar agencies from imposing prepublication review requirements on former employees who (i) have not held TS/SCI clearance, or (ii) who left government service more than 10 years ago.

Limiting the system in these ways would confine prepublication review to the circumstances in which it is most justifiable. It is important to remember that prepublication review has never been an effective safeguard against intentional disclosures of classified information, because those who disclose classified information intentionally do not submit their manuscripts for review. Instead, the narrower interest served by prepublication review is in preventing inadvertent disclosures. That interest is served most directly not by prepublication review, but by threat of administrative, civil, and criminal sanctions for the unauthorized disclosure of classified information. The interests served by prepublication review are narrower still with respect to the two categories of individuals identified above—those who have never held TS/SCI clearance and those who left government service more than a decade ago—because these two categories of individuals are unlikely to possess information whose inadvertent disclosure could cause
serious harm. Any residual interest the government has in nonetheless reviewing their
draft publications could be served by a system of voluntary submission.

Narrowing the universe of people subject to mandatory prepublication review require-
ments would have national security benefits, too. It would allow reviewers to focus
their attention on the manuscripts most likely to contain information whose disclosure
would cause real harm. It would also relieve an overburdened system, making prepubli-
cation review faster and thereby reducing the likelihood that former employees disre-
gard their obligations.

2. The president and Congress should limit the kinds of materials agencies can
require former employees to submit for review.

In the current system, submission requirements vary considerably by agency, and they
are imposed through a confusing and sometimes conflicting tangle of contracts, regula-
tions, and policies. As a rule, agency submission requirements are vague and overbroad
and fail to give former employees fair notice of what they must submit. Many of them
use phrases like “relates to,” “pertains to,” and “might be based upon,” which are of
uncertain meaning and scope and invest reviewers with broad discretion that can easily
be abused.

The CIA’s standard secrecy agreement, for example, requires former agency employees
to submit all materials that are “intelligence related.” The regime of the Department of
Homeland Security (DHS) obligates former DHS employees to submit all manuscripts
“that reference DHS intelligence data or related activities, at any classification level, or...

information derived as a result of affiliation with DHS.” Form 4414, the standard form
that agency employees must sign in order to be afforded access to SCI, requires the sub-
mission of any materials that “contain or purport[] to contain any SCI” or that “produce
or relate to SCI or that [the individual has] reason to believe are derived from SCI.” Many
of the operative terms here are sweeping and elastic. Former agency employees who
have asked agencies for guidance about their submission obligations have been given
inconsistent responses, when they have been given responses at all.

The president and Congress should limit the materials subject to prepublication review to
manuscripts reasonably likely to contain or be derived from classified information obtained
during the course of an individual’s government service. Limiting submission requirements
in this way would clarify and narrow former employees’ obligations, align the prepubli-
cation review system more closely with the First Amendment, and allow reviewers to focus on
the relatively small number of manuscripts likely to contain information whose disclosure
would cause real harm. As the House and Senate Intelligence Committees have recognized,
it would also “better incentivize” former employees to comply with their obligations.
Establish New Procedural Safeguards

3. **The president and Congress should strictly limit the time agencies may take to review the manuscripts submitted to them.**

In the current system, former employees who submit manuscripts for review routinely wait weeks or months for a substantive response. The CIA now estimates that its review of book-length manuscripts will take more than a year. Some authors have waited even longer. The long delays deter some former employees from putting pen to paper. When they do write, their manuscripts sometimes do not see the light of day until long after the public debates they seek to engage have subsided. Frequently, the public is denied timely access to information and insight that is important to its ability to understand government policy or hold government decisionmakers accountable for their decisions.

The president and Congress should impose clear deadlines for the completion of manuscript review. As an initial matter, they should establish a schedule of deadlines for review tied primarily to the length of the submission. One reasonable approach might be to require agencies to review manuscripts of less than 1,500 words within three days; manuscripts of 1,500–10,000 words within 14 days; and manuscripts of more than 10,000 words within 30 days. The president and Congress should also establish a channel for expedited review of newsworthy and other works whose publication is time-sensitive—an analog to the “expedited processing” provision of the Freedom of Information Act.

The president and Congress should also establish clear deadlines for inter-agency referrals. They should require agencies to make referrals promptly (e.g., within 24 hours for short manuscripts), to notify authors of the agencies to which their manuscripts were referred, and to notify them of the dates on which the referrals were made. They should also strictly limit the time an agency may take to review a manuscript referred to it by another agency. An agency that receives a manuscript through referral should be required to review the referred manuscript within the same period of time it would have been afforded had the manuscript been submitted to it in the first instance.

The president and Congress should also incentivize agencies to meet these deadlines. They should do this in two ways. They should provide that an agency’s failure to complete a manuscript review within the statutorily prescribed period will preclude the agency from imposing any direct or indirect sanction on the submitter for failing to satisfy her prepublication review obligations. (Direct sanctions would include attempting to impose a constructive trust on the submitter’s book proceeds. Indirect sanctions would include revoking the submitter’s security clearance.)
Finally, Congress should establish a cause of action that (i) permits a former employee whose manuscript has not been reviewed within the statutorily prescribed deadline to obtain an injunction requiring the agency to complete the review within a period of seven days; and (ii) entitles the former employee to reasonable attorneys’ fees and costs associated with the action.

4. **The president and Congress should prohibit agencies from exploiting the prepublication review process for ends unrelated to national security.**

Prepublication review obligations are quintessential prior restraints. The argument for their constitutionality turns on the claim that the restraints are necessary to protect national security secrets. Many agencies, however, use the prepublication review process to control and suppress other types of information. Indeed, some agencies expressly claim the authority to censor information unrelated to national security. For example, the DOD permits reviewers to censor any information “requiring protection in the interest of national security or other legitimate governmental interest.” Other agencies, including the NSA and ODNI, fail to specify any limitation on reviewers’ censorship authority at all, effectively giving reviewers a free hand. Even those agencies whose regulatory frameworks seem to contemplate that reviewers’ authority will extend only to national security secrets permit reviewers to censor classified information without regard to whether the submitter learned of the information as a result of her government service. Agencies routinely censor information that submitters learned from newspapers, congressional hearings, and even the agencies’ own websites.

The president and Congress should prohibit agencies from using the prepublication review system to censor anything other than properly classified information that former agency employees learned in the course of government service.

5. **The president and Congress should require agencies to document the reasons for their censorial decisions.**

Currently, agencies are not required to provide authors with reasons for their decisions. The president and Congress should require agencies to provide authors with reasons, to the extent that reasons can be provided in unclassified form, and to document their reasons more fully in classified form. They should require agencies to make the classified record available to any court called on to review the propriety of the agency’s decisions.
6. **The president and Congress should require agencies to establish an effective administrative appeals process.**

Although some agencies currently have appeals processes, they provide no specific timeframes for resolution of appeals. For example, the ODNI states that appeals will be adjudicated “as time and resources allow.” Similarly, the Defense Department informs submitters that appeals will be resolved “as quickly as possible.” In practice, the appeals process is often a source of significant additional delay. Yet a “prompt and transparent” appeals process is essential, as the Intelligence Committees have recognized. The president and Congress should require agencies to resolve administrative appeals within a period of time equal to the statutorily prescribed time for initial review.

7. **The president and Congress should provide for prompt and meaningful judicial review of the agencies’ substantive decisions.**

In the current system, agencies effectively have the last word with respect to what gets published. Submitters rarely challenge agency decisions in court because litigation is costly and time-consuming, and because courts almost always defer to agencies’ substantive decisions without assessing whether publication would cause harm or whether the risk of harm outweighs the public interest in disclosure.

The president and Congress could mitigate the first of these problems by establishing a “reciprocal notice” framework, under which an agency would be obligated to initiate judicial review upon notice from an author that she intends to contest the agency’s substantive decisions. The 2015 USA Freedom Act provides a possible model. Under that statute, if the recipient of a “national security letter” notifies the government that it intends to contest the legitimacy of a non-disclosure order, the government is required to initiate judicial review within 30 days, and the district court is required to “rule expeditiously.” In adapting this model to prepublication review, the president and Congress should set out short, mandatory deadlines for the government to file suit, and Congress should provide deadlines for judicial resolution of authors’ claims. Particularly in cases involving time-sensitive publications, it would be reasonable to require the government to initiate judicial review within five days of receiving an author’s notice, and to require courts to resolve the suits at least as quickly as they would resolve requests for a preliminary injunction.
To address the second problem identified above, Congress should require that courts reviewing agencies’ substantive decisions independently balance the government’s interest in secrecy with the public’s interest in disclosure. This balancing of interests is constitutionally required. As the Supreme Court has made clear, the question of whether information is properly classified is distinct from the question of whether an injunction against its publication is consistent with the First Amendment.

**Mandate Transparency**

**8. The president and Congress should require agencies to publish their prepublication review policies.**

Under the current system, former government employees often don’t know what their obligations are because the obligations are imposed through contracts, regulations, or policies that they do not have and that aren’t easily available online. In some cases, these documents aren’t public at all. For example, one CIA regulation relating to prepublication review was made public only after the ACLU and the Knight Institute sued for its release. (A version of the document was already available online, but that version was 11 years old and heavily redacted.)

The president and Congress should require every agency that imposes prepublication review obligations on former employees to publish the contracts, regulations, and policies that impose or interpret the obligations. Building on the Intelligence Committees’ instruction, agencies should also be required to publish a “summary of the lawful measures each agency may take to enforce its policy, to include civil and criminal referrals.” The president and Congress should require the ODNI to consolidate all of this information on a single website accessible to the public.

**9. The president and Congress should require the ODNI to audit agencies’ prepublication review practices and policies and to report regularly to Congress and the public on the operation of the prepublication review system.**
In the current system, even basic statistical information about prepublication review is difficult to come by. If responses to FOIA requests filed by the ACLU and Knight Institute are any guide, it seems that many agencies do not have this information themselves. The president and Congress should require agencies to maintain databases tracking at least the following with respect to every submission: the name of the submitter, the title of the submission, the date of submission, the type of submission, the length of the submission, the agency that received the submission, the agencies to which the submission was referred, the date of any substantive response, and a summary of that response. They should require agencies to make their databases available to the ODNI on an ongoing basis, and they should require the ODNI to publish a consolidated database in a native database format, excluding only the name of each submitter and the title of each submission (which could be added to the database after manuscripts are published). They should also require the ODNI to periodically audit individual agencies’ compliance with new statutory requirements, and Congress should require the ODNI to report regularly to the Intelligence Committees and the public about deficiencies in agencies’ compliance with those requirements.

Provide Dedicated Funding

10. Congress should give intelligence agencies the resources they need to administer a streamlined prepublication review system effectively.

Some of the problems associated with the current system stem from a lack of resources. Streamlining the system along the lines proposed above would help a great deal. But Congress should also provide the agencies with dedicated funding for prepublication review. This funding should be separate from the funding provided to the agencies for declassification review and the processing of Freedom of Information Act requests. A better functioning prepublication review system should not come at the cost of these other systems, which serve important functions in our democracy.

* * *

In its current form, the prepublication review system imposes intolerable costs on former public officials who want to responsibly share their experiences and insights with the public; on the intelligence agencies, whose energies and resources the current system misdirects; and on the public, which is denied timely access to important information and ideas. It’s clear what steps need to be taken to fix the system. The new administration and the new Congress should take those steps quickly.
This issue brief was initially published as “How a New Administration—and a New Congress—Can Fix Prepublication Review: A Roadmap for Reform,” by Alex Abdo, Jameel Jaffer, Meenakshi Krishnan, and Ramya Krishnan, in Just Security (November 24, 2020).

Synopsis
Background: Former national security professionals brought action against, in their official capacities, Secretary of Defense and Directors of National Intelligence, Central Intelligence Agency, and National Security Agency, seeking declaratory and injunctive relief based on claims that prepublication review (PPR) regimes of officials' agencies violated First Amendment free speech clause and were void for vagueness. Some national security professionals moved to omit their home addresses from caption, certain third party moved for leave to file amicus brief, and government officials moved to dismiss action for lack of standing or for failure to state claim.

Holdings: The District Court, George J. Hazel, J., held that:
[1] home addresses could be omitted from caption;
[2] third party could file amicus brief;
[3] national security professionals had standing;
[4] claims were ripe;
[5] PPR regimes did not violate First Amendment free speech clause; and
[6] PPR regimes were not void for vagueness.

Motions granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Standing; Other.

West Headnotes (46)
[1] Federal Civil Procedure ⇐ Officer's death or separation from office
Substitution of a public-official party's successor is automatic under the party-substitution rule concerning a public officer's death or separation from office. Fed. R. Civ. P. 25(d).

A district court should grant a motion to dismiss for lack of subject-matter jurisdiction only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. Fed. R. Civ. P. 12(b)(1).

The burden of establishing subject-matter jurisdiction rests with the plaintiff.

[4] Federal Civil Procedure ⇐ Motion
Federal Courts ⇐ Evidence; Affidavits
When a defendant challenges subject-matter jurisdiction pursuant to a motion to dismiss for lack of such jurisdiction, the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. Fed. R. Civ. P. 12(b)(1).
Countervailing public interests at play were limited, and thus District Court would waive requirement of local rule that complaint include parties' addresses, with respect to certain former national security professionals who brought action against government officials, challenging prepublication review (PPR) regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA); complaint described professional background and identified state of residence of each national security professional, omission of professionals' addresses would not prejudice government officials, and addresses were irrelevant to questions before Court. U.S.Dist.Ct.Rules Md. Civil Rule 102(2)(a).

Ethics institute at law school complied with District Court's standing order requiring third parties seeking to file amicus briefs to show why briefs were desirable, and thus District Court would permit institute to file amicus brief in former national security professionals' action against government officials, challenging prepublication review (PPR) regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA); institute asserted that its events and publications on ethics and national security showed special interest in suit's outcome and expertise in subject matter at issue, and stated that its brief would provide information about PPR regimes' chilling effect.

Decisions about whether and how to allow amicus participation in federal district court are left to the discretion of the trial judge.

One element of the Article III case-or-controversy requirement for federal court jurisdiction is that plaintiffs must establish that they have standing to sue. U.S. Const. art. 3, § 2, cl. 1.

To invoke federal court jurisdiction, a plaintiff bears the burden of establishing the irreducible minimum requirements of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

The presence of one party with standing is sufficient to satisfy Article III's case-
or-controversy requirement for federal court jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

[13] **Constitutional Law ⇨ Public employment in general**

Constitutional Law ⇨ Public employment in general

Prepublication review regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA) did not constitute speech licensing schemes which by their very nature created Article III standing, in former national security professionals' action against government officials, challenging agencies' prepublication review regimes as violative of First Amendment free speech clause and void for vagueness under same clause and Fifth Amendment due process clause; agency employees voluntarily took on prepublication review (PPR) obligations as condition of their employment and of their access to protected government information. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 5.

[14] **Constitutional Law ⇨ Licenses and Permits in General**

A facial challenge under the First Amendment free speech clause lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. U.S. Const. Amend. 1.

[15] **Constitutional Law ⇨ Licenses and Permits in General**

Speech licensing schemes give rise to two major First Amendment risks: self-censorship by speakers in order to avoid being denied a license to speak, and the difficulty of effectively detecting, reviewing, and correcting content-based censorship as applied without standards by which to measure the licensor's action. U.S. Const. Amend. 1.

[16] **Declaratory Judgment ⇨ Proper Parties**

Because past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects, for Article III standing a plaintiff seeking declaratory or injunctive relief must establish an ongoing or future injury in fact. U.S. Const. art. 3, § 2, cl. 1.

[17] **Constitutional Law ⇨ Public employment in general**

Constitutional Law ⇨ Public employment in general

Former national security professionals plausibly alleged chilling effect on exercise of First Amendment rights, and thus made sufficient showing of injury in fact, as element of Article III standing, in action against government officials, challenging prepublication review (PPR) regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA) as violative of First Amendment free speech clause and void for vagueness under same clause and Fifth Amendment due process clause; complaint alleged that security professionals did not write about certain topics as result of experiences with PPR and had accepted redactions merely to not delay publication and not risk relationships with PPR officials. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 5.

[18] **Constitutional Law ⇨ Freedom of Speech, Expression, and Press**
In First Amendment free expression cases, the injury-in-fact element of Article III standing is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

Although subjective or speculative accounts of a chilling effect are not sufficient, a claimant alleging violation of his First Amendment right to free expression need not show he ceased those expressive activities altogether to demonstrate an injury in fact for Article III standing. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

Government action will be sufficiently chilling of free expression to demonstrate an injury in fact for Article III standing when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights, rendering the chilling effect objectively reasonable; if the government conduct meets that threshold, there is an ongoing injury in fact. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

A claimant challenging an alleged chilling effect with respect to his right to free expression need not show he ceased First Amendment activities altogether to demonstrate an injury in fact for Article III standing, as long as the claimed chill to those activities is objectively reasonable. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[22] Constitutional Law ⇐ Public employment in general
Constitutional Law ⇐ Public employment in general
Former national security professionals sought relief which would at least to some extent reduce their risk of additional injury, and thus satisfied redressability prong of Article III standing, in action against government officials, challenging prepublication review (PPR) regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA) as violative of First Amendment free speech clause and void for vagueness under same clause and Fifth Amendment due process clause; national security professionals sought declaration that PPR regimes violated First and Fifth Amendments, which would necessitate government officials implement reforms to regimes to remedy their potential constitutional defects. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 5.

Under a credible-threat-of-enforcement theory, plaintiffs who wish to challenge a policy under the First Amendment free speech clause can demonstrate Article III standing by showing that they intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and that there is a credible threat that the policy will be enforced against them when they do so. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[24] Federal Civil Procedure ⇐ Causation; redressability
The redressability requirement of Article III standing is met when the court's decision would
reduce to some extent the plaintiffs’ risk of additional injury. U.S. Const. art. 3, § 2, cl. 1.

[25] Constitutional Law ↔ Certainty and definiteness; vagueness
A provision may be impermissibly vague, as a matter of due process, if it authorizes or even encourages arbitrary and discriminatory enforcement. U.S. Const. Amend. 5.

[26] Administrative Law and Procedure ↔ Injury in general
That a plaintiff has, as an element of Article III standing, demonstrated harm from one particular inadequacy in government administration does not authorize a court to remedy all inadequacies in that administration. U.S. Const. art. 3, § 2, cl. 1.

[27] Constitutional Law ↔ Armed services
Constitutional Law ↔ Foreign policy and national defense
Generally, absent a clear expression by Congress to the contrary, courts should not intrude upon the authority of the Executive in military and national security affairs.

[28] Constitutional Law ↔ Ripeness; prematurity
Former national security professionals plausibly alleged that they were subject to prepublication review (PPR) regimes which required them to self-censor, and thus professionals' claims against government officials, challenging PPR regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA) as violative of First Amendment free speech clause and void for vagueness under same clause and Fifth Amendment due process clause, were ripe; national security professionals alleged that they had declined to write about certain topics as result of past experiences with PPR and, in interest of timely contributing to public debates, had accepted redactions instead of challenging them. U.S. Const. Amends. 1, 5.

[29] Federal Courts ↔ Fitness and hardship
The question of whether a claim is ripe turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

[30] Federal Courts ↔ Ripeness; Prematurity
As with Article III standing, ripeness is a question of subject-matter jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

[31] Constitutional Law ↔ Ripeness; prematurity
Much like Article III standing, ripeness requirements are also relaxed in First Amendment cases. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[32] Constitutional Law ↔ Ripeness; prematurity
First Amendment rights are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. U.S. Const. Amend. 1.

[33] Constitutional Law ↔ Public Employees and Officials
Public Employment ↔ Confidentiality
United States ↔ Confidentiality
Prepublication review regimes of Office of the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DOD), and National Security Agency (NSA), imposed to prevent publication of classified information, were reasonable, and
thus did not violate First Amendment free speech rights of former agency employees; far-reaching nature of agency prepublication review (PPR) regimes which invested agencies with discretion in requiring submission of materials and demanding redactions did not render PPR regimes unreasonable. U.S. Const. Amend. 1.

[34] Constitutional Law ⊑ Burden of Proof

Plaintiffs bringing facial constitutional challenges to a provision have a greater burden than those merely challenging application of the provision to themselves.

[35] Constitutional Law ⊑ Balancing of interests

When a generally applicable statute or regulation, as opposed to a post-hoc disciplinary action, operates as a prior restraint on government employee speech, under the First Amendment free speech clause the government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the government. U.S. Const. Amend. 1.

[36] Constitutional Law ⊑ Public Employees and Officials

When a generally applicable regulation, as opposed to a post-hoc disciplinary action, operates as a prior restraint on government employee speech, under the First Amendment free speech clause the government must demonstrate that the recited harms underlying the regulation are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way. U.S. Const. Amend. 1.

[37] Constitutional Law ⊑ Certainty and definiteness; vagueness

The void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, regulated parties should know what is required of them so they may act accordingly, and second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. U.S. Const. Amend. 5.

[38] Constitutional Law ⊑ Speech, press, assembly, and petition

When speech is involved, rigorous adherence to the due process requirements of the void for vagueness doctrine is necessary to ensure that ambiguity does not chill speech protected by the First Amendment. U.S. Const. Amends. 1, 5.

[39] Constitutional Law ⊑ Public Employees and Officials

Constitutional Law ⊑ Particular issues and applications

Public Employment ⊑ Confidentiality

United States ⊑ Confidentiality

Central Intelligence Agency's (CIA) prepublication review (PPR) regime gave fair notice of former agency employees’ PPR obligations, and thus to that extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; CIA PPR regime mandated submission of materials that were intelligence-related, mentioned CIA or intelligence data or activities, or were on any subject about which author had possessed access to classified information in course of his CIA employment, and PPR regime also required former agency employees who had possessed access to sensitive compartmented information (SCI) to submit any material that contained or purported to contain
any description of activities related to SCI. U.S. Const. Amends. 1, 5.

[40] Constitutional Law ↔ Public Employees and Officials
Constitutional Law ↔ Particular issues and applications
Public Employment ↔ Confidentiality
United States ↔ Confidentiality
Prepublication review (PPR) regime of Department of Defense (DOD) gave fair notice of former agency employees’ PPR obligations, and thus to that extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; PPR required submission of information related to information in DOD’s custody and control or acquired as part of official duties within DOD if information pertained to military matters, national security issues, or subjects of significant concern to DOD, and PPR regime also required former agency employees who had possessed access to sensitive compartmented information (SCI) to submit any material that contained or purported to contain any description of activities related to SCI. U.S. Const. Amends. 1, 5.

[41] Constitutional Law ↔ Public Employees and Officials
Constitutional Law ↔ Particular issues and applications
Public Employment ↔ Confidentiality
United States ↔ Confidentiality
National Security Agency’s (NSA) prepublication review (PPR) regime gave fair notice of former agency employees’ PPR obligations, and thus to that extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; PPR required former NSA affiliates acting in private capacity to submit material if there was doubt as to whether NSA information in material was unclassified and approved for public release, which did not automatically include public domain information, and PPR regime also required former agency employees who had possessed access to sensitive compartmented information (SCI) to submit any material that contained or purported to contain any description of activities related to SCI. U.S. Const. Amends. 1, 5.

[42] Constitutional Law ↔ Public Employees and Officials
Constitutional Law ↔ Particular issues and applications
Public Employment ↔ Confidentiality
United States ↔ Confidentiality
Prepublication review (PPR) regime of Office of the Director of National Intelligence (ODNI) gave fair notice of former agency employees’ PPR obligations, and thus to that extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; ODNI PPR regime required former agency employees to submit all official and non-official information intended for publication that discussed ODNI, Intelligence Community (IC), or national security, and ODNI PPR regime required former agency employees who had possessed access to classified information to submit any material that might have been based upon information that was classified or in process of classification determination. U.S. Const. Amends. 1, 5.

[43] Constitutional Law ↔ Public Employees and Officials
Constitutional Law ↔ Particular issues and applications
Public Employment ↔ Confidentiality
United States ↔ Confidentiality
Central Intelligence Agency’s (CIA) prepublication review regime did not facilitate arbitrary and discriminatory enforcement against former agency employees, and thus to that
extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; CIA prepublication review (PPR) regime provided that agency’s review board would review material solely to determine whether it contained any classified information, and PPR regime also provided that any submission would be reviewed for sensitive compartmented information (SCI) if author had possessed access to it as employee. U.S. Const. Amends. 1, 5.

[44] **Constitutional Law** ⇔ **Public Employees and Officials**

**Constitutional Law** ⇔ **Particular issues and applications**

**Public Employment** ⇔ **Confidentiality**

**United States** ⇔ **Confidentiality**

Even if they applied to former agency employees, certain Department of Defense (DOD) prepublication review (PPR) requirements did not facilitate arbitrary and discriminatory enforcement against such employees, and thus to that extent were not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; DOD PPR requirements provided for security review for information that could lead to compromise of classified information or disclosure of operations security, and DOD PPR requirements also provided for review for information requiring protection in interest of national security or other legitimate governmental interest, and for any classified, export-controlled, or other protected information. U.S. Const. Amends. 1, 5.

[45] **Constitutional Law** ⇔ **Public Employees and Officials**

**Constitutional Law** ⇔ **Particular issues and applications**

**Public Employment** ⇔ **Confidentiality**

**United States** ⇔ **Confidentiality**

Prepublication review (PPR) regime of Office of the Director of National Intelligence (ODNI) did not facilitate arbitrary and discriminatory enforcement against former agency employees, and thus to that extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; PPR regime provided that ODNI had security obligation and legal responsibility under executive orders governing intelligence and classification to safeguard sensitive intelligence information and prevent its unauthorized publication, and ODNI PPR regime provided that purpose of PPR was to give government opportunity to determine whether material sought to be publicly disclosed contained information that was classified or was in process of classification determination. U.S. Const. Amends. 1, 5.

[46] **Constitutional Law** ⇔ **Public Employees and Officials**

**Constitutional Law** ⇔ **Particular issues and applications**

**Public Employment** ⇔ **Confidentiality**

**United States** ⇔ **Confidentiality**

National Security Agency’s (NSA) prepublication review (PPR) regime did not facilitate arbitrary and discriminatory enforcement against former agency employees, and thus to that extent was not void for vagueness under First Amendment free speech clause or Fifth Amendment due process clause; NSA PPR regime provided that public release of official NSA information would be limited only as necessary to safeguard information requiring protection in interest of national security or other legitimate government interest, and NSA PPR regime provided that PPR included both classification review, and review for consistency with NSA policies and programs as well as specifically identified information security standards and corporate messaging standards. U.S. Const. Amends. 1, 5.
I. BACKGROUND

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

A. Plaintiffs

Plaintiff Edgar, a Rhode Island resident, is a cybersecurity expert who was employed by the Office of the Director of National Intelligence (the “ODNI”) from 2006 until his resignation in June 2013. ECF No. 1 ¶¶ 56, 58. At various points during his time at ODNI, Edgar served in roles including Deputy for Civil Liberties and Senior Associate General Counsel. Id. ¶ 58. In 2009 and 2010, he was detailed to the White House National Security Staff as Director of Privacy and Civil Liberties. Id. After signing a nondisclosure agreement with the ODNI, Edgar obtained a Top Secret/Sensitive Compartmented Information (“TS/SCI”) security clearance in 2006, which he held continuously until June 2013. Id. ¶ 59.

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

After Edgar submitted the manuscript, the ODNI informed him that it was referred to the Central Intelligence Agency (“CIA”) and the National Security Agency (“NSA”) for additional review. Id. ¶ 63. Edgar was unable to communicate directly with reviewing officials at those agencies despite multiple inquiries. Id. On January 12, 2017, the ODNI informed Edgar that he could publish the manuscript only if he redacted or excised certain material. Id. ¶ 64. Some of the redactions related to events that had taken place or issues...
that had arisen after Edgar had left government, while others related to facts that were widely discussed and acknowledged if not officially confirmed. *Id.*

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

Edgar believes that the ODNI's PPR regime requires him to submit an excessive amount of material and finds the agency's submission requirements to be vague and confusing, leaving him uncertain of the exact scope of his submission obligations. *Id.* ¶ 66. He fears that the delay associated with PPR will hinder his career as an academic and impede his ability to participate effectively in public debates on matters involving his area of expertise. *Id.* He further alleges that the delay and uncertainty associated with PPR has dissuaded him from writing some pieces that he otherwise would have written and caused him to write others differently than he otherwise would have. *Id.* Finally, he believes that the ODNI, CIA, and NSA might have taken longer to review his book if they had perceived it to be unsympathetic to the intelligence community. *Id.* He is also concerned that "government censors will be less responsive to him if he writes books that are perceived to be critical." *Id.*

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

Since leaving the ODNI, Immerman has submitted book manuscripts, articles, papers, public talks, and academic syllabi to the agency for PPR. *Id.* ¶ 72. On January 25, 2013, Immerman emailed to the ODNI's PPR office a manuscript entitled The Hidden Hand: A Brief History of the CIA. *Id.* ¶ 73. The manuscript did not directly or indirectly refer to any classified information that Immerman obtained while employed with the ODNI or Department of State and cited public sources for all factual propositions. *Id.* The ODNI acknowledged receipt three days after Immerman's email. *Id.* ¶ 74. Nearly three months later, Immerman was informed that the agency had referred part of the manuscript to the CIA for additional review. *Id.* Several weeks after that, the ODNI informed him that the CIA was reviewing the entire manuscript. *Id.* Immerman contacted the CIA but was unable to obtain information about the review. *Id.*

**512** On July 12, 2013, the ODNI informed Immerman that he could publish the manuscript only with extensive redactions mandated by the CIA, all of which related to information for which Immerman had cited public sources. *Id.* ¶ 75. Some redactions related to information that government agencies including the CIA had published previously, and many related to events that had taken place or issues that had arisen after Immerman left government. *Id.* In some instances, the ODNI directed Immerman to excise citations to newspaper articles, while in others the ODNI directed Immerman to delete passages relating to information he had obtained from public sources, including information about the CIA's use of drones. *Id.* The ODNI also instructed him to redact words communicating judgments and arguments he considered fundamental to his conclusions as a trained historian. *Id.* The agency did not provide Immerman with any explanation for the mandated redactions. *Id.* ¶ 76.

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

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

The PPR process has taken less than two months for most of Goodman's books. Id. ¶ 89. In 2017, however, the CIA took eleven months to review a manuscript entitled Whistleblower at the CIA in which Goodman provided an account of his experience as a senior CIA analyst. Id. In part because of the delay, Goodman's publisher at one point threatened to cancel his contract. Id. All of the changes to the manuscript that the CIA eventually mandated, Goodman believes, were intended to protect the agency from embarrassment rather than to protect classified information. Id. ¶ 90. The manuscript discussed aspects of U.S. policy, including the use of armed drones overseas, of which Goodman has no personal knowledge; his commentary in the book was based on cited press accounts. Id. The CIA demanded that Goodman not discuss these matters at all, however, and did not provide a written explanation. Id. Goodman met with a CIA official but was unable to persuade the agency to reconsider and thus decided to remove the passages to which the agency had objected. Id. ¶ 91.

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

Plaintiff Bhagwati, a New York resident, is a writer, activist, and former Marine Corps officer. Id. ¶ 94. Bhagwati obtained a Secret security clearance in the early 2000s. Id. ¶¶ 95–96. As a former DOD employee, Bhagwati is subject to the PPR requirements imposed by multiple DOD policies. Id. ¶ 96. In March 2019, Bhagwati published a memoir discussing her experiences with misogyny, racism, and sexual violence during her military service, but only learned of her PPR obligations on the eve of publication through conversations with her counsel in this action. Id. ¶¶ 94, 96, 98. She has also published more than a dozen op-ed and opinion pieces about her experiences in the Marine Corps and advocacy work she has performed on issues of sexual assault and discrimination in the military. Id. ¶ 97. She plans to continue her advocacy through written publications and public appearances but has no plans to submit any future work for PPR because she is certain that her future publications will not contain classified information. Id. ¶ 99.

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

Fallon has published op-eds, articles, columns, and a book since leaving government service, many of which he submitted to the DOD for PPR. Id. ¶ 103. In 2016, Fallon completed a book titled Unjustifiable Means about the George W. Bush administration's policies relating to “interrogation and torture of prisoners” and the experiences of public servants, including Fallon, who had opposed the policies. Id. ¶ 104. The book relied on information the government had declassified and on public record materials relating to “the Bush administration's policies and their consequences.” Id. Fallon “was confident that the book did not contain properly classified information.” Id. When he began writing the book in 2014, Fallon consulted former NCIS colleagues about PPR, one of whom stated that he had not submitted his own manuscript and the rest of whom advised him that they did not believe he was required to submit his. Id. ¶ 105.

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

On January 11, 2017, the DOD PPR office informed Fallon that its review of the manuscript was complete but that review by other agencies was necessary as well, though the reviewing official would not identify the agencies. Id. ¶ 108. After Fallon noted his publication date, the official assured him that the DOD “would do everything it could to complete review by that date.” Id. Fallon emailed the reviewing official at least eight times prior to the planned publication date, stressing that delay would force the date to be pushed back, which would require cancelling book tours and speaking engagements. Id. ¶ 109. The DOD did not inform Fallon that review was complete until August 25, 2017. Id. ¶ 110. It also required Fallon to make 113 separate excisions from the book if he wished to proceed with publication. Id.
In Fallon's view, "the excisions were arbitrary, haphazard, and inconsistent, and, at least in some instances, seemingly intended to protect the CIA from embarrassment." Id. Some related to material published in unclassified congressional reports while others concerned news articles Fallon had cited. Id. While Fallon believed that all of the excisions were unnecessary and unjustified, he decided not to challenge them to avoid delaying publication further. Id. ¶ 111. Fallon had originally intended to publish the book at the start of the Trump administration after torture became a major issue during the 2016 U.S. presidential campaign and it was important to him to publish "while it was still possible to influence the public debate on this subject." Id. ¶¶ 107, 111. Though Fallon was forced to cancel events and travel, and his publisher at one point threatened to cancel his contract for non-delivery, the book was eventually published on October 24, 2017. Id. ¶¶ 111–12.

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

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

In Fallon's experience, PPR "has been haphazard and opaque, and communication from the DOD has been sporadic and unhelpful." Id. ¶ 116. Fallon has come to believe that the DOD's PPR officials "have no control or influence over the other agencies to which they send authors' works for review" and that there is "a lack of accountability from those offices to the DOD." Id. ¶ 117. While Fallon plans to continue submitting to the DOD any op-eds, articles, columns, and books he writes in the future, he alleges that his experiences with PPR "continue to negatively impact him and deny him the opportunity to contribute to the public debate over breaking news." Id. ¶¶ 115, 118. Specifically, because of his concerns about potential delays and unjustified agency objections that arise with PPR, Fallon has declined *516 offers to author op-eds and write articles on breaking news and topics of public concern because they require an immediate response. Id. ¶ 118. He also is unsure how his PPR obligations apply in academic settings, including whether he must submit edits and additions he makes to the work of others, which hinders his work and ability to engage with his colleagues. Id. Finally, Fallon worries that the government will retaliate against him by stripping his security clearance, which he requires for his consulting work, if he does not strictly comply with PPR requirements. Id. ¶ 119.

B. PPR Regimes

1. Historical Background

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

In 1980, the Supreme Court decided Snepp v. United States, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam), affirming the imposition of a constructive
trusting on proceeds earned by a former CIA officer who had published a book without submitting it for PPR. Id. ¶ 19. In 1983, President Reagan issued National Security Decision Directive 84, which mandated that intelligence agencies require all persons with access to Sensitive Compartmented Information (“SCI”) sign a nondisclosure agreement with a PPR provision. Id. ¶ 20. The Directive received significant bipartisan criticism from Congress and was suspended after legislation that would have prohibited most agencies from imposing PPR requirements was considered in hearings by a House subcommittee. Id. ¶ 21. Agencies continued to require employees to sign a form imposing essentially the same PPR requirements, however. Id. ¶ 22.

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

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

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

Each agency also maintains additional secrecy and PPR policies. First, the CIA requires that all officers submit for PPR “any and all materials they intend to share with the public that are intelligence related,” according to the agency’s website. Id. ¶ 32c. Additionally, through Agency Regulation (“AR”) 13-10, titled “Agency Prepublication Review of Certain Material Prepared for Public Dissemination,” the CIA requires all “former Agency employees and contractors, and others who are obligated by CIA secrecy agreement,” to submit for PPR any material “that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his employment or other contact with the Agency.” Id. ¶ 32d. According to documents obtained through Freedom of Information Act litigation by Plaintiffs’ counsel, the CIA “will not provide a copy of a secrecy agreement or nondisclosure agreement to an author who requests one they signed,” even though such agreements “are typically not classified.” Id. ¶ 32e.

The CIA’s PPR authority is known as the Publications Review Board. Id. ¶ 33. Plaintiffs allege that Standard Form 312, Form 4414, the CIA secrecy agreement, and AR 13-10 collectively “give the Board discretion to censor information that it claims is classified without regard” to considerations

*517 2. Current Regimes
including “whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by public interest in disclosure.” Id. ¶ 33. Plaintiffs also assert that when the Board refers manuscripts by former CIA employees to other agencies for review, other agencies censor the manuscripts on the basis of undisclosed review standards. Id.

Plaintiffs further allege that “the breadth and vagueness of the CIA's review standards invite capricious and discriminatory enforcement” and that “in practice the Board's censorship decisions are often arbitrary or influenced by the author's viewpoint.” Id. ¶ 34. For example, Plaintiffs *518 assert, former intelligence community employees “who wrote books criticizing the CIA's torture of prisoners apprehended in the ‘war on terror’ have complained publicly that their books were heavily redacted even as former CIA officials’ supportive accounts of the same policies were published without significant excisions of similar information.” Id. According to Plaintiffs, the CIA in 2012 opened an internal investigation into whether its PPR regime was being misused to suppress speech critical of the agency, but the agency has not released or publicly described its findings. Id. Finally, Plaintiffs allege that: the regime does not require the Board to provide authors with reasons for its decisions and that the Board generally does not do so; that deadlines for adjudication of appeals are merely aspirational and that the regime fails to assure prompt review; and that the regime fails to require the government to initiate judicial review of PPR decisions and to guarantee that such review is prompt. Id. ¶¶ 35–37.

Plaintiffs’ general allegations about the DOD, NSA, and ODNI regimes are similar to those about the CIA’s. Plaintiffs allege that each regime “imposes submission requirements that, taken together, are vague, confusing, and overbroad,” id. ¶¶ 38, 44, 50; that each regime “fails to meaningfully cabin the discretion” of the agency's PPR authority and instead grants to the authority “discretion to censor information” without regard to the same interests that Plaintiffs allege the CIA Publications Review Board is not required to consider, id. ¶¶ 39, 45, 51; that the agencies refer manuscripts to other agencies that do not disclose their review standards, id. ¶¶ 39, 45, 51; that the “breadth and vagueness” of the agencies’ standards mean that the agencies’ PPR decisions are often or frequently “arbitrary” or “invite capricious and discriminatory enforcement,” id. ¶¶ 40, 46, 52; and that the regimes do not require the PPR authorities to provide authors with reasons for their decisions, id. ¶¶ 41, 47, 53; provide no assurance of prompt review, id. ¶¶ 42, 48, 54; and fail to require the government to initiate judicial review of PPR decisions or to guarantee that such review is prompt, id. ¶¶ 43, 49, 55.

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

Such information must be submitted if, for example, it “[i]s or has the potential to become an item of national or international interest”; “[a]ffects national security policy, foreign relations, or ongoing negotiations”; or “[c]oncerns a subject of potential controversy among the DoD Components or with other federal agencies.” Id. (alterations in original). PPR is performed at the agency by the Defense Office of Prepublication and Security Review (“DOPS”), which the agency's policies indicate conducts both “security review” for protecting *519 classified information and “policy review” to ensure that materials do not conflict with DOD or government policies or programs. Id. ¶ 39. Plaintiffs allege that DOD components “often disagree as to what must be censored,” and that review “frequently takes many weeks or even months” and can result in required redactions of readily available public information. Id. ¶ 40.
With respect to the NSA, Plaintiffs allege that the agency has adopted NSA/CSS Policy 1-30, “Review of NSA/CSS Information Intended for Public Release,” which requires all former NSA employees to submit for PPR any material, other than a resume or job-related document, “where [it] contains official NSA/CSS information that may or may not be UNCLASSIFIED and approved for public release.” *Id.* ¶ 44c (alteration in original). “Official NSA/CSS information” is defined to include “[a]ny NSA/CSS, DoD, or IC information that is in the custody and control of NSA/CSS and was obtained for or generated on NSA/CSS’ behalf during the course of employment or other service, whether contractual or not, with NSA/CSS.” *Id.* (alteration in original). Plaintiffs further allege that “the censorship decisions” of “the agency's censors, known as Prepublication Review Authorities,” are “often arbitrary” and can result in required redactions of publicly available facts, and that “review frequently takes many weeks or even months.” *Id.* ¶¶ 45–46, 48.

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

PPR at the ODNI is conducted by the Director of the Information Management Division. *Id.* ¶ 51. The ODNI has also adopted Instruction 80.04, “ODNI Pre-publication Review of Information to be Publicly Released,” which “requires all former agency employees, regardless of their level of access to sensitive information, to submit all official and non-official information intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security.” *Id.* ¶ 50d (alteration in original). The Instruction, Plaintiffs allege, “imposes no limitations whatsoever on the Director's power to censor,” stating only that “the goal of pre-publication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication.” *Id.* Plaintiffs finally allege that review under the ODNI regime “frequently takes many weeks or even months.” *Id.* ¶ 54.

Plaintiffs filed their Complaint on April 2, 2019. ECF No. 1. The Complaint asserts two causes of action. *Id.* ¶¶ 120–21. First, Plaintiffs assert that Defendants’ PPR regimes “violate the First Amendment because they invest executive officers with sweeping discretion to suppress speech and fail to include procedural safeguards designed to avoid the dangers of a censorship system.” *Id.* ¶ 120. Plaintiffs then allege that the regimes “are void for vagueness under the First and Fifth Amendments because they fail to provide *520 former* government employees with fair notice of what they must submit for prepublication review and of what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement.” *Id.* ¶ 121. For relief, the Complaint seeks a declaration that the PPR regimes violate the First and Fifth Amendments and an injunction barring Defendants and individuals associated with them from continuing to enforce the regimes “against Plaintiffs, or any other person.” *Id.* at 41. 3

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

II. STANDARD OF REVIEW

“A district court should grant a motion to dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1) ‘only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.’ ” *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 645 (4th Cir. 2018) (quoting *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647

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

(4th Cir. 1999)). “The burden of establishing subject matter jurisdiction rests with the plaintiff.” Demetres v. East West Constr., 776 F.3d 271, 272 (4th Cir. 2015). “When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), ‘the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.’ ” Evans, 166 F.3d at 647 (quoting Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)). Article III standing is a prerequisite to subject matter jurisdiction. See Beyond Sys., Inc. v. Kraft Foods, Inc., 777 F.3d 712, 715 (4th Cir. 2015).

To state a claim that survives a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The “mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6).” *521 Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012). To determine whether a claim has crossed “the line from conceivable to plausible,” the Court must employ a “context-specific” inquiry, drawing on the court's “experience and common sense.” Iqbal, 556 U.S. at 679–80, 129 S.Ct. 1937 (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). The Court accepts “all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint.” Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009). The Court must “draw all reasonable inferences in favor of the plaintiff.” Id. at 253 (citing Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)). “[B]ut [the Court] need not accept the legal conclusions drawn from the facts, and ... need not accept as true unwarranted inferences, unreasonable conclusions or arguments.” Id. (first alteration in original) (quoting Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008)).

III. DISCUSSION

[6] Before addressing Defendants’ Motion to Dismiss the Complaint, the Court first considers the other pending motions, neither of which Defendants have opposed. First, the Motion to Omit Home Addresses from Caption filed by Plaintiffs Edgar, Bhagwati, and Fallon (“Movants”) asks the Court to waive the requirement of this District's Local Rule 102.2(a) that a complaint include the names and addresses of all parties. ECF No. 8. As the Court noted in Casa de Maryland, Inc. v. Trump, the Fourth Circuit has held that while the public has an important interest in open judicial proceedings, “compelling concerns relating to personal privacy or confidentiality may warrant some degree of anonymity.” No. GJH-18-845, 2018 WL 1947075, at *1 (D. Md. Apr. 25, 2018) (quoting Doe v. Pub. Citizen, 749 F.3d 246, 273 (4th Cir. 2014)). The Fourth Circuit has identified several factors for courts to consider in balancing the need for open proceedings against litigants’ privacy concerns, including:

Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent nonparties; the ages of the person whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and, relatedly, the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.
Here, Movants assert that they reasonably fear for their physical safety and that of their family members “in light of the passion that may be inflamed by this lawsuit against high-ranking government actors.” ECF No. 8-1 at 2. Bhagwati notes that she is an activist who conducts public advocacy on issues of misogyny, racism, and sexual violence in the military and has been subject to stalking and repeated online attacks, which she asserts are common responses to advocacy on such issues. Id. at 2–3. Fallon states that his professional history as a senior official investigating al-Qaeda members and terrorist attacks creates heightened dangers of physical harm to him and his family if his home address is made public. Id. at 3. Finally, Edgar asserts that he resides with young children and fears for their safety if his address is disclosed. Id.

While the Movants’ rationales for withholding their addresses align with the Public Citizen factors to varying degrees, the Court finds that granting the motion is warranted given the limited countervailing public interests at play. As in Casa de Maryland, Plaintiffs’ addresses “are of minimal import to furthering the openness of judicial proceedings.” 2018 WL 1947075 at *2. Given that the Complaint extensively describes each Movant’s professional background and identifies their state of residence, there can be little if any confusion about their identities, and any ambiguity that did exist would not be remedied by ordering disclosure of their home addresses. Further, there is no indication of any prejudice to Defendants from allowing Movants to withhold their addresses, which is underscored by Defendants’ lack of any opposition to the motion. Nor is it apparent that the addresses are relevant to any questions before the Court. See Casa de Maryland, 2018 WL 1947075, at *2. For these reasons, the Court will grant the motion.


CERL states that it is a non-partisan institute at the University of Pennsylvania Law School “dedicated to preserving and promoting ethics and the rule of law in national security, democratic governance, and warfare.” ECF No. 34 at 2. Among other activities, it holds conferences and events and publishes various academic materials “at the intersection of national security and ethics.” Id. CERL asserts that these activities and others demonstrate that it has a “special interest in the outcome of [this] suit” and expertise in the subject matter at issue. Id. (alteration in original) (quoting Bryant, 923 F. Supp. at 728). Finally, CERL states that its brief “would provide the Court with important background information about the chilling effect of Defendants’ prepublication regimes on academics, national security professionals and the general public.” Id. at 3–4.

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

A. Standing

[9] [10] [11] [12] Defendants first move to dismiss the Complaint under Rule 12(b)(1) on the ground that Plaintiffs lack standing and that the Court therefore lacks subject matter jurisdiction. “Article III of the U.S. Constitution limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” *Beck v. McDonald,* 848 F.3d 262, 269 (4th Cir. 2017) (quoting U.S. Const. art. III, § 2). “One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.” *Id.* (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)). “To invoke federal jurisdiction, a plaintiff bears the burden of establishing the three ‘irreducible minimum requirements’ of Article III standing.” *Id.* (quoting *David v. Alphin,* 704 F.3d 327, 333 (4th Cir. 2013)). The plaintiff must demonstrate “(1) an injury in fact (i.e., a ‘concrete and particularized’ invasion of a ‘legally protected interest’); (2) causation (i.e., a ‘fairly ... trace[able]’ connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is ‘likely’ and not merely ‘speculative’ that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).” *David,* 704 F.3d at 333 (alterations in original) (quoting *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008)). “[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Bostic v. Schaefer,* 760 F.3d 352, 370 (4th Cir. 2014) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)).

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

[13] [14] [15] Plaintiffs’ licensing scheme theory argues that the PPR regimes are akin to prior restraint statutes that place “unbridled discretion in a government official over whether to permit or deny expressive activity” and are thus subject to **facial challenges.** *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Under that doctrine, “a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.” *Id.* at 759, 108 S.Ct. 2138. Such schemes give rise to “two major First Amendment risks”: “self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship ‘as applied’ without standards by which to measure the licensor’s action.” *Id.* On the basis of this doctrine, the Supreme Court has permitted facial challenges to, for example, an ordinance giving a mayor “unfettered discretion” to deny or condition permits for newspaper display racks on public property, *id.* at 772, 108 S.Ct. 2138, and a Maryland statute requiring submission of films to a state review board before exhibiting them, *Freedman v. Maryland,* 380 U.S. 51, 56, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

While there is some superficial resemblance between the provisions challenged in these cases and the PPR regimes at issue here, Plaintiffs’ attempt to fit their Complaint under this doctrine in order to demonstrate standing is unconvincing. First, PPR as Plaintiffs have described it cannot plausibly be understood as a licensing scheme. Plaintiffs have not

alleged that the PPR schemes at issue require them to obtain licenses to engage in any expressive conduct at all, as is the case in the typical licensing challenge that tests “the states’ and municipalities’ longstanding authority to license activities within their borders.” Am. Entertainers, L.L.C. v. City of Rocky Mount, 888 F.3d 707, 719 (4th Cir. 2018). Rather, they must submit for review materials that discuss the subjects of their work as former federal intelligence professionals pursuant to agreements they have signed. While Plaintiffs might validly question whether the scope and extent of that requirement is proper, the established concept of a “licensing scheme” does not capture the constraints under which Plaintiffs allege that they operate.

Underscoring this point is that Plaintiffs are not plausibly comparable to the paradigmatic newspaper publishers and theater owners that have brought challenges to licensing regimes. See Midwest Media Prop., L.L.C. v. Symmes Township, 503 F.3d 456, 473 (6th Cir. 2007) (noting the Supreme Court's observation that “newspapers, radio stations, movie theaters and producers” are “often those with the highest interest and the largest stake in a First Amendment controversy” (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 n.11, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)). Such entities would have no interaction with the government with respect to their expressive activities but for the challenged regulations. In contrast, Plaintiffs here are former government employees who voluntarily took on their PPR obligations as a condition of their employment and their access to protected government information. Cf. John Doe, Inc. v. Mukasey, 549 F.3d 861, 877 (2d Cir. 2008) (rejecting an analogy between PPR requirements for former CIA employees and a statute barring telecommunications firms from disclosing that they received subpoenas from the FBI, explaining that unlike the former employees the firms “had no interaction with the Government until the Government imposed its nondisclosure requirement upon [them]”). And Plaintiffs do not dispute the government's basic power to restrict release of classified information by those entrusted with it. For these reasons, Plaintiffs’ attempt to fit PPR under licensing scheme doctrine for standing purposes is unavailing.

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

[17] [18] [19] [20] “In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of ‘self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.’ ” Cooksey, 721 F.3d at 235 (alterations in original) (quoting Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011)). “Although ‘[s]ubjective or speculative accounts of such a chilling effect are not sufficient ... a claimant need not show he ceased those activities altogether to demonstrate an injury in fact.’ ” Kenny, 885 F.3d at 289 n.3 (alterations in original) (quoting Cooksey, 721 F.3d at 236). “Instead, ‘[g]overnment action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights,’ ” rendering the chilling effect “objectively reasonable.” Id. (alterations in original) (quoting Cooksey, 721 F.3d at 236). If the government conduct meets that threshold, “there is an ongoing injury in fact.” Kenny, 885 F.3d at 288.

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

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

[21] Defendants respond that Plaintiffs’ claims of chill are belied by the fact that Plaintiffs have published extensively and intend to continue doing so despite the inadequacies they allege in the PPR regimes. Id. (citing ECF No. 1 ¶¶ 61, 65, 72, 79, 85, 93, 103, 115). This argument is unpersuasive. As the Court has noted, “a claimant need not show [he] ceased [First Amendment] activities altogether to demonstrate an injury in fact” as long as the claimed chill to those activities is objectively reasonable. Cooksey, 721 F.3d at 236 (first alteration in original) (quoting Benham, 635 F.3d at 135). Defendants next argue that Plaintiffs’ claims of chill are not objectively reasonable because Plaintiffs’ decisions not to write about certain topics or to accept redactions they disagree with are “based on a mere preference to avoid potential disagreement, the possibility of delays in the publication process, or uncertainty.” ECF No. 30-1 at 28. Plaintiffs contend that their decisions are reasonable responses to the breadth and vagueness of the PPR regimes, uncertainty about the time required for manuscript review, and the risk of sanctions for failure to submit. ECF No. 33 at 20.

Defendants rely on The Baltimore Sun Co. v. Ehrlich, in which the Fourth Circuit affirmed the dismissal of a First Amendment claim by two reporters challenging the Governor of Maryland’s ban on state staff speaking with them. 437 F.3d 410, 413 (4th Cir. 2006). The ban in that case was imposed because the Governor’s press office felt the reporters were not “objectively” reporting on the administration. Id. at 413. The court explained that “[i]t would be inconsistent with the journalist’s accepted role in the ‘rough and tumble’ political arena to accept that a reporter of ordinary firmness can be chilled by a politician’s refusal to comment or answer questions on account of the reporter’s previous reporting.” Id. at 419 (quoting Eaton v. Meneley, 379 F.3d 949, 956 (10th Cir. 2004)). It is unclear how that reasoning bears on Plaintiffs’ claims here. Plaintiffs are not journalists claiming viewpoints in their reporting will be “chilled” because politicians refuse to engage with them in response to perceived unfair criticisms. Id. at 417. Rather, Plaintiffs allege that they are former public servants who seek to engage in public discourse surrounding the topics of their expertise but whose writings are subject to redactions and who face threats to their livelihood and potentially severe sanctions for failure to comply with PPR requirements. Their decisionmaking therefore is plausibly premised on more than a preference to avoid mere “disagreement[s].” ECF No. 30-1 at 28.

Defendants next assert that because of the presumption that government officials properly discharge their duties absent clear evidence to the contrary, Plaintiffs’ alleged concerns about PPR reviewers being less responsive if Plaintiffs’ writings criticize the government are misplaced. While such a presumption exists in some contexts, see Nardea v. Sessions, 876 F.3d 675, 680 (4th Cir. 2017), its application here would not undermine Plaintiffs’ other alleged reasons for self-censorship, which stem from the structure of the PPR regimes rather than conduct by individual reviewers. Finally, Defendants make the peculiar argument that Plaintiffs are not chilled but rather benefitted by PPR because review of
their work prior to publication *527 protects them from punishment for having published classified information. ECF No. 30-1 at 29. Even if Defendants were correct that the existence of a PPR system provides this counterintuitive incidental benefit to authors, however, that does not negate the other sources of chill caused by the alleged flaws in the specific PPR regimes at issue here.

[22] [23] [24] Because Plaintiffs have plausibly alleged that features of the PPR regimes result in a chilling effect on the exercise of First Amendment rights, Plaintiffs have made a sufficient showing of an injury in fact to proceed. 7 With respect to the redressability prong of standing, Defendants’ only argument is that a judicial order could not set time limits for review in a way that would remedy the harms Plaintiffs allege. ECF No. 30-1 at 28. This claim is unconvincing for two reasons. First, the redressability requirement is met “when the court’s decision would reduce ‘to some extent’ plaintiffs’ risk of additional injury.” Carter v. Fleming, 879 F.3d 132, 138 (4th Cir. 2018) (quoting Massachusetts v. EPA, 549 U.S. 497, 526, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007)). Additionally, the lack of certainty about the duration of review is only one factor contributing to the chill Plaintiffs allege, the remainder of which Defendants do not directly address.

To be sure, Plaintiffs’ arguments supporting redressability are somewhat nebulous. In their Opposition, Plaintiffs assert that they seek a declaration that the PPR regimes violate the First and Fifth Amendments and “an injunction prohibiting Defendants from sanctioning them for failure to comply with these regimes.” ECF No. 33 at 22. 8 Plaintiffs then state that “[i]f the Court were to afford Plaintiffs this relief, Defendants would presumably revise their prepublication review regimes to bring these regimes into alignment with the First and Fifth Amendments.” ECF No. 33 at 22. Unspecified as that prediction is, a declaration that features of the PPR regimes are unconstitutional would necessitate that Defendants implement reforms to the regimes to remedy their potential constitutional defects. Because the court’s decision need only reduce “ ‘to some extent’ plaintiffs’ risk of additional injury” to satisfy the redressability prong, Plaintiffs’ allegations are generally sufficient to proceed. Carter, 879 F.3d at 138 (quoting Massachusetts, 549 U.S. at 526, 127 S.Ct. 1438).

The speculative nature of Plaintiffs’ redressability arguments, however, relates to other alleged deficiencies that Defendants raise in Plaintiffs’ claims and the relief Plaintiffs request. Defendants first argue *528 that Plaintiffs lack standing to assert that PPR must apply only to narrow categories of former employees and only to material reasonably likely to contain “the most closely held government secrets” because Plaintiffs and their written work fall into those categories and therefore would not be impacted by the limitations Plaintiffs seek. ECF No. 30-1 at 30–31. Elsewhere in their brief, however, Defendants argue that all classified information is considered “closely held” under Executive Orders establishing the classification system. Id. at 38. This apparent conflict indicates that Defendants’ argument here is essentially an attempt to derail Plaintiffs’ standing through a grammatical technicality rather than a substantive objection.

Defendants then assert that Plaintiffs’ works are reasonably likely to contain classified information, as indicated by the fact that Plaintiffs’ past works have been redacted. Id. at 31. A core claim of Plaintiffs’ suit, however, is that those redactions were frequently without basis, and further that the regimes require submission of more than just materials likely to contain classified information. Defendants’ argument is therefore unpersuasive. Next, Defendants argue that Plaintiffs lack standing to challenge features of the regimes that apply only to current employees. Id. at 32. Plaintiffs make clear in their Opposition that they do not intend to do so, though they acknowledge Defendants’ correct assertion that one of the DOD policies the Complaint cites, Directive 5230.09, has been replaced by a new policy, Instruction 5230.09. ECF No. 33 at 16 n.3, 17 n.4. Finally, Defendants assert that Plaintiffs lack standing to challenge a provision of the NSA policy relating to information “in the custody and control of NSA/ CSS,” because none of the Plaintiffs alleges that they were employed by the NSA. ECF No. 30-1 at 33. Given that the ODNI has referred Plaintiff Edgar’s writings to the NSA in the past, however, see ECF No. 1 ¶¶ 63–65, Plaintiffs have adequately alleged that they are impacted by that agency’s PPR regime.

[25] Defendants also argue that Plaintiffs lack standing to bring their vagueness claim because Plaintiffs have identified no circumstance in which uncertainty about the scope of their PPR obligations has caused or is likely to cause them any tangible harm, and that they rather are well aware of their
need to submit materials for PPR and have adhered to those obligations. Id. at 33. As the merits portion of Plaintiffs’ brief notes, however, a provision may be impermissibly vague “if it authorizes or even encourages arbitrary and discriminatory enforcement.” Hill v. Colorado, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (citing Chicago v. Morales, 527 U.S. 41, 56–57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)). Plaintiffs allege that their works have been arbitrarily redacted and excised, in part because of discrimination against the viewpoints they contain. See ECF No. 1 ¶ 75, 77, 90, 110–11, 114. Because Plaintiffs have plausibly alleged a resulting chilling effect on future expression, Plaintiffs have drawn a sufficient link between the harms they assert and their vagueness claim.

Defendants also raise the separation of powers concerns not substantially implicate the separation of powers concerns Defendants raise. The Court will accordingly proceed.

B. Ripeness

Before addressing the merits of Plaintiffs’ Complaint, Defendants also raise the additional justiciability challenge that Plaintiffs’ claims are unripe. “The question of whether a claim is ripe ‘turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration.’ ” South Carolina v. United States, 912 F.3d 720, 730 (4th Cir. 2019) (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)). “As with standing, ripeness is a question of subject matter jurisdiction.” Id. (citing Sansotta v. Town of Nags Head, 724 F.3d 533, 548 (4th Cir. 2013)). Defendants here assert that “Plaintiffs do not take issue with any current prepublication review decision, and their abstract fears about how the system might operate in the future are therefore divorced from any immediate, concrete factual setting.” ECF No. 30-1 at 35–36. Defendants’ argument thus essentially reduces to the claim that no challenge to PPR should be allowed to proceed except for after-the-fact appeals in individual cases of agency review.

In response, Plaintiffs note several cases in which courts have nonetheless reviewed executive action concerning national security when the government's conduct has implicated fundamental individual liberties. ECF No. 33 at 23 (citing Boumediene v. Bush, 553 U.S. 723, 797, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 536, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); United States v. Moussaoui, 382 F.3d 453, 469 (4th Cir. 2004)). The Court need not wade into the interplay between these weighty principles, however, because as noted previously, Plaintiffs have retreated from the maximal relief requested in their Complaint and now characterize the remedy they seek as a declaration that the PPR regimes are constitutionally flawed and “an injunction prohibiting Defendants from sanctioning [Plaintiffs] for failure to comply with these regimes.” Id. at 22. Equitable relief that barred penalties solely against these Plaintiffs and that granted Defendants time to address any constitutional deficiencies the Court identified with the PPR regimes would not substantially implicate the separation of powers concerns Defendants raise. The Court will accordingly proceed.

As the Fourth Circuit has explained, however, “[m]uch like standing, ripeness requirements are also relaxed in First Amendment cases.” Cooksey, 721 F.3d at 240 (citing New Mexicans for Bill Richardson v. Gonzales,
64 F.3d 1495, 1500 (10th Cir. 1995)). “Indeed, ‘First Amendment rights ... are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.’ ”

\[\text{Id. (quoting Snepp, 64 F.3d at 1500).}\]

 Plaintiffs’ standing here is premised on precisely such a chill, and “standing and ripeness should be viewed through the same lens.” \[\text{Id.}\]

As discussed previously, Plaintiffs have plausibly alleged that they have declined to write about certain topics as a result of past experiences with PPR and have accepted redactions rather than challenged them in the interest of timely contributing to public debates. See ECF No. 1 ¶¶ 64, 66, 78, 80, 92–93, 110, 112, 118–19. In other words, Plaintiffs are currently subject to PPR regimes that they reasonably allege require them to self-censor. Accordingly, Plaintiffs’ claims challenging the alleged constitutional infirmities in those regimes are ripe for adjudication.

C. Merits

1. First Amendment Claim

[33] The Court thus turns to the merits of Plaintiffs’ claims, beginning with the primary claim that features of Defendants’ PPR regimes violate the First Amendment. While Plaintiffs discuss several ways in which they allege the regimes contravene constitutional speech protections, the overarching theme is that the regimes constitute “a far-reaching system of prior restraints” that invest reviewing agencies with excessive discretion, allowing them to require submission of materials that do not include classified information and unwarrantedly demand redactions and excisions. ECF No. 33 at 8; see also ECF No. 1 ¶ 120. Defendants argue that the PPR regimes are not prior restraints and that the sole reason PPR authorities require changes to submissions is that they contain classified material. ECF No. 30-1 at 44. To the extent that the regimes require submission and redaction of materials that may not include classified information, Defendants contend, the Supreme Court in Snepp v. United States found such requirements fully consistent with the First Amendment. See id. at 38–39 (citing Snepp, 444 U.S. at 511–13, 100 S.Ct. 763). The Court first discusses Snepp before turning to its implications for Plaintiffs’ claim.

\[\text{Snepp involved a former CIA agent who published a book about his experiences without submitting it to the agency for PPR, violating agreements he had signed when he joined and departed the agency. Id. at 508, 100 S.Ct. 763.} \]

In the first agreement, Snepp promised “that he would not ... publish ... any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment ... without specific prior approval by the Agency.” \[\text{Id. at 508, 100 S.Ct. 763.}\]

The government brought suit to enforce the agreements after Snepp published his book. \[\text{Id. at 508, 100 S.Ct. 763.}\]

In ruling for the government, the trial court “enjoined future breaches of Snepp's agreement” and “imposed a constructive trust on Snepp's profits,” finding that Snepp had breached fiduciary obligations to the agency. \[\text{Id. (citing 456 F. Supp. 176, 180–82 (E.D. Va. 1978)).}\]

The Fourth Circuit affirmed in part and reversed in part, lifting the imposition of the trust based on the government's concession that the book contained no classified intelligence and the court's finding that Snepp had a First Amendment right to publish unclassified information. \[\text{Id. at 509–10, 100 S.Ct. 763 (citing 531 F.2d 926, 935–36 (4th Cir. 1979)).}\]

“In other words,” the Supreme Court explained, the Fourth Circuit “thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material.” \[\text{Id. at 510, 100 S.Ct. 763.}\]

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relating to the Agency without submitting the information for clearance.”

Id. at 510–11, 100 S.Ct. 763 (emphasis in original). Whether Snepp violated that trust, the Court explained, did not depend on “whether his book actually contained classified information.”

Id. at 511, 100 S.Ct. 763. The Court noted that the lower courts “found that a former intelligence agent’s publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified.”

Id. at 511–12, 100 S.Ct. 763.

“When a former agent relies on his own judgment about what information is detrimental,” the Court further noted, “he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful.”

Id. at 512, 100 S.Ct. 763. In view of these principles, and unchallenged evidence in the record that “Snepp's book and others like it [had] seriously impaired the effectiveness of American intelligence operations,” the Court approved the lower courts’ conclusions that “Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government.”

Id. at 512–13, 100 S.Ct. 763. The Court concluded that in order to deter future breaches of trust similar to Snepp's, a constructive trust was the appropriate remedy.

Id. at 515–16, 100 S.Ct. 763.

While it was not the primary focus of its opinion, the Court also addressed and rejected Snepp's argument that the agreement he signed when he joined the CIA was “unenforceable as a prior restraint on protected speech.”

Id. at 509 n.3, 100 S.Ct. 763. The Court agreed with the Fourth Circuit that the agreement was “an ‘entirely appropriate’ exercise of the CIA Director's statutory mandate to ‘protec[t] intelligence sources and methods from unauthorized disclosure, 50 U.S.C. § 403(d)(3).”

Id. (alteration in original) (citing 395 F.2d at 932).9 The Court also explained that “even in the absence of an express agreement ... the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.”

Id. (citing U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)).

Finally, the Court declared that “[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service,” and concluded that “[t]he agreement that Snepp signed is a reasonable means for protecting this vital interest.”

Id. In responding to arguments made in a dissent, the Court described the logic of PPR, explaining that while “neither the CIA nor foreign agencies would be concerned” if information that “in fact ... is unclassified or in the public domain” is published, “[t]he problem is to ensure in advance, and by proper procedures, that information detrimental to national interest is not published.”

Id. at 513 n.8, 100 S.Ct. 763. “Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.”

Id. The Court finally rejected the suggestion that its holding would “allow[ ] the CIA to ‘censor’ its employees’ publications,” finding that Snepp's agreement “requires no more than a clearance procedure subject to judicial review.”

Id.

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

Both Circuits have also held, echoing Snepp, that the CIA's PPR requirement “is not ... a ‘system of prior restraints’ in the classic sense.” Wilson, 586 F.3d at 183. In United States v. Aguilar, the Court stated that when a government employee “voluntarily assume[s] a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.” 515 U.S. 593, 606, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (citing Snepp, 444 U.S. 507, 100 S.Ct. 763). Similarly, in United States v. National Treasury Employees Union (“NTEU”), the Court noted that it has “recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.” 513 U.S. 454, 465, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (citing Snepp, 444 U.S. 507, 100 S.Ct. 763).

Plaintiffs ask the Court to disregard this body of case law and treat Defendants’ PPR regimes as presumptively unconstitutional prior restraints under the framework established by the Supreme Court in 1965 in Freedman v. Maryland. ECF No. 33 at 24–25. As mentioned previously, the Court in that case rejected a Maryland statute that required approval from a state board before publicly exhibiting films but set no time limit for the board's review and did not assure prompt judicial review. 380 U.S. at 54–55, 58, 85 S.Ct. 734. The Court held that to comply with the First Amendment, a system requiring prior submission of films must include “procedural safeguards” that both place on the censoring authority the burden of proving the film is unprotected expression and require the censor to either grant a license or file a court action to “assure a prompt final judicial decision.” Id. at 58–59, 85 S.Ct. 734. Plaintiffs also argue, citing the Supreme Court’s rejection of a parade permit ordinance in Shuttlesworth v. City of Birmingham, that the PPR regimes must include “narrow, objective, and definite standards to guide the [reviewing] authority.” ECF No. 33 at 25 (citing 394 U.S. 147, 150–52, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)).

Plaintiffs’ position is simply untenable in light of Snepp. The Court there unquestionably rejected the argument that the CIA’s PPR regime was a prior restraint and upheld the validity of Snepp’s agreements “not to divulge classified information and not to publish any information without prepublication clearance.” 444 U.S. at 508, 509 n.3, 100 S.Ct. 763. Multiple courts of appeals have recognized and applied that holding, see Wilson, 586 F.3d at 183; McGehee, 718 F.2d at 1147–48 (D.C. Cir. 1983); see also Stillman v. CIA, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) (citing Snepp and stating that “[t]he Supreme Court has already decided that a prepublication review requirement imposed on a government employee with access to classified information is not an unconstitutional prior restraint.”). Plaintiffs make several arguments here to attempt to persuade the Court to depart from these precedents. None are persuasive.

First, Plaintiffs observe that the Fourth Circuit characterized the CIA’s PPR regime as a “prior restraint” in United States v. Marchetti, a 1972 decision upholding the secrecy agreement of a former CIA employee and affirming an injunction barring him from violating it by publishing materials discussing his work without submitting them for PPR. 466 F.2d 1309, 1311–13 (4th Cir. 1972). While that is an accurate summary of the decision, it is at best doubtful whether Marchetti’s reasoning survived Snepp, given the Supreme Court’s rejection of Snepp’s argument to that
effect and its conclusion that the CIA could have imposed restrictions on disclosure “even in the absence of an express agreement.” 444 U.S. at 509 n.3, 100 S.Ct. 763. Moreover, even if Marchetti does remain intact, the court there upheld the CIA’s PPR system, noting that under Freedman, “some prior restraints in some circumstances are approvable of course” and that “the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure.” 466 F.2d at 1316–17 (citing Freedman, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649).

Plaintiffs next attempt to distinguish the D.C. and Second Circuit cases that Defendants cite on the ground that they involved as-applied challenges to PPR while Plaintiffs’ challenge here is facial. ECF No. 33 at 26. Plaintiffs neglect to explain the significance of that distinction, however, and as Defendants correctly observe, plaintiffs bringing facial challenges have a greater burden than those merely challenging application of a provision to themselves. See United States v. Stevens, 559 U.S. 460, 472–73, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); see also Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449–50, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (citing United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)).

Snepp by characterizing its First Amendment analysis as “a cursory footnote” and by noting that the Court decided the case without oral argument or briefing on the merits. ECF No. 33 at 40–41. This Court will decline to discard a controlling Supreme Court precedent on such grounds.

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

First, it is apparent that for the Court in Snepp, the structure of the CIA's PPR regime and the scope of its requirements were irrelevant in light of the obligations contained in the agreements Snepp had voluntarily signed, both of which the Court took care to quote in their entirety. See 444 U.S. at 507–08 & n.1, 100 S.Ct. 763. The Court was plainly aware that Snepp's secrecy agreements barred him from publishing any information about the CIA or his employment there, classified or not, but nonetheless found those requirements consistent with the First Amendment. Id. at 508, 100 S.Ct. 763. The Court emphasized that the government's concessions that Snepp had a general right to publish unclassified information and that his book contained no classified material did not “undercut[ ] [the government's] claim that Snepp's failure to submit to prepublication review was a breach of his trust.” Id. at 511, 100 S.Ct. 763. In short, the Court's analysis indicates that it took into account the broad scope of the agency's submission and review requirements and found they created no obstacle to enforcing the PPR agreements Snepp had entered.

Second, Plaintiffs offer little basis to distinguish between Snepp and other CIA employees or employees of other agencies. Plaintiffs assert that in his role at CIA, Snepp had access to some of the government's “most closely held secrets,” a phrase Plaintiffs use repeatedly in their briefing but fail to define. ECF No. 33 at 40. While Plaintiffs correctly note the Court's statement that “[t]he types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties,” that statement served to support the possibility that Snepp's trust relationship with the CIA would exist even without a written agreement. ECF No. 33 at 40 (quoting 444 U.S. at 511 n.6, 100 S.Ct. 763). The primary focus of the decision, however, was Snepp's breach of his secrecy agreements, and there is no indication that the ruling was intended to be limited to CIA employees in Snepp's position. See Nat'l Fed'n of Fed. Emps. v. United States, 695 F. Supp. 1196, 1201 (D.D.C. 1988) (“That the agreement in Snepp covered only 'secret' information and was executed only by CIA employees does not change the

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conclusory fashion by citing to considerations discussed in

Plaintiffs are therefore left with demonstrating that the PPR regimes fail the reasonableness test that the Court established in

irrelevant in light of

prior restraint doctrine, and because

Snepp found that doctrine does not apply in this context, that

Snepp did not raise them is not a distinguishing limitation of the decision but rather an expected feature.

Because none of Plaintiffs’ arguments distinguishing

or limiting its reach are persuasive, Plaintiffs remain bound by its holding that prior restraint doctrine does not apply to PPR regimes imposed to prevent publication of classified information. Accordingly, Plaintiffs’ arguments that the regimes at issue here do not meet the requirements of prior restraint doctrine must fail. Such arguments constitute the majority of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss: Plaintiffs assert that Defendants’ “submission and censorship standards are vague, subjective, and overly broad” – as opposed to the “narrow, objective, and definite” requirement set by the Supreme Court in

– and “lack constitutionally required procedural safeguards” that the Court established in

Shuttlesworth

– and

Snepp, Plaintiffs’ many arguments relying on them cannot support their First Amendment claim.

Plaintiffs are therefore left with demonstrating that the PPR regimes fail the reasonableness test that the Court established in

Snepp. They attempt to do so unconvincingly and in

Marchetti, the continued viability of which this Court has already questioned. Id. at 43–44. Plaintiffs alternatively turn to a separate body of First Amendment doctrine concerning restrictions on the speech of public employees. In

Pickering v. Board of Education of Township High School District 205, the Supreme Court explained that if the speech of public employees “is of public concern, courts [assessing such restrictions under the First Amendment] must balance ‘the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’ ”

Liverman v. City of Petersburg, 844 F.3d 400, 406–07 (4th Cir. 2016) (second alteration in original) (quoting

391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)).

Finally, even if Plaintiffs were correct that

Snepp was a narrow decision that concerned only high-level CIA employees, the considerations that Plaintiffs assert the Court failed to address in the case have little bearing on the constitutionality of other PPR regimes unless they qualify as prior restraints under

Freedman and its progeny. Those considerations include the permissible scope of a submission requirement, permissible purposes of review, and “procedural protections that might be constitutionally required.” ECF No. 33 at 41. Because Plaintiffs derive those concerns from prior restraint doctrine, and because

Snepp did not raise them

[35] [36] In its subsequent decision in

NTEU, the Court “addressed how courts should apply

Pickering when a generally applicable statute or regulation (as opposed to a post-hoc disciplinary action) operates as a prior restraint on speech.”

Id. at 407. As the Fourth Circuit has explained,

NTEU involved a statute that prohibited federal employees from accepting any compensation for giving speeches or writing articles, even when the topic was unrelated to the employee's official duties. See

513 U.S.] at 457, 115 S.Ct. 1003. Emphasizing that the honoraria ban impeded a “broad category of expression” and “chills potential speech before it happens,” the Court held that “the Government's burden is greater

with respect to this statutory restriction on expression than with respect to [the] isolated disciplinary action[s]” in

Pickering

and its progeny.

Id. at 467, 468, 115 S.Ct. 1003. Accordingly, “[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's ‘necessary impact on the actual operation’ of the Government.”

Id. at 468, 115 S.Ct. 1003, (quoting

Pickering, 391 U.S. at 571, 88 S.Ct. 1731). Further, the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in

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fact alleviate these harms in a direct and material way.”

Id. at 475, 115 S.Ct. 1003.

Id.

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

Id.

Plaintiffs also point to the Second Circuit’s decision in Harman v. City of New York, in which that court held that a city policy restricting public comments by certain agency employees was inconsistent with Pickering and NTEU. 140 F.3d 111, 124–25 (2d Cir. 1998). In rejecting the defendants’ claim that the challenged policies were necessary to protect the confidentiality of the agencies’ cases and clients, the court distinguished Snepp, stating “that case concerned materials ‘essential to the security of the United States and—in a sense—the free world.’” Id. at 122 (quoting 444 U.S. at 512 n.7, 100 S.Ct. 763). The court also observed that “[c]ourts traditionally grant great deference to the government’s interests in national defense and security.”

Id. (citing Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980)). Because the issues at play here deal with matters of national defense and security and not local agencies, Harman provides little support for Plaintiffs’ position.

Plaintiffs’ argument that the PPR regimes fail the NTEU test is similarly unpersuasive. Quoting from NTEU, Plaintiffs state that the regimes implicate the core political speech of “a vast group of present and future employees,” although incidentally no Plaintiff here is a member of that group. ECF No. 33 at 44 (quoting NTEU, 513 U.S. at 468, 115 S.Ct. 1003). Plaintiffs then draw on a D.C. Circuit opinion adding detail to the NTEU test, stating that “the public’s interest in hearing this speech is ‘manifestly great,’ because ‘government employees are in a position to offer the public unique insights into the workings of government.’” Id. (quoting Sanjour v. EPA, 56 F.3d 85, 94 (D.C. Cir. 1995) (en banc)). Finally, Plaintiffs state that “Defendants’ regimes are not ‘narrowly tailored to serve the government’s asserted *537 interest,’ ” noting that courts have applied such a requirement in NTEU analysis. Id. (quoting Wolfe v. Barnhart, 446 F.3d 1096, 1106–07 (10th Cir. 2006)).

In support of this tailoring claim, Plaintiffs argue that “[t]he only legitimate interest served by [PPR] is the prevention of inadvertent disclosures by employees who submit to review,” which Plaintiffs assert would be “served most directly” by statutes criminalizing disclosure of sensitive information and by “the availability of administrative and civil sanctions for those who mishandle such information.” Id. at 44–45. “Any residual need for prepublication review can be served by a system far more tailored than Defendants’ current regimes,” Plaintiffs conclude. Id. at 45. Plaintiffs fail to describe the nature of such a system, however, except perhaps by unstated reference to their prior restraint arguments. Moreover, this argument appears to at least suggest, if not outright assert, that no PPR regime could be sufficiently narrowly tailored to satisfy the First Amendment. That claim cannot be correct unless NTEU effectively abrogated Snepp, a holding that the Court has no basis to reach here.
Further, Plaintiffs’ argument that Defendants have only a narrow interest in preventing inadvertent disclosure ignores the Supreme Court's pronouncements in Snepp about the government's “compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality” that justifies PPR. 444 U.S. at 509 n.3, 100 S.Ct. 763; see also Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1441 (D.C. Cir. 1996) (upholding a PPR regime for employees of the State Department and related agencies and noting this component of Snepp as speaking to the government's interests). Plaintiffs’ assertion that penalties for unauthorized disclosures are inadequate to serve the government's interest similarly ignores Snepp’s explanation that “[t]he problem is to ensure in advance, and by proper procedures, that information detrimental to national interest is not published” and that “[w]ithout a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.” 444 U.S. at 513 n.8, 100 S.Ct. 763 (emphasis in original); see also Weaver, 87 F.3d at 1442 (citing Snepp and stating that “advance review is plainly essential to preventing dissemination” of classified information).

In short, as with their prior restraint arguments, accepting Plaintiffs’ position under NTEU requires the Court to essentially treat Snepp as obsolete. Plaintiffs’ desire for the Court to do so is clear in their additional argument that the Court should look past Snepp because of the expansion and evolution of PPR over the last four decades. See ECF No. 33 at 41. But as Plaintiffs are of course aware, while the Supreme Court may question and reexamine its precedents in light of societal change and the passage of time, this Court has no such power. While the allegations Plaintiffs have made about the inadequacies and breadth of the challenged PPR regimes do not appear inaccurate or implausible, Snepp remains the precedent governing the Court's evaluation of Plaintiffs’ First Amendment claim, and Plaintiffs have failed to demonstrate that the regimes do not meet its low threshold of reasonableness. Accordingly, Plaintiffs’ First Amendment claim will be dismissed. 10

*538 2. Vagueness Claim

[37] [38] The Court finally turns to Plaintiffs’ vagueness claim, which asserts that the PPR regimes are void for vagueness under the First and Fifth Amendments because they fail to provide former government employees with fair notice of what they must submit for PPR and what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement. ECF No. 1 ¶ 121. “[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012) (citing Grayed v. City of Rockford, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). “When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” Id.

[39] Plaintiffs assert that the PPR regimes at issue here fail on both counts because language used in describing what former employees must submit for review is ambiguous and because the regimes “are vague with respect to what the agencies may censor,” which “has facilitated arbitrary and discriminatory application to the writings of Plaintiffs and others.” ECF No. 33 at 45–46. The Court considers these arguments in turn. First, in arguing that the regimes fail to give fair notice of former employees’ PPR obligations, Plaintiffs point to several phrases in the agency policies at issue that they allege are impermissibly vague in describing the subjects or content that render a work subject to PPR. ECF No. 33 at 27–29. For the CIA, these include the requirement in its AR 13-10 policy mandating submission of materials: that are “intelligence related;” that “mention[ ] CIA or intelligence data or activities;” or that are “on any subject about which the author has had access to classified information in the course of his employment.” Id. at 27 (citing ECF No. 1 ¶¶ 32c, 32d); see ECF No. 33-1 at 8.
For the DOD, Plaintiffs quote submission requirements for any information that “relates to information in the custody and control of the [DOD], or was acquired ... as part of their official duties within [DOD]” if the information “pertains to military matters, national security issues, or subjects of significant concern to [the agency].” ECF No. 33 at 28 (alterations in original) (quoting ECF No. 1 ¶ 38c); see ECF No. 33-1 at 23, 29, 41. 11 Plaintiffs next raise the NSA's Policy 1-30, *539 pointing to the requirement that former NSA/CSS affiliates “acting in a private capacity” must submit material for PPR whenever there is “doubt” as to whether “NSA/CSS information” in the material is “UNCLASSIFIED” and “approved for public release.” ECF No. 33 at 28 (quoting ECF No. 1 ¶ 44c); see ECF No. 33-1 at 57, 61. Plaintiffs note that the policy states that “Official NSA/CSS information appearing in the public domain shall not be automatically considered UNCLASSIFIED or approved for public release.” ECF No. 33 at 28 (quoting ECF No. 1 ¶ 44c); see ECF No. 33-1 at 58.

Plaintiffs also raise two ODNI policies. The agency's Instruction 80.04 requires former employees to submit “all official and non-official information intended for publication that discusses the ODNI, the IC, or national security.” ECF No. 33 at 28 (quoting ECF No. 1 ¶ 50(d)); see ECF No. 33-1 at 76–77. Additionally, the ODNI's Form 313 requires former employees who had access to classified information to submit any material that “might be based upon [information that is classified or is in the process of a classification determination].” ECF No. 33 at 28–29 (alteration in original) (quoting ECF No. 1 ¶ 50(c)); see ECF No. 33-1 at 70–71. Finally, Plaintiffs point to the obligations in Form 4414, in which all of the agencies require former employees who had access to SCI to submit any material “that contains or purports to contain any ... description of activities that ... relate to SCI.” Id. at 29 (alterations in original) (quoting ECF No. 1 ¶¶ 32b, 38b, 44b, 50b); see ECF No. 33-1 at 86.

Plaintiffs assert that phrases in these policies, including “intelligence related” in the CIA policy, “relates to,” “pertains to,” “subjects of significant concern to [the agency]” in the DOD's policies, “might be based upon” and “in the process of a classification determination” in the ODNI's policy, and “relate to” in Form 4414, are impermissibly vague. ECF No. 33 at 29–31, 45. Beyond case law generally describing vagueness doctrine, Plaintiffs cite only one controlling authority in support of their position, *Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991).* The Supreme Court there rejected a state professional responsibility rule on pretrial publicity, which allowed lawyers to speak only to the “general” nature of a claim or defense “without elaboration,” on the ground that “general” and “elaboration” were “both classic terms of degree.” *501 U.S. at 1048–49, 1061–62, 111 S.Ct. 2720.* Plaintiffs’ contention that the phrases at issue here are similarly vague terms of degree is simply incorrect as a grammatical matter.

Instead of case law, Plaintiffs focus on describing the wide body of material that the policies currently require Plaintiffs to submit and on offering hypothetical examples of works by former employees that would be subject to the submission requirements despite a low likelihood of containing classified information. See ECF No. 33 at 30–32. These arguments indicate that Plaintiffs’ primary objection to the policies is their breadth rather than any difficulties Plaintiffs have in understanding what they require. While the policies do appear to reach a wide range of publications by Plaintiffs and other former employees, Plaintiffs fail to persuasively demonstrate how that leads to a constitutional concern outside of the prior restraint context. 12 Plaintiffs’ objections thus appear *540 best directed at efforts to amend the policies administratively or legislatively rather than to invalidate them under the First or Fifth Amendments.

Two further points raised by Defendants further demonstrate the lack of merit to Plaintiffs’ claim. First, courts have recognized that a regulated party's ability to obtain prospective guidance from an agency before penalties are imposed mitigates concerns about a policy's “allegedly unconstitutional vagueness.” *U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 738–39 (D.C. Cir. 2016)* (citing *DiCola v. FDA, 77 F.3d 504, 508 (D.C. Cir. 1996)*). As Plaintiffs’ own allegations demonstrate, Plaintiffs have such an ability by contacting the PPR office of their former employing agency to inquire about submission requirements. See ECF No. 1 ¶ 106; see also ECF No. 33-1 at 7–8, 16, 53. Second, the Fourth Circuit has found that statutory language describing protected government information in broad or general terms presents a lessened vagueness concern when individuals responsible
for understanding the statute's meaning are intelligence professionals. See United States v. Morison, 844 F.2d 1057, 1074 (4th Cir. 1988) (rejecting a vagueness challenge to the phrase "relating to the national defense" in an Espionage Act prosecution on the ground that the defendant was an "experienced intelligence officer" who had "expertise in the field of governmental secrecy and intelligence operations" and had been instructed on "regulations concerning the security of secret national defense materials"). That principle squarely applies to Plaintiffs here.

In support of their second claim that the regimes’ vagueness facilitates arbitrary and discriminatory enforcement, Plaintiffs cite provisions from agency policies describing standards for review of submissions. The CIA's AR-10 policy provides that the agency's review board will review material “soley to determine whether it contains any classified information.” ECF No. 33 at 32; see ECF No. 33-1 at 10. It is difficult to see how that clear standard invites arbitrary and discriminatory enforcement given its narrowness and specificity. With respect to the DOD, Plaintiffs note provisions of Instruction 5230.09 and Instruction 5230.29, which according to Plaintiffs together provide that DOD will conduct PPR of former employees' submissions through both “security review,” which “protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security,” as well as through an additional review for information “requiring protection in the interest of national security or other legitimate governmental interest” and for “any classified, export-controlled or other protected information.” ECF No. 33 at 32; see ECF No. 33-1 at 33–34, 37, 46.

As the Court noted in discussing Plaintiffs’ standing, Defendants contend that some of these requirements apply only to current DOD personnel, while Plaintiffs insist that they apply to former employees as well. ECF No. 30-1 at 32; ECF No. 33 at 28 n.9, 32; ECF No. 36 at 16–17. The Court need not settle this dispute, however, because if Plaintiffs are correct, their vagueness argument is in fact weakened because the disputed policies give additional guidance to DOD PPR reviewers and further cabin their discretion. In other words, if these provisions indeed apply to Plaintiffs and other former employees as Plaintiffs ask the Court to conclude, the risk of "arbitrary and discriminatory enforcement" is reduced because the policies increase the degree to which the DOD has “provide[d] explicit standards for those who apply them.” Hill v. Coggins, 867 F.3d 499, 513 (4th Cir. 2017) (quoting Grayned, 408 U.S. at 108–09, 92 S.Ct. 2294).

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

Plaintiffs also appear to overlook NSA policy language. The first paragraph of NSA/CSS Policy 1-30 states that “[t]he public release of official NSA/CSS information shall be limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate Government interest,” which is followed by a citation to DOD Directive 5230.09. ECF No. 33-1 at 57, 66. The paragraph further explains that PPR “includes both a classification review” and a review for consistency with NSA “policies and programs” and specifically identified “information security standards” and “corporate messaging standards.” Id. To be sure, these policies set out an expansive scope of considerations for PPR reviewers to consider. But given their relative specificity, they cannot plausibly be read
as so vague that they impermissibly facilitate arbitrary and discriminatory enforcement. Finally, Plaintiffs cite the fact that all of the agencies review submissions for the presence of SCI if the author had access to it as an employee. ECF No. 33 at 33. In no way can that requirement be construed as vague or allowing for the unchecked exercise of discretion. Plaintiffs have thus fallen short of plausibly demonstrating that the challenged policies raise constitutional concerns under either of the two vagueness frameworks. The Court notes that they have also failed to link the redactions and excisions from their own works that they allege were arbitrary and discriminatorily motivated to a challenge to the PPR regimes as a whole. See ECF No. 1 ¶¶ 66, 80, 89, 110, 114. Nor have they responded to Defendants’ *542 observation that no Plaintiff has pursued judicial review of a PPR decision, as they are entitled to do. See, e.g., Bernsten v. CIA, 618 F. Supp. 2d 27 (D.D.C. 2009). While the Court appreciates the delay in publication that judicial review could entail, Plaintiffs have not demonstrated that such a delay on its own renders the PPR regimes constitutionally infirm, nor that review in a specific case would not be a more effective means of reviewing the alleged vagueness of a given PPR policy than a facial challenge. In any event, because none of the avenues that Plaintiffs have pursued for their vagueness claim are viable, the claim will be dismissed.

IV. CONCLUSION

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

All Citations

454 F.Supp.3d 502

Footnotes

1 Unless otherwise stated, these facts are taken from the Complaint, ECF No. 1, and are presumed to be true.
2 Plaintiffs allege that DOD alternatively or additionally requires employees with access to SCI to complete form DD Form 1847-1, which is similar to Form 4414. ECF No. 1 ¶ 38b.
3 Pin cites to documents filed on the Court’s electronic filing system (CM/ECF) refer to the page numbers generated by that system.
4 Plaintiffs also concurrently filed a consent motion for leave to file an opposition that exceeds the page limit set by the Local Rules. ECF No. 32. The motion will be granted.
5 The Court notes that neither Plaintiffs nor Defendants have raised that some of the named Defendants no longer hold their positions. The issue is immaterial to disposition of the pending motions, however, because all Defendants are sued in their official capacities and substitution of a public official party’s successor is automatic under Federal Rule of Civil Procedure 25(d). See Maryland v. United States, 360 F. Supp. 3d 288, 318 (D. Md. 2019).
6 CERL states that Plaintiff Fallon is a member its Advisory Council but was not involved in drafting the proposed amicus brief. ECF No. 34 at 2 & n.2.
7 Because Plaintiffs’ theory based on chilling effect is sufficient to demonstrate standing, the Court need not consider at length Plaintiffs’ alternative “credible threat of enforcement” theory. Under such a theory, plaintiffs can demonstrate standing by showing that “they intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and that there is a ‘credible threat’ that the policy will be enforced against them when they do so.” Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018) (quoting Kenny, 885 F.3d at 288). The Court notes, however, that like Plaintiffs’ licensing
scheme argument, credible threat of enforcement is an awkward fit for this case because Plaintiffs do not
state a desire to engage in conduct that is specifically proscribed by government policy, but rather express
confusion and uncertainty about PPR policies with which Plaintiffs are willing to comply but for the regimes’
alleged vagueness and other flaws.

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

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

It also bears mention that the wholesale reforms to PPR that Plaintiffs seek to obtain from the Court in this
claim strain at the limits of the judiciary's role, particularly given the national security context. See Egan,
484 U.S. at 530, 108 S.Ct. 818 (1988). Both that concern and the Court's inability to sidestep Snepp limit
the force of arguments made in the amicus brief submitted by CERL, which describes how lengthy PPR
delays chill contributions to public discourse by former officials and discourage national security experts from
entering the government. ECF No. 34-1. Whatever the merits of these assertions, they are more properly
directed to the branches of government empowered to create and execute public policy rather than to simply
evaluate its consistency with the Constitution.

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

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

While Plaintiffs do not cite the specific policy imposing this requirement, Defendants appear to be correct
in speculating that Plaintiffs are referring to Form 4414, the SCI nondisclosure agreement, which provides
that “the purpose of [PPR] ... is to give the United States a reasonable opportunity to determine whether the
preparation submitted ... sets forth any SCI.” ECF No. 36 at 22 (quoting ECF No. 33-1 at 86).
United States brought suit seeking declaration that former CIA agent had breached contract, injunction requiring former agent to submit future writings for prepublication review, and order imposing constructive trust on the Government's benefit on all profits that former agent might earn from publishing book in violation of his fiduciary obligations to the CIA. The United States District Court for the Eastern District of Virginia, Oren R. Lewis, J., 456 F.Supp. 176, enjoined future breaches of former agent's agreement and imposed constructive trust on profits received by former agent from publishing book about CIA activities, and former agent appealed. The Court of Appeals, 595 F.2d 926, affirmed in part and reversed in part, and petitions for certiorari were granted. The Supreme Court held that: (1) former agent breached fiduciary obligation by failing to submit material concerning CIA for prepublication review, and (2) proceeds of former agent's breach were impressed with a constructive trust.

Reversed and remanded for reinstatement of district court judgment.

Mr. Justice Stevens, with whom Mr. Justice Brennan and Mr. Justice Marshall joined, filed a dissenting opinion.

100 S.Ct. 763, 62 L.Ed.2d 704, 5 Media L. Rep. 2409


51 Cases that cite this headnote

United States ⇨ Confidentiality

Agreement voluntarily signed by former CIA agent by which agent agreed to submit any proposed publication for prior review was a reasonable means for protecting Government's vital interest in protecting both secrecy of information important to national security and appearance of confidentiality so essential to the effective operation of foreign intelligence service. National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3); U.S.C.A.Const. Amend. 1.

51 Cases that cite this headnote

[5] Public Employment ⇨ Prepublication review  
United States ⇨ Prepublication review


17 Cases that cite this headnote

[6] Trusts ⇨ Breach of contract of agency or employment

Where former CIA agent breached his fiduciary duty to CIA by publishing book about certain CIA activities without submitting book to CIA for prepublication review, where actual damages were unquantifiable and nominal damages were a hollow alternative and would not deter subsequent breaches, where punitive damages would be speculative and, even if recovered, might bear no relation to either Government's irreparable loss or former agent's unjust gain, and where proof of tortious conduct necessary to sustain punitive damages award might have forced Government to disclose some of the very confidences that former agent promised to protect, proceeds of former agent's breach would be impressed with a constructive trust. U.S.C.A.Const. Amend. 1; National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

43 Cases that cite this headnote

Opinion

*507 **764 PER CURIAM.

In No. 78–1871, Frank W. Snepp III seeks review of a judgment enforcing an agreement that he signed when he accepted employment with the Central Intelligence Agency (CIA). He also contends that punitive damages are an inappropriate remedy for the breach of his promise to submit all writings about the Agency for prepublication review. In No. 79–265, the United States conditionally cross petitions from a judgment refusing to find that profits attributable to Snepp's breach are impressed with a constructive trust. We grant the petitions for certiorari in order to correct the judgment from which both parties seek relief.

I

Based on his experiences as a CIA agent, Snepp published a book about certain CIA activities in South Vietnam. Snepp published the account without submitting it to the Agency for prepublication review. As an express condition of his employment with the CIA in 1968, however, Snepp had executed an agreement promising that he would “not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . .
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without specific prior approval by the Agency.” App. to Pet. for Cert. in No. 78–1871, p. 59a. The promise was an integral part of Snepp's concurrent undertaking “not to disclose any classified information relating to the Agency without proper authorization.” Id., at 58a. Thus, Snepp had pledged not to divulge classified information and not to publish any information without prepublication clearance. The Government brought this suit to enforce Snepp's agreement. It sought a declaration that Snepp had breached the contract, an injunction requiring Snepp to submit future writings for prepublication review, and an order imposing a constructive trust for the Government's benefit on all profits that Snepp might earn from publishing the book in violation of his fiduciary obligations to the Agency.

The District Court found that Snepp had “willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement” by publishing his book without submitting it for prepublication review. 456 F.Supp. 176, 179 (E.D.Va.1978). The court also found that Snepp deliberately misled CIA officials into believing that he would submit the book for prepublication clearance. Finally, the court determined as a fact that publication of the book had “caused the United States irreparable harm and loss.” *509 Id., at 180. The District Court therefore enjoined future breaches of Snepp's agreement and imposed a constructive trust on Snepp's profits.

[1] [2] [3] [4] The Court of Appeals accepted findings of the District Court and agreed that Snepp had breached a valid contract. It specifically affirmed the finding that Snepp's failure to submit his manuscript for prepublication review had inflicted “irreparable harm” on intelligence activities vital to our national security. 595 F.2d 926, 935 (CA4 1979). Thus, the court upheld the injunction against future violations of Snepp's prepublication obligation. The court, however, concluded that the record did not support imposition of a constructive trust. The conclusion rested on the court's perception that Snepp had a First Amendment right to publish unclassified information and the Government's concession—for the purposes of this litigation—that Snepp's book divulged no classified intelligence. Id., at 935–936. In other words, the court thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material. It therefore limited recovery to nominal damages and to the possibility of punitive damages if the Government—in a jury trial—could prove tortious conduct.

Judge Hoffman, sitting by designation, dissented from the refusal to find a constructive trust. The 1968 agreement, he wrote, “was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA.” Id., at 938. Prepublication clearance was part of Snepp's undertaking to protect confidences associated with his trust. Punitive damages, Judge Hoffman argued, were both a speculative and inappropriate remedy for Snepp's breach. We agree with Judge Hoffman that Snepp breached a fiduciary obligation and that the proceeds of his breach are impressed with a constructive trust.

II

[5] Snepp's employment with the CIA involved an extremely high degree of trust. In the opening sentence of the agreement that he signed, Snepp explicitly recognized that he was entering a trust relationship. The trust agreement specifically imposed the obligation not to publish any information relating to the Agency without submitting the information for clearance. Snepp stipulated at trial that—after undertaking this obligation—he had been “assigned to various positions of trust” and that he had been granted “frequent access to classified information, including information regarding intelligence sources and methods.” 456 F.Supp., at 178. Snepp published his book about CIA activities on the basis of this background and exposure. He deliberately and surreptitiously violated his obligation to submit all material for prepublication review. Thus, he exposed the classified information with which he had been entrusted to the risk of disclosure.

Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The Government does not deny—as a general principle—Snepp's right to publish unclassified information. Nor does it contend—at this stage of the litigation—that Snepp's book contains classified material. The Government simply claims that, in light of the special trust reposed in him and the

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agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources. Neither of the Government's concessions undercuts its claim that Snepp's failure to submit to prepublication review was a breach of his trust.

Both the District Court and the Court of Appeals found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified. When a former agent relies 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. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.

Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties. Admiral Turner, Director of the CIA, testified without contradiction that Snepp's book and others like it have seriously impaired the effectiveness of American intelligence operations. He said, “Over the last six to nine months, we have had a number of sources discontinue work with us. We have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us.”

In view of this and other evidence in the record, both the District Court and the Court of Appeals recognized that Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government.

The decision of the Court of Appeals denies the Government the most appropriate remedy for Snepp's acknowledged wrong. Indeed, as a practical matter, the decision may well leave the Government with no reliable deterrent against similar breaches of security. No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain.

The Government could not pursue the only remedy that the Court of Appeals left it without losing the benefit of the bargain it seeks to enforce. Proof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect. The trial of such a suit, before a jury if the defendant so elects, would subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs. Rarely would the Government run this risk. In a letter introduced at Snepp's trial, former CIA Director Colby noted the analogous problem in criminal cases. Existing law, he stated, “requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution.”

A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust. It deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the

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trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain. The decision of the Court of Appeals would deprive the Government of this equitable and effective means of protecting intelligence that may contribute to national security. We therefore reverse the judgment of the Court of Appeals insofar as it refused to impose a constructive trust on Snepp's profits, and we remand the cases to the Court of Appeals for reinstatement of the full judgment of the District Court.

Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

In 1968, Frank W. Snepp signed an employment agreement with the CIA in which he agreed to submit to the Agency any information he intended to publish about it for prepublication review. The purpose of such an agreement, as the Fourth Circuit held, is not to give the CIA the power to censor its employees' critical speech, but rather to ensure that classified, nonpublic information is not disclosed without the Agency's permission. 595 F.2d 926, 932 (1979); see also United States v. Marchetti, 466 F.2d 1309, 1317 (CA4 1972), cert. denied, 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516.

In this case Snepp admittedly breached his duty to submit the manuscript of his book, Decent Interval, to the CIA for prepublication review. However, the Government has conceded that the book contains no classified, nonpublic material. Thus, by definition, the interest in confidentiality that Snepp's contract was designed to protect has not been compromised. Nevertheless, the Court today grants the Government unprecedented and drastic relief in the form of a constructive trust over the profits derived by Snepp from the sale of the book. Because that remedy is not authorized by any applicable law and because it is most inappropriate for the Court to dispose of this novel issue summarily on the Government's conditional cross-petition for certiorari, I respectfully dissent.

I

The rule of law the Court announces today is not supported by statute, by the contract, or by the common law. Although Congress has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information, it has not seen fit to authorize the constructive trust remedy the Court creates today. Nor does either of the contracts Snepp signed with the Agency provide for any such remedy in the event of a breach. The Court's per curiam opinion seems to suggest that its result is supported by a blend of the law of trusts and the law of contracts. But neither of these branches of the common law supports the imposition of a constructive trust under the circumstances of this case.

Plainly this is not a typical trust situation in which a settlor has conveyed legal title to certain assets to a trustee for the use and benefit of designated beneficiaries. Rather, it is an employment relationship in which the employee possesses fiduciary obligations arising out of his duty of loyalty to his employer. One of those obligations, long recognized by the common law even in the absence of a written employment agreement, is the duty to protect confidential or "classified" information. If Snepp had breached that obligation, the common law would support the implication of a constructive trust upon the benefits derived from his misuse of confidential information.

But Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty, imposed in aid of the basic duty to maintain confidentiality, to obtain prepublication clearance. In order to justify the imposition of a constructive trust, the majority attempts to equate this contractual duty with Snepp's duty not to disclose, labeling them both as "fiduciary." I find nothing in the common law to support such an approach.

Employment agreements often contain covenants designed to ensure in various ways that an employee fully comlimes with his duty not to disclose or misuse confidential information.
One of the most common is a covenant not to compete. Contrary to the majority's approach in this case, the courts have not construed such covenants broadly simply because they support a basic fiduciary duty; nor have they granted sweeping remedies to enforce them. On the contrary, because such covenants are agreements in restraint of an individual's freedom of trade, they are enforceable only if they can survive scrutiny under the "rule of reason." That rule, originally laid down in the seminal case of Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng.Rep. 347 (1711), requires that the covenant be reasonably necessary to protect a legitimate interest of the employer (such as an interest in confidentiality), that the employer's interest not be outweighed by the public interest, and that the covenant not be of any longer duration or wider geographical scope than necessary to protect the employer's interest.

The Court has not persuaded me that a rule of reason analysis should not be applied to Snepp's covenant to submit to prepublication review. Like an ordinary employer, the CIA has a vital interest in protecting certain types of information; at the same time, the CIA employee has a countervailing interest in preserving a wide range of work opportunities (including work as an author) and in protecting his First Amendment rights. The public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information. When the Government seeks to enforce a harsh restriction on the employee's freedom, despite its admission that the interest the agreement was designed to protect—the confidentiality of classified information—has not been compromised, an equity court might well be persuaded that the case is not one in which the covenant should be enforced.

But even assuming that Snepp's covenant to submit to prepublication review should be enforced, the constructive trust imposed by the Court is not an appropriate remedy. If an employee has used his employer's confidential information for his own personal profit, a constructive trust over those profits is obviously an appropriate remedy because the profits are the direct result of the breach. But Snepp admittedly did not use confidential information in his book; nor were the profits from his book in any sense a product of his failure to submit the book for prepublication review. For, even if Snepp had submitted the book to the Agency for prepublication review, the Government's censorship authority would surely have been limited to the excision of classified material. In this case, then, it would have been obliged to clear the book for publication in precisely the same form as it now stands. Thus, Snepp has not gained any profits as a result of his breach; the Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity. Despite the fact that Snepp has not caused the Government the type of harm that would ordinarily be remedied by the imposition of a constructive trust, the Court attempts to justify a constructive trust remedy on the ground that the Government has suffered some harm. The Court states that publication of “unreviewed material” by a former CIA agent “can be detrimental to vital national interests even if the published information is unclassified.” Ante, at 766. It then seems to suggest that the injury in such cases stems from the Agency's inability to catch “harmful” but unclassified information before it is published. I do not believe, however, that the Agency has any authority to censor its employees' publication of unclassified information on the basis of its opinion that publication may be “detrimental to vital national interests” or otherwise “identified as harmful.” Ibid. The CIA never attempted to assert such power over Snepp in either of the contracts he signed; rather, the Agency itself limited its censorship power to preventing the disclosure of “classified” information. Moreover, even if such a wide-ranging prior restraint would be good national security policy, I would have great difficulty reconciling it with the demands of the First Amendment.

The Court also relies to some extent on the Government's theory at trial that Snepp caused it harm by flouting his prepublication review obligation and thus making it appear that the CIA was powerless to prevent its agents from publishing any information they chose to publish, whether classified or not. The Government theorized that this appearance of weakness would discourage foreign governments from cooperating with the CIA because of a fear that their secrets might also be compromised. In support of its position that Snepp's book had in fact had such an impact, the Government introduced testimony by the Director of the CIA, Admiral Stansfield Turner, stating that Snepp's book and others like it had jeopardized the CIA's relationship with foreign intelligence services by making them unsure...
of the Agency's ability to maintain confidentiality. Admiral Turner's truncated testimony does not explain, however, whether these unidentified "other" books actually contained classified information. If so, it is difficult to believe that the publication of a book like Snepp's, which does not reveal classified information, has significantly weakened the Agency's position. Nor does it explain whether the unidentified foreign agencies who have stopped cooperating with the CIA have done so because of a legitimate fear that secrets will be revealed or because they merely disagree with our Government's classification policies.

In any event, to the extent that the Government seeks to punish Snepp for the generalized harm he has caused by failing to submit to prepublication review and to deter others from following in his footsteps, punitive damages is, as the Court of Appeals held, clearly the preferable remedy "since a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment. See D. Dobbs, *773 Law of Remedies § 3.9 at 205 and § 4.3 at 246 (1973)." 595 F.2d, at 937.

The Court's decision to dispose of this case summarily on the Government's conditional cross-petition for certiorari is just as unprecedented as its disposition of the merits.

Snepp filed a petition for certiorari challenging the Fourth Circuit's decision insofar as it affirmed the entry of an injunction requiring him to submit all future manuscripts for prepublication review and remanded for a determination of whether punitive damages would be appropriate for his failure to submit Decent Interval to the Agency prior to its publication. The Government filed a brief in opposition as well as a cross petition for certiorari; the Government specifically stated, however, that it was cross-petitioning only to bring the entire case before the Court in the event that the Court should decide to grant Snepp's petition. The Government explained that "because the contract remedy provided by the court of appeals appears to be sufficient in this case to protect the Agency's interest, the government has not independently sought review in this Court." In its concluding paragraph the Government stated: "if this Court grants [Snepp's] . . . petition for a writ of certiorari in No. 78–1871, it should also grant this cross-petition. If the petition in No. 78–1871 is denied, this petition should also be denied." Pet. for Cert. in No. 79–265, p. 5.

Given the Government's position, it would be highly inappropriate, and perhaps even beyond this Court's jurisdiction, to grant the Government's petition while denying Snepp's. Yet that is in essence what has been done. The majority obviously does not believe that Snepp's claims merit this Court's consideration, for they are summarily dismissed in a footnote. *725 Ante, at 765, n. 3. It is clear that Snepp's petition would not have been granted on its own merits.

The Court's opinion is a good demonstration of why this Court should not reach out to decide a question not necessarily presented to it, as it has done in this case. Despite the fact that the Government has specifically stated that the punitive damages remedy is "sufficient" to protect its interests, the Court forges ahead and summarily rejects that remedy on the grounds that (a) it is too speculative and thus would not provide the Government with a "reliable deterrent against similar breaches of security," ante, at 768, and (b) it might require the Government to reveal confidential information in court, the Government might forego damages rather than make such disclosures, and the Government might thus be left with "no remedy at all," ante, at 768. It seems to me that the Court is foreclosed from relying upon either ground by the Government's acquiescence in the punitive damages remedy. Moreover, the second rationale is entirely speculative and, in this case at least, almost certainly wrong. The Court states that

"[p]roof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect." Ante, at 768.

Yet under the Court of Appeals' opinion the Government would be entitled to punitive damages simply by proving that Snepp deceived it into believing that he was going to comply with his duty to submit the manuscript for prepublication review and that the Government relied on these misrepresentations to its detriment. I fail to see how such a showing would require the Government to reveal any confidential information or to expose itself to "probing
III

The uninhibited character of today's exercise in lawmaking is highlighted by the Court's disregard of two venerable principles that favor a more conservative approach to this case.

First, for centuries the English-speaking judiciary refused to grant equitable relief unless the plaintiff could show that his remedy at law was inadequate. Without waiting for an opportunity to appraise the adequacy of the punitive damages remedy in this case, the Court has jumped to the conclusion that equitable relief is necessary.

Second, and of greater importance, the Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government. Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an especially heavy burden on the censor to justify the remedy it seeks. It would take more than the Court has written to persuade me that that burden has been met.

I respectfully dissent.

Footnotes

1 Upon the eve of his departure from the Agency in 1976, Snepp also executed a “termination secrecy agreement.” That document reaffirmed his obligation “never” to reveal “any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative.” App. to Pet. for Cert. in No. 78–1871, p. 61a.

2 At the time of suit, Snepp already had received about $60,000 in advance payments. His contract with his publisher provides for royalties and other potential profits. 456 F.Supp. 176, 179 (E.D.Va.1978).

3 The Court of Appeals and the District Court rejected each of Snepp's defenses to the enforcement of his contract. 595 F.2d 926, 931–934 (CA4 1979); 456 F.Supp., at 180–181. In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech.

When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an “entirely appropriate” exercise of the CIA Director's statutory mandate to “protect[t] intelligence sources and methods from unauthorized disclosure,” 50 U.S.C. § 403(d) (3). 595 F.2d, at 932. Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. CSC v. Letter Carriers, 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973); see Brown v. Glines,
The Government's concession distinguished this litigation from United States v. Marchetti, 466 F.2d 1309 (CA4), cert. denied, 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972). There, the Government claimed that a former CIA employee intended to violate his agreement not to publish any classified information. Marchetti therefore did not consider the appropriate remedy for the breach of an agreement to submit all material for prepublication review. By relying on Marchetti in this litigation, the Court of Appeals overlooked the difference between Snepp's breach and the violation at issue in Marchetti.

The first sentence of the 1968 agreement read: "I, Frank W. Snepp, III, understand that upon entering duty with the Central Intelligence Agency I am undertaking a position of trust in that Agency of the Government...." App. to Pet. for Cert. in No. 78–1871, p. 58a.

Quite apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship. See 595 F.2d, at 939 (Hoffman, J., concurring in part and dissenting in part). Few types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties.

Every major nation in the world has an intelligence service. Whatever fairly may be said about some of its past activities, the CIA (or its predecessor the Office of Strategic Services) is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence. See generally T. Powers, The Man Who Kept the Secrets (1979).

In questioning the force of Admiral Turner's testimony, Mr. Justice STEVENS' dissenting opinion suggests that the concern of foreign intelligence services may not be occasioned by the hazards of allowing an agent like Snepp to publish whatever he pleases, but by the release of classified information or simply the disagreement of foreign agencies with our Government's classification policy. Post, at 772. Mr. Justice STEVENS' views in this respect not only find no support in the record, but they also reflect a misapprehension of the concern reflected by Admiral Turner's testimony. If in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned. The problem is to ensure in advance, and by proper procedures, that information detrimental to national interest is not published. Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.

The dissent argues that the Court is allowing the CIA to "censor" its employees' publications. Post, at 772. Snepp's contract, however, requires no more than a clearance procedure subject to judicial review. If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. See Alfred A. Knopf, Inc. v.


Although both the District Court and the Court of Appeals expressly found otherwise, Mr. Justice STEVENS says that “the interest in confidentiality that Snepp's contract was designed to protect has not been compromised.” Post, at 769. Thus, on the basis of a premise wholly at odds with the record, the dissent bifurcates Snepp's 1968 agreement and treats its interdependent provisions as if they imposed unrelated obligations. Mr. Justice STEVENS then analogizes Snepp's prepublication review agreement with the Government to a private employee's covenant not to compete with his employer. Post, at 770–771. A body of private law intended to preserve competition, however, simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to “protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 403(d)(3).

Judge Hoffman's dissent suggests that even this remedy may be unavailable if the Government must bring suit in a State that allows punitive damages only upon proof of compensatory damages. 595 F.2d., at 940. The Court of Appeals majority, however, held as a matter of federal law that the nominal damages recoverable for any breach of a trust agreement will support an exemplary award. See id., at 936, and n. 10, 937–938.

Mr. Justice STEVENS concedes that, even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment. Post, at 770. He also concedes that all personal profits gained from the exploitation of such information are impressed with a constructive trust in favor of the employer. Post, at 771. In this case, he seems to think that the common law would not treat information as “confidential” unless it were “classified.” See, e.g., post, at 770. We have thought that the common-law obligation was considerably more expansive. See, e.g., Restatement (Second) of Agency §§ 396(c), 400 and Comment c, 404 and Comments b, d (1958); 5 A. Scott, Trusts § 505 (3d ed. 1967). But since this case involves the breach of a trust agreement that specifically required the republication review of all information about the employer, we need not look to the common law to determine the scope of Snepp's fiduciary obligation.

Snepp also signed a termination agreement in 1976 in which he made substantially the same commitment.

In response to an interrogatory asking whether it contended that “Decent Interval contains classified information or any information concerning intelligence or CIA that has not been made public by CIA,” the Government stated that “[f]or the purpose of this action, plaintiff does not so contend.” Record Item No. 24, p. 14. Because of this concession, the District Judge sustained the Government's objections to defense efforts to determine whether Decent Interval in fact contains information that the Government considers classified. See, e.g., the testimony of Admiral Stansfield Turner, Director of the CIA, Tr. 135; and of Herbert Hetu, the CIA's Director of Public Affairs, Tr. 153.

See, e.g., 18 U.S.C. § 798, which imposes a prison term of 10 years and a $10,000 fine for knowingly and willfully publishing certain types of classified information; 18 U.S.C. § 794, which makes it a criminal offense punishable by life in prison to communicate national defense information to a foreign government; and 5 U.S.C. § 8312, which withdraws the right to Government retirement benefits from a person convicted of violating these statutes. See also Exec.Order No. 12065, 3 CFR 190 (1979), note following 50 U.S.C. § 401 (1976 ed., Supp. II), which provides administrative sanctions, including discharge, against employees who publish classified information. Thus, even in the absence of a constructive trust remedy, an agent like Snepp would hardly be free, as the majority suggests, “to publish whatever he pleases.” Ante, at 767, n. 8.
In both his original employment agreement and the termination agreement Snepp acknowledged the criminal penalties that might attach to any publication of classified information. In his employment agreement he also agreed that a breach of the agreement would be cause for termination of his employment. No other remedies were mentioned in either agreement.

In a footnote, see ante, at 768, n. 11, the Court suggests that it need not look to the common law to support its holding because the case involves a written contract. But, inasmuch as the contract itself does not state what remedy is to be applied in the event of a breach, the common law is the only source of law to which we can look to determine what constitutes an appropriate remedy.

See, e. g., Sperry Rand Corp. v. A–T–O, Inc., 447 F.2d 1387, 1392 (CA4 1971) (Virginia law), cert. denied, 405 U.S. 1017, 92 S.Ct. 1292, 31 L.Ed.2d 479; Tlapek v. Chevron Oil Co., 407 F.2d 1129 (CA8 1969) (Arkansas law); Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., 401 F.Supp. 1102, 1120 (E.D.Mich.1975) (Michigan law); Restatement (Second) of Agency § 396(c) (1958) (“Unless otherwise agreed, after the termination of the agency, the agent: . . . (c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal . . .”).

As the court held in Herbert Morris, Ltd. v. Saxelby, [1916] A.C. 688, 704, the employer's interest in protecting trade secrets does not outweigh the public interest in keeping the employee in the work force:

“[A]n employer can[not] prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else. . . .”

The covenant imposes a serious prior restraint on Snepp's ability to speak freely, see n. 17, infra, and is of indefinite duration and scope—factors that would make most similar covenants unenforceable. See, e. g., Alston Studios, Inc. v. Lloyd V. Gress & Associates, 492 F.2d 279, 282 (CA4 1974) (Virginia law); Mixing Equipment Co. v. Philadelphia Gear, Inc., 436 F.2d 1308, 1312 (CA3 1971) (New York law); Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163, 167 (CA5 1969) (Georgia law); Restatement (Second) of Contracts § 330 (Tent. Draft No. 12, Mar. 1, 1977).

The Court correctly points out that the Government may regulate certain activities of its employees that would be protected by the First Amendment in other contexts. Ante, at 765, n. 3. But none of the cases it cites involved a requirement that an employee submit all proposed public statements for prerelease censorship.
or approval. The Court has not previously considered the enforceability of this kind of prior restraint or the remedy that should be imposed in the event of a breach.

If he had submitted the book to the Agency and the Agency had refused to consent to the publication of certain material in it, Snepp could have obtained judicial review to determine whether the Agency was correct in considering the material classified. See United States v. Marchetti, 466 F.2d 1309, 1317 (CA4 1972), cert. denied, 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516. It is noteworthy that the Court does not disagree with the Fourth Circuit’s view in Marchetti, reiterated in Snepp, that a CIA employee has a First Amendment right to publish unclassified information. Thus, despite its reference in footnote 3 of its opinion to the Government's so-called compelling interest in protecting “the appearance of confidentiality,” ante, at 765, n. 3, and despite some ambiguity in the Court's reference to “detrimental” and “harmful” as opposed to “classified” information, ante, at 766, I do not understand the Court to imply that the Government could obtain an injunction against the publication of unclassified information.

The District Judge sustained the Government’s objections to questions concerning the identity of other agents who had published the unauthorized works to which Admiral Turner referred. Tr. 136. However, Admiral Turner did testify that the harmful materials involved “[p]rimarily the appearance in the United States media of identification of sources and methods of collecting intelligence. . . .” Id., at 143. This type of information is certainly classified and is specifically the type of information that Snepp has maintained he did not reveal in Decent Interval. See, e. g., Snepp's December 7, 1977, interview on the Tomorrow show, in which he stated: “I have made a very determined effort not to expose sources or methods. . . .” Government's Requests for Admissions, Record Item 19, Exhibit I, p. 5.

Snepp's attorneys were foreclosed from asking Admiral Turner whether particular foreign sources had stopped cooperating with United States' authorities as a direct result of the publication of Decent Interval. Tr. 138. Thus, it is unclear whether or why foreign sources may have reacted unfavorably to its publication. However, William E. Colby, the CIA's former Director, did indicate in his testimony that foreign nations generally have a stricter secrecy code than does the United States. Id., at 175–176.

One of the Court's justifications for its constructive trust remedy is that “it cannot saddle the former agent with exemplary damages out of all proportion to his gain.” Ante, at 768. This solicitude for Snepp's welfare is rather ironic in view of the Draconian nature of the remedy imposed by the Court today.

I have been unable to discover any previous case in which the Court has acted as it does today, reaching the merits of a conditional cross-petition despite its belief that the petition does not merit granting certiorari.

Which, it should be noted, does not appear anywhere in the Government's 5-page cross-petition.

The mere fact that the Agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have an inhibiting effect on the author's writing. Moreover, the right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts. See, e. g., New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822; Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683. In view of the national interest in maintaining an effective intelligence service, I am not prepared to say that the restraint is necessarily intolerable in this context. I am, however, prepared to say that, certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument.
2020 WL 4784897 (C.A.4) (Appellate Brief)
United States Court of Appeals, Fourth Circuit.

Timothy H. EDGAR; Richard H. Immerman; Melvin A. Goodman;
Anuradha Bhagwati; Mark Fallon, Plaintiffs-Appellants,
v.
John RATCLIFFE, in his official capacity as Director of National Intelligence; Gina Haspel, in her official capacity as Director of the Central Intelligence Agency; Mark T. Esper, in his official capacity as Secretary of Defense; Paul M. Nakasone, in his official capacity as Director of the National Security Agency, Defendants-Appellees.

No. 20-1568.

On appeal from the United States District Court for the District of Maryland -- No. 8:19-cv-00985 (Hazel, J.)

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Other Authorities
*1 Introduction

This case, brought by five individuals who between them have served in the intelligence community and the military for almost a century, involves a challenge to four federal agencies' “prepublication review” regimes, which require millions of former intelligence-agency employees and military personnel to obtain permission from the government before publishing works relating even tangentially to their government service.

These regimes are unconstitutional in multiple respects. They impose prepublication review obligations on former government employees without regard to whether those employees ever had access to sensitive information, and without regard to how long ago those employees left government service. Submission requirements and review standards are vague, confusing, and overbroad. In the absence of concrete deadlines, manuscript review frequently takes weeks or even months, which means that books, articles, and blog posts cleared for publication are published long after the debates they seek to engage have subsided. And Defendants' censorial decisions are often arbitrary, unexplained, unrelated to national security concerns, or influenced by authors' viewpoints.

Forty years ago, the Supreme Court held that the concept of prepublication review was compatible with the First Amendment. The Court did not, however, address the constitutional bounds of the government's authority to require former employees to submit to such review—it did not, in other words, address the issues presented by this case. Moreover, in the decades since the Supreme Court's only confrontation with prepublication review, the prepublication review system has metastasized in every respect. Even if the Supreme Court had endorsed every feature of the prepublication review regime before it in 1980—and it did not—today's regimes cannot be squared with the First and Fifth Amendments. For the reasons below, Plaintiffs respectfully urge the Court to reverse the district court's decision granting Defendants' motion to dismiss.

Statement of Jurisdiction

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291. The district court exercised jurisdiction over the underlying action under 28 U.S.C. § 1331. The district court granted Defendants' motion to dismiss in a memorandum opinion issued on April 16, 2020, and it entered a final order on May 7, 2020. JA146-202, 204, 206. Plaintiffs filed a timely notice of appeal. JA208-10.

Statement of Issues on Appeal

1. Did the district court err in holding that Defendants' prepublication review regimes do not violate the First Amendment?

2. Did the district court err in holding that Defendants' prepublication review regimes are not void for vagueness under the Fifth Amendment?
3. The district court held that Plaintiffs have standing because Defendants' prepublication review regimes chill constitutionally protected speech. Did the court err in rejecting the argument that Plaintiffs also have standing because Defendants' prepublication review regimes are licensing schemes that give executive officers overly broad discretion to suppress speech?

Statement of the Case

Origins and Metastasis of the Prepublication Review System

The prepublication review system originated in a set of contractual obligations imposed on a very small number of intelligence officers with access to the nation's most sensitive secrets. Since its establishment in 1947, the CIA has required employees to sign secrecy agreements as a condition of employment and again upon their resignation from the agency. Compl. ¶ 17 (JA13). Although the terms of these agreements have varied over time, the agreements have generally prohibited former employees from publishing manuscripts without first obtaining the agency's consent. Id. In the 1950s and 1960s, when comparatively few former intelligence-agency employees sought to publish manuscripts, the agencies handled prepublication review informally. Id. ¶ 18 (JA13). In the 1970s, however, partly as a result of the Vietnam War and the abuses documented by the Church and Pike Committees, many more former intelligence-agency employees began writing, often critically, about the intelligence agencies and their activities. Id. One of the ways the CIA responded was by establishing a Publications Review Board. Id.

The decade that followed was a critical period in the evolution of prepublication review. In 1980, a divided Supreme Court decided Snepp v. United States, 444 U.S. 507 (1980), which affirmed the imposition of a constructive trust on profits earned by a former CIA agent who had published a book without submitting it for review. Id. ¶ 19 (JA13-14). After the Supreme Court decided that case, the Reagan administration introduced Form 4193, a standard-form contract that intelligence agencies could use to impose a lifetime prepublication review requirement on employees with access to Sensitive Compartmented Information (“SCI”). Id. ¶ 22 (JA15). In 1983, President Reagan issued National Security Decision Directive 84, requiring all intelligence-agency employees to sign a similar form as a condition of access to SCI. Id. ¶ 20 (JA14). President Reagan ultimately suspended Directive 84's prepublication review mandate in response to congressional backlash, id. ¶ 21 (JA14-15), but agencies continued to require employees to sign Form 4193, id. ¶ 22 (JA15).

Over the past five decades, the prepublication review system has expanded on every axis. Today, all seventeen intelligence agencies impose lifetime prepublication review requirements on at least some subset of employees. Id. ¶ 24 (JA15). These agencies impose review obligations on more categories of people—not just, as before, on individuals with access to SCI, but on employees who never had access to SCI or even (in some cases) to classified information of any kind. Id. ¶ 25 (JA15-16). At the same time, the amount of information that is classified has expanded dramatically. Whereas in 1980 original and derivative classification authorities made sixteen million classification decisions, in 2017 they made more than three times that number. Id. ¶ 26 (JA16). Agency prepublication review regimes have also become increasingly complex. Whereas the CIA prepublication review obligations involved in Snepp were described only in employee contracts, today agencies impose review obligations through a confusing tangle of contracts, regulations, and policies. Id. ¶ 27 (JA16). In addition, submission and review standards, review timelines, and appeals processes vary widely across agencies. For a combination of all of these reasons, the amount of material submitted for review has steadily increased. For example, the number of pages reviewed by the CIA each year increased from about 1,000 in the mid-1970s to 150,000 in 2014. Id. ¶ 28 (JA17). And in part because so much more material is submitted to them, agencies now take much more time to complete their reviews. The CIA, for instance, estimates that its review of book-length manuscripts will take over a year. Id. ¶ 29 (JA18).
In sum, the prepublication review system that exists today bears little resemblance to the one that existed when the CIA first introduced prepublication review in the late 1940s, or even to the one that existed in 1980 when the Supreme Court decided *Snepp*.

**Defendants’ Prepublication Review Regimes**

Defendants' prepublication review regimes differ in their particulars, but they share several important characteristics.

*6* First, each of the regimes comprises a tangle of nondisclosure agreements, policies, and regulations. For example, the CIA's regime encompasses a classified information nondisclosure agreement (Standard Form 312), an SCI nondisclosure agreement (Form 4414), a secrecy agreement that all CIA employees must sign on joining the agency (Form 368), and an agency regulation (AR 13-10). *Id.* ¶ 32 (JA19-20).

Second, each of the regimes applies to broad categories of former employees, including to some who may never have had access to SCI or even to classified information. For example, the CIA's, NSA's, and ODNI's regimes apply to all former employees of those agencies. *Id.* ¶ 32 (JA19-20), ¶ 44 (JA25-26), ¶ 50 (JA27). The DOD's regime applies to all former DOD employees and all former active or reserve military service members. *Id.* ¶ 38 (JA22-23).

Third, each of the regimes requires former employees to submit for agency review a wide but vaguely defined range of material, including material that goes far beyond the category of material the government might have a legitimate interest in reviewing. For example, the ODNI's regime requires former employees to submit “all official and non-official information intended for publication that discusses the ODNI, the [Intelligence Community], or national security.” *Id.* ¶ 50.d (JA28).

Fourth, each of the regimes permits the agencies to censor a wide but vaguely defined range of information, including information that the agencies have no legitimate interest in censoring. For example, the DOD permits reviewers to censor not just properly classified information but any information “requiring protection in the interest of national security or other legitimate governmental interest.” *Abdo Decl. Ex. E.* § 1.2.d (JA90-91). The NSA and ODNI, for their part, fail to state any review criteria whatsoever. Compl. ¶ 45 (JA26), ¶ 51 (JA28).

Fifth, while the regimes contemplate inter-agency referrals, they fail to specify the terms under which referrals will be made. *Id.* ¶ 33 (JA20), ¶ 39 (JA23-24), ¶ 45 (JA26), ¶ 51 (JA28).

Sixth, the regimes fail to provide procedural safeguards to limit the risk of arbitrary or illegitimate censorship. Most significantly, they fail to impose firm deadlines for the completion of review. *Id.* ¶¶ 36-37 (JA21), ¶¶ 42-43 (JA24-25), ¶¶ 48-49 (JA27), ¶¶ 54-55 (JA29).

**The Plaintiffs**

Plaintiffs Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon are former national security professionals and former employees of the ODNI, CIA, and DOD. Between them, they served in the intelligence community and the military in a diversity of roles for almost a century. *Id.* ¶ 4 (JA10-11). All of them have drafted publications subject to prepublication review requirements, most have submitted works for review in the past, and all of them intend to continue writing works that Defendants' regimes require them to submit for review. *Id.*

Plaintiffs' experience with Defendants' prepublication review regimes has underscored the regimes' defects. Plaintiffs have had to submit materials far afield from those that could reasonably be thought to contain classified information. *Id.* ¶ 62 (JA30-31). They have experienced lengthy and unexplained delays in the review process. *Id.* ¶ 64 (JA31), ¶ 74 (JA34), ¶ 89 (JA38), ¶ 110.
They have been compelled to redact information that was not classified, or that they learned from public sources after they left government service. *Id.* ¶ 64 (JA31), ¶ 78 (JA35), ¶ 110 (JA45). They have been forced to delay the publication of time-sensitive material. *Id.* ¶ 64 (JA31), ¶ 78 (JA35), ¶ 107 (JA44). They have had to accept redactions they believed to be illegitimate because contesting the redactions would have resulted in further delay, or would have compromised their relationships with agency censors whom they could not afford to provoke or offend. *Id.* ¶ 64 (JA31), ¶ 78 (JA35), ¶ 110 (JA45), ¶ 119 (JA47).

And as a result of their experiences with Defendants' prepublication review regimes, they have self-censored in multiple ways. *Id.* ¶ 66 (JA32), ¶ 80 (JA36), ¶¶ 92-93 (JA39-40), ¶ 112 (JA45-46), ¶¶ 118-19 (JA47).

For example, Mr. Fallon, an expert on counterterrorism, counterintelligence, and interrogation who spent more than three decades in government service, waited *9* eight months for the DOD to review his book manuscript relating to the Bush administration's interrogation policies. *Id.* ¶ 110 (JA45). At the end of those eight months, the DOD informed him that he could publish his manuscript only if he made 113 separate excisions that Mr. Fallon believed were arbitrary, haphazard, inconsistent, and in some instances seemingly intended to protect the CIA from embarrassment. *Id.* Some of the excisions were of material that had been published in unclassified congressional reports; others were of material that had been published in news articles that Mr. Fallon had cited. *Id.*

Mr. Edgar's experience with the prepublication review system has been similarly vexing. After he submitted a book manuscript about privacy and surveillance, the ODNI referred his manuscript to the NSA and CIA for additional review, but despite multiple inquiries he was unable to contact those conducting that review. *Id.* ¶ 63 (JA31). Three months after he submitted the manuscript, the ODNI demanded that he excise material relating to events that had taken place, and issues that had arisen, after he left government. *Id.* ¶ 64 (JA31). Although he viewed these redactions as illegitimate and unnecessary, Mr. Edgar ultimately decided against challenging them because he worried that delay would make the book less relevant to ongoing public debates. *Id.* He also believed that maintaining a good relationship with his ODNI reviewers might be important to ensuring the timely review of future manuscripts, and that challenging the redactions could harm that relationship. *Id.*

*10* Professor Immerman and Mr. Goodman have had comparable experiences with prepublication review. *Id.* ¶¶ 72-80 (JA33-36), ¶¶ 85-93 (JA37-40). Although Ms. Bhagwati has not submitted manuscripts for review, she recently learned that the DOD's prepublication review regime requires her to submit her manuscripts for review even though her writing regarding her experiences as a servicewoman could not plausibly necessitate review for classified information. *Id.* ¶¶ 96-99 (JA40-41). 1

**Procedural History**

Plaintiffs filed this suit on April 2, 2019, alleging that Defendants' prepublication review regimes violate the First and Fifth Amendments. JA8-49. Plaintiffs sought declaratory and injunctive relief. JA48.

Defendants filed a motion to dismiss on June 4, 2019, and the district court granted the motion on April 16, 2020. JA146. The court held that Plaintiffs have standing because they plausibly alleged that Defendants' prepublication review regimes chill protected speech. JA176. It rejected Plaintiffs' claims, however, that the regimes violate the First and Fifth Amendments. JA194, 201.

Plaintiffs filed their notice of appeal on May 12, 2020. JA208-10.

*11* **Summary of Argument**
The district court correctly held that Plaintiffs have standing to challenge Defendants' prepublication review regimes. It erred, however, in dismissing Plaintiffs' claim that Defendants' prepublication review regimes violate the First Amendment. The crux of the court's decision was its holding that Plaintiffs' challenge is foreclosed by *Snepp*. But *Snepp* does not in fact control this case. Because the defendant in *Snepp* had deliberately disregarded his prepublication review obligations, the Supreme Court's opinion in that case focused narrowly on a question of remedy and simply did not consider the questions presented here. It did not address the categories of former employees who may be required to submit their writings for review; it did not address the materials the government may compel those individuals to submit; it did not address the scope of the government's authority to censor materials submitted for review; and it did not address the procedural safeguards that must attend a system of prior restraint of this kind.

Even if *Snepp* could be read to have categorically endorsed the CIA's prepublication review regime as it existed in 1980, the regimes that Defendants defend today are dramatically different from the one the Court dealt with in *Snepp*: they apply to many more people, they reach far more speech, and the absence of procedural safeguards means that they are far more susceptible to abuse. *12 Accordingly, while *Snepp* is certainly relevant to this case, it does not dictate its outcome.

Defendants' prepublication review regimes cannot survive constitutional scrutiny under the standards the courts have conventionally applied to prior restraints. Nor can they survive scrutiny under the employee-speech framework that the Supreme Court applied in *Snepp*. While the legitimacy of the government's interest in protecting national security by safeguarding properly classified information is obvious, the interest served by the prepublication review system in particular--preventing inadvertent disclosures of classified information by those who submit for review--is narrow. At the same time, the interest of former government employees in speaking publicly about matters of public concern is substantial, as is the interest of the public in hearing from former government employees who in many instances have unique insights into the operation of the agencies for which they worked.

Against this background, Defendants' prepublication review regimes are not reasonably tailored to the government's interest. The regimes apply too broadly, reaching individuals who were never given SCI or even classified information; they require former employees to submit nearly everything they write about their government service, including manuscripts that could not reasonably be thought to necessitate review for classified information; they permit the government to censor *13 far more than just properly classified information obtained in the course of government employment; and they fail to impose reasonable--or, indeed, any--firm deadlines for review. Perhaps more carefully tailored prepublication review regimes could withstand constitutional scrutiny, but these ones cannot.

The district court also erred in dismissing Plaintiffs' claim that Defendants' prepublication review regimes are unconstitutionally vague. Defendants' regimes rely on terms that are ill-defined and subjective, and the ODNI and NSA regimes lack any censorship standards whatsoever. These regimes fail to give former employees fair notice of what is required of them and invite arbitrary and discriminatory application by agency censors.

**Standard of Review**

This Court reviews the grant of a motion to dismiss de novo, “accept[ing] as true all well-pleaded facts in a complaint and constru[ing] them in the light most favorable to the plaintiff[s].” *Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017).

**Argument**

I. Defendants' prepublication review regimes violate the First Amendment.
A. Snepp does not control this case.

The linchpin of the district court's analysis--its conclusion that “this case is controlled by Snepp,” JA185--was incorrect. Because of the posture in which Snepp came to the Supreme Court, the Court's opinion in that case focused narrowly on a question of remedy and simply did not consider the questions presented here--including what universe of materials an agency may constitutionally require its former employees to submit to government censors, on what bases an agency can constitutionally withhold permission to publish, and whether there is a constitutional limit to the length of time an agency may take to complete its review. Snepp cannot fairly be read to have endorsed every feature of the prepublication review system that existed in 1980, and it certainly cannot be read to have endorsed the much broader and much more speech-suppressive system that exists today. The district court's holding to the contrary does not withstand scrutiny.

Snepp involved a former CIA officer, Frank Snepp, who had signed “an agreement promising that he would ‘not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency.’ ” 444 U.S. at 508. Shortly after resigning from the agency, however, he published a book without first submitting it for review. Id. at 507. When the government sued him for violating his contract, the district court found that Snepp had “willfully, deliberately and surreptitiously breached his position of trust with the CIA and [his] secrecy agreement,” that he had deliberately misled CIA officials into believing that he would submit his book for review, and that publication of the book had “caused the United States irreparable harm and loss.” United States v. Snepp, 456 F. Supp. 176, 179-80 (E.D. Va. 1978). Relying on these findings, the court enjoined Snepp from violating his agreement in the future and imposed a constructive trust on the proceeds of his book. The injunction included a number of safeguards that the secrecy agreement did not: Snepp was required to submit writings only if they contained “information [he] gained during the course of or as a result of his employment,” the CIA was required to complete its review within thirty days, and the CIA could censor only information that was classified. 456 F. Supp. at 182. On appeal, this Court affirmed the injunction but reversed the order imposing a constructive trust. United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

In his petition for certiorari, Snepp challenged the injunction, arguing that his secrecy agreement was unenforceable as a prior restraint. 444 U.S. at 509 n.3. The Supreme Court granted Snepp's petition, as well as a conditional cross-petition by the government that focused on the question of remedy. Very unusually, however, the Court decided the case summarily on the basis of the petitions, without inviting briefing on the merits or hearing oral argument. Id. at 526 n.17 (Stevens, J., dissenting). Its per curiam opinion focused almost entirely on this Court's reversal of the order imposing a constructive trust. See id. at 507-16 (majority op.). It mentioned the First Amendment only twice, including once in its summary of the decisions below, and it disposed of Snepp's First Amendment argument in a cursory footnote. The footnote stated that the CIA has “a compelling interest in protecting both the secrecy of information important to our national security” and the “appearance of confidentiality,” and that the “agreement Snepp signed is a reasonable means for protecting this vital interest.” Id. at 509 n.3.

Snepp was a narrow opinion about the remedies available to the CIA against an author who “willfully, deliberately, and surreptitiously” flouted his obligations under a now-displaced censorship scheme, and it does not control this case. Again, virtually all of the analysis in Snepp focused on whether the agency was entitled to the proceeds of Snepp's book. The Court did not consider the constitutionality of the specific features of the CIA's prepublication review regime, let alone the features of any other agency's regime. “[I]t would therefore be inaccurate to say that [Snepp] upheld [those] features.” Freedman v. Maryland, 380 U.S. 51, 54 (1965) (observing that an earlier case had not decided the constitutionality of a particular
prior restraint because the earlier case addressed only the “narrow” question of “whether a prior restraint was necessarily unconstitutional under all circumstances” and did not consider “the specific features” of the particular restraint).

Snepp did not, for example, consider the categories of speakers to whom a prepublication review requirement may constitutionally extend. Snepp himself was a former CIA officer who had been granted access to some of the government’s most closely held secrets, and the Court emphasized that status in concluding that his prepublication review requirement was constitutional: “Few types of government *17 employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties.” Snepp, 444 U.S. at 511 n.6. Moreover, Snepp had left the CIA relatively recently. (He resigned in 1976 and published his book the following year. Id. at 511 n.1.) The Court did not consider (or have any reason to consider) whether the prepublication review obligation the CIA had imposed on Snepp could be imposed on other CIA employees, or on employees of other agencies, and it did not consider whether the First Amendment would bar the agency from enforcing a prepublication review requirement on someone who had left the agency's employ many years earlier. 2

Nor did Snepp consider what materials an agency can constitutionally require its former employees to submit for review, the grounds on which a government reviewer can constitutionally censor a manuscript, the length of time an agency may constitutionally spend reviewing a manuscript, or the other procedural protections that must be afforded to former government employees in this context. The Court *18 had no reason to reach these issues, because Snepp did not submit his manuscript for review, and because it was undisputed that the manuscript described CIA intelligence activities.

Even if Snepp could tenably be read as a categorical endorsement of every feature of the CIA regime that existed in 1980, it cannot reasonably be read to have categorically endorsed the sprawling, byzantine, and multifariously dysfunctional prepublication review system that exists today. In 1977, the year Snepp published his book, the CIA received only forty-three submissions for prepublication review. Compl. ¶ 28 (JA17). The processes and practices surrounding prepublication review were relatively new, and lifetime prepublication review was confined to the CIA and NSA, the two agencies with the most direct role in intelligence gathering. Id. ¶ 24 (JA15). As a result, prepublication review applied, in practice, to relatively few people and publications. Id. ¶¶ 27-28 (JA16-17).

Since then, prepublication review has expanded on nearly every axis: the number of agencies that impose prepublication review requirements on former employees, the categories of former employees subject to prepublication review, the amount of information that is classified, the complexity of prepublication review regimes, the amount of material that is submitted for review, and the time taken to complete reviews. Id. ¶¶ 23-29 (JA15-18). In 2015, the CIA received 8,400 submissions for review (about 150,000 pages)--about 195 times as many *19 submissions as it received in 1977. Id. ¶ 28 (JA17). The CIA's Inspector General predicted in 2015 that the review of book-length manuscripts by the agency would take more than a year, id. ¶ 29 (JA18), and today the agency's reviews sometimes take even longer, id. ¶ 36.

The district court reasoned that the differences between the 1980 system and the contemporary one have “little bearing” on the latter's constitutionality. JA189. Indeed, under its reading of Snepp, the specifics of today's prepublication review regimes are simply “irrelevant.” JA188, 190. As the Supreme Court has emphasized, however, whether a system of prior restraint is constitutional depends entirely on “the specific features” of that system. Freedman, 380 U.S. at 54. Snepp cannot plausibly be read to mean that any system of prior restraint introduced in the name of national security, or in the name of prepublication review, is constitutional. Cf. Riley v. California, 573 U.S. 373, 393 (2014) (rejecting the government's argument that a principle announced in one factual context may be mechanically transposed to a new factual context: “any extension of that reasoning [to the new context] has to rest on its own bottom”).

Snepp is surely relevant to this case, but the district court was wrong to conclude that Snepp decides it.
B. Defendants' prepublication review regimes impose a prior restraint on speech.

Because they require would-be speakers to submit their speech to government censors for prior approval, Defendants' prepublication review regimes are prior restraints. As prior restraints, they carry a heavy presumption of unconstitutionality. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Flowing from the First Amendment's "distaste for censorship," this presumption is "deeply etched in our law." Se. Promotions v. Conrad, 420 U.S. 546, 553, 559 (1975). As the Supreme Court has observed, "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Id. at 559.


One especially offensive form of prior restraint is the licensing scheme: any regime that forbids individuals from publishing without obtaining government permission in advance. Classic licensing schemes include municipal requirements that the public obtain permits to protest on public streets, see Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); local ordinances prohibiting public assembly in city parks without government sign-off, see Hague v. CIO, 307 U.S. 496, 516 (1939); state laws proscribing the solicitation of money absent an official's say-so, see Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); and laws regulating adult entertainment businesses, see City of Littleton v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 776, 780 (2004).

Prepublication review regimes fit comfortably into this group. Like other licensing schemes, prepublication review regimes share the "special vice" of all prior restraints: they suppress speech "before an adequate determination that it is unprotected," rather than punishing unprotected speech after it is uttered. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973). Agency censors are "empowered to determine whether the applicant should be granted permission--in effect, a license or permit--on the basis of [their review of the content of the proposed [speech]]." Se. Promotions, 420 U.S. at 554. And these censors impose these restrictions without a "prior judicial determination" that their judgment is correct. Alexander, 509 U.S. at 551.

Relying on Snepp, the district court rejected the argument that Defendants' prepublication review regimes are prior restraints, Op. 41 (JA186)--but its reading of that case was manifestly incorrect. In fact, the Snepp Court never contested the characterization of prepublication review as a prior restraint; it just determined that the restraint at issue in that case was a constitutional one. See 444 U.S. at 509 n.3 (holding that Snepp's secrecy agreement was a "reasonable means for protecting the government's vital interest" in protecting national security secrets). In doing so, the Supreme Court borrowed this Court's language from United States v. Marchetti, 466 F. 2d 1309 (4th Cir. 1972), and essentially endorsed its conclusion. In
Marchetti, this Court repeatedly characterized the CIA's prepublication review regime as “a system of prior restraint.” See id. at 1317; see id. at 1313 (“readily agreeing” with Marchetti that the CIA's secrecy agreements established “a system of prior censorship”). And, just as the Supreme Court did years later in Snepp, it held that the restraint on speech was constitutional, as a “[r]easonable [m]eans” of protecting agency secrets, id. at 1316 (emphasis removed)–so long as the agency acted promptly upon receiving submissions and censored only classified information obtained in the course of employment that was not already in the public domain, id. 1317-18. 3

*23 Defendants' prepublication review regimes are prior restraints, and nothing in Snepp suggests they should be understood otherwise.

C. Whatever standard of review applies, Defendants' prepublication review regimes fail.

In a series of seminal cases, the Supreme Court explained that a content-based system of prior restraint is consistent with the First Amendment only if it has (1) narrow, objective, and definite standards to guide government censors and cabin official discretion, Shuttlesworth, 394 U.S. at 150-51, and (2) robust procedural safeguards designed to mitigate the dangers of illegitimate censorship, Freedman, 380 U.S. at 58-59; Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130-31 (1992); Se. Promotions, 420 U.S. at 560. As explained below, Defendants' regimes have neither. As a result, these regimes cannot survive the scrutiny that the Court has given licensing schemes in most contexts. 4

Defendants' regimes fail First Amendment scrutiny even if evaluated using the framework the Supreme Court has used to assess restrictions on the speech of government employees--the framework the Court relied on in Snepp. As discussed *24 above, Snepp's First Amendment analysis was very brief. The Court was unequivocal, however, about the framework it was applying. In its footnote addressing Snepp's First Amendment claim, the Court wrote that its “cases make clear that” the government may “act[] to protect substantial government interests by imposing reasonable restrictions on employee activities,” 444 U.S. at 509 n.3, and in support it cited principally its earlier decision in U.S. Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973). That case involved a straightforward application of Pickering v. Board of Education, 391 U.S. 563 (1968) to the Hatch Act's prohibition against federal employee participation in political campaigns. Quoting Pickering, the Letter Carriers Court explained: “the problem in any case is to arrive at 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.” Letter Carriers, 413 U.S. at 564 (cleaned up). The Snepp Court also cited five other opinions, each of which applied either Pickering or some form of heightened First Amendment scrutiny. See 444 U.S. at 509 n.3 (citing cases); see also Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (noting that, in Snepp, the Court “essentially applied Pickering”).

Since Snepp was decided, the Supreme Court has bifurcated its doctrine relating to restrictions on the speech of government employees, drawing a distinction *25 between cases that involve a “post hoc” challenge to a disciplinary action and those that involve a challenge to a “wholesale deterrent to a broad category of expression by a massive number of potential speakers.” NTEU, 513 U.S. at 467. The latter, the Court has observed, “give [] rise to far more serious concerns than could any single supervisory decision” in part because they “chill[] potential speech before it happens,” id. 468, and accordingly, “the
Government's burden [in justifying such a restraint] is greater,” id.; accord Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016).

Whereas the test under Pickering balances the interests of the government in punishing particular speech against the interests of the employee in engaging in that speech, the test under NTEU accounts for the interests of all employees whose speech is or will be restricted and of their audiences in hearing what those employees have to say. As the Court explained in the latter case, the government must show “that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's ‘necessary impact on the actual operation’ of the Government.” NTEU, 513 U.S. at 468. Moreover, the government “must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” Id. at 475 (cleaned up) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994)); see also Liverman, 844 F.3d at 409 (“A stronger showing of public interest in the speech requires a concomitantly stronger showing of government-employer interest to overcome it.” (quoting McVey v. Stacy, 157 F.3d 271, 279 (4th Cir. 1998) (Murnaghan, J., concurring)).

Applying NTEU, Defendants' prepublication review regimes are unconstitutional.

1. The government's interests are narrow.

While the government plainly has a strong interest in protecting national security secrets, Defendants' interest in prepublication review is ultimately quite narrow. Prepublication review does not serve the government's interest in deterring former employees from intentionally disclosing classified information; those individuals will not submit the information for review in the first place. Instead, the narrower interest served by the prepublication review system is the prevention of inadvertent disclosures by former employees whose goal is to publish their writing without jeopardizing the government's secrets. That interest is served most directly not by prepublication review, but by the laws criminalizing the disclosure of classified and national defense information, see, e.g., 18 U.S.C. §§ 793-799, which provide a strong incentive for former employees to be exceedingly careful in deciding what information to include in their manuscripts. See, e.g., Compl. ¶ 66 (JA32), ¶ 80 (JA36), ¶ 92 (JA39), ¶ 118 (JA47); see Carroll v. President & Comm'r of Princess Anne, 393 U.S. 175, 180-81 (1968) (“Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.”). The government may have a residual interest in protecting against inadvertent disclosures by former employees who have every reason to be careful with the government's secrets and every intention of doing so, but as explained below that narrow interest could be served by a regime far more tailored than the ones challenged here.

It also bears emphasis that there is no evidence that inadvertent disclosure of classified information by former employees would be a significant problem in the absence of prepublication review. As the Supreme Court underscored in NTEU, the government cannot justify a restraint on broad categories of protected speech without establishing that the restraint is necessary to address an actual harm. 513 U.S. at 475; see also Liverman, 844 F.3d 408-09. In 1983, when Congress carefully studied the question with the benefit of statistical studies conducted by the General Accounting Office, the House concluded that prepublication review “is a massive policy response to what has been, in the recent past, a very limited disclosure problem.” H. Rep. No. 98-578, at 15H. Rep. No. 98-578, at 15 (1983). In 1987, the House pointed to an updated study by the General Accounting
Office once again showing that inadvertent disclosure of classified information was a marginal concern. H. Rep. No. 100-991, at 14H. Rep. No. 100-991, at 14 (1988). The House's report quoted former CIA director Admiral Stansfield Turner as having confirmed that the intelligence agencies' prepublication review agreements were “not critical” to national security. Id.

Just three years ago, Congress directed the intelligence agencies to streamline and narrow the prepublication review system after concluding that the system sweeps too broadly. In 2017, the House and Senate Intelligence Committees instructed the Director of National Intelligence to prepare, within 180 days of the Intelligence Authorization Act for that year, a new prepublication review policy that would apply to all intelligence agencies and that would “yield timely, reasoned, and impartial decisions that are subject to appeal.” 115 Cong. Rec. H3300 (daily ed. May 3, 2017); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (same). The new policy, the committees said, should require each intelligence agency to develop and maintain a prepublication review policy that identifies the individuals whose work is subject to prepublication review, provides guidance on what must be submitted for review, requires “timely responses,” establishes “a prompt and transparent appeal process,” and includes guidelines for the assertion of “interagency equities.” Id. More than *29 three years have passed, however, and the DNI has not published or formulated such a policy.

2. The interests of former employees subject to prepublication review, and of their audiences, are substantial.

On the other side of the balance, former employees and their audiences have a substantial interest in the speech restrained by Defendants' prepublication review regimes. As the Supreme Court has recognized, “speech by public employees on subject matter related to their employment holds special value” in our democracy. Lane v. Franks, 573 U.S. 228, 240 (2014). Public employees “are often in the best position to know what ails the agencies for which they work,” id. at 236 (quotations marks omitted) (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)), and “[t]here is considerable value . . . in encouraging, rather than inhibiting, [this] speech,” id. These observations have special force here because Plaintiffs are former public employees, who-- unlike current employees--always speak “in their capacity as citizens.” NTEU, 513 U.S. at 465.

Defendants' prepublication review regimes place an extraordinary burden on this core political speech. The obligations they impose are lifelong--they remain in place even years after a person has left government service. They bind millions of people. Compl. ¶ 1 (JA9), ¶ 24 (JA15). They reach an untold number of manuscripts every year, id. ¶ 28 (JA17), and they chill an unknowable number more. When the prepublication review system significantly delays the publication of former *30 employees' manuscripts, the manuscripts may have lost much of their value by the time they finally reach the public. Id. ¶ 66 (JA32). When authors are told they cannot publish at all, the public is denied those authors' insights forever.

As with most prior restraints, it is impossible to tally the full damage done by prepublication review to public understanding because manuscripts never written leave no trace. See NTEU, 513 U.S. at 470 (recognizing that courts have “no way to measure the true cost of [such] burden[s]”); see also Brief of Amicus Curiae Center for Ethics and Rule of Law, Edgar v. Coats, No. 8:19-cv-00985, 2020 WL 1890509 (D. Md. 2020) (arguing that Defendants' prepublication review regimes chill national security dialogue and discourage national security experts from entering government service). However, in recent months, some of the costs of the system have become unusually visible, with the media reporting that the government has used prepublication review as a mechanism to delay the publication of books critical of the president. 5 Perhaps most notably, after President Trump directed his staff to prevent the publication of former national security advisor John Bolton's book prior to the 2020 presidential election, the White House used the prepublication review process to delay the book's publication. 6 As explained below, cases like these are the *31 predictable result of regimes that invest executive officers with sweeping discretion, and that fail to include procedural safeguards to mitigate the risk that this discretion will be abused.
3. The current system of prepublication review is not reasonably tailored to the government's interests.

The First Amendment demands that a regulation of core political speech be tightly drawn to the interests it is meant to serve, yet Defendants' regimes are anything but. The standards for what materials must be submitted are vague, and they reach far beyond the speech that the government could plausibly claim must be reviewed for the presence of information whose disclosure would cause harm. The standards for what may be censored are similarly vague and overbroad. And the regimes lack reasonable procedural safeguards that would mitigate the risk of abuse or chill. Defendants' regimes, in other words, are not “reasonably necessary” to serve the government's interests. * NTEU, 513 U.S. at 474.

The district court held that, given *Snepp*, the details of Defendants' prepublication review regimes were simply “irrelevant” to their constitutionality, JA190, but the district court erred. In applying *NTEU* to a particular prepublication review regime, courts must consider the scope and specificity of submission and review criteria as well as the procedural safeguards that are in place. In considering a particular version of prepublication review in *Marchetti*, for example, this Court cited *Freedman* multiple times, ultimately holding that the First Amendment requires that an agency's review of a manuscript be concluded within a definite period of time--thirty days. * 466 F.2d at 1317. Other circuits have similarly applied traditional prior-restraint principles—including from *Shuttlesworth* and *Freedman*—to prior restraints on government employees.  

a. The submission standards are vague and overbroad.

Defendants' regimes are vague and overbroad with respect to who must submit what for review. The regimes impose prepublication review requirements on all former employees—not just those who had access to SCI. And the regimes subject these employees to submission requirements that extend far beyond material that could plausibly be expected to contain classified information obtained in the course of government employment. Indeed, the regimes sweep in virtually everything that former intelligence agency employees might write about the *NTEU* balance government. Moreover, the submission standards use terms that are vague, undefined, and subjective. See *Harman*, 140 F.3d at 120 (finding that the absence of “narrow, objective, and definite” standards weighs against the government in the *NTEU* balance (quoting *Shuttlesworth*, 394 U.S. at 151)).

1. The CIA's submission standards. The CIA requires all former employees to submit for review any materials that “contain[ ] any mention of intelligence data or activities” or “any other information that might be based on [information obtained in the course of their employment that is classified or they know is in the process of a classification determination],” Decl. of Antoinette B. Shiner Ex. A ¶¶ 3, 5 (JA54), as well as “material on any subject about which the author has had access to classified information in the course of his employment,” Compl. ¶ 32(d) (JA20).

2. The DOD's submission standards. The DOD requires all former employees and service members to submit for review any information that “relates to information in the custody and control of the [DOD], or was acquired . . . as part of their official duties or because of their official status within [DOD]” if that information “pertains to military matters, national security issues, or subjects of significant concern to [the agency].” Id. ¶ 38(c) (JA22) (emphasis added). In addition, the DOD requires them to submit any “information they intend to release to the public” to ensure that it “does not compromise national security as required by their nondisclosure agreements.” Instruction 5230.09 § 1.2(g) (JA91).

3. The NSA’s submission standards. The NSA requires all former “NSA/CSS affiliates acting in a private capacity” to submit material for review whenever there is “doubt” as to whether “NSA/CSS information” in the material is “UNCLASSIFIED” and “approved for public release.” Compl. ¶ 44(c) (JA25-26); NSA/CSS Policy 1-30 § 2, 6(b) (JA114, 117) (emphasis added).
The NSA's policy states that “NSA/CSS information appearing in the public domain shall not be automatically considered UNCLASSIFIED or approved for public release.” NSA/CSS Policy 1-30 § 3(a) (JA115).

4. The ODNI's submission standards. The ODNI requires all former employees to submit for review “all official and non-official information intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security.” Compl. ¶ 50(d) (JA28). Pursuant to Form 313, the ODNI also requires former employees who had access to classified information to submit any material that “might be based upon [information that is classified or is in the process of a classification determination].” Id. ¶ 50(c) (JA27-28); Form 313(5) (JA127-28).

5. Defendants' shared submission standards. Through Form 4414, all Defendants require former employees who had access to SCI to submit any material “that contains or purports to contain any . . . description of activities that . . . relate to SCI.” Compl. ¶ 32(b) (JA19), ¶ 38(b) (JA22), ¶ 44(b) (JA25), ¶ 50(b) (JA27). In addition, all of the Defendants' regimes contemplate that the agencies will coordinate review with other agencies--but none of them specifies when they will do so and what censorship standards the other agencies will apply. Id. ¶ 33 (JA20), ¶ 39 (JA23-24), ¶ 45 (JA26), ¶ 51 (JA28).

Even a constitutional prepublication review regime would sweep in some speech that goes beyond what the government may constitutionally punish after the fact, but the submission criteria summarized here reach a vast amount of material that Defendants have no legitimate interest in reviewing, as the House and Senate Intelligence Committees recently recognized. Cf. 115 Cong. Rec. H3300 (daily ed. May 3, 2017) (recommending that agencies “limit[] the information subject to pre-publication review . . . to only those materials that might reasonably contain or be derived from classified information obtained during the course of an individual's association with the [Intelligence Community]”); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (same). For example, under the CIA's requirement, a former agency employee must submit for review virtually anything related to the CIA or other intelligence agencies--even if the manuscript in question has no relation at all to anything the former employee learned in government. The DOD's submission requirement similarly mandates that former employees submit for review anything that “relates to information in the [agency's] custody and control” if it “pertains to . . . subjects of significant concern to” the agency. The NSA's submission requirement turns on whether information has been “approved for public release,” but the agency does not say who decides whether something is approved for public release, when, or according to what standards. And the ODNI's regime requires former employees to submit anything that “discusses” the agency, the intelligence community, or national security. These submission requirements show no serious effort to tailor prepublication review to the government's asserted interest in preventing the inadvertent disclosure of classified information.

Many of these submission requirements also use terms that are subjective or ill-defined. The CIA requires that former employees submit any material “that might be based on” information obtained in the course of employment that is classified or pending classification. JA54. The DOD's submission requirement reaches anything that “relates to information in the custody and control of the [DOD]” if it “pertains to military matters, national security issues, or subjects of significant concern to [the agency].” Compl. ¶ 38(c) (JA22-24) (emphasis added). Similarly, the ODNI requires submission of any materials that “might be based upon” information that is classified, or in the process of being classified. Id. ¶ 50(c) (JA27-28). And, through Form 4414, all Defendants require the submission of materials that “relate to” SCI. Id. ¶ 32(b) (JA19), ¶ 38(b) (JA22), ¶ 44(b) (JA25), ¶ 50(b) (JA27).

The Supreme Court has held that terms such as these “provide[] insufficient guidance because [they are] classic terms of degree” and offer “no principle for determining when remarks pass from the safe harbor . . . to the forbidden sea.” Gentile v. State Bar of Nev., 501 U.S. 1030, 1048-49 (1991) (holding that standard for what lawyer can discuss hinging on “relates to” is unconstitutionally vague); see also Nat'l Fed'n of Fed. Emps. v. United States, 695 F. Supp. 1196, 1202-03 (D.D.C. 1988) (“On
its face, ‘classifiable’ has not readily discernible meaning” and could ensnare “information that does not become classified until its disclosure piques the concerns of the Executive.”).

The vagueness and overbreadth of these submission standards cannot survive NTEU balancing. For example, under these standards, a CIA officer employed for one month in the 1970s to analyze U.S. foreign policy toward Vietnam would today have to submit for review any pieces concerning the CIA's assessment of Russian interference in the 2016 election, the NSA's bulk collection of Americans' call records, or even the artistic merit of the popular television show “The Americans”--even if these pieces had no connection whatsoever to the author's service half a century ago. A former DOD employee would similarly have to submit for review a piece exposing racial discrimination in the agency's hiring practices. And a former ODNI employee would have to submit literally every piece of public writing discussing the ODNI or national security.

The complaint explains the implications of all of this for Plaintiffs themselves. For example, because Mr. Goodman's work at the CIA several decades ago focused on the former Soviet Union and its Cold War foreign policy, he must submit to the CIA for approval anything he writes about Russia and large parts of the Middle East, Asia, and Africa--all “subject[s] about which [he] has had access to classified information in the course of his employment”--no matter how unlikely it is that his writings contain classified information. See Compl. ¶ 32(d) (JA19-20), ¶¶ 81-82 (JA36-37). The DOD's standards would encompass Ms. Bhagwati's writings about her experiences with misogyny, racism, and sexual violence in the military, even though this work does not discuss classified information, id. ¶ 94, 99 (JA40-41), and Mr. Fallon's writings about the interrogation and torture of prisoners, even if scrupulously sourced to declassified information and materials in the public record, id. ¶ 104 (JA43).

b. The review standards are vague and overbroad.

The review standards of Defendants' regimes are confusing, subjective, and overbroad. Several of Defendants' regimes do not specify censorship criteria at all. Even the narrowest of them invests agency officials with the power to censor information (1) whether or not it was obtained by the author in the course of *38 employment; (2) whether or not its disclosure would actually cause harm; (3) whether or not it is already in the public domain; and (4) whether or not the public interest in its disclosure outweighs the government's interest in secrecy.

1. The CIA's censorship standards. The CIA reviews submissions by former employees “solely to determine whether [they] contain[] any classified information.” AR 13-10 § 3(f)(2) (JA67); see also Compl. ¶ 33 (JA20).

2. The DOD's censorship standards. The DOD subjects the submissions of former employees to “security review,” which “protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security.” Instruction 5230.29, Encl. 3 § 1 (JA103); see also Compl. ¶ 39 (JA23-24). The DOD also appears to review submissions for information “requiring protection in the interest of national security or other legitimate governmental interest,” Instruction 5230.09 § 1.2(d) (JA90-91), and for “any classified, export-controlled or other protected information,” JA94.


4. The ODNI's censorship standards. The ODNI's policies do not set forth any censorship standard for submissions by former employees. However, they state that “the goal of pre-publication review is” not only to “prevent the unauthorized disclosure of information,” but also to “ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication.” Id. ¶ 51 (JA28).
5. **Defendants' shared censorship standards.** All Defendants review submissions of former employees who had access to SCI for the presence of SCI. *Id.* ¶ 33 (JA20), ¶ 39 (JA23-24), ¶ 45 (JA26), ¶ 51 (JA28).

Defendants' policies do not meaningfully limit their censorship authority. First, the NSA’s and the ODNI's policies do not set out a censorship standard at all, *id.* ¶ 39 (JA26), ¶ 51 (JA28). This deficiency is fatal. “A long line of cases in the Supreme Court makes it clear that [the government] cannot require all who wish to disseminate ideas to present them first to [government] authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be disseminate[d].” *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (quotation marks and emphasis omitted) (collecting cases); *see also* *Sanjour*, 56 F.3d at 97 (invalidating employee-speech regulation that vested “broad discretion” in agency to censor speech); *Harman*, 140 F.3d at 120-21 (similar).

Second, Defendants' review standards reach an immense amount of material that the government has no legitimate interest in censoring. The DOD, for example, asserts the authority to censor several categories of unclassified information. Instruction 5230.29, Encl. 3 § 1 (JA103); *see also* Compl. ¶ 39 (JA23-24) (“controlled unclassified information”); JA94 (“export-controlled or other protected information”). The ODNI asserts the categorical authority to censor information that is already in the public domain, even if further disclosure would cause no harm. *See ODNI Instruction 80.04 § 6(A)(2) (JA135) (stating that former employees must in all circumstances “not use sourcing that comes from known leaks, or unauthorized disclosures of sensitive information”). And all Defendants assert the authority to censor information that former employees learned after they left government, even if the employees' discussion of that information would neither reveal nor confirm anything they learned while they were government employees.

The government has no legitimate interest in censoring this information, unless its publication would reveal properly classified information that the employee learned in the course of employment. *See, e.g.*, *Marchetti*, 466 F.2d at 1316-17 (noting that “the Government's need for secrecy in this area lends justification” to censorship only of “information obtained during the course of employment”); *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (explaining that “[t]he government may not censor [information obtained from public sources]” and “has no legitimate interest in censoring unclassified materials”).

Third, Defendants' standards do not limit censorship to information that is properly classified, ignoring Plaintiffs' “strong first amendment interest in ensuring that [the] censorship of [their writings] results from a proper classification.” *McGehee*, 718 F.2d at 1148. Moreover, the standards permit the government to censor information even when its disclosure would not cause harm--though the government lacks any legitimate interest in censoring this information. *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring) (Even where questions of allegedly urgent national security interests are involved, the government must show that “disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people.”). In addition, Defendants' standards do not limit censorship to instances in which the government's interest in secrecy outweighs the public's interest in disclosure. But as the Supreme Court has held, restraints on public employee-speech are permissible only where the interests of prospective speakers and their audiences are outweighed by the expression's actual impact on the government's interests. *See* NTEU, 513 U.S. at 468.

Fourth, while the CIA's and Form 4414's censorship standards are limited to classified information, *see AR 13-10 § 3(f)(2) (JA67); see also Compl. ¶ 33 (JA20); id. ¶ 33 (JA20), ¶ 39 (JA23-24), ¶ 45 (JA26), ¶ 51 (JA28), they reach a sweeping amount of protected speech by, as summarized above, permitting censorship of information without regard to whether it was obtained by the author in the course of employment, whether disclosure would actually cause harm, whether it is already in the public domain,
and whether the public interest in its disclosure outweighs the government's interest in secrecy. Thus, the CIA's standards permit it to censor a former employee's writings about a major news story based on an unauthorized disclosure of classified information, even if the employee had no access to that information while at the CIA and even if she expressly disclaims any such knowledge in her writings. It was presumably pursuant to this authority that the CIA demanded that Mr. Goodman redact publicly available information from his writing about the CIA's drone program even though he left the CIA decades before that program was established, Compl. ¶ 90 (JA39), and demanded that Professor *42 Immerman redact information that was derived from public sources, that concerned issues that arose after he left government, and that the CIA itself had published previously, id. ¶ 75 (JA34-35); see also id. ¶ 110 (JA45), ¶ 114 (JA46) (similar for Mr. Fallon).

Fifth, the DOD's censorship criteria are impermissibly vague and subjective--as are the ODNI's, to the extent the ODNI has a censorship standard at all. For example, the DOD asserts the authority to censor not just classified information but also information "requiring protection in the interest of national security or other legitimate governmental interest," Instruction 5230.09 § 1.2(d) (JA90-91), and the ODNI seems to assert the authority to censor information whose disclosure is "unauthorized" or whose disclosure might "adversely affect[]" the ODNI's mission, ODNI Instruction 80.04 § 3 (JA133). These terms are unconstitutionally vague. See McGehee, 718 F.2d at 1143; cf. United States v. U.S. Dist. Court for E.D. Mich., S. Div. (Keith), 407 U.S. 297, 320 (1972), (noting the "inherent vagueness of the domestic security concept"); Pentagon Papers, 403 U.S. at 719 (Black, J., concurring) (noting that "security" is a "broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment"); Zweibon v. Mitchell, 516 F.2d 594, 653 (D.C. Cir. 1975) (similar with respect to "affecting foreign relations"); Sanjour, 56 F.3d at 96-97 (similar with respect to "within the mission of the agency").

*43 Finally, Defendants' practice of cross-agency referrals exacerbates the system's constitutional deficiencies, because the agencies refer publications to other agencies without specifying the standards according to which the works will be shared and reviewed. Compl. ¶ 33 (JA20), ¶ 39 (JA23-24), ¶ 45 (JA26), ¶ 51 (JA28); see also id. ¶ 63 (JA31), ¶ 74 (JA34), ¶ 87 (JA38), ¶ 108 (JA44) (describing Plaintiffs' experience with cross-agency referrals).

c. The regimes lack reasonable procedural safeguards to mitigate the risk of abuse and chill.

Defendants' regimes lack reasonable procedural safeguards that would mitigate the risk of abuse and chill. As an initial matter, the regimes lack any definite deadlines for decision. In Marchetti, this Court held that the prepublication review of a former employee's speech should take place within thirty days. 466 F.2d at 1317. Other circuits have similarly insisted on definite deadlines in employee-speech restrictions. See, e.g., Harman, 140 F.3d at 121 (invalidating employee-speech restrictions in part because “[t]hey provide no time limit for review to ensure that commentary is not rendered moot by delay”); Crue v. Aiken, 370 F.3d 668, 679 (7th Cir. 2004) (similar with respect to preclearance policy that “does not have a schedule for the review of proposed communications”).

Here, however, Defendants' prepublication review regimes do not require that submissions be reviewed within any specific time period at all. They provide at most aspirational (and unenforceable) timeframes within which Defendants will seek to *44 complete review. See supra Statement of the Case. The government argued in the district court that these “benchmarks” satisfy constitutional requirements, Gov't Br. 32-24, ECF No. 30, but aspirational time limits are no substitute for binding ones; that government officials “might” make decisions within reasonable time frames is insufficient. Chesapeake B & M, Inc. v. Hartford Cty., Md., 58 F.3d 1005, 1011 (4th Cir. 1995) (holding that a licensing scheme must “ensure a prompt administrative decision” (emphasis added)).
The lack of any firm deadlines in Defendants' regimes has routinely resulted in delays of many months or even years. See, e.g., Compl. ¶ 36 (JA21). Plaintiffs themselves have experienced delays of many months and would have faced further delays had they contested redactions that they believed to be unjustified. See, e.g., id. ¶ 75 (JA34-35), ¶ 89 (JA38), ¶ 110 (JA45).

Defendants' prepublication regimes also fail to ensure “expeditious judicial review” of adverse determinations, FW/PBS v. City of Dallas, 493 U.S. 215, 227 (1990), or to impose on the government the burden of initiating such review, Freedman, 380 U.S. at 59; see Compl. ¶ 37 (JA21), ¶ 43 (JA25), ¶ 49 (JA27), ¶ 55 (JA29). Thus, “the [censor's] determination in practice may be final,” Se. Promotions, 420 U.S. at 561, particularly when the intended speech is time-sensitive. Plaintiffs' experiences are illustrative: All who have submitted pieces for review have accepted censorship decisions they believe were unjustified to avoid further delays. See Compl. ¶ 64 (JA31), ¶ 78 (JA35), ¶ 91 (JA39), ¶ 111 (JA45).

To be sure, this Court has rejected the need for government-initiated judicial review of prepublication review decisions, but it did so based upon the assumption that “in most instances, there ought to be no practical reason for judicial review,” given the “limited nature” of the government's power to censor—a power that, on the Court's description in that case, extended only to classified information obtained in the course of employment that was not already in the public domain. Marchetti, 466 F.2d at 1317. The regimes at issue here, however, extend much further, and Defendants rely on those regimes to censor much more.

For these reasons, Defendants' prepublication review regimes fail the First Amendment standard of review invoked by the Supreme Court in Snepp.

II. Defendants' prepublication review regimes are void for vagueness under the Fifth Amendment.

The vagueness doctrine addresses “two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). When First Amendment rights are at stake “rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” Id. Defendants' prepublication review regimes fail to satisfy either.

A. Defendants' prepublication review regimes fail to give former employees fair notice of what they must submit for review.

As explained above, Defendants' submission standards are vague. See supra § Part I.C.3.a. They rely on terms such as “relates to,” “pertains to,” “subjects of significant concern,” and “might be based upon,” which are ambiguous terms of degree. See Gentile, 501 U.S. at 1048-49; see also In re Murphy-Brown, LLC, 907 F.3d 788, 800 (4th Cir. 2018) (finding a gag order using language such as “the general nature of” and “elaboration” was unconstitutionally vague because it forced individuals to “guess at its contours”). The standards force former employees to guess at whether they must submit their speech for review, unsurprisingly causing many to over-submit in an abundance of caution. Compl. ¶ 66 (JA32), ¶ 80 (JA36). Defendants' submission standards thus fail to give former employees fair notice of what they must submit for review.

*47 The district court dismissed Plaintiffs' vagueness claim for several reasons, but none has merit. First, the district court construed Plaintiffs' claim to concern the “breadth [of Defendants' regimes] rather than any difficulties Plaintiffs have in
understanding what they require.” JA197. Here, however, Defendants' regimes are overbroad and vague. They use terms that sweep far too broadly as well as terms of indefinite reach.

Second, the district court also found it relevant that Plaintiffs may obtain “prospective guidance from an agency.” JA198. In the case the court relied on, however, the D.C. Circuit rejected the plaintiffs' claim that an agency rule was vague because the agency had articulated the goals the rule was meant to serve, specified the factors that would inform the rule's application, and included a description of how each factor would be interpreted and applied. *U.S. Telecom Ass'n v. Fed. Commc'n's Comm'n, 825 F.3d 674, 736-37 (D.C. Cir. 2016)* The availability of prospective guidance was relevant only because it would address any “potential lingering” doubt about the rule's application. *Id.* at 738. Here, however, Defendants' submission and review standards are fundamentally vague, and the availability of prospective guidance cannot cure that deficiency. While former employees can ask agency reviewers whether or not they must submit a particular manuscript for review, it is entirely up to those reviewers—subject to vague standards—to decide. Unlike in *U.S. Telecom*, these decisions are not “publicly available,” *825 F.3d at 738,* and so the system is never clarified, but instead applied arbitrarily time and time again. Cf. *Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)* (“the more important aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern [government actors]” (internal marks and citation omitted)).

Third, the district court misapplied *United States v. Morison*, 844 F.2d 1057, 1071-73 (4th Cir. 1988), in concluding that Defendants' regimes “present [] a lessened vagueness concern” because those subject to the regimes “are intelligence *United States v. Morison, 844 F.2d 1057, 1071-73 (4th Cir. 1988)* professionals.” JA198. In *Morison*, the Fourth Circuit considered a vagueness challenge to the Espionage Act brought by an intelligence employee who stole photographs from his workplace that were prominently stamped “Secret” and mailed them to a reporter. *Id.* at 1061, 1073-74. Morison argued that the provisions of the Espionage Act under which he was convicted were unconstitutionally vague, but this Court rejected that claim in a lengthy analysis focused on the Act's scienter requirement and the jury instructions given in the case. *Id.* at 1073. Only then did the Court go on to observe that, in Morison's case in particular, there was no cause for concern about vagueness, because Morison in fact knew that his conduct violated the Espionage Act. *Id.* at 1073-74. *Morison* is inapposite here, however, because the point of Plaintiffs’ challenge is that the terms of Defendants' regimes are vague and Plaintiffs do not know their meaning.

**B. Defendants' prepublication review regimes fail to provide explicit standards for reviewers, thus inviting arbitrary and discriminatory enforcement.**

As explained above, Defendants' censorship standards also fail to provide “explicit standards for those who apply them,” inviting “arbitrary and discriminatory enforcement,” *Grayned, 408 U.S. at 108. See supra § Part I.C.3.b.* For example, under the DOD's policy, reviewers may censor not just classified information but also information “requiring protection in the interest of national security or other legitimate governmental interest.” Instruction 5230.09 § 1.2(d) (JA90-91). Likewise, ODNI asserts the authority to “safeguard sensitive intelligence information,” ODNI Instruction 80.04 § 6 (JA134), and to censor information whose disclosure is “unauthorized” or whose disclosure might “adversely affect[]” the ODNI's mission, ODNI Instruction 80.04 § 3 (JA133). In evaluating other regulatory standards, courts have found similar language unconstitutionally vague. See, e.g., *Zweibon, 516 F.2d at 653; Sanjour, 56 F.3d at 96-97.* The district court addressed the agencies' review standards one-by-one, but it erred in its consideration of each.

With respect to the DOD, the court held that the multiplicity of the agency's censorship standards “reduced” their vagueness. JA199. In other words, the court appeared to view the DOD's many standards as somehow constraining the agency's *50
discretion to censor, when in fact they increase it. Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 601-02 (1967) (noting that a complex system of rules for public employees to parse is “a highly efficient in terrorem mechanism” and suggesting it presents a vagueness problem). With respect to the NSA, which has not set out any censorship standards, Compl. ¶ 45 (JA26), the court mistakenly looked to the first paragraph of NSA/CSS Policy 1-30 to suggest that the NSA policy provides clear guidance on former employee submissions. JA200. But the language the court quoted is located within a section of the policy entitled “Public release in an official capacity,” making it inapplicable to Mr. Edgar and other former employees who are not publishing in an official capacity. And with respect to the ODNI, the district court attempted to cobble together multiple disparate pieces of the agency's regime into a coherent censorship standard, JA199-200, but the fact remains that the piecemeal censorship standard nevertheless permits ODNI to censor material pursuant to the vague criteria quoted above.

While the district court concluded that Defendants' policies “cannot plausibly be read as so vague that they impermissibly facilitate arbitrary and discriminatory enforcement,” JA200, experience demonstrates otherwise. For example, former intelligence-agency employees who wrote books criticizing the CIA's torture of prisoners detained in the “war on terror” have had their books heavily redacted while former CIA officials' supportive accounts of the same policies were published without significant excisions of similar information. Compl. ¶ 34 (JA20-21). And in the ODNI's and CIA's review of Professor Immerman's manuscript, all of the mandated redactions related to information that came from public sources or that had been published previously by the government itself. Id. ¶ 75 (JA34-35).

III. The district court correctly concluded that Plaintiffs have standing to challenge Defendants' prepublication review regimes.

As the district court correctly concluded, Plaintiffs have standing because “features of [Defendants' prepublication review] regimes result in a chilling effect on the exercise of First Amendment rights.” JA176. The Fourth Circuit has recognized that plaintiffs satisfy the injury-in-fact requirement if they make a “sufficient showing of ‘self-censorship, which occurs when . . . claimant[s are] chilled from exercising [their] right to free expression.’ ” Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013) (quoting Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011)); see also Kenny v. Wilson, 885 F.3d 280, 288 (4th Cir. 2018). As the district court properly concluded, Plaintiffs have plausibly alleged that key features of Defendants' prepublication review regimes have chilled their speech. JA173-74.

Contrary to the district court's ruling, however, Plaintiffs also have standing because they are subject to Defendants' regimes, which, as explained above, are licensing schemes. See supra Part I.B. In “the area of freedom of expression it 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 [the speaker's] conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.” Freedman, 380 U.S. at 56; see also City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988). The Supreme Court has affirmed this rule repeatedly, see, e.g., Forsyth Cty., 505 U.S. at 129; Shuttlesworth, 394 U.S. at 150-51; Thornhill v. Alabama, 310 U.S. 88, 97 (1940), and this Court has made clear that those who are subject to such schemes may “bring an immediate facial challenge,” 11126 Balt. Boulevard, Inc. v. Prince George's Cty., 58 F.3d 988, 994 (4th Cir. 1995); see also City of Lakewood, 486 U.S. at 758. Plaintiffs' central allegation here is that Defendants' “exercise of [censorship] authority” is “not bounded by precise and clear standards.” Se. Promotions, 420 U.S. at 553; accord Compl. ¶ 4 (JA10-11), ¶ 120 (JA47). This is sufficient to establish their standing.
In rejecting this argument, the district court purported to distinguish Defendants' regimes from “typical” licensing schemes that “require [individuals] to obtain licenses to engage in any expressive conduct at all.” JA171. But that supposed distinction is not real: Licensing schemes governing parade permits or the showing of obscene films do not prohibit all expressive activity--indeed, they almost always target specific types of expression. See Billups v. City of Charleston, S.C., 961 F.3d 673, 677 (4th Cir. 2020) (licensing for tours in Charleston's historic districts); Chesapeake B & M, Inc., 58 F.3d at 1007 (licensing for adult bookstores). And whether or not it is formally called a “license,” the clearance former employees must seek under Defendants' regimes is the functional equivalent of a license to engage in speech.

The district court also viewed Defendants' regimes as distinct from licensing schemes because Plaintiffs “must submit [materials] for review . . . pursuant to agreements they have signed” voluntarily. JA172. But how a prior restraint is imposed--by statute, court order, executive decree, or contract--has never been understood to alter a plaintiff's ability to challenge it. See supra Part I.B. Indeed, courts (including this one) have repeatedly recognized prior restraints in the employee-speech context even where those restraints were imposed in “voluntary” agreements. See, e.g., Marchetti, 466 F.2d at 1317 (“Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech.”); Mansoor v. Trank, 319 F.3d 133, 139 n.4 (4th Cir. 2003) (holding that a written plan created by county officials operated as a prior restraint on a police officer's speech even though the officer had agreed to the plan); see also Connick v. Myers, 461 U.S. 138, 142 (1983) ("[I]t has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.” (collecting cases)). In any event, Defendants' prepublication review regimes are not creatures only of contract, but of formal government policies and regulations, too.9

Conclusion

Respectfully, this Court should reverse the district court's grant of the government's motion to dismiss and remand for further proceedings.

August 14, 2020

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Footnotes
The Complaint provides a fuller account of the history of the prepublication review system, Defendants' prepublication review regimes, and Plaintiffs' experience with those regimes. JA9-47.

To support its argument that prepublication review was necessary, the CIA relied on the declaration of its director, Admiral Stansfield Turner, who testified that Snepp's book had “seriously impaired the effectiveness of American intelligence operations.” Snepp, 444 U.S. at 512. After Turner left the agency, he testified to Congress that “reviews as conducted by the CIA and NSA are susceptible to abuse and should be placed under some outside regulation,” and that “there is greater danger than benefit in extending the prepublication review requirement to other agencies of our government.” Letter from William M. Baker, CIA Director of Public Affairs (Aug. 12, 1988), https://perma.cc/3DWL-7WL6.

In United States v. Snepp, 897 F.2d 138, 143 (4th Cir. 1990), the Fourth Circuit confirmed that Marchetti's reasoning survived Snepp. Asked to consider whether the “the Supreme Court [in Snepp] intended to overrule Marchetti,” it held that “the Supreme Court did not so intend.” Id.

Plaintiffs believe that Snepp should have analyzed the CIA's prepublication review regime under this framework, rather than under the employee-speech framework discussed below, because, among other things, Snepp was not a government employee when he published his book. In light of Snepp, Plaintiffs ask this Court to apply the employee-speech framework here, but they respectfully preserve for further review the argument that Snepp was wrong in this respect.


See, e.g., Sanjour v. E.P.A., 56 F.3d 85 (D.C. Cir. 1995) (“[I]n the context of Pickering balancing, [the potential for censorship] justifies an additional thumb on the employees' side of [the] scales.”); Harman v. City of New York, 140 F.3d 111, 118 (2d Cir. 1998) (“However, the concerns that lead courts to invalidate a statute on its face may be considered as factors in balancing the relevant interests under Pickering.”); Weaver, 87 F.3d at 1440 (“Pickering can readily count those [prior-restraint] concerns in the course of the balance.”).

In other contexts involving national security, some courts have endorsed a “reciprocal notice” procedure, in which the would-be speaker bears the burden of notifying the government that she intends to challenge the restraint on her speech, but the government bears the burden of initiating judicial process. See John Doe, Inc. v. Mukasey, 549 F.3d 861, 879 (2d Cir. 2009); see also 28 C.F.R. § 17.18(i) (2019) (DOJ reciprocal notice procedure for prepublication review).

Though the district court did not address it, Plaintiffs also have standing because they face a credible threat of sanctions for non-compliance. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014).
2020 WL 5866623


UNITED STATES of America, Plaintiff,
v.
John R. BOLTON, Defendant.

Case No. 1:20-cv-1580-RCL
Signed 10/01/2020

Synopsis
Background: United States brought action alleging that former National Security Advisor breached his fiduciary obligations to government and his contractual duties by publishing his memoir before completing prepublication review, and by disclosing classified information. Defendant moved to dismiss.

Holdings: The District Court, Royce C. Lamberth, Senior District Judge, held that:

[1] United States pled plausible claim for breach of contractual obligation to submit memoir for prepublication review;

[2] prepublication review requirement did not require showing that defendant have reason to know that writing contained sensitive compartmented information (SCI);

[3] prepublication review requirement did not violate Free Speech Clause;

[4] United States pled plausible claim for breach of contractual obligation not to disclose information without confirming that it was unclassified;

[5] defendant did not breach his contractual obligation to never divulge anything marked as SCI;

[6] United States pled plausible claim for breach of his contractual obligation not to divulge classified information to unauthorized persons without prior written notice of authorization;

[7] prohibition against unauthorized disclosure of classified information without prior written notice of authorization did not require that disclosure be with scienter; and

[8] imposition of constructive trust on defendant's royalties would not violate First Amendment.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

West Headnotes (23)

[1] Federal Courts ➞ Public contracts
In interpreting contracts between private parties and United States, courts apply federal common law.

Federal common law of contracts dovetails with general principles of contract law.

Under federal common law, contract interpretation begins with text's plain meaning.

Under federal common law, when parties’ intent can be determined from face of agreement, court's analysis also ends with text.

Under federal common law, contract is unambiguous if it can be given definite or certain meaning as matter of law.

[6] United States ⇔ Confidentiality
United States ⇔ Prepublication review
United States pled plausible claim against former National Security Advisor for breach of his contractual obligation to submit for prepublication review any writing that he contemplated disclosing to anyone not authorized to have access to sensitive compartmented information (SCI) or that he prepared for public disclosure by alleging that he prepared manuscript describing activities related to SCI for public disclosure, and that he shared his manuscript with publisher and published it before completing prepublication review and receiving written authorization from government.

[7] United States ⇔ Confidentiality
United States ⇔ Prepublication review
Provisions of nondisclosure agreement signed by former National Security Advisor imposing lifelong obligation to submit writings for prepublication review any writing that he contemplated disclosing to anyone not authorized to have access to sensitive compartmented information (SCI) or that he prepared for public disclosure did not require that he have reason to know that writing contained SCI, only that it describe activities related to SCI.

[8] Contracts ⇔ Rights and Liabilities on Breach
Contractual requirements impose strict liability by default.

[9] Constitutional Law ⇔ Public Employees and Officials

United States ⇔ Confidentiality
United States ⇔ Prepublication review
Requirement in nondisclosure agreement signed by former National Security Advisor that he submit writings for prepublication review did not violate Free Speech Clause; government had compelling interest in reviewing information related to sensitive compartmented information (SCI), and agreement only required review when materials were, related to, or purported to be SCI or described activities that produced or related to SCI, required government to make initial response within 30 days, and did not permanently restrain him from publishing unclassified information. U.S. Const. Amend. 1.

[10] Contracts ⇔ Preventing disclosure of trade secrets
United States ⇔ Confidentiality
Nondisclosure agreements that United States required former National Security Advisor to sign were contracts of adhesion, where Advisor —no matter how sophisticated lawyer he might be—had no opportunity to negotiate their terms.

Contract of adhesion is valid contract.

[12] Constitutional Law ⇔ Avoidance of doubt
When interpreting statutes, courts must try to avoid constructions that create serious doubt as to constitutionality.

To invoke constitutional doubt canon, litigant must show both ambiguity and unanswered constitutional question.
[14] **Contracts ↔ Preventing disclosure of trade secrets**

**United States ↔ Confidentiality**

**United States ↔ Prepublication review**

United States pled plausible claim against former National Security Advisor for breach of his contractual obligation not to disclose classified information without confirming that information was unclassified by alleging that he submitted manuscript of his memoir of his time as National Security Advisor for review, and that he disclosed manuscript to publisher before receiving confirmation that material was unclassified.

[15] **Contracts ↔ Preventing disclosure of trade secrets**

**United States ↔ Confidentiality**

**United States ↔ Prepublication review**

Former National Security Advisor did not breach his contractual obligation to “never divulge anything marked as sensitive compartmented information (SCI) or that [he] know[s] to be SCI to anyone who is not authorized to receive it without prior written authorization,” absent allegation that he knowingly disclosed SCI or that he disclosed marked SCI.

[17] **Contracts ↔ Preventing disclosure of trade secrets**

**United States ↔ Confidentiality**

**United States ↔ Prepublication review**

Agreement prohibiting National Security Advisor from disclosing classified information to unauthorized persons without prior written notice of authorization did not require that his disclosure be with scienter, despite his contention that agreement's requirement that he consult with his agency in cases of uncertainty would be pointless if he were strictly liable for disclosing classified information; predisclosure consultation requirement protected classified information from inadvertent disclosure, while nondisclosure requirement guarded against disclosure of all kinds.

[18] **Contracts ↔ Effect in general; enforcement in general**

When contract is silent on state of mind, parties are strictly held to their obligations to perform.

[19] **Constitutional Law ↔ Public Employees and Officials**

**Trusts ↔ Fraud or other wrong in acquisition of property in general**

**United States ↔ Confidentiality**

Imposition of constructive trust on former National Security Advisor's royalties from his memoir of his time in that position based on breach of his agreements not to disclose sensitive compartmented information (SCI) and classified would not violate First Amendment's prohibition on punishing speaker for content of his speech; under agreements, he acknowledged that SCI and classified information were government property, and assigned his royalties to government upon breach. U.S. Const. Amend. 1.
MEMORANDUM OPINION

Royce C. Lamberth, United States District Judge

I. BACKGROUND

A. Classified Information and the Agreements

The federal government classifies information at three levels. Information is classified as confidential, secret, or top secret if its unauthorized release could cause, respectively, damage, serious damage, or exceptionally grave damage to the national security. Exec. Order No. 13,526 at § 1.2(a), 75 Fed. Reg. 707, 707 (Dec. 29, 2009). Information may not be classified to conceal unlawful behavior, prevent embarrassment, or delay the release of otherwise unprotected information. Id. at § 1.7(a), 75 Fed. Reg. at 710. When classified information concerns or derives from intelligence sources and methods, the government designates it as SCI. All SCI is classified as confidential, secret, or top secret.

Before accessing classified information, a person must sign a nondisclosure agreement. Id. at § 4.1(a), 75 Fed. Reg. at 720. The government's nondisclosure agreement for classified information is referred to as a Standard Form 312. For SCI, the agreement is called Form 4414.

1. SCI Nondisclosure Agreement (Form 4414)

The SCI nondisclosure agreement imposes lifelong obligations on persons granted access to SCI. The agreement defines SCI as information that “involves or derives from intelligence sources or methods and is classified or is in process of a classification determination.” Ex. A at 4, ¶ 1. Before signing the agreement, a recipient of SCI must receive a security indoctrination “concerning the nature and protection of SCI, including the procedures to be
followed in ascertaining whether other persons to whom [he] contemplate[s] disclosing [SCI] have been approved for access to it.” Id. at 4, ¶ 2.

*2 The agreement imposes the following obligations. First, a recipient agrees to “never divulge” any marked or known SCI without written authorization. Id. at 4, ¶ 3. The recipient also agrees to submit for prepublication security review any writings that meet one of several SCI-based triggering conditions, id. at 4, ¶ 4, in order to “give the United States a reasonable opportunity to determine whether the [writing] sets forth any SCI,” id. at 4, ¶ 5. Third, the recipient agrees to “not disclose the contents of [a writing submitted for review] with, or show it to, anyone who is not authorized to have access to SCI until” he receives written permission from the government. Id. at 4, ¶ 4. Fourth, the agreement provides that SCI remains property of the United States. Id. at 4, ¶ 8. Finally, upon an unauthorized disclosure of SCI, a recipient assigns to the government “all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result or may result from any [unauthorized] disclosure.” Id. at 2, ¶ 5.

B. Factual Allegations
Bolton served as President Trump's National Security Advisor from April 2018 to September 2019. First Am. Compl. ¶ 9, ECF No. 18. In that role, he led the National Security Council (NSC) in advising the President on national security and foreign policy questions and in facilitating interagency coordination on those topics. Id. at ¶¶ 7–8; see generally National Presidential Security Memorandum 4, 82 Fed. Reg. 16,681 (Apr. 6, 2017). The National Security Advisor regularly deals with some of the most sensitive information the government possesses. First Am. Comp. ¶ 7.

When he became National Security Advisor, Bolton signed three nondisclosure agreements with the United States. He signed two SCI nondisclosure agreements (Form 4414) to access SCI.3 Ex. A at 4–7. He also signed a classified information nondisclosure agreement (SF 312) to access classified information. Id. at 2–3.

In the months after Bolton left the White House, he and publisher Simon & Schuster agreed to produce a memoir of Bolton's time as National Security Advisor. First Am. Compl. ¶ 23. Bolton titled his memoir The Room Where It Happened.

*3 Bolton then began a prepublication review process. At the end of 2019, Bolton's attorney contacted Ellen Knight, the NSC's senior director for records access and information security management, to submit his manuscript for review. Id. at ¶ 31; Ex. D. In a letter to Knight, Bolton's attorney asserted that “Bolton has carefully sought to avoid any discussion in the manuscript of [SCI] or other classified information, and we accordingly do not believe that prepublication review is required.” Ex. D. He described the decision to submit the manuscript as taken “out of an abundance of caution, as contemplated by the nondisclosure agreements that [Bolton] entered.” Id. Knight and her staff conducted a preliminary review of the manuscript and informed Bolton that it contained “significant amounts of classified information,” some of which was classified as top secret. First Am. Compl. ¶ 33; Ex. E; see also Ex. H. Through in-person meetings, phone calls, and written comments, Knight and Bolton worked
through an iterative series of changes to his manuscript to exclude classified information. First Am. Compl. ¶¶ 41–45. On April 28, 2020, Knight completed her prepublication review and believed that the manuscript did not contain classified information. Id. at ¶ 46. But despite Bolton's requests for a letter confirming that he had permission to publish his manuscript, Knight declined to provide a letter and told him that the review was ongoing. Id. at ¶¶ 47, 49.

After Knight completed her initial review, Michael Ellis, the NSC's senior director for intelligence programs, began a second review. Id. at ¶ 51. Ellis possessed delegated authority to classify information, id., see also Exec. Order No. 13,526 at § 1.3(a)(3), 75 Fed. Reg. at 708, and had regular access to more “extremely sensitive intelligence reports” than Knight, First Am. Compl. ¶ 52. Ellis determined that the manuscript contained classified information, including SCI. Id. at ¶¶ 57, 59. Accordingly, on June 8, 2020, the NSC's legal advisor sent Bolton's attorney a letter explaining that the manuscript contained classified information and that publication could not occur until the government confirmed that the prepublication review process was complete. Id. at ¶ 54.


C. Procedural History
On June 16, 2020, one week before the memoir's official release date, the government commenced this action. It sought (a) a declaration that Bolton had acted unlawfully, (b) an injunction to prevent Bolton from publishing the book, and (c) a constructive trust over Bolton's royalties. See Compl. In its original complaint, the government alleged only that the manuscript contains classified information. See id. at ¶ 58. Three days later, the government amended its complaint to allege that Bolton's memoir contains SCI. First Am. Comp. ¶ 59.

In the amended complaint, the government raises three claims. First, it alleges that Bolton breached the SCI agreements, the classified information agreement, and his fiduciary duties by sharing his manuscript before he completed prepublication review. Id. at ¶¶ 68–76. Second, the government alleges that Bolton breached the SCI agreements, the classified information agreement, and his fiduciary duties by disclosing classified information without authorization. Id. at ¶¶ 77–80. Third, it alleges that Bolton unjustly enriched himself by breaching both the agreements and his fiduciary duties. Id. at ¶¶ 81–86. And by breaching the agreements, the government claims, Bolton assigned all his royalties to the United States. Id.

The government also sought a temporary restraining order and a preliminary injunction to prevent the memoir's publication. See Emergency Appl., ECF No. 3. After holding a hearing on the motion and reviewing ex parte the government's classified declarations, the Court denied the motion. See Mem. Order 6, 10 (June 20, 2020), ECF No. 27. Though the Court determined that “Bolton likely jeopardized national security by disclosing classified information in violation of his nondisclosure agreement[s],” id. at 6, it also concluded that the government would not suffer irreparable harm in the absence of an injunction, because Simon & Schuster had already distributed thousands of copies of the memoir, id. at 8–9.

*4 Bolton now seeks to dismiss the complaint for failure to state a claim upon which relief may be granted. 4 See Fed. R. Civ. P. 12(b)(6).

II. LEGAL STANDARDS

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)) (citation omitted). In resolving a motion under Rule 12(b)(6), “[t]he Court assumes the truth of all well-pleaded factual allegations in the complaint and construes reasonable inferences from those allegations in the plaintiff's favor[ ] but is not required to accept the plaintiff's legal
conclusions as correct.” Sissel, 760 F.3d at 4. The Court may also consider documents attached to or incorporated by reference in the complaint. He Depu, 950 F.3d at 901.


III. ANALYSIS

The government alleges that Bolton breached his fiduciary duties and contractual obligations by failing to complete prepublication review and by disclosing classified information. Accordingly, to prevail on his motion to dismiss, Bolton must show either that he did not have those obligations or, even if he had them, that he did not breach them.

The Court first analyzes Bolton's prepublication review obligations under the SCI agreements and the classified information agreement. See infra Section III.A. Next, the Court analyzes Bolton's nondisclosure obligations under both agreements. See infra Section III.B. Finally, the Court need not, and accordingly does not, address whether Bolton owed the government fiduciary duties to complete prepublication review and to refrain from disclosing classified information. See infra Section III.C.

A. Prepublication Review Requirement (Count 1)

The government argues that (1) the SCI agreements and (2) the classified information agreement require Bolton to complete prepublication review. The Court holds that the SCI agreements require Bolton to complete full prepublication review and that the classified information agreement requires Bolton merely to receive authorization before disclosure.

1. SCI Agreements

Paragraph three of the SCI agreements requires predisclosure consultation under certain circumstances. A recipient of SCI agrees that:

Ex. A at 4, ¶ 3. Accordingly, the provision conditionally requires consultation—but not review—when a recipient has “reason to believe [that information] might be [SCI], or related to or derived from SCI.” Id. at 4, ¶ 3. In that case, he must consult with the agency that cleared him to verify whether the information is in fact SCI. Id. The government does not expressly allege that Bolton had reason to believe his manuscript contained information that “might be, or related to or derived from SCI” before he disclosed it. Therefore, Bolton was not required to engage in predisclosure consultation with the government. But this is not the end of the analysis.
To “give the United States a reasonable opportunity to determine whether” a draft publication contains SCI, id. at 4, ¶ 5, paragraph four of the agreements imposes an easily triggered prepublication review requirement. The provision provides that a recipient:

agree[s] to submit for security review by the Department or Agency that last authorized [his] access to such information or material, any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [he has] reason to believe are derived from SCI, that [he] contemplate[s] disclosing to any person not authorized to have access to SCI or that [he has] prepared for public disclosure. [He] understand[s] and agree[s] that [his] obligation to submit such preparations for review applies during the course of [his] access to SCI and thereafter, and [he] agree[s] to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI.

*6 The government sufficiently alleges that Bolton's manuscript met both a disclosure threshold and an SCI nexus. No one disputes that Bolton prepared his manuscript for public disclosure: he signed a contract to publish it as a book. And though the complaint does not allege that the manuscript (b) purported to contain SCI or (c) contained materials that Bolton had had “reason to believe are derived from SCI,” it does allege that the manuscript (a) describes activities related to SCI, 5 First Am. Compl. ¶ 59, Under the plain terms of the agreement, that fact, if proven, would provide an SCI nexus and would have required Bolton to not publish the manuscript until he “received written authorization” from the government. Ex. A at 4, ¶ 4.

Not only did the SCI agreements prohibit publication before written authorization, but they also obligated Bolton not to share the contents of the manuscript with anyone until he received written clearance. Id. The agreements provide that a recipient of SCI:

further agree[s] that [he] will not disclose the contents of such preparation with, or show it to, anyone who is not authorized to have access to SCI until [he has] received written authorization from the Department or Agency that last authorized [his] access to SCI that such disclosure is permitted.

Bolton raises four arguments to the contrary. None are convincing.
First, Bolton argues that every SCI nexus requires scienter. He says that because the agreements twice refer to “contemplate[d]” disclosure of SCI, the Court should interpret the nexuses as applying only when a recipient of SCI knows or should know that he is disclosing SCI. But two isolated references in a compact yet detailed agreement cannot overcome the agreements’ express text. The first reference appears in a provision acknowledging indoctrination in procedures for “contemplate[d]” disclosure of SCI. Ex. A at 4, ¶ 2. That Bolton was trained in how to disclose SCI does not change his other obligations under the agreements—though that training may belie his assertion that he had no reason to believe he must submit his manuscript for prepublication review. Nor does the provision’s reference to contemplated disclosure change the meaning of the word disclosure when it appears unmodified elsewhere in the agreements. The agreements also reference contemplated disclosure in describing one of the two disclosure thresholds to trigger prepublication review. To restate, the SCI agreements’ prepublication review requirement requires a recipient to:

submit for security review ... any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [he] ha[s] reason to believe are derived from SCI, that [he] contemplate[s] disclosing to any person not authorized to have access to SCI or that [he has] prepared for public disclosure.

The disclosure thresholds—“that [he] contemplate[s] disclosing to any person not authorized to have access to SCI” and “that [he has] prepared for public disclosure”—appear in parallel adjectival phrases modifying “writing” and “preparation.” And the SCI nexuses appear in another adjectival phrase also modifying “writing” and “preparation.” Syntactically, an adjectival phrase containing a disclosure threshold cannot modify either the adjectival phrase containing the other disclosure threshold or a third adjectival phrase containing the SCI nexuses. Rather, all three phrases modify the nouns “writing” and “preparation.” The SCI nexuses are an independent requirement, and do not require scienter except as expressly provided for material that a recipient “ha[s] reason to believe” is derived from SCI. The SCI nexuses do not require Bolton to have contemplated disclosing SCI or material related to or describing SCI; they simply require that he prepare for public disclosure a manuscript meeting an SCI nexus.

*7 [8] The other two nexuses are, by their terms, strict liability. And that makes sense. Contractual requirements impose strict liability by default. See Restatement (Second) of the Law of Contracts, ch. 11, introductory note (1981) (“Contract liability is strict liability.... The obligor is therefore liable in damages for breach of contract even if he is without fault ....”). Here, only one of the SCI nexuses requires that the recipient act with a specific state of mind, because only that nexus references a state of mind. See Legal Aid Soc’y of N.Y. v. United States, 92 Fed. Cl. 285, 299 (2010) (“Under the doctrine of expressio unius est exclusio alterius, it is well-settled that ‘[w]here certain things are specified in detail in a contract, other things of the same general character relating to the same matter are generally held to be excluded by implication.’ ” (quoting Grover C. Grismore, Principles of the Law of Contracts § 105, at 164 (1947))). And Bolton cannot overcome the default presumption, because strict liability serves the agreements’ overriding purpose. By holding a recipient who shirks his prepublication review requirements strictly liable, the agreements incentivize recipients of SCI to undergo prepublication review. And in so doing, the agreements protect SCI.

[9] Second, Bolton claims that the First Amendment prohibits the government from requiring him to submit writings for prepublication review when he neither believes nor has reason to believe that the writings contain SCI. Bolton roots his argument in the idea that prepublication review requirements must be reasonably necessary to protect the government's interest in protecting the material under review. And, claims Bolton, the SCI agreements require prepublication review of everything he writes “from Op-Eds and blog posts to cookbooks.” Def.’s Br. 32. Thus, he argues, the SCI agreements unreasonably require prepublication review. But the contracts do no such thing: they require review when materials are, relate to, or purport to be SCI or describe activities that produce or relate to SCI. See Ex. A at 4,
4. While the National Security Advisor's role may require many of his writings to be submitted for prepublication review, the nexuses apply only to information related to intelligence sources and methods. Bolton may freely publish a cookbook, unless he intends to edit a set of recipes from CIA operatives and sources. And even then, he might be in the clear. Cf. Letter from Michael Pompeo, Director, CIA, to Benjamin Wittes, Editor-in-Chief, Lawfare (Dec. 29, 2017), https://www.lawfareblog.com/letter-michael-pompeo (disclosing Pompeo family fudge recipe). Additionally, prepublication review does not allow the government to permanently restrain a former employee from publishing unclassified information. Many authors complete review and publish their writings, even when those writings criticize the administration reviewing them. See, e.g., Robert M. Gates, Duty: Memoirs of a Secretary at War (2015) (former Defense Secretary's critical assessment of his time in Bush and Obama administrations). Indeed, the SCI agreements require swift action: the government must make an initial response to a submission within thirty working days. Ex. A at 4, ¶ 5. Here, for example, Knight provided an initial response twenty-four calendar days after Bolton submitted his manuscript. First Am. Compl. ¶¶ 31, 33; Ex. D; Ex. E. Prepublication review slows, but does not prevent, former officials’ speech. And this fact curtails the process's First Amendment implications.

Further, controlling law forecloses Bolton's argument. In Snepp v. United States, the Supreme Court rejected a First Amendment challenge to a stricter prepublication review requirement found in a former CIA agent's nondisclosure agreement. 444 U.S. 507, 509 n.3, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980). Snepp, the CIA agent, signed an agreement promising to "not ... publish ... any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment ... without specific prior approval by the Agency." Id. at 508, 100 S.Ct. 763 (alterations and omissions in original) (emphasis added). The Supreme Court held that because “[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service;” Id. at 509 n.3, 100 S.Ct. 763, Snepp's agreement "[w]as a reasonable means for protecting this vital interest," Id.; see also Wilson v. C.I.A., 586 F.3d 171, 183–84 (2d Cir. 2009); McGehee v. Casey, 718 F.2d 1137, 1140 (D.C. Cir. 1983); United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972). Snepp's agreement thus subjected far more to prepublication review than Bolton's. In fact, Bolton admits as much. Hr'g Tr. 4:6–17 (Sept. 24, 2020) ("[T]he scope of Snepp's prepublication review and approval obligation could not have been broader... [I]f Ambassador Bolton had signed an agreement like Snepp's we wouldn't be here today ... ") , ECF No. 55. While Bolton's SCI agreements required prepublication review only for writings that meet an SCI nexus, Snepp's agreement covered anything related to the CIA and to intelligence more broadly. Compare 444 U.S. at 508, 100 S.Ct. 763, with Ex. A at 4, ¶ 4. As the government could constitutionally require Snepp to submit for review any writings related to intelligence activities, so too can the government require Bolton to submit for review writings related to the narrower category of intelligence sources and methods. Therefore, enforcing the plain meaning of the agreement does not offend the First Amendment.

*8 Bolton also argues that the government would violate the First Amendment if it required prepublication review of "harmless" material—material which he had no reason to know related to SCI. That argument fails for two reasons. First, and most importantly, the agreement in Snepp did precisely that. It imposed a blanket prepublication review requirement for any writings related to a signatory's CIA employment regardless of whether they contained classified information. And the Supreme Court upheld it. Second, as the Court explains below, the government has a compelling interest in reviewing information related to SCI prior to its disclosure. See infra p. ——; cf. CIA v. Sims, 471 U.S. 159, 178, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985) (approving of the withholding of seemingly innocuous information to protect intelligence sources in context of FOIA); Marchetti, 466 F.2d at 1318 (“The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.”). The government has the power to prevent harm to the national security. While the government may not prevent Bolton from publishing unclassified materials, it may require him to undergo a reasonable prepublication review
process. See *Wilson, 586 F.3d at 184–86; *Marchetti, 466 F.2d at 1317. The SCI agreements are thus consistent with the First Amendment.

Next, Bolton argues that the government failed to allege that the material in his manuscript was classified as SCI when he disclosed it. The complaint does not explicitly allege when the government classified the material as SCI. But it need not. The relevant SCI nexus requires only that the writing describe activities related to SCI. And the complaint adequately alleges that Bolton's manuscript, as prepared for publication, had that nexus to SCI and thus triggered prepublication review. See *First Am. Compl. ¶¶ 7, 21. Bolton wrote a memoir of his time serving as National Security Advisor—a role pervaded with SCI. See id. Accordingly, writing a book about the work of the National Security Advisor alone triggers prepublication review, because any detailed description of the National Security Advisor's work relates to SCI.

Fourth, Bolton argues that the contract should be construed against the government.

To start, Bolton argues that the agreements are contracts of adhesion and thus should be construed against their drafter. The SCI agreements are, notwithstanding the government's protestations, contracts of adhesion, because Bolton—no matter how sophisticated a lawyer he may be—had no opportunity to negotiate their terms. See *City of Gettysburg v. United States, 64 Fed. Cl. 429, 451 (2005) ("An adhesion contract is a form of contract unilaterally drafted by one party and presented to the other party on a “take-it-or-leave-it” basis."); aff'd, 173 F. App'x 827 (Fed. Cir. 2006); see also 11 Williston on Contracts § 32:12. But a contract of adhesion is still a valid contract. If, after exhausting its interpretive toolbox, the Court still found genuine ambiguity in the contracts, it might construe ambiguous provisions in favor of Bolton. See *Gardiner, Kamya & Assocs., P.C. v. Jackson, 467 F.3d 1348, 1352 (Fed. Cir. 2006) ("[C]ontra proferentem is a ‘rule of last resort.’"); see also 11 Williston on Contracts § 32:12. Here, however, the Court holds that the contracts unambiguously set out Bolton's duties. Without intractable ambiguity in the agreements, *contra proferentem offers Bolton no help.

*9 Next, Bolton argues that the agreements cannot require prepublication review when a recipient has no reason to know that his writing contains SCI. Bolton contends that such an interpretation would be absurd and would render superfluous the consultation requirement in paragraph three and the nondisclosure requirement in paragraph four. He further claims that if the mere presence of SCI triggered prepublication review, there would be no need for the purported-SCI or reason-to-believe nexuses.

Bolton fails to recognize that each of the SCI nexuses is broader than a simple presence-of-SCI trigger and that the nondisclosure and consultation requirements provide additional protections for SCI. Take the SCI nexuses. Each provision offers a distinct nexus which, when combined with a disclosure threshold, obliges a recipient to submit material for prepublication review. That principle is easiest to understand in the context of non-SCI information that purports to be SCI. If a national security official intends to publish information that he claims he derived from intelligence sources and methods, his employer may well want to know about those plans regardless of whether the information is actually SCI. At the very least, his employer could want to ensure that the information is properly unclassified. That desire to safeguard intelligence sources and methods is hardly absurd. Indeed, because disclosing SCI may endanger lives, cf. *Fitzgibbon v. CIA, 911 F.2d 755, 763–64 (D.C. Cir. 1990), the only reasonable construction of the agreements is one that allows the government to secure SCI. Similarly, take the requirement not to disclose information known to be or marked as SCI. Information that bore an SCI paragraph marker and which had subsequently been declassified would not require prepublication review under Bolton's interpretation of the contract. But the government would not act absurdly if it reviewed that material out of an abundance of caution, especially because items of intelligence may be harmless individually yet critically sensitive when combined. *Halkin v. Helms, 598 F.2d 1, 8–9 (D.C. Cir. 1978) (citing *Marchetti, 466 F.2d at 1318).

The Court prefers to give meaning to all parts of a contract, *United Int'l Investigative Servs. v. United States, 109 F.3d 734, 737 (Fed. Cir. 1997), but its reading does not create superfluity.
Moreover, in the context of a contract that protects the nation's most sensitive intelligence information, the Court acknowledges that the government may have drafted broadly out of a sense of caution. In such a case, the rule against surplusage carries less weight. Cf. Ethan J. Leib & James J. Brudney, The Belt-and-Suspenders Canon, 105 Iowa L. Rev. 735, 750 (2020) (discussing caution as a motive in repetitive statutory drafting).

Paragraphs three and four of the agreement impose a number of similar but distinct requirements; their potential for redundancy, however, does not render any of them superfluous. [12] [13] Last, Bolton argues that the Court must interpret the agreement to avoid unresolved First Amendment questions. To be sure, when interpreting statutes, courts must try to avoid constructions that create serious doubt as to constitutionality. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). At least in some circumstances, the courts also avoid tough constitutional questions in interpreting contracts. See, e.g., United States v. Winstar Corp., 518 U.S. 839, 875, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). But Snepp controls and resolves Bolton's First Amendment arguments. And when binding precedent answers a question, “there are no constitutional rulings to be avoided.” Ali v. Trump, 959 F.3d 364, 373 (D.C. Cir. 2020). To invoke the constitutional doubt canon a litigant must show both ambiguity and an unanswered constitutional question. Bolton fails to do either.

Because all four of Bolton's arguments for why the Court should make presumptions in his favor fail, the Court rests its analysis on the contracts’ plain meaning.

The SCI agreements required Bolton to complete prepublication review.

2. Classified Information Agreement

The Government also argues that the classified information agreement imposes a prepublication review requirement. The classified information agreement provides that a recipient of classified information: agree[s] that [he] will never divulge classified information to anyone unless: (a) [he has] officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) [he has] been given prior written notice of authorization ... that such disclosure is permitted. [He] understand[s] that if [he is] uncertain about the classification status of information, [he is] required to confirm from an authorized official that the information is unclassified before [he] may disclose it, except to a person as provided in (a) or (b), above.

Ex. A at 2, ¶ 3.

Unlike the SCI agreements, the classified information agreement does not require prepublication review. It simply requires predisclosure authorization. Paragraph three requires a recipient to ensure that anyone he shares that information with is authorized to receive it. And it requires that a recipient who is uncertain whether information is classified verify its status prior to disclosure. The agreement does not refer to a “security review” or anything like it. It does not presume that the recipient has written anything capable of review. And, unlike the CIA agreement at issue in Marchetti, it does not refer to publication. See 466 F.2d at 1312 n.1 (“I do solemnly swear that I will never divulge, publish or reveal ... any classified information ....” (emphasis added)). Rather, the provision simply functions as a precautionary check. While a person bound by the classified information agreement may freely share unclassified information, he may share classified information only (a) to those authorized to receive it or (b) with written permission. And if a person bound by the classified information agreement is not certain whether the information he wants to share is classified, he must verify the information's status.
The government sufficiently alleges that Bolton disclosed information without confirming that the information was unclassified. First, in alleging that Bolton submitted his manuscript for review and that the material Bolton submitted actually contained classified information, the government alleges sufficient facts to allow a factfinder to conclude that Bolton was uncertain as to the status of the information. First Am. Compl. ¶¶ 31–33, 44–45. Even if Bolton operated out of an abundance of caution in submitting his manuscript for review, the very existence of his caution leads to a fair inference that Bolton was less than certain as to the status of the manuscript. And the allegation that classified material was actually present in the manuscript makes it more likely that Bolton harbored doubts as to whether everything in his manuscript was unclassified. Cf. United States v. James, 169 F.3d 1210, 1214 (9th Cir. 1999). Certainty, after all, is a high bar to clear. — an iota of doubt would render Bolton uncertain. Second, in alleging that Bolton disclosed the manuscript both during and after Knight's review, the government alleges sufficient facts to allow a factfinder to conclude that Bolton disclosed the information prior to receiving confirmation that the material was unclassified. First Am. Compl. ¶¶ 35, 37–38, 46–47, 49–50, 53. If proven, those allegations would demonstrate that Bolton breached his predisclosure consultation requirement.

In response, Bolton contends that he did not believe the manuscript contained classified information and that Knight confirmed that the manuscript did not contain classified information. If Bolton can prove either of those claims, he would demonstrate that he complied with the predisclosure consultation requirement. In ruling on a motion to dismiss, however, the Court may look only to the face of the complaint and must draw all reasonable inferences in favor of the plaintiff. The complaint does not allege that Knight told Bolton his manuscript was cleared. See id. at ¶¶ 46–48, 49–50 (alleging only that Knight told the NSC legal staff that she believed the manuscript did not contain classified information and that Knight told Bolton the review was ongoing). And the complaint does not contain enough material to defeat the inference that Bolton doubted whether the information in his manuscript was classified. Because at this stage the Court cannot consider Bolton's contradictory arguments, it must permit the government's claim for breach of the predisclosure consultation requirement to proceed.

1. SCI Agreements

The SCI agreements provide that a recipient of SCI may “never divulge anything marked as SCI or that [he] know[s] to be SCI to anyone who is not authorized to receive it without prior written authorization.” Ex. A at 4, ¶ 3. The agreement thus expressly prohibits unauthorized disclosure of marked or known SCI. It does not prohibit unknowing disclosure of unmarked SCI.

2. Classified Information Agreement

The classified information agreement provides that a recipient of classified information may “never divulge classified information to anyone unless: (a) [he] have[s] officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) [he has] been given prior written notice of authorization.” Id. at 2, ¶ 3. The agreement thus prohibits unauthorized disclosure of classified information; that is, of marked or unmarked information that is classified or in the classification process. Id. at 2, ¶ 1.

In sum, the government sufficiently alleges that Bolton breached his prepublication review and predisclosure consultation obligations.

**B. Nondisclosure Requirement (Count 2)**

The government argues that (1) the SCI agreements and (2) the classified information agreement prohibit Bolton from disclosing classified information. The Court holds that the classified information agreement—but not the SCI agreements—prohibits conduct in which the government alleges Bolton engaged.

**1. SCI Agreements**

The SCI agreements provide that a recipient of SCI may “never divulge anything marked as SCI or that [he] know[s] to be SCI to anyone who is not authorized to receive it without prior written authorization.” Ex. A at 4, ¶ 3. The agreement thus expressly prohibits unauthorized disclosure of marked or known SCI. It does not prohibit unknowing disclosure of unmarked SCI.

**2. Classified Information Agreement**

The classified information agreement provides that a recipient of classified information may “never divulge classified information to anyone unless: (a) [he has] officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) [he has] been given prior written notice of authorization.” Id. at 2, ¶ 3. The agreement thus prohibits unauthorized disclosure of classified information; that is, of marked or unmarked information that is classified or in the classification process. Id. at 2, ¶ 1.

The complaint does not allege that Bolton knowingly disclosed SCI or that he disclosed marked SCI. The complaint thus does not state a claim for breach of the SCI agreements' nondisclosure provision.

The complaint alleges that Bolton disclosed classified information without prior written authorization. See First Am.
Compl. ¶¶ 59, 61. Accordingly, the government has stated a prima facie claim for breach of the classified information agreement's nondisclosure requirement.

[17] Bolton attempts to read a scienter requirement into the classified information agreement. He argues that requiring him to consult with his agency in cases of uncertainty would be pointless if he were strictly liable for disclosing classified information. From this, he draws the conclusion that he is only liable for knowing disclosures. That argument fails to take account of the agreement's text, subject matter, and structure.

[18] First, unlike parts of the SCI agreements, the classified information agreement is silent on the recipient's state of mind when he discloses classified information. The government knows how to prohibit only knowing disclosures. It did so in the SCI agreement. See Ex. A at 4, ¶ 3 (“I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI ....”). But it did not so limit the prohibition on disclosing classified information. And when a contract is silent on state of mind, the parties are strictly held to their obligations to perform. See Restatement (Second) of the Law of Contracts, ch. 11, introductory note. Therefore, the contract's plain meaning defeats Bolton's argument.

*12 Second, Bolton's superfluity argument does not make sense in the context of safeguarding classified information. Here, the belt-and-suspenders combination of predisclosure consultation and postdisclosure liability makes sense. If money damages—or even a constructive trust—would adequately remedy unauthorized disclosure, the government would be indifferent between compliance and damages. See Robert L. Birmingham, Breach of Contract, Damage Measures, and Economic Efficiency, 24 Rutgers L. Rev. 273, 284 (1970); cf. Oliver Wendell Holmes The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897). But the government classifies information because its release would damage national security. Exec. Order No. 13,526 at § 1.2, 75 Fed. Reg. at 707. Once information is released, it cannot be resecured. See, e.g., Mem. Order 4, ECF No. 27. Damages are not equivalent to performance when classified information is at risk. In this context, the predisclosure consultation requirement protects classified information from inadvertent disclosure, while the nondisclosure requirement guards against disclosure of all kinds. When classified information is on the line, overlapping precautions are not superfluous.

Third, the classified information agreement's structure indicates that a recipient is strictly liable for disclosing classified information. The nondisclosure and predisclosure provisions must be read together. And reading those provisions of both the SCI agreement and the confidential information agreement together illustrates two different frameworks for protecting classified information: one relying more on ex ante measures and the other on ex post. The SCI agreements impose a stricter predisclosure regime: a full security review. But they also impose a less stringent nondisclosure obligation: a person bound by the SCI agreements may not share marked or known SCI. In short, they heavily burden a recipient's ability to disclose information prior to prepublication review but give the government less recourse to sue a recipient for disclosing SCI after review. In contrast, the classified information agreement imposes a laxer predisclosure regime: mere predisclosure authorization. But it also prohibits any disclosure of classified information. In short, it imposes minimal upfront burdens but strictly prohibits disclosure of classified information and provides the government broad ability to sue for unauthorized disclosures.

Bolton also argues that the complaint fails to allege that the information he disclosed was classified at the time he disclosed it. See Hr'g Tr. 7:17–8:9 (Sept. 24, 2020). Unlike with SCI, however, the complaint alleges that the manuscript contained classified information before Bolton and Knight revised it. First Am. Compl., ¶¶ 33, 39–40, 44, and that Bolton disclosed the manuscript without authorization, id. at ¶¶ 37–38. So the government has satisfied the classified information agreement's temporal requirement.

The classified information agreement obligates Bolton not to disclose classified information without prior written authorization. As the government alleges that Bolton did just that, it has stated a prima facie claim for breach of the classified information agreement.

[19] Bolton additionally argues that imposing a constructive trust on his royalties would violate the First Amendment's prohibition on punishing a speaker for the content of his speech. That argument misapprehends both the nature
of a constructive trust and the protections attached to disseminating classified information.

[20] [21] [22] Though the result might feel like a punishment to Bolton, a constructive trust is an equitable remedy. And equity does not punish. See Liu v. SEC, — U.S. ——, 140 S. Ct. 1936, 1941, 207 L.Ed.2d 401 (2020); see generally Samuel L. Bray, Fiduciary Remedies, in The Oxford Handbook of Fiduciary Law 449 (Evan J. Criddle, et al., eds., 2018). Rather, equity protects rights while avoiding injustice. See Bray, supra at 450. A constructive trust arises by operation of law when one person holds property (the government's classified information) or its traceable proceeds (the royalties) that properly belong to another. See Beatty v. Guggenheim Expl. Co., 225 N.Y. 380, 122 N.E. 378 (1919) (Cardozo, J.); see also Caryl A. Yzenbaard, et al., Bogert's The Law of Trusts and Trustees § 471 (June 2020 update). In short, a constructive trust is appropriate when the trust res never properly belonged to the defendant. In such cases, a constructive trust prevents the defendant's unjust enrichment at the plaintiff's expense. Here, the government theorizes that the royalties Bolton earns from the memoir are the government's property because they are proceeds of the government's misappropriated classified information. Indeed, under the agreements, Bolton acknowledged that SCI and classified information were government property, Ex. A at 2, ¶ 7; 4, ¶ 8, and assigned his royalties to the government upon breach. Id. at 2, ¶ 5; 5, ¶ 12. If the government proves its theory, it will regain its rightful property. A constructive trust would no more punish Bolton than replevin punishes a converter.

*13 [23] Nor does the First Amendment prohibit punishing those who unlawfully disclose classified information. See New York Times Co. v. United States, 403 U.S. 713, 735, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (White, J., concurring). “If the Government classified the information properly, then [a recipient] simply has no [F]irst [A]mendment right to publish it.” Stillman, 319 F.3d at 548; accord Wilson, 586 F.3d at 183; see also McGehee, 718 F.2d at 1147. Thus, even if the remedy the government sought did punish Bolton, the First Amendment would offer him no refuge.

The classified information agreement lawfully prohibits Bolton from disclosing classified information without authorization.

* * *

In sum, the government sufficiently alleges that Bolton breached his nondisclosure obligations.

C. Fiduciary Duty

The government also argues that Bolton owed a fiduciary duty to complete prepublication review and to refrain from disclosing classified information.

The Court will follow Snepp in declining to reach those issues. In Snepp, the Supreme Court reasoned that “since this case involves the breach of a trust agreement that specifically required ... prepublication review ... we need not look to the common law to determine the scope of Snepp's fiduciary obligation.” 444 U.S. at 515 n.11, 100 S.Ct. 763. Here, where the agreements clearly delineate prepublication review and nondisclosure requirements, the Court will look to the agreements to define Bolton's duties.

IV. CONCLUSION

Count One in the government's complaint alleges that Bolton breached his prepublication review obligations. Having found that the government alleges sufficient facts to support its claim that Bolton violated these obligations in the SCI agreements and classified information agreement, the Court will not dismiss Count One.

Count Two in the government's complaint alleges that Bolton breached his nondisclosure obligations. Having found that the government alleges sufficient facts to support its claim that Bolton violated these obligations in the classified information agreement, the Court will not dismiss Count Two.

Count Three in the government's complaint alleges that the government is entitled to a constructive trust over Bolton's royalties as a result of the conduct that underlies Counts One and Two. Having declined to dismiss the substantive claims in Counts One and Two, the Court will not dismiss the remedial claim in Count Three.
Therefore, the Court will deny the motion to dismiss by separate order.

All Citations

--- F.Supp.3d ----, 2020 WL 5866623

Footnotes

1 All references to exhibits refer to the exhibits to the original complaint, ECF No. 1. The United States did not refile the exhibits attached to the original complaint when it filed the first amended complaint, but the first amended complaint refers to the exhibits as if they were attached. See He Depu v. Yahoo! Inc., 950 F.3d 897, 901 (D.C. Cir. 2020) ("In deciding a motion to dismiss, a court may ... consider documents 'attached to or incorporated in the complaint.'").

2 As the Court must accept as true all well-pleaded facts in a complaint when resolving a motion to dismiss, see Sissel v. U.S. Dept of Health & Hum. Servs., 760 F.3d 1, 4 (D.C. Cir. 2014), the facts in this section are drawn from the first amended complaint.

3 Bolton signed two copies of Form 4414 because each allowed him to access different Special Access Programs, which provide compartmented security for SCI. The terms of the two agreements are identical, except that the agreements list different Special Access Programs.

4 In addition to its response, the government moved for summary judgment, ECF No. 44, and Bolton, in turn, sought to delay consideration of the summary judgment motion under Rule 56(d), ECF No. 49. Those motions remain pending.

5 It also alleges that the manuscript contained SCI but fails to allege that the material was classified as SCI or was in the process of being classified as SCI at the time Bolton disclosed it. See infra p. —— & n.7.

6 Bolton also argues that the complaint does not detail what SCI he disclosed. Yet the complaint puts Bolton on notice as to the theory under which the government is proceeding. The government is not required to publicly divulge classified information to meet notice-pleading requirements. Cf. Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003) (instructing courts to handle ex parte classified materials unless further disclosure is unavoidable).

7 The record might support such an allegation, see, e.g., Hr'g Tr. 10:9–24 (June 20, 2020) (“Three of the examples, including the example relating to TS/SCI were classified before Mr. Ellis's review.”), ECF No. 28, but in the context of a Rule 12(b)(6) motion, the Court may consider only the complaint.


9 "A person may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head ...; (2) the person has signed an approved nondisclosure
The government argues that the classified information agreement should be read to impose an objective standard for predisclosure consultation. If the agreement required consultation when a recipient should be uncertain about the classified status of information, the government would be correct. But the agreement does not contain that critical language. Instead, the requirement to consult turns on whether the recipient was in fact uncertain. To be sure, courts construe contracts objectively. But the objective theory of contracts means only that courts look to the parties’ objective manifestations of intent in forming a contract. See 11 Williston on Contracts § 31:4. It does not prevent contracts from basing obligations on a party’s subjective understanding of facts.

A person is certain when he is “[f]ully confident upon the ground of knowledge, or other evidence believed to be infallible; having no doubt; assured; sure.” Certain, II The Oxford English Dictionary 1051 (2d ed. 1989). But “[c]ertitude is not the test of certainty. We have been cock-sure of many things that were not so.” Oliver Wendell Holmes, Collected Legal Papers 311 (1920).

Thus, whether such a communication would have to be in writing—as Bolton maintains—is immaterial.
Synopsis

Background: Government moved for temporary restraining order or preliminary injunction to prevent publication of tell-all book authored by former National Security Advisor.

Holdings: The District Court, Royce C. Lamberth, Senior District Judge, held that:

[1] government demonstrated the requisite likelihood of success in showing that classified information had been published, but

[2] government was not entitled to injunctive relief to prevent publication and to require destruction of numerous copies of book that had already been shipped both domestically and internationally, given that injunction would no longer prevent irreparable injury.

Motion denied.

Procedural Posture(s): Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO).

West Headnotes (8)

[1] Injunction Extraordinary or unusual nature of remedy

Preliminary injunction is an extraordinary remedy.

[2] Injunction Grounds in general; multiple factors

Injunction Clear showing or proof

To obtain a preliminary injunction, movant must make a clear showing that four factors, taken together, warrant relief: (1) a substantial likelihood of success on the merits, (2) that the movant will suffer irreparable injury if injunction is not granted, (3) that an injunction will not substantially injure other interested parties, and (4) that the public interest will be furthered by the injunction.

[3] Injunction Clear, likely, threatened, anticipated, or intended injury

Injunction Irreparable injury

Regardless of a movant's high likelihood of success on the merits, he or she still must demonstrate that irreparable injury is likely in the absence of an injunction in order to obtain preliminary injunctive relief.


Injunction Armed services and national security

On motion for temporary restraining order or preliminary injunction to prevent publication of tell-all book authored by former National Security Advisor, and to require destruction of numerous copies of book that had already been shipped both domestically and internationally to various retail booksellers from national chains and online entities to host of small, independent retailers, government demonstrated a likelihood of success in demonstrating that former National Security Advisor, in “pull[ing] the plug” on security review process and sending his still-under-review manuscript to publisher for printing, had likely published classified information and not only jeopardized national
security interests but his own right to retain profits from publication of book.

1 Cases that cite this headnote

[5] Constitutional Law Public Employees and Officials
Mandated prepublication review process for publication of books and other works by former government employees that contain potentially sensitive information is not an unconstitutional prior restraint on free speech. U.S. Const. Amend. 1.

[6] Constitutional Law Public Employees and Officials
First Amendment rights are preserved, in connection with mandatory prepublication review process for publication of books and other works by former government employees that contain potentially sensitive information, as long as restrictions protect a substantial government interest unrelated to the suppression of free speech, and the restrictions are narrowly drawn to restrict speech no more than is necessary to protect the substantial government interest. U.S. Const. Amend. 1.

[7] Injunction Publishing, journalism, and bookselling
Injunction Armed services and national security
While government, in moving for temporary restraining order (TRO) or preliminary injunction to prevent publication of tell-all book authored by former National Security Advisor, had demonstrated likelihood of success in showing that former National Security Advisor had likely published classified information by “pull[ing] the plug” on security review process and sending his still-under-review manuscript to publisher for printing, government was not entitled to injunctive relief to prevent publication and to require destruction of numerous copies of book that had already been shipped both domestically and internationally, given that book had already been released and copies thereof were in possession of hundreds booksellers and various news organizations, and that injunction would no longer prevent irreparable injury now that “horse [wa]s already out of the barn,” indeed the country.

1 Cases that cite this headnote

[8] Federal Civil Procedure In general; injury or interest
Federal Civil Procedure Causation; redressability
Article III standing requires a plaintiff to allege injury-in-fact, causation, and redressability. U.S. Const. art. 3, § 1 et seq.

Attorneys and Law Firms


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MEMORANDUM ORDER

Royce C. Lamberth, United States District Judge

Before the Court is the government's motion for a temporary restraining order and preliminary injunction to enjoin defendant John Bolton from publishing his book. Mot., ECF No. 3. The book, a political memoir reflecting on Bolton's tenure as National Security Advisor, has been printed, bound, and shipped across the country. It is due for national release on Tuesday, June 23, 2020. The government insists that the book contains sensitive information that could compromise national security and alleges that Bolton
prematurely halted his prepublication review process in order to proceed to publication. Defendant Bolton characterizes his actions differently—he emphasizes his substantial and extensive compliance with the review process and dismisses the government's recent objections to his manuscripts as pretextual and politically motivated. While Bolton's unilateral conduct raises grave national security concerns, the government has not established that an injunction is an appropriate remedy.

I. BACKGROUND

John Bolton accepted a role as National Security Advisor in April 2018. In this position, Bolton directed and supervised the work of the National Security Council (“NSC”) staff on behalf of the President. He left his post on September 10, 2019. Within two months, Bolton had secured a book deal with publisher Simon & Schuster.

The government anticipates that public officials will seek to publish accounts of their experiences. When those officials have access to sensitive information that implicates national security, the government guards that information by conditioning employment on a guarantee of nondisclosure. Bolton accepted this condition of employment and executed multiple nondisclosure agreements with the government. In one agreement, Standard Form 312, Bolton agreed that he would “never divulge classified information to anyone unless: (a) [he has] officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) [he has] been given prior written notice of authorization from the United States Government ... that such disclosure is permitted.” SF 312 ¶ 3. In the event Bolton was “uncertain about the classification status of information, [he was] required to confirm from an authorized official that the information is unclassified before [he] may disclose it.” Id. Violation could result in “assign[ing] to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of [SF 312].” Id. ¶ 5. Bolton agreed to abide by the restrictions in SF 312 “[u]nless and until [he is] released in writing by an authorized representative of the United States Government.” Id. ¶ 8.

Another agreement, Form 4414, detailed conditions Bolton must follow to gain access to highly classified sensitive compartmented information (“SCI”). Here, Bolton agreed to “submit for security review ... any writing or other preparation in any form ... that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [he has] reason to believe are derived from SCI, that [he] contemplate[s] disclosing to any person not authorized to have access to SCI or that [he] has prepared for public disclosure.” Form 4414 ¶ 4. Bolton promised “not [to] disclose the contents of such preparation with, or show[ ] it to, anyone who is not authorized to have access to SCI until [he had] received written authorization ... that such disclosure is permitted.” Id.

In December 2019, Bolton submitted a draft manuscript to the NSC for prepublication review. Over the following four months, Bolton worked to incorporate the edits he received from the Senior Director for Records Access and Information Security Management at the NSC, Ellen Knight. These edits were iterative and extensive, and on April 27, 2020, Knight communicated to Bolton that she no longer considered the manuscript to contain classified material. Bolton Decl. ¶ 16, ECF No. 9-1. Bolton claims that he and Knight discussed the possibility that the final written authorization might be ready as early as that afternoon. Id. ¶ 17.

The written authorization did not issue, and Knight soon clarified that the process was ongoing. Mitman Decl., Ex. I, ECF No. 3-14. Weeks passed without further communication between Bolton and the government. On June 8, 2020, John Eisenberg, Deputy White House Counsel and Legal Advisor to the NSC, issued a letter to Bolton that claimed the manuscript still contained classified information. Mitman Decl., Ex. J, ECF No. 3-15. By that point, Bolton had already delivered a final manuscript to his publisher for printing and shipping, without written authorization and without notice to the government.

What is the government asking this Court to do about it? Its proposed order seeks a Temporary Restraining Order (“TRO”) or Preliminary Injunction that would:

1. Enjoin Bolton from “proceeding with the publication of his book in any form or media without first obtaining written authorization from the United States through the prepublication review process;”
2. Require Bolton to “ensure that his publisher and resellers receive notice that the book contains classified information that he was not authorized to disclose;”

3. Require Bolton to “instruct his publisher to delay the release date of the book pending the completion of the prepublication review process and authorization from the United States that no classified information remains in the book;”

4. Require Bolton to “instruct his publisher to take any and all available steps to retrieve and destroy any copies of the book that may be in the possession of any third party;”

5. Enjoin Bolton from “taking any additional steps toward[s] public[ly] disclosing classified information without first obtaining authorization from the United States through the prepublication review process;” and

6. Require Bolton to “ensure that his publisher and resellers receive notice of [the injunction].”

Proposed Order, ECF No. 3-19.

The government does not name Simon & Schuster as a defendant in the case. Instead, the government seeks to secure Simon & Schuster’s compliance by way of enjoining Bolton. Federal Rule of Civil Procedure 65(d)(2) instructs that an injunction or TRO binds not only the parties, but also “the parties’ officers, agents, servants, employees, and attorneys,” and “all other persons who are in active concert or participation with” the parties, if they receive actual notice of the order.

II. LEGAL STANDARD


[3] In the past, the D.C. Circuit has applied a “sliding scale” approach to the four factors, holding that injunctive relief “may be granted with either a high likelihood of success and some injury, or vice versa.” Cuomo v. U.S. Nuclear Regulatory Comm’n, 772 F.2d 972, 974 (D.C. Cir. 1985). The Supreme Court, however, suggests that the “sliding scale” approach has fallen out of favor. See Winter, 555 U.S. at 22–24, 129 S.Ct. 365. In Winter, the Court specifically stated that regardless of a movant's high likelihood of success on the merits, he or she still must “demonstrate that irreparable injury is likely in the absence of an injunction.” Id. at 22, 129 S.Ct. 365.

The D.C. Circuit has expressly declined to address the viability of the “sliding scale” approach post-Winter. See Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009) (stating that “[w]e need not decide whether” that approach is still viable “because the [movants] fail even under the ‘sliding scale’ analysis”). Other courts have found that Winter prohibits use of the “sliding scale” approach. See, e.g., Am. Trucking Ass'n v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009); Daily Caller v. U.S. Dep't of State, 152 F. Supp. 3d 1, 5–6 (D.D.C. 2015); see also Singh v. McConville, 187 F. Supp. 3d 152, 160 (D.D.C. 2016). Then-Judge Kavanaugh's concurrence in Davis dismissed the applicability of the “sliding scale” approach because Winter requires a movant to “meet four independent requirements” to obtain injunctive relief.

Davis, 571 F.3d at 1295–96.

This Court will apply the standard set forth in Winter—the government must clearly establish all four factors.

III. DISCUSSION
a. Is the government likely to succeed on the merits?

Yes. Bolton disputes that his book contains any such classified information and emphasizes his months-long compliance with the prepublication review process. He bristles at the mixed messages sent by prepublication review personnel and questions the motives of intelligence officers. Bolton could have sued the government and sought relief in court. Instead, he opted out of the review process before its conclusion. Unilateral fast-tracking carried the benefit of publicity and sales, and the cost of substantial risk exposure. This was Bolton’s bet: If he is right and the book does not contain classified information, he keeps the upside mentioned above; but if he is wrong, he stands to lose his profits from the book deal, exposes himself to criminal liability, and imperils national security. Bolton was wrong.

The government submitted classified declarations for the Court's ex parte review in camera. ECF No. 4. On June 19, 2020, the Court held a sealed ex parte hearing for further in camera review with the government. ECF 6/19/20. Upon reviewing the classified materials, as well as the declarations filed on the public docket, ECF No. 3–1–5, the Court is persuaded that Defendant Bolton likely jeopardized national security by disclosing classified information in violation of his nondisclosure agreement obligations.

Bolton was the National Security Advisor to the President. He was entrusted with countless national secrets and privy to countless sensitive dealings. To Bolton, this is a selling point: His book is entitled The Room Where It Happened. He rushed to write an account of his behind-closed-doors experiences and produced over 500 pages of manuscript for review. Not four months later, Bolton pulled the plug on the process and sent the still-under-review manuscript to the publisher for printing. Many Americans are unable to renew their passports within four months, but Bolton complains that reviewing hundreds of pages of a National Security Advisor's tell-all deserves a swifter timetable. Access to sensitive intelligence is rarely consolidated in individuals, and it comes as no surprise to the Court that the government requested several iterations of review headed by multiple officers. But what is reasonable to the Court was intolerable to Bolton, and he proceeded to publication without so much as an email notifying the government.

b. Will the government suffer irreparable injury if an injunction is not granted?

The government has not carried its burden of establishing that an injunction will prevent irreparable injury. At the hearing on the injunction, the Court remarked that given the widespread dissemination of the books, the “horse is already out of the barn.” According to Simon & Schuster Chief Executive Jonathan Karp's affidavit, “[m]ore than 200,000 copies of the Book have already been shipped domestically ... to retail booksellers large and small, from large national chains and online entities to a host of small,
independent, booksellers.” Karp Decl. ¶ 19, ECF No. 9-17.
Indeed, “thousands of copies of the Book [have been shipped] to booksellers around the world, including in Continental Europe, India and the Middle East.” Id. Reviews of and excerpts from the book are widely available online. As noted at the hearing, a CBS News reporter clutched a copy of the book while questioning the White House press secretary. By the looks of it, the horse is not just out of the barn—it is out of the country.

Counsel for the government still press for an injunction. In its motion, the government asks this Court to order Bolton “to instruct his publisher to take any and all available steps to retrieve and destroy any copies of the book that may be in the possession of any third party.” Mot. 27, ECF No. 3. For reasons that hardly need to be stated, the Court will not order a nationwide seizure and destruction of a political memoir.

If nothing else, the government argues, an injunction today would at least prevent any further spread of the book, such as limiting its audiobook release. The argument is unavailing. In taking it upon himself to publish his book without securing final approval from national intelligence authorities, Bolton may indeed have caused the country irreparable harm. But in the Internet age, even a handful of copies in circulation could irrevocably destroy confidentiality. A single dedicated individual with a book in hand could publish its contents far and wide from his local coffee shop. With hundreds of thousands of copies around the globe—many in newsrooms—the damage is done. There is no restoring the status quo.

[8] Remarking on the same, counsel for Bolton questioned the government's standing to seek a preliminary injunction. Article III of the Constitution requires a plaintiff to allege injury-in-fact, causation, and redressability. *7 Carpenter Indus. Council v. Zinke, 854 F.3d 1, 5 (D.C. Cir. 2017); see also Steel Co. v. Citizens for a Better Envt, 523 U.S. 83, 107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (“Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”); Town of Chester v. Laroe Estates, Inc., — U.S. ——, 137 S. Ct. 1645, 1650, 198 L.Ed.2d 64 (2017) (“[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.”) (internal quotations omitted). While the government has made its case for injury and causation, this Court could reframe the factor two reasoning above as demonstrating a lack of redressability. Rather than delve into a full justiciability analysis, the Court is content to rely on both the *Winter factors and the standing argument as sufficient grounds for denial. The Court therefore need not reach further First Amendment concerns in its current posture.

c. Would an injunction substantially injure other interested parties, and would the public interest be furthered by the injunction?

In keeping with the above, any injunction considered by this Court would be so toothless as to not substantially injure anyone. And perhaps the public interest would be nominally served by the gesture. But an injunction remains an untimely solution—resolving these third and fourth *Winter factors in the government's favor does not revive the motion's prospects.

IV. CONCLUSION
Defendant Bolton has gambled with the national security of the United States. He has exposed his country to harm and himself to civil (and potentially criminal) liability. But these facts do not control the motion before the Court. The government has failed to establish that an injunction will prevent irreparable harm. Its motion is accordingly DENIED.

It is SO ORDERED.

All Citations
468 F.Supp.3d 1
MEMORANDUM & ORDER

VITALIANO, D.J.

*1 On October 10, 2018, plaintiff Steven Douglas Coleman commenced this action against Maria Kim Grand, bringing a libel claim and requesting damages of at least $500,000 plus attorney's fees. Grand filed counterclaims alleging libel and intentional infliction of emotional distress (IIED). The parties have cross-moved for summary judgment on their respective claims. For the reasons that follow, both parties' libel claims and Grand's IIED claim fail as a matter of law.

Background

From 2011 to 2016, Coleman and Grand had what both parties characterize as a rocky, on-and-off sexual relationship. Coleman's libel claim arises from a November 2017 email Grand circulated to around 40 friends and industry colleagues, describing her experiences in the relationship and her feeling that Coleman had used his age and status to harass and take advantage of her. See Am. Compl., Dkt. 22, ¶¶ 51–59; Grand Email, Dkt. 1-3; Grand Letter, Dkt. 1-4. Grand's libel counterclaim centers on, among other communications, an email Coleman sent to around 80 people in May 2018 saying her accusations were false, presenting his side of the story and including explicit text messages between the two. See Ans. to Am. Compl., Dkt. 25, ¶¶ 75–92; Coleman Email, Dkt. 87-3.

Grand, an aspiring young saxophonist, met Coleman, a prominent saxophonist, when she attended a 2009 workshop he gave in New York City. Pl.'s 56.1, Dkt. 82-1, ¶ 1. At this first encounter, Coleman was 52 years old and Grand was 17. Def.'s 56.1, Dkt. 85, ¶ 1. Grand, who was visiting the United States from her home in Switzerland, asked Coleman for a lesson and, after first saying he did not work with beginners, he agreed. Def.'s Mem., Dkt. 86, at 4–5. There is no dispute that they did not then begin a sexual relationship, though each says the other was pursuing one. See, e.g., Coleman Tr., Dkt. 82-7, at 454:10–13; Grand Tr., Dkt. 82-6, at 33:22–23.

Grand moved to New York City in 2011, at which point she and Coleman did begin a sexual relationship, though they disagree about who initiated it. Grand Tr. at 34:21–35:8; Am. Compl. ¶ 12. The relationship was never exclusive—Coleman was married and saw other women, and Grand also had other relationships. Def.'s 56.1 ¶ 3. Grand would later say she felt pressured to have sex with Coleman in order for him to continue teaching and working with her, and to avoid his anger. Def.'s Mem. at 5; Grand Tr. at 109:17–110:13, 131:4–132:2. At the same time, she said she was in love with him, was “slightly manipulative” and sometimes initiated sex, which “was never physically forced.” Def.'s Mem. at 5; Grand Tr. at 112:4–5. Coleman says the relationship was fully consensual, often with Grand pursuing him, and that he helped her gain valuable work experience and an O-1 visa. Am. Compl. ¶¶ 10–17.

*2 They split temporarily in 2013, following an argument Grand says was occasioned by Coleman's wife asking for a divorce. Pl.’s 56.1 ¶ 3; Grand Tr. at 111:10–21. Their relationship resumed in 2014 and continued on and off for the next two years with increasing antagonism, especially when they toured together. Grand Tr. at 85:24–86:16, 134:17–135:16; Coleman Tr. at 254:2–16. They had their final sexual encounter in September 2016. Grand Tr. at 57:17–58:21; Pl.’s
6.1 ¶ 5–6. As with much else, they disagree on who initiated it. Grand Tr. at 57:17–58:21, 60:18–25; Pl.’s 56.1 ¶¶ 5–6. In November 2016, Grand told Coleman's manager she no longer wanted to work with Coleman. Pl.’s 56.1 ¶ 7. For the next year, they had little contact. Am. Compl. ¶ 27; Grand Tr. at 62:5–63:15.

In May and October 2017, Grand wrote in emails and texts to Coleman that she intended to speak publicly about her concerns with their relationship, centered on Coleman pursuing her despite the gap in their age and status. Pl.’s 56.1 ¶¶ 8–12. She posted on Facebook in October that, after former Hollywood producer Harvey Weinstein's arrest for sex crimes, she was glad “skeletons are coming out.” Dkt. 1-2. Coleman apparently saw this post, and her other messages, as “threats.” Am. Compl. ¶ 31; Pl.’s 56.1 ¶¶ 10–11. Grand, adding fuel to the fire, flat out denies that they were. Ans. to Am. Compl. ¶ 31. Grand also wrote an email to Coleman's estranged wife in November saying she intended to speak publicly. Pl.’s 56.1 ¶ 13.

These communications led up to the November 2017 email and letter at the heart of Coleman's claim. On November 5, 2017, Grand emailed seven friends, asking for help proofreading an open letter on her relationship with Coleman before she shared it more broadly. Pl.’s 56.1 ¶¶ 17; Dkt. 82-13 at 50. On November 17, Grand sent the finalized seven-page letter to around 40 people, mostly industry colleagues. See Grand Email. It recounted her history with Coleman, but called him “X” because, she said, naming him would be “legally dangerous.” Id. Grand said the letter described her “experience with” “sexism in the music industry,” motivated by her desire to “start [ ] a larger conversation” on the subject. Id.

The letter Grand sent that lit the fireworks began by stating that she felt conversations on sexism were “long overdue,” then detailed what she called an “abusive dynamic” and “sexual harassment” in her relationship with Coleman, focusing on the post-2013 period. Grand Letter at 2. She described various encounters she said disturbed her, such as waking up to find “X” in her hotel bed and having to convince him to leave. But, the letter also acknowledged that she had fallen in love with him and that she was grateful for their time together. Id. at 4, 6, 8. “Simply, the highs were very high and the lows were very low,” she wrote. Id. at 4. Then circling back to where she had begun her letter, Grand claimed that, despite her anxiety and reluctance to “say something,” she was “speaking out” to create change in the industry. Id. at 7–8.

Among the letter's statements Coleman challenges as defamatory are: “About 6 months after I moved to New York in 2011, he convinced me to be intimate with him”; “By that point [in 2013], though, I wasn't in love with him anymore. I didn't want to be intimate with him anymore. That period is when the sexual harassment started.”; and “He would call me in the middle of the night and never take no for an answer.” Id. at 4–5; Pl.’s Mem., Dkt. 83, at 10–14.

There appears to be no dispute that, as Coleman alleges, Grand authorized one of the email's recipients, Okkyung Lee, to share the letter with colleagues and journalists and name Coleman in doing so. Pl.’s 56.1 ¶ 19; Def.’s Reply 56.1, Dkt. 94, ¶ 19; Dkt. 82-13 at 14, 20, 24–25, 31. Nor is there a dispute that, on November 27, Grand named Coleman when sending the letter to seven members of the We Have Voice Collective, a group she and other artists launched “to bring awareness to issues of inequity, including but not limited to sexual harassment and bullying” in the performing arts. Pl.’s 56.1 ¶ 18; Dkt. 82-13 at 2–3; Dkt. 87-16. Grand also sent the letter to Coleman's wife, which is again undisputed. Pl.’s 56.1 ¶ 15; Def.’s Reply 56.1, ¶¶ 15. His wife, Coleman says, knew it was about him. Pl.’s 56.1 ¶¶ 15, 22; Def.’s Reply 56.1, ¶¶ 15, 22.

*3 Coleman claims he found out about Grand's email in January 2018. Coleman Tr. at 209:18–24. He testified that he lost band members as a result of it, and experienced embarrassment and lost productivity. Id. at 193:21–194:9, 199:19–204:3; Pl.’s 56.1 ¶¶ 55–57. He alleges that, to cope, he began receiving massages and seeing a psychotherapist. Coleman Tr. at 180:3–181:23. He asserts that he lost work starting in October 2018. Pl.’s 56.1 ¶¶ 58–67; Dkt. 82-12 at 8–28.

Striking back, on May 5, 2018, Coleman emailed a letter of his own to around 80 people—forming the focus of Grand's counterclaims. See Coleman Email; Def.'s 56.1 ¶ 8; Ans. to Am. Compl. ¶¶ 75–76. He selected recipients whom he thought had received Grand's letter, though some had not. Coleman Tr. at 308:4–14, 312:5–12. He addressed the letter to the We Have Voice Collective. Coleman Email at 2. He said he was “writing this letter to categorically denounce [Grand's] accusation as false, and to appeal to you to hear both sides

of the story before reflexively rushing to judgment.” Id. He said he was doing so now because, the week before, one of the Collective's members had asked Coleman to leave a concert of Grand's, at her request. Id. Like Grand's letter, Coleman's gave his version of the relationship. He said it “was unusual, intense, argumentative, and passionate, but it was also completely consensual and should have been private.” Id. He said each pursued the other, and he never threatened Grand or forced her to do anything, “which thoroughly refutes Maria's accusations of sexual harassment.” Id. He called her sexually aggressive and manipulative. Id. at 2–3. He included an “addendum” with excerpts of his texts with Grand as “small examples of evidence,” some explicitly sexual and others discussing their relationship or making plans. Id. at 4–9. Coleman also made a few statements over the following months on Facebook, in emails and to the media, defending his position and saying Grand's story was false. Ans. to Am. Compl. ¶¶ 77–84.

Coleman filed the instant case on October 10, 2018, making Grand's email and letter available on the Court's public docket. Compl., Dkt. 1. Beginning almost immediately, he lost numerous bookings and a teaching job. Pl.’s 56.1 ¶¶ 58–67; Coleman Decl., Dkt. 82-8, ¶ 48. In explaining their cancelations, however, venues cited the lawsuit, headlines about it and their institutions' related concerns. Dkt. 82-12 at 8–28. Coleman's expert estimates his losses topped $1.2 million. Pl.’s 56.1 ¶ 68; Kucsma Report, Dkt. 82-10, at 7. Similarly, Grand claims she lost work due to Coleman's statements, as well as during their relationship, when she alleges he only booked her if she slept with him. Ans. to Am. Compl. ¶¶ 93–94.

Standard of Review

Summary judgment shall be granted in the absence of a genuine dispute as to any material fact and upon a showing that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). “[A] fact is material if it ‘might affect the outcome of the suit under the governing law.’” Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene of the City of New York, 746 F.3d 538, 544 (2d Cir. 2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Courts do not try issues of fact at the summary judgment stage, but instead merely “determine whether there are issues of fact to be tried.” Sutera v. Schering Corp., 73 F.3d 13, 16 (2d Cir. 1995) (quoting Katz v. Goodyear Tire & Rubber Co., 737 F.2d 238, 244 (2d Cir. 1984)).

*4 The movant carries the burden of demonstrating there is no genuine dispute as to any material fact. Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005), and the motion court will resolve all ambiguities and draw all permissible factual inferences in the light most favorable to the party opposing the motion. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 83 (2d Cir. 2004). Where the nonmoving party “will bear the burden of proof at trial,” it bears the initial procedural burden at summary judgment of demonstrating that undisputed facts “establish the existence of [each] element essential to that party's case.” Celotex Corp., 477 U.S. at 322–23, 106 S.Ct. 2548. “If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper.” Hetchkop v. Woodlawn at Grassmere, Inc., 116 F.3d 28, 33 (2d Cir. 1997). When the parties cross-move for summary judgment, “each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.” Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC, 628 F.3d 46, 51 (2d Cir. 2010) (quoting Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001)).

Discussion

Although Coleman and Grand disagree on most everything else, they both describe their relationship as rocky, with numerous highs and lows. Each recalls pursuing the other and being pursued, sometimes saying no and sometimes yes to a continued personal and professional relationship. Both sides agree that the encounters, retold in their briefing, were legal and consensual. Although the parties may parse the details of those encounters, all that is in issue is whether the dueling
statements Grand and Coleman published about each other give rise to plausible claims of defamation and, in Grand's case, for intentional infliction of emotional harm, and whether on any of them any party is entitled to summary judgment in the absence of any dispute of material issue.

I. Coleman's Defamation Claim

Coleman's single claim is that Grand's email and letter constitute defamation as a matter of law. Libel is defamation in writing or print. See Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 176 (2d Cir. 2000). Under New York law, which applies here, a plaintiff must establish five elements to prevail on a libel claim:

1) a written defamatory statement of fact of and concerning the plaintiff;

2) publication by defendant to a third party;

3) fault;

4) falsity of the defamatory statement; and

5) injury to plaintiff, either special damages or per se libel.


Opinions are constitutionally protected. Immuno AG., 77 N.Y.2d at 254–55, 566 N.Y.S.2d 906, 567 N.E.2d 1270. In deciding these issues, summary judgment on libel claims has “particular value” in avoiding the “chilling effect of protracted litigation.” Id. at 256, 566 N.Y.S.2d 906, 567 N.E.2d 1270.

A. Fault

The applicability of the actual malice fault standard depends on whether Coleman is a public figure and whether Grand spoke on a matter of public interest. These are questions of law for the Court. See Celle, 209 F.3d at 176; Konikoff, 234 F.3d at 106.

i. General purpose public figure

A public figure is someone with “general fame or notoriety in the community, and pervasive involvement in the affairs of society.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 324, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). As previewed above, public figure status is a question of law for the Court that places the burden of proof on the defendant. Krauss v. Globe Int'l, Inc., 251 A.D.2d 191, 192, 674 N.Y.S.2d 662 (1st Dep't 1998). If a plaintiff is classified as a public figure, he
must then prove by clear and convincing evidence that the defendant acted with actual malice, defined as “knowledge of its falsity or reckless disregard for the truth.” Gertz, 418 U.S. at 342, 94 S.Ct. 2997.

There are two types of public figures: general and limited purpose public figures. General purpose public figures are those who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,” and must therefore meet the actual malice standard for all libel claims. Gertz, 418 U.S. at 345, 94 S.Ct. 2997. To qualify, the person's fame must be “very great; the individual must be a ‘household name’ on a national scale.” Biro v. Conde Nast, 963 F. Supp. 2d 255, 270 n.8 (S.D.N.Y. 2013), aff’d, 807 F.3d 541 (2d Cir. 2015), and aff’d, 622 F. App’x 67 (2d Cir. 2015) (quoting Lluberes v. Uncommon Productions, LLC, 663 F.3d 6, 20 n.14 (1st Cir. 2011)). It is the “rare person” who meets this test. Lerman v. Flynt Distrib. Co., 745 F.2d 123, 137 (2d Cir. 1984).

Grand argues Coleman has achieved sufficient fame as a musician to be considered a general purpose public figure. Def.’s Mem. at 39–40. Coleman began playing music in the 1970s, and has continued performing, touring, giving workshops and releasing albums since. Holzen Report, Dkt. 87-26, 1; Def.’s 56.1 ¶ 10; see generally Coleman Tr. He has received recognition for this work, including a MacArthur Fellowship, a Guggenheim Fellowship and awards from the Doris Duke Charitable Foundation. Holzen Report ¶ 17; Kucsma Report at 5; Coleman Tr. at 46:16–24. Local media coverage from 2015 and 2016 describes him as “a rising giant” in jazz and a recipient of “many awards.” See Morning Call Article, Dkt. 96-2, at 3; Chicago Reader Article, Dkt. 96-3, at 3. In 2017 and 2018, publications ranked his albums as among the year's best jazz releases. Def.’s 56.1 ¶ 9. Tabloid headlines covering this litigation call Coleman a “famed” and “prominent” saxophonist. Holzen Report ¶ 25; Dkt. 87-28.

These facts show Coleman has achieved notable success and recognition within the world of jazz—one he described as “small,” Coleman Tr. at 309:4–9, and “underground,” Dkt. 96-23 at 3—and the broader creative community. Coleman has sought and attained public attention for his music, including by giving interviews to the media. See James v. Gannett Co., 40 N.Y.2d 415, 422, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976) (considering media access central to the public figure analysis); Morning Call Article; Chicago Reader Article. To classify Coleman as a general purpose public figure, however, his celebrity must be greater than that of a successful musician “well known in some circles.” Mitre Sports Int'l Ltd. v. Home Box Office, Inc., 22 F. Supp. 3d 240, 249 (S.D.N.Y. 2014). The Court does “not lightly assume” that Coleman's “participation in community and professional affairs render[s] him a public figure for all purposes.” Gertz, 418 U.S. at 352, 94 S.Ct. 2997. Instead, the Court requires a “clear showing” of fame, asking whether he is a “well-known celebrity” whose name is a “ ‘household word.’ ” Horowitz v. Mannoia, 10 Misc. 3d 467, 469, 802 N.Y.S.2d 917, 921 (Nassau Cty. Sup. Ct. 2005) (quoting Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 (D.C. Cir. 1980)). As Grand has not sufficiently demonstrated that Coleman has reached this high level of celebrity and name recognition, Coleman cannot be classified as a general purpose public figure.

ii. Limited purpose public figure

Depending upon the circumstances established in the record, a plaintiff can be classified as a limited purpose public figure if he “ha[s] thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Gertz, 418 U.S. at 345, 94 S.Ct. 2997. When such a plaintiff challenges a defendant's statements concerning that controversy as defamatory, to succeed he must show the defendant acted with actual malice. Id. at 342, 94 S.Ct. 2997.

For courts to categorize a plaintiff as a limited purpose public figure:

A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the

... public controversy; and (4) maintained regular and continuing access to the media.

Lerman, 745 F.2d at 136–37.

Grand does not contend that Coleman meets this test, arguing instead that he is a public figure for all purposes. In any event, Grand fails at the first factor. There is no evidence that, prior to Grand’s email, Coleman successfully sought public attention and influence for his views on matters arguably related to this litigation, such as his relationships, relationships generally or sexual harassment allegations. The record reflects only that Coleman sought and received attention for making music. Cf. Lerman, 745 F.2d at 137 (plaintiff was limited purpose public figure in case involving mislabeled nude photos because she had “voluntarily devot[ed] herself to the public's interest in sexual mores, through extensive writing on this topic”); Pisan v. Staten Island Univ. Hosp., No. 06-CV-1016 (JFB) (MLO), 2008 WL 1771922, at *16 (E.D.N.Y. Apr. 15, 2008) (plaintiff was private figure because “[d]efendants have failed to cite any facts showing that [plaintiff’s] prominence was related to the topic of the [defendant's] statement”); Naantaanbuu v. Abernathy, 816 F. Supp. 218, 225 (S.D.N.Y. 1993) (plaintiff who “sought out the press on matters completely unrelated” to alleged defamation was private figure).

Further, while Grand's email addressed an existing public controversy—as “part of broader discussions regarding sexual assault, sexual harassment and consent in workplaces across the country,” Elliot v. Donegan, 469 F. Supp. 3d 40, 53 (E.D.N.Y. 2020)—Coleman did not voluntarily inject himself into and assume prominence in that controversy. Responding to Grand's email and bringing this action do not make him a public figure, nor does the fact that his attorney commented in one newspaper article. See Time, Inc. v. Firestone, 424 U.S. 448, 457, 96 S. Ct. 958, 966–67, 47 L. Ed. 2d 154 (1976) (participating in litigation generally insufficient to render plaintiff public figure); Lluberes, 663 F.3d at 19 (“[A]n individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations.”); Lerman, 745 F.2d at 136 (plaintiff “dragged unwillingly into the controversy” is not public figure). In this light, therefore, Coleman does not meet the test for classification as a limited purpose public figure. Consequently, because Grand has not shown Coleman to be either a general or limited public figure, for litigation purposes he must be treated as a private figure, which would require Grand to show she spoke on a matter of public interest in order to have the defamation claim lodged against her by Coleman adjudged by the more defense-friendly actual malice standard, as discussed below.

iii. Matter of public interest

*7 Not missing a beat, Grand initially argued that, even if Coleman is not a public figure, her statements addressed a matter of public concern, requiring him to show she acted with gross irresponsibility. See Def.’s Mem. at 40 (citing Chapadeau, 38 N.Y.2d at 199, 379 N.Y.S.2d 61, 341 N.E.2d 569). Seeking now to raise the bar even higher, Grand argues in a recent submission to this Court that New York’s amended anti-strategic litigation against public participation (“anti-SLAPP”) statute—which applies to communications on issues of public interest—has imposed a new standard that requires Coleman to show she acted with actual malice. See Def.’s Notice, Dkt. 105 (citing Palin, — F.Supp.3d ——, 2020 WL 7711593; N.Y. Civ. Rights. Law § 76-a).

It was an important tweak to New York law. New York courts have long held that, if a defendant's allegedly defamatory statements involve a matter “arguably within the sphere of legitimate public concern,” the plaintiff bears the burden of showing, by a preponderance of the evidence, that the defendant made those statements “in a grossly irresponsible manner.” Konikoff, 234 F.3d at 101 (quoting Chapadeau, 38 N.Y.2d at 199, 379 N.Y.S.2d 61, 341 N.E.2d 569). The state's protections for libel defendants speaking on public affairs increased on November 10, 2020, when amendments to New York's anti-SLAPP statute took effect. See Palin, — F.Supp.3d at —— ——, 2020 WL 7711593, at *1–2. Indeed, New York's anti-SLAPP law has always imposed an actual malice standard in any “action involving public petition and participation.” Id.; N.Y. Civ. Rights Law § 76-a(2). The old version of the law defined such actions narrowly, however, covering only those “brought by a public applicant or permittee.” Palin, — F.Supp.3d at

—, 2020 WL 7711593, at *2 (citing Chandok v. Klessig, 632 F.3d 803, 819 (2d Cir. 2011)). The amendments, among other changes, broadly expand that definition to include:

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

N.Y. Civ. Rights Law § 76-a(1)(a); see also Palin, —— F.Supp.3d at ———, 2020 WL 7711593, at *2.

The only court to have addressed this amendment thus far has it applies in federal court and has retroactive effect. See Palin, —— F.Supp.3d at ——— – ———, 2020 WL 7711593, at *3–4. This Court agrees. It is a hornbook rule that “federal courts sitting in diversity apply state substantive and federal procedural law.” Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427, 116 S. Ct. 2211, 2219, 135 L. Ed. 2d 659 (1996). The anti-SLAPP provision at issue here, § 76-a, applies in federal court because it is “manifestly substantive,” governing the merits of libel claims and increasing defendants’ speech protections. Id.; cf. La Liberte v. Reid, 966 F.3d 79, 86 n.3 (2d Cir. 2020) (finding California anti-SLAPP law’s “special motion to strike” procedural); Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014) (finding Nevada anti-SLAPP law’s provisions on immunity from civil liability and fee-shifting substantive); Egiazaryan v. Zalmayev, No. 11-CV-2670 (PKC), 2011 WL 6097136, at *12 (S.D.N.Y. Dec. 7, 2011) (applying New York’s pre-amendment anti-SLAPP law in diversity jurisdiction case).

Having found § 76-a to be substantive and applicable in federal court, the question becomes whether that application can be retroactive. New York’s statutory amendments “are presumed to have prospective application unless the Legislature’s preference for retroactivity is explicitly stated or clearly indicated.” In re Gleason (Michael Vee, Ltd.), 96 N.Y.2d 117, 122, 726 N.Y.S.2d 45, 749 N.E.2d 724 (2001). New York, moreover, is in harmony with the general rule that legislation considered “remedial,” “should be given retroactive effect in order to effectuate its beneficial purpose.” Id. So, too, should legislation regarding which the Legislature “conveyed a sense of urgency,” or aimed “to rewrite an unintended judicial interpretation.” Id. Overall, these legislative statements must amount to a “‘persuasive reason’ for the ‘potentially harsh’ impacts of retroactivity.” Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal, 35 N.Y.3d 332, 375, 130 N.Y.S.3d 759, 154 N.E.3d 972, 995 (2020) (internal citation omitted).

*8 The anti-SLAPP amendments are just such remedial, retroactive legislation. The memorandum accompanying the bill's introduction states that “as drafted, and as narrowly interpreted by the courts, the application of Section 76-a has failed to accomplish [its] objective.” S52A Sponsor Mem. (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52. The memorandum expresses the specific intent that the proposed amendments will “better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law”: to protect the free exercise of speech, particularly in public fora on matters of public interest. Id. The bill became effective “immediately,” Id. Under New York law, these clear legislative expressions of remedial purpose and urgency give the amendments retroactive effect. See Palin, —— F.Supp.3d at ———, 2020 WL 7711593, at *5 (quoting Gleason, 96 N.Y.2d at 123, 726 N.Y.S.2d 45, 749 N.E.2d 724 (“These factors together persuade [the Court] that the remedial purpose of the amendment should be effectuated through retroactive application.”)). Nor, furthermore, does retroactive application offend due process where, as here, plaintiff will face no “harsh impacts” from retroactive application. See id. at ———, 2020 WL 7711593, at *5. Coleman has already hitched his wagon to the actual malice standard, which he claims to satisfy. See Pl.’s Mem. at 8–10.

Applying New York’s amended anti-SLAPP law, the Court finds Coleman must prove Grand acted with actual malice because he brings “a claim based upon ... lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest.” N.Y. Civ. Rights Law § 76-a(1)(a). This interpretation is guided not only by the legislative intent of the amendment,
but also by its directive to construe “public interest” broadly, as encompassing all but purely private matters. 552A Sponsor Mem. The Court is guided by this legislative directive, as well as the New York courts’ “extremely broad interpretation” of statements on “matters of public concern,” which likewise receive heightened protections. 7 Albert v. Loksen, 239 F.3d 256, 269 (2d Cir. 2001). In that regard, New York law considers a matter of public concern as “a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.” 8 Fairley v. Peeksill Star Corp., 83 A.D.2d 294, 298, 445 N.Y.S.2d 156 (2d Dep’t 1981) (quoting 7 Waldbaum, 627 F.2d at 1296). This includes “a matter of political, social, or other concern to the community,” even if it does not “affect the general population.” 9 Abbott v. Harris Publications, Inc., No. 97-CV-7648 (JSM), 2000 WL 913953, at *7 (S.D.N.Y July 7, 2000). That said, “publications directed only to a limited, private audience” are deemed by those same New York courts as “matters of purely private concern.” Id. at 270 (quoting 9 Huggins v. Moore, 94 N.Y.2d 296, 303, 704 N.Y.S.2d 904, 726 N.E.2d 456 (1999)). Following logically, statements falling “into the realm of mere gossip and prurient interest” are also deemed matters of private concern. 10 Weiner v. Doubleday & Co., 74 N.Y.2d 586, 595, 550 N.Y.S.2d 251, 549 N.E.2d 453 (1989).

Here, Grand defines the issue of public interest as “sexual impropriety and pressure in the music industry.” Pl.’s Mem. at 40. The Court assesses the topic at the time of her allegedly defamatory statements. Grand sent her email and letter on November 17, 2017, amid the rising tide of public concern over workplace sexual harassment known as the #MeToo movement. Following the reporting of sexual assault allegations against Harvey Weinstein, “#MeToo catapulted into the public's consciousness in October 2017.” 11 Elliott, 469 F. Supp. 3d at 51. People began engaging in “widespread and difficult conversations about what constitutes inappropriate behavior in professional settings and how to construe consent in sexual relationships between prominent industry players and those seeking opportunities within that industry.” Id. at 52. Against this backdrop, the Court finds that sexual impropriety and power dynamics in the music industry, as in others, were indisputably an issue of public interest at the time Grand sent her email.

Grand’s email and letter marked her foray into these conversations. She quite clearly frames them as her contribution to the larger discussions occurring at the time of the #MeToo movement. Her email begins by saying she is joining the “talk[ ] about sexism in the music industry” by sharing her own experiences. Grand Email at 2; see 12 Huggins, 94 N.Y.2d at 304, 704 N.Y.S.2d 904, 726 N.E.2d 456 (finding articles on parties’ divorce addressed matter of public concern by “show[ing] the greater significance of [defendant's] personal story”). Her letter starts by saying she wants to “speak up” in part “for the sake of other young women.” Grand Letter at 2. Coleman acknowledges this context, saying Grand wrote “as part of the broader #MeToo movement.” Pl.’s Reply, Dkt. 92, at 8. Further adding to the public interest in Grand’s statements, while Coleman does not have the household-name status that qualifies him as a general purpose public figure, he remains a prominent musician of interest to the jazz community. Cf. 15 McKee v. Cosby, 874 F.3d 54, 62 (1st Cir. 2017) (finding sexual assault allegations against actor Bill Cosby were public controversy).

*9 These findings set the litigation battlefield. Because Grand’s statements were “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest,” Coleman must show she spoke with actual malice. 16 N.Y. Civ. Rights Law § 76-a(1)–(2). This requires him to “establish[ ] by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false.” Id. § 76-a(2). Important, “[d]espite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of the publication.” 17 Behar, 238 F.3d at 174; see also 18 Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S. Ct. 2419, 2429, 115 L. Ed. 2d 447 (1991) (actual malice “should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will”).

In assessing the defendant’s subjective doubts as to the publication’s truth, a “court typically will infer actual malice from objective facts.” 19 Celle, 209 F.3d at 183. These facts may include “the defendant’s own actions or statements, the dubious nature of his sources, [and] the inherent
improbability of the story.”  Id. (quoting Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1293 (D.C. Cir. 1988)). Significant on this motion, courts may make this determination on summary judgment, which should be granted if no reasonable factfinder could find, by clear and convincing evidence, that the defendant acted with actual malice. See, e.g., id.; Anderson, 477 U.S. at 257, 106 S.Ct. 2505.

Coleman argues that his claim satisfies the actual malice standard, making two proffers of evidentiary support. Pl.’s Mem. at 8–10. First, he points to a line in Grand's email saying “it's not public at the moment because it's legally dangerous for me to publish this (even though I've removed any mention of names).” Id. at 10 (quoting Grand Email at 2). Relatedly, he notes that Grand wrote in an email to a friend and colleague that she was not going to name Coleman because “I spoke with an attorney and apparently it's very dangerous for me legally to post this, because then he can sue me for damages incurred if he loses any work, or for defamation,” and made similar statements to another friend. Id. (quoting Dkt. 82-13 at 52). Coleman claims that because it is known that speaking the truth is legal, Grand's statements show that she knew her words were false. Id. Second, he argues that by authorizing a different friend and colleague to circulate the letter within the industry and to journalists, and to name Coleman in doing so, Grand showed “her true motive was revenge.” Id.; Dkt. 82-13 at 14, 20, 24–25, 31.

Neither of these proffers shows Grand acted with actual malice. While Grand could theoretically have feared a defamation suit because she knew her words were false, she could also have feared suit because she, and the attorney she consulted, believed Coleman might sue regardless of whether she spoke truthfully. Grand says just that—rooting her fears in her awareness that meritless defamation suits can be brought as “punishment,” and saying she never had or voiced any concerns with her letter's truthfulness. See Def.’s Opp'n Mem., Dkt. 93, at 27; Grand Opp'n Decl., Dkt. 95, ¶ 24. Indeed, New York amended its anti-SLAPP law to counter the same phenomenon Grand cites: suits aimed at chilling speakers’ public participation. See S52A Sponsor Mem. Both theories are plausible but what is crucial is that Coleman offers no facts proving, by clear and convincing evidence, that Grand knowingly or recklessly made false statements.

See Anderson, 477 U.S. at 254, 106 S.Ct. 2505 (“[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.”).

*10 As to Coleman's argument that Grand was motivated by revenge when she authorized the letter's circulation, this also does not show actual malice. Evidence of ill will can occasionally support a finding of actual malice in combination with other clear and convincing evidence, but “standing alone ... [it] is not sufficient to establish actual malice.” Celle, 209 F.3d at 183. The actual malice standard focuses not “on the defendant's attitude toward the plaintiff,” but rather “on the defendant's attitude toward the truth,” so Grand's feelings toward Coleman do not speak to actual malice. Konikoff, 234 F.3d at 99. At any rate, authorizing a friend to share her letter does not show she knowingly or recklessly disregarded the truth of that letter, just that she wanted others to read it.

Grand further refutes a finding of actual malice by stating that she wrote her email and letter only from first-hand knowledge, carefully edited it with friends before sending and, albeit naively, hoped to contain its distribution. Def.’s Opp'n Mem at 27; Pl.’s 56.1 ¶ 17; Dkt. 82-13 at 50–69. At bottom, Coleman fails to meet his burden to show, by clear and convincing evidence, that Grand acted with actual malice and, as a result, he cannot prevail on his defamation claim against her. But, importantly, it is not the only reason.

B. Statements of Opinion

Because falsity is an element of a libel claim, a statement must consist of falsifiable facts in order to be actionable. Opinions, by contrast, are constitutionally protected. Gross v. New York Times Co., 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993). Coleman argues Grand's statement consists of falsifiable, and false, facts about him, while Grand maintains she was sharing her subjective opinions on their relationship. See Def.’s Mem. at 17–25; Pl.’s Reply at 2–6. To determine which is correct, it must be asked “whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.” Immuno AG., 77 N.Y.2d at 254, 566 N.Y.S.2d 906, 567
N.E.2d 1270. Although this question can prove difficult to answer, it is one of law, properly—and preferably—decided by the Court on summary judgment. Id. at 256, 566 N.Y.S.2d 906, 567 N.E.2d 1270. In this decisional framework, Coleman bears the burden to show the challenged statement is fact, not protected opinion. Celle, 209 F.3d at 179.

To determine whether Grand's statements are protected opinion, the Court examines:

(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proved true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (internal citations and quotations omitted).

To begin, some of Grand's language has a precise meaning and some does not. Taking, for example, her statements about meeting Coleman, “I met him at 17 at a workshop” clearly has a precise meaning, while “I also felt this really strong sexual vibe coming from him in the way he looked at me” does not. Grand Letter at 2. Second, some of Grand's statements are capable of being proven true or false, and others are not. For example, Coleman takes issue with her line, “About 6 months after I moved to New York in 2011, he convinced me to be intimate with him.” Id. at 4. Yet whether Coleman persuaded Grand to sleep with him, as she says, or whether Grand pursued him to advance her career, as he says, is not determinable by this Court. These are “inherently subjective evaluations of intent and state of mind, which are matters not readily verifiable and intrinsically unsuitable as a foundation for defamation.” Cummings v. City of New York, 2020 WL 882335, at *22 (S.D.N.Y. Feb. 24, 2020). Additionally, other statements are both verifiable and undisputed, such as the basic timeline of their relationship.

*11 Third, the full context of Grand's email and letter supports a finding that readers are likely to consider them as opinion. In undertaking this critical, and dispositive, prong of the analysis, the Court is mindful that the “hypertechnical parsing of a possible ‘fact’ from its plain context of ‘opinion’ ” imperils “the cherished constitutional guarantee of free speech.” Immuno AG., 77 N.Y.2d at 256, 566 N.Y.S.2d 906, 567 N.E.2d 1270. Importantly, an opinion does not become actionable because its author includes supporting facts. An opinion that offers “a full recitation of the facts on which it is based is readily understood by the audience as conjecture” and allows readers to make up their own minds, so is nonactionable. Gross, 82 N.Y.2d at 154, 603 N.Y.S.2d 813, 623 N.E.2d 1163. Conversely, an opinion that implies the existence of undisclosed facts is actionable, as readers are likely to assume those facts are unfavorable to the statement's subject. Id. at 153–54, 603 N.Y.S.2d 813, 623 N.E.2d 1163. In evaluating the competing contentions, the summary judgment court first looks to “the full context of the communication in which the statement appears.” Id. at 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163. Grand frames her statements as personal opinions on her turbulent relationship with Coleman, and adds supporting facts. Her email begins, “There's been lots of talk[] about sexism in the music industry. I wrote a long letter about my experience with it.” Grand Email at 2. She writes that she hopes to “be the start of a larger conversation about what's acceptable and what's not.” Id. She starts her letter similarly, writing “[t]here's been a lot of talk about sexism lately, and I feel that I should speak up about the way sexism has affected me.” Grand Letter at 2. These statements create a context in which Grand's letter is read as describing her subjective experience, allowing readers to decide for themselves “what's acceptable.” Coleman counters that the letter cannot be read as opinion because it falsely alleges criminal sexual misconduct, pointing to Grand's mentions of “sexual harassment,” an “abusive dynamic” and being a “victim,” among similar statements. Pl.'s Reply at 3–4. Yet the letter's full context remains one of opinion supported by disclosed facts, and its
language is more nuanced than Coleman claims. For example, Grand says, “I don’t intend to cast myself as only a victim of the situation” but “I do want to shed light on the strange process that happens when you enter this type of abusive dynamic and how this dynamic is embedded in the sexism that goes through our society.” Grand Letter at 2. This line is consistent with a letter sharing personal opinions on a difficult relationship and related societal issues.

Furthermore, Grand does not allege criminal, non-consensual sex, as Coleman claims. She describes experiencing “sexual harassment,” but recounts only instances in which Coleman tried to convince her to have sex but gave up after she refused—not instances in which he persisted despite her refusal. And, Grand supports her assertion that she was harassed by disclosing relevant facts. Even if she had alleged criminal conduct, and even though allegations of sexual harassment can be actionable, Grand's letter remains protected opinion. Just as “assertions that a person is guilty of ‘blackmail,’ ‘fraud,’ ‘bribery’ and ‘corruption’ could, in certain contexts, be understood as mere, nonactionable ‘rhetorical hyperbole’ or ‘vigorous epithet[s]’ ” or, “even when uttered or published in a more serious tone,” nonactionable if based on disclosed facts and framed as “personal surmise built upon those facts,” indeed a claim of harassment supported by facts can be protected opinion. Gross, 82 N.Y.2d at 155, 603 N.Y.S.2d 813, 623 N.E.2d 1163; see also Melius v. Glacken, 94 A.D.3d 959, 961, 943 N.Y.S.2d 134 (2d Dep't 2012) (finding statement that plaintiff was “extortionist” nonactionable where supported by factual statement that “plaintiff's lawsuit was seeking an amount ‘far in excess of the appraised value’ of the property.”). Reading the language Coleman quotes in the context of the full letter—which begins and ends by saying it is a personal narrative and adds supporting facts in the middle—supports a finding that the letter is protected opinion.

II. Grand’s Defamation Counterclaim

Now, for the flip side, subject to the same legal standards used to evaluate his libel claim against her, Coleman moves for summary judgment on Grand's defamation counterclaim. Pl.’s Mem. at 16. Grand defends by arguing that two of Coleman's communications were defamatory. Def.’s Opp'n Mem. at 28–31; cf. Ans. to Am. Compl. ¶¶ 75–92. First in the spotlight is Coleman's May 5, 2018 email to over 80 recipients, addressed to the We Have Voice Collective, which asserted that Grand made “false accusations,” “was consciously trying to manipulate emotions of sympathy from the recipients of her letter” and “deliberately left [] out” the “sexual aggression on her part.” Def.’s Opp'n Mem. at 28 (quoting Coleman Email at 2–3). Coleman's communication explained that he wrote to “stop the bullying, intimidation, black-balling and lying from continuing.” Id. (quoting Coleman Email at 3). Second on Grand's target list is Coleman's October 24, 2018 Facebook post claiming Grand “covertly spread misinformation,” “deliberately lied” about their relationship and “co-opt[ed] the very necessary, warranted and powerful #MeToo movement.” Id. at 28–29 (quoting Dkt. 87-24 at 1). Coleman responds only that Grand did lie, so he did not defame her by saying so. Pl.’s Mem. at 16.

Here, too, the fact versus opinion distinction is dispositive. Coleman claims, that, unlike her own letter, Coleman’s is factual because it says she “ma[de] false accusations” of sexual harassment. Courts considering similar statements have found some actionable and others protected opinion, depending on...
Like Grand's letter, Coleman's uses both language that is capable of precise meaning and falsifiable, and language that is not. Some of the lines Grand challenges as libelous are unverifiable speculation on her motives, such as Coleman's statement that she "was consciously trying to manipulate emotions of sympathy from the recipients of her letter" by omitting her "sexual aggression." Def.'s Opp'n Mem. at 28 (quoting Coleman Email at 3); see also Cummings, 2020 WL 882335, at *22.

*13 Also like Grand's letter, the letter's immediate and broader social context signal to readers that the letter contains opinion, not fact. Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163. Coleman introduces his letter by saying that while he had "hesitated in publicly telling my side of the story," he believed he "must speak up now or forever allow hers to be the only on-the-record narrative," giving readers "both sides of the story." Coleman Email at 2. He ends by inviting readers' responses, saying he "cannot control what each of you will think about this" but is "open to dialogue." Id. at 3. As in Grand's letter, this framing indicates to readers that Coleman is offering his version of the story and expects readers to have their own views.

The social context bolsters this conclusion. Coleman wrote to recipients of Grand's letter and others he thought had read it, so readers were likely aware of their rocky relationship and sharply divergent perspectives. See Kidd, 79 A.D.3d at 651, 915 N.Y.S.2d 38. For any who were not, the letter provides this context, saying their relationship was "unusual, intense, argumentative and passionate" and "did not end well." Coleman Letter at 2. His references to the #MeToo movement, such as "the rights of individuals being accused," further signal that he is voicing his opinion on controversial topics. Id. at 3.

Further, Coleman disclosed the facts supporting his assertion that Grand's claims were false. The body of the letter describes consensual sexual encounters, and the "addendum" contains text messages with Grand about those encounters. Cf. McKee, 874 F.3d at 63 (finding letter nonactionable because it "adequately disclosed the non-defamatory facts underlying [defendant's] assertions," including "citations to articles and other sources" and "extensive underlying facts"). Coleman does not imply the existence of undisclosed facts. He says he has not included all of their texts, but readers would not expect him to, nor draw adverse inferences against Grand because he did not. See id.; Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163.

In much the same way, Coleman's October 24 Facebook post is also protected opinion. It is a mix of precise, falsifiable statements and vague, unverifiable allegations as to Grand's motives in "covertly spread[ing] misinformation" to "ruin my reputation." Dkt. 87-24. Coleman frames the post as one sharing his side of the story, saying he and Grand were "presenting our evidence" and respective "positions." Id. He shares his opinion on the #MeToo movement, calling it "very necessary" but accusing Grand of "co-opting" it. Id. He calls Grand's claims false, but discloses the supporting facts—this time by excerpting the complaint in this action. He includes almost all of the complaint, and correctly notes that it is a matter of public record, so does not imply the existence of undisclosed facts. With each of Coleman's challenged statements falling, like Grand's, into the category of nonactionable protected opinion, Coleman is entitled to summary judgment on Grand's defamation counterclaim.

Grand's counterclaim also fails as to the Facebook post under the same amended New York anti-SLAPP statute she invoked in her defense. Her claim is an "action involving public petition and participation," as it is based on a "communication in a place open to the public or a public forum in connection with an issue of public interest." N.Y. Civ. Rights Law § 76-a(1)(a); see also id. § 76-a(1)(b) (including counterclaims); Palin, —— F.Supp.3d at ——, 2020 WL 7711593, at *2. Facebook is a public forum within the meaning of New York's anti-SLAPP law, just as it is under other states', and Coleman posted on his public Facebook page, generating dozens of comments. See Dkt. 87-24; Stark v. Lackey, 136 Nev. 38, 42, 458 P.3d 342, 346 (2020) (finding Facebook public forum under Nevada's anti-SLAPP law); Cross v. Facebook, Inc., 14 Cal. App. 5th 190, 222 Cal. Rptr. 3d 250, 258 (2017) (same, under California's, since Facebook and the pages at issue were "accessible to anyone who consents to Facebook's Terms"); Cevetillo v. Lang, No. 19-CV-6031687 (TRT), 2019 WL 7597451, at *5 (Conn. Super.

Ct. Dec. 13, 2019) (same, under Connecticut's); see also Packingham v. North Carolina, —— U.S. ———, 137 S. Ct. 1750, 1757, 198 L. Ed. 2d 273 (2017) (calling Facebook and other social networking sites the “modern public square”); Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019) (finding President Trump's use of his Twitter account created public forum). Coleman's post addresses the #MeToo movement which, as discussed above, is an issue of public interest. See Dkt. 87-24 at 1; Elliott, 469 F. Supp. 3d at 51. Grand therefore must prove by clear and convincing evidence that Coleman acted with actual malice—that he knowingly or recklessly made false statements in his Facebook post. N.Y. Civ. Rights Law § 76-a(2). She fails to argue Coleman is liable under any fault standard, so cannot meet her burden to show actual malice. Cf. Celle, 209 F.3d at 183. For this additional reason, Grand's defamation counterclaim fails as a matter of law.

III. Grand's IIED Claim

*14 Last, Coleman moves for summary judgment on Grand's IIED claim, in which Grand alleges he “repeatedly and continually attempted to intimidate and distress [her] because she refused to engage in sexual acts with [him] and because she wrote the Letter.” Ans. to Am. Compl. ¶ 95; Pl.'s Mem. at 17–19. Under New York law, an IIED claim has four elements: “(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress.” Bender v. City of New York, 78 F.3d 787, 790 (2d Cir. 1996).

Clearly, IIED “is a highly disfavored cause of action under New York law, one that is almost never successful.” Collins v. Giving Back Fund, No. 18-CV-8812 (CM), 2019 WL 3564578, at *14 (S.D.N.Y. Aug. 6, 2019). Claims typically fail as a matter of law on the first element. See Howell v. New York Post Co., 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 612 N.E.2d 699 (1993). “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Stuto v. Fleishman, 164 F.3d 820, 827 (2d Cir. 1999) (quoting id. at 122, 596 N.Y.S.2d 350, 612 N.E.2d 699). Even showing a defendant acted with tortious, criminal or malicious intent is insufficient. Id. (quoting Restatement (Second) of Torts § 46 cmt. d (1965)).

Grand does not clear this high bar. She claims Coleman used his age and prominence to “manipulate” her into a sexual relationship; that he threatened her career, “withheld performance opportunities” and “yelled at her” when she declined sex; and attended her shows “knowing that his presence would distress” her and refused to leave when asked. Ans. to Am. Compl. ¶¶ 96–98. She alleges that, after she wrote the letter, Coleman directed others to “repeatedly bully and threaten [her] with public legal action” in emails, texts and on social media, and engaged in “continued harassment.” Id. ¶¶ 99, 103; Def.'s Opp'n Mem. at 31–32.

Grand correctly notes that sexual harassment can form the basis for an IIED claim, provided “the continuous nature of the conduct [] make[s] it so outrageous and extreme as to be actionable.” Bonner v. Guccione, 916 F. Supp. 271, 276–77 (S.D.N.Y. 1996); Def.'s Opp'n Mem. at 31. However, “[a]cts which merely constitute harassment, disrespectful or disparate treatment, a hostile environment, humiliating criticism, intimidation, insults or other indignities” are insufficiently “outrageous” to constitute IIED. Semper v. New York Methodist Hosp., 786 F. Supp. 2d 566, 587 (E.D.N.Y. 2011) (quoting Stevens v. New York, 691 F. Supp. 2d 392, 399 (S.D.N.Y. 2009)).

While the record shows Coleman and Grand had a difficult relationship that left lasting marks on each, it does not, as a matter of law, reflect acts meeting the exceedingly high bar required to constitute IIED. Further, to the extent Grand's IIED claim is based on alleged libel by Coleman or others responding to her letter, “defamatory statements generally cannot [be pleaded as] the extreme and outrageous behavior required” by New York law to assert an IIED claim. Restis v. Am. Coal. Against Nuclear Iran, Inc., 53 F. Supp. 3d 705, 729 (S.D.N.Y. 2014). The Court therefore grants summary judgment for Coleman on Grand's IIED claim.

Conclusion
For the foregoing reasons, both parties’ defamation claims and Grand's IIED counterclaim fail as a matter of law, and the respective cross-motions of the parties are resolved correspondingly.

*15 So Ordered.

All Citations

--- F.Supp.3d ----, 2021 WL 768167

Footnotes

1 Grand also brought and dropped a claim for “loss of employment and/or other income.” See Ans. to Am. Compl., Dkt. 25, ¶ 93–94; Def.’s Opp’n Mem., Dkt. 93, at 28 n.149.

2 The relevant facts are drawn from the amended complaint, the parties’ Local Rule 56.1 statements and their submissions on the motions for summary judgment, and are reviewed in the light most favorable to the nonmoving parties. See Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 456 (2d Cir. 2007). Any factual disputes are noted.

3 The parties do not dispute that Grand’s letter was of and concerning Coleman and that she published it to third parties.

4 Nor could Coleman show Grand acted grossly irresponsibly in sending her letter—the longstanding fault standard applied to matters of public concern under New York law. Konikoff, 234 F.3d at 101. That standard is objective, requiring a plaintiff to show by a preponderance of the evidence that the defendant spoke without “due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” Id. (quoting Chapadeau, 38 N.Y.2d at 199, 379 N.Y.S.2d 61, 341 N.E.2d 569). Neither of Coleman’s evidentiary proffers shows gross irresponsibility, especially given that Grand’s motives are irrelevant under this objective standard.

5 Coleman argues that Grand implied the existence of undisclosed facts by offering to show text messages to interested readers as “proof.” Pl.’s Reply at 3–4. Yet by saying the texts are “proof for most of what [she] is talking about here,” Grand implies that they support exactly the facts described in the letter, not some other set of undisclosed allegations. The law does not require that Grand include all primary source material, just that she recite the facts supporting her opinions, which she does. Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163.

6 Because the Court finds Coleman fails on the fault and falsity elements, it declines to reach the question of injury.

7 Unlike in the briefing on Coleman's claim, in the briefing on Grand's defamation counterclaim, the parties do not address the applicable fault standard. While Grand is not famous enough to be a general purpose public figure, her participation in the public controversy of the music industry's #MeToo movement could render her a limited purpose public figure on that topic. The burden to establish public figure status rests on the defendant, however, and Coleman has made no such showing here. See Krauss, 251 A.D.2d at 192, 674 N.Y.S.2d 662.
52 P.3d 685, 124 Cal.Rptr.2d 507, 02 Cal. Daily Op. Serv. 7960...

KeyCite Yellow Flag - Negative Treatment

29 Cal.4th 53
Supreme Court of California

EQUILON ENTERPRISES,
LLC, Plaintiff and Appellant,
v.
CONSUMER CAUSE, INC.,
Defendant and Respondent.

No. S094877.

Aug. 29, 2002.

Synopsis
Oil company brought action against consumer group, seeking declaratory and injunctive relief related to consumer group's notice of intent to sue for private enforcement of the state Safe Drinking Water and Toxic Enforcement Act. The Superior Court, Los Angeles County, No. BC202502, Barbara Ann Meiers, J., granted consumer group's anti-SLAPP motion and dismissed action. Oil company appealed. The Court of Appeal, Second District, affirmed. Oil company sought further review. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Werdegar, J., held that: (1) consumer group had no burden to demonstrate that oil company's cause of action was brought with the intent of chilling the its exercise of constitutional rights of speech or petition; that is, the filing of intent-to-sue notices, and thus was subject to anti-SLAPP motion.

Affirmed.

Opinion, 102 Cal.Rptr.2d 371, superseded.

Procedural Posture(s): On Appeal.

West Headnotes (10)

[1] Pleading Application and proceedings thereon
A defendant who moves under the anti-SLAPP statute to strike a cause of action as a strategic lawsuit against public participation (SLAPP), in order to prevail, has no burden to demonstrate that the cause of action was brought with the intent of chilling the defendant's exercise of constitutional speech or petition rights; disapproving Paul for Council v. Hanyecz, 85 Cal.App.4th 1356, 102 Cal.Rptr.2d 371, superseded.


37 Cases that cite this headnote

[2] Constitutional Law Judicial rewriting or revision
When interpreting statutes, the Supreme Court follows the Legislature's intent, as exhibited by the plain meaning of the actual words of the law; it has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.

The only thing a defendant needs to establish to invoke the potential protection of the anti-SLAPP statute, authorizing a motion to strike a complaint as a strategic lawsuit against public participation (SLAPP), is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech; from that fact the court may effectively presume the purpose of the action was to chill the defendant's exercise of First Amendment rights, and it is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits. U.S.C.A. Const.Amend. 1; West's Ann.Cal.C.C.P. § 425.16.

Oil company's action against consumer group arose from consumer group's activity in furtherance of its constitutional rights of speech or petition, that is, the filing of intent-to-sue notices, and thus was subject to a special motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute, even if oil company had pure intentions in filing its action, where oil company's action sought both declaratory judgment that consumer group's notice of intent to sue for private enforcement of state Safe Drinking Water and Toxic Enforcement Act Consumer did not
comply with applicable regulations and an injunction barring consumer group from filing its enforcement action. West's Ann.Cal.C.C.P. § 425.16.

16 Cases that cite this headnote

[9] Pleading Application and proceedings thereon
The anti-SLAPP (strategic lawsuit against public participation) statute requires that a court engage in a two-step process when ruling on a defendant's anti-SLAPP motion to strike a complaint: first, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity; if the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. West's Ann.Cal.C.C.P. § 425.16.

1241 Cases that cite this headnote

[10] Pleading Application and proceedings thereon
The moving defendant's burden when making an anti-SLAPP motion to strike a complaint as a strategic lawsuit against public participation (SLAPP) is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue, as defined in the anti-SLAPP statute. West's Ann.Cal.C.C.P. § 425.16(b)(1).

1042 Cases that cite this headnote

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52 P.3d 685, 124 Cal.Rptr.2d 507, 02 Cal. Daily Op. Serv. 7960...

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Opinion

WERDEGAR, J.

Must a defendant, in order to obtain a dismissal of a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (section 425.16; the anti-SLAPP statute), demonstrate that the action was brought with the intent to chill the defendant's exercise of constitutional speech or petition rights? For the following reasons, we conclude not.

***511 BACKGROUND

As the Court of Appeal explained, defendant Consumer Cause, Inc., served on Shell Pipe Line Corporation and Texaco, Inc., predecessors in interest to plaintiff Equilon Enterprises, LLC (Equilon), a notice of its intent to sue for alleged violations of Proposition 65. (See Health & Saf.Code, § 25249.7, subd. (d).) Consumer Cause's notice asserted that numerous Shell and Texaco gas stations in Southern California had, since 1994, been polluting groundwater by discharging benzene, lead, and toluene into the soil. Consumer Cause sent copies of its notice to the state Attorney General, the Los Angeles County District Attorney, and the Los Angeles City Attorney.

Equilon did not ask Consumer Cause to clarify its Proposition 65 notice. Instead, it filed this lawsuit for declaratory and injunctive relief, seeking a declaration that the notice failed to comply with the California Code of Regulations. Specifically, Equilon claimed the notice had not been served on the proper parties and that it failed to describe the alleged toxic discharges with sufficient particularity. Equilon also sought an injunction barring Consumer Cause from filing a Proposition 65 enforcement action.

Consumer Cause moved under the anti-SLAPP statute to strike Equilon's complaint. The trial court granted the motion and dismissed the action. The Court of Appeal affirmed. We granted Equilon's petition for review.

DISCUSSION

Section 425.16 provides, inter alia, that “A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (Id., subd. (b)(1).) “As used in this section, ‘act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law....” (Id., subd. (e).)

[1] Courts of Appeal reviewing the application of section 425.16 have divided over the question whether a defendant who moves under the statute to strike a cause of action must, in order to prevail, demonstrate that the cause of action was brought with the intent of chilling the defendant's exercise of constitutional speech or petition rights. (Compare,
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**A. Statute's Plain Language**

Section 425.16 nowhere states that, in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the plaintiff brought the cause of action complained of with the intent of chilling the defendant's exercise of speech or petition rights. There simply is “nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's subjective motivations before it may determine [whether] the anti-SLAPP statute is applicable.” **§512** *(Damon v. Ocean Hills Journalism Club, supra, 85 Cal.App.4th at p. 480, 102 Cal.Rptr.2d 205.)* Section 425.16, rather, unambiguously makes subject to a special motion to strike any “cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue” as to which the plaintiff has not “established that there is a probability that [he or she] will prevail on the claim.” *(§ 425.16, subd. (b)(1); see **§59** Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628, 648, 49 Cal.Rptr.2d 620 [Church of Scientology ] [anti-SLAPP statute “clear and unambiguous” in applying to all claims “arising from” protected activity].)*

Nor is there anything in section 425.16's operative sections implying or even suggesting an intent-to-chill proof requirement. “The legislative concern,” rather, “is that the cause of action ‘aris[e] from’ an act in furtherance of the constitutional right to petition or free speech.” *(Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal.App.4th 294, 307, 106 Cal.Rptr.2d 906.)*

[2] When on previous occasions we have construed the anti-SLAPP statute, we have done so strictly by its terms *(Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377, 17 P.3d 735 [calculation of anti-SLAPP attorney fees]; see also **Briggs v. Eden Council for Hope & Opportunity** (1999) 19 Cal.4th 1106, 1113-1117, 81 Cal.Rptr.2d 471, 969 P.2d 564 (Briggs ) [construction of § 425.16, subd. (e) ], and no reason appears why we should proceed otherwise in this case. Since section 425.16 neither states nor implies an intent-to-chill proof requirement, **§689** for us judicially to impose one, as Equilon urges, would violate the foremost rule of statutory construction. When interpreting statutes, “we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law.... ‘This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.’ ” *(California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 632–633, 59 Cal.Rptr.2d 671, 927 P.2d 1175.)*

**B. Legislative Intent**

Citing the Legislature's finding, set out in the statute's preamble, that “there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances” and its declaration “that it is in the public interest to encourage continued participation in matters of public significance” *(§ 425.16, subd. (a)),* Equilon argues that the anti-SLAPP statute was intended by the Legislature to combat only actions brought with an intent to chill speech. For the following reasons we conclude that, to the contrary, judicial imposition on section 425.16 of an intent-to-chill proof requirement would contravene the legislative intent expressly stated in section 425.16, as well as that implied by the statute's legislative history.

The anti-SLAPP statute has since its enactment contained a preamble setting forth the Legislature's desire “to encourage continued participation in matters of public significance” *(§ 425.16, subd. (a), as added by Stats.1992, ch. 726, § 2, p. 3523).* In 1997, the Legislature amended section 425.16, effecting no substantive changes to the anti-SLAPP scheme, but adding to the preamble a requirement that the statute, to achieve its stated ends, “shall be construed broadly.” *(**§513** § 425.16, subd. (a).)*
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as amended by Stats.1997, ch. 271, § 1.)

Interpreting section 425.16, in accordance with its plain language, as encompassing unsubstantiated causes of action arising from protected speech or petitioning, without regard to the subjective intent of the plaintiff, both maximizes the statute's tendency "to encourage continued participation in matters of public significance" and conforms to the Legislature's express requirement of broad construction.

On the other hand, judicial imposition of an intent-to-chill proof requirement would undermine the Legislature's expressed aim that public participation "not be chilled" (§ 425.16, subd. (a)) by SLAPP's. Obviously, not only when a plaintiff intends to chill speech may the filing of a lawsuit have that result. "Intimidation will naturally exist anytime a community member is sued by an organization for millions of dollars even if it is probable that the suit will be dismissed" (Comment, Strategic Lawsuits Against Public Participation: An Analysis of the Solutions (1991) 27 Cal. Western L.Rev. 399, 405, fn. omitted). "Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights" (Church of Scientology, supra, 42 Cal.App.4th at p. 652, 49 Cal.Rptr.2d 620). "The Legislature recognized that 'all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights.' " (Beilenson v. Superior Court (1996) 44 Cal.App.4th 944, 949, 52 Cal.Rptr.2d 357.) For us to bar use of the anti-SLAPP device against nonmeritorious speech-burdening claims whenever a defendant cannot prove the plaintiff's improper intent would fly in the face of that legislative recognition.

We previously have stated that the legislative intent underlying section 425.16 must be "gleaned from the statute as a whole" (Briggs, supra, 19 Cal.4th at p. 1118, 81 Cal.Rptr.2d 471, 969 P.2d 564). "The fact the Legislature expressed a concern in the statute's preamble with lawsuits brought 'primarily' to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute." (Damon v. Ocean Hills Journalism Club, supra, 85 Cal.App.4th at p. 480, 102 Cal.Rptr.2d 205; see also Briggs, supra, at p. 1118, 81 Cal.Rptr.2d 471, 969 P.2d 564.) Any such requirement would be "too restrictive" (Church of Scientology, supra, 42 Cal.App.4th at p. 648, 49 Cal.Rptr.2d 620) in light of the Legislature's unqualified desire to "encourage continued participation in matters of public significance" (§ 425.16, subd. (a)).

[3] Judicial imposition of an intent-to-chill proof requirement also would contravene legislative intent by modifying the detailed remedial scheme the Legislature laid out in the statute's operative sections. That scheme, as noted, makes subject to a special motion to strike any cause of action against a person arising from constitutionally protected speech or petitioning activity, as defined in section 425.16, subdivision (e), "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim" (id., subd. (b)). Such terms are "inconsistent with a requirement the defendant prove the challenged lawsuit was brought to chill her First Amendment rights.... [T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits." (Fox Searchlight Pictures, Inc. v. Paladino, supra, 89 Cal.App.4th at p. 307, 106 Cal.Rptr.2d 906.)

[4] Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; "no resort to extrinsic aids is necessary or proper." (People v. Otto (1992) 2 Cal.4th 1088, 1108, 9 Cal.Rptr.2d 596, 831 P.2d 1178.) Nevertheless, we may observe that available legislative history buttresses our conclusion.

As we observed in Briggs: "Legislative history materials respecting the origins of section 425.16 indicate the statute was intended broadly to protect, inter alia, direct petitioning of the government and petition-related statements..."

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and writings.... The seminal academic research on which the original version of the statute was based used ‘an operational definition of SLAPP suits as implicating “behavior protected by the Petition Clause.”’ 508 U.S. at p. 60, 113 S.Ct. 1920—does not require the party that creates the costs to bear them. 81 Cal.Rptr.2d 471, 969 P.2d 564, quoting Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches* (1988) 22 L. & Soc'y Rev. 385, 387.) As Professors *62* Canan and Pring have explained, a neutral, easily applied definition for SLAPP's “avoids subjective judgments” about filers' or targets' motives, good faith, or intent. (Canan & Pring, SLAPPs: Getting Sued for Speaking Out (1996) p. 8.)

In short, the Legislature has in the anti-SLAPP statute expressly stated both its understanding of the problem to be addressed (see § 425.16, subd. (a)) and a detailed and specific remedy for addressing it (see id., subd. (b)). “We have no reason to suppose the Legislature failed to consider the need for reasonable limitations on the use of special motions to strike.” 508 U.S. at p. 60, 113 S.Ct. 1920—does not require the party that creates the costs to bear them. 81 Cal.Rptr.2d 471, 969 P.2d 564.)

C. Constitutional Considerations

Equilon argues that an intent-to-chill proof requirement is a constitutionally compelled element of the anti-SLAPP statutory scheme. Citing **691** *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49, 60–62, 113 S.Ct. 1920, 123 L.Ed.2d 611 (Professional Real Estate Investors), Equilon asserts that the First Amendment generally bars liability for filing lawsuits, the only exception being for “sham” lawsuits. More particularly, Equilon contends that by contemplating the award of attorney fees without assessing intent to chill (§ 425.16, subd. (c)), the anti-SLAPP statute treads in a constitutional “minefield.”

Equilon fails to demonstrate that its proffered construction of *section 425.16* is constitutionally compelled. Hundreds of California statutes provide for an award of attorney fees to the prevailing party. (See ***515* Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed.2001) § 2.1, p. 12; see also *id.*, ch. 17 [charting many such statutes].) Fee shifting simply requires the party that creates the costs to bear them. 814 F.2d 358, 373.) It does not make a party “liable” for filing a lawsuit. This distinguishes *Professional Real Estate Investors, supra,* 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611, Equilon's central authority, which concerns not fee shifting but the scope of antitrust liability for engaging in litigation. There, when movie studios challenging the rental of videodiscs to hotel guests brought a copyright infringement action against certain hotel operators, the operators filed counterclaims alleging the studios' action was intended illegally to restrain trade. The high court held that one who initiates litigation is immune from antitrust liability for doing so unless the litigation is a “sham.” Id. at pp. 60–61, 113 S.Ct. 1920. The case did not involve a fee-shifting provision nor did the court anywhere suggest that its “sham” litigation rationale might apply in the fee-shifting context. Equilon cites no case in *63* which a fee-shifting provision has been held unconstitutional under *Professional Real Estate Investors* or its rationale. (See generally *Alyeska Pipeline Co. v. Wilderness Society* (1975) 421 U.S. 240, 262, 95 S.Ct. 1612, 44 L.Ed.2d 141 [finding it “apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine”].)

In any event, *Professional Real Estate Investors*—wherein the high court was at pains expressly “to reject a purely subjective definition of ‘sham’” *Professional Real Estate Investors, supra,* 508 U.S. at p. 60, 113 S.Ct. 1920—does not support Equilon's contention that the anti-SLAPP statute must be engrafted with an intent-to-chill proof requirement in order to pass constitutional muster. (See generally *Columbia v. Omni Outdoor Advertising, Inc.* (1991) 499 U.S. 365, 380, 111 S.Ct. 1344, 113 L.Ed.2d 382 [private party's selfish motives are irrelevant to doctrine precluding liability for petitioning government].) On the other hand, the United States Supreme Court has held that a defendant may obtain an attorney fee award where the plaintiff's suit is objectively “without foundation,” noting that to permit such awards in cases of vexatious litigation “in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him.” *Christiansburg Garment Co. v.
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Contrary to Equilon's implication, see section 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b)), a provision we have read as "requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim" (Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 412, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (Rosenthal)).

So construed, "section 425.16 provides an efficient means of dispatching, early on in the lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims." (Paul for Council v. Hanyecz (2001) 85 Cal.App.4th 1356, 1364, 102 Cal.Rptr.2d 864.)

[5] Nor do the anti-SLAPP statute's fee-shifting provisions inappropriately punish plaintiffs. Plaintiffs as well as defendants may recover fees: defendants, as *64 Amendment right of petition by filing lawsuits. The right to petition is not absolute, providing little or no protection for baseless litigation" (Church of Scientology, supra, 42 Cal.App.4th at p. 648, fn. 4, 49 Cal.Rptr.2d 620).

Equilon also cites California Teachers Assn. v. State of California (1999) 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622 (California Teachers ) for the proposition that "a party cannot be held liable or punished for genuine petitioning," but for at least two reasons California Teachers is not apposite. First, in California Teachers we addressed the "unique and virtually unprecedented" requirement (id. at p. 333, 84 Cal.Rptr.2d 425, 975 P.2d 622) that a teacher who does not prevail on a reasonable and good faith challenge to a disciplinary suspension or dismissal pay to the state one-half the cost of the administrative law judge. Contrary to Equilon's implication, California Teachers nowhere discusses or calls into question fee-shifting provisions such as the one found in the anti-SLAPP statute.

Second, whereas the proponent of a speech-burdening claim may avoid an anti-SLAPP dismissal by submitting an affidavit substantiating the claim's legal sufficiency (§ 425.16, subd. (b)(2); Rosenthal, supra, 14 Cal.4th at p. 412, 58 Cal.Rptr.2d 875, 926 P.2d 1061), the disciplinary scheme at issue in California Teachers incorporated no such safety valve to diminish constitutional concerns. Section 425.16 "is one of several California statutes providing a procedure for exposing and dismissing certain causes of action lacking merit." (Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal.App.4th 855, 866, 44 Cal.Rptr.2d 46.) "In varying language, all of these statutes literally require the trial court, at a preliminary stage of the litigation, to determine by examining affidavits the 'substantial probability' of plaintiff's prevailing on a claim, whether evidence 'substantiates' a standard of proof the plaintiff must meet, or whether plaintiff has 'established ... a reasonable probability' of recovery” (ibid.). Equilon has failed to identify any support for the proposition that the constitutionality of such provisions depends upon their requiring proof of subjective intent.

D. Congruence with Privilege Law

[6] "It is a fundamental rule of statutory construction that statutes should be construed to avoid anomalies.” (State of South Dakota v. Brown (1978) 20 Cal.3d 765, 775, 144 Cal.Rptr. 758, 576 P.2d 473; see also People v. Ledesma (1997) 16 Cal.4th 90, 101, 65 Cal.Rptr.2d 610, 939 P.2d 1310.) In accordance with this principle, we previously have declined to construe the anti-SLAPP statute so as to produce "the anomalous result that much direct petition activity ... [while] absolutely privileged under the litigation privilege ... and under the federal and state Constitutions, would not be entitled to the procedural protections of the anti-SLAPP

*65 law, even though section 425.16 expressly states the Legislature's intent thereby ‘broadly’ to protect the right of petition (§ 425.16, subd. (a)).” (Briggs, supra, 19 Cal.4th at p. 1121, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

Similarly here. Were we to impose an intent-to-chill proof requirement, petitioning that is absolutely privileged under the litigation privilege would be deprived of anti-SLAPP protection whenever a moving defendant could not prove that the plaintiff harbored an intent to chill that activity. Our construction avoids that anomalous result.

E. Public Policy
Considerations of public policy buttress the foregoing legal arguments against judicially imposing an intent-to-chill proof requirement on California's anti-SLAPP statute. A requirement that courts confront with anti-SLAPP motions inquire into the plaintiff's subjective intent would commit scarce judicial resources to an inquiry inimical to the legislative purpose that unjustified SLAPP's be terminated at an early stage. “Imposing a requirement of establishing bad faith or ulterior motive adds a needless burden to SLAPP targets seeking relief, and destroys the relatively value-free nature of existing anti-SLAPP structures under which actions become suspect because of the circumstances of their arising and the relief sought, without need to litigate motive.” (Braun, Increasing SLAPP Protection: Unburdening the Right of Petition in California (1999) 32 U.C. Davis L.Rev. 965, 969, fn. 9.) By requiring that a moving defendant demonstrate that the targeted cause of action is one arising from protected speech or petitioning (§ 425.16, subd. (b)), our anti-SLAPP statute utilizes a reasonable, objective test that lends itself to adjudication on pretrial motion. Such early resolution is consistent with the statutory design “to prevent SLAPPs by ending them early and without great cost to the SLAPP target” (Tate, California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope (2000) 33 Loyola L.A. L.Rev. 801), a purpose reflected in the statute's short time frame for anti-SLAPP filings and hearings (§ 425.16, subd. (f)) and provision for a stay of discovery (id., subd. (g)).

Contrary to Equilon's assertion, our conclusion will not allow the anti-SLAPP statute itself to become a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances. The anti-SLAPP remedy is not available where a probability exists that the plaintiff will prevail on the merits. (§ 425.16, subd. (b).) “The Legislature, moreover, has provided, and California courts have recognized, substantive and procedural limitations that protect plaintiffs against overbreadth application of the anti-SLAPP mechanism.” (Briggs, supra, 19 Cal.4th at pp. 1122–1123, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

*66 Courts deciding anti-SLAPP motions, for example, are empowered to mitigate their impact by ordering, where appropriate, “that specified discovery be conducted notwithstanding” the motion's pendency. (§ 425.16, subd. (g).) And if “the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion” (id., subd. (e)).

Most importantly, section 425.16 requires every defendant seeking its protection to demonstrate that the subject cause of action is in fact one “arising from” the defendant's protected speech or petitioning activity. (§ 425.16, subd. (b).)

As courts applying the anti-SLAPP statute have recognized, the arising from requirement is not always easily met. (See, e.g., ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1002, 113 Cal.Rptr.2d 625; Church of Scientology, supra, 42 Cal.App.4th at p. 651, 49 Cal.Rptr.2d 620.) The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, “act in furtherance of a public issue.” (See Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, 1417, 103 Cal.Rptr.2d 174.)

[7] As discussed more fully in the companion case City of Cotati v. Cashman, supra, 29 Cal.4th 69, 124 Cal.Rptr.2d 519, 52 P.3d 694, the mere fact an action was filed after protected...
activity took place does not mean it arose from that activity. (ComputerXpress, Inc. v. Jackson, supra, 93 Cal.App.4th at p. 1002, 113 Cal.Rptr.2d 625.) Rather, "the act underlying the plaintiff's cause" or 'the act which forms the basis for the plaintiff's cause of action' must *itself* have been an act in furtherance of the right of petition or free speech." (Id. at p. 1003, 113 Cal.Rptr.2d 625.)

In sum, as section 425.16 already contains express limitations on the availability and impact of anti-SLAPP motions, courts confronting such motions are well equipped to deny, mitigate, or even sanction them when appropriate. Contrary to Equilon's suggestion, therefore, it is not necessary that we impose an additional intent-to-chill limitation in order to avoid jeopardizing meritorious lawsuits. (See Briggs, supra, 19 Cal.4th at p. 1122, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

**694** We are well advised not to upset the Legislature's carefully crafted scheme for disposing of SLAPP's quickly and at minimal expense to taxpayers and litigants. Our Legislature apparently adjudged the anti-SLAPP statute's two-prong test ("arising from" and minimal merit) and the statute's other express limitations to be adequate, finding it unnecessary to add *67* an intent-to-chill or similar proof requirement such as Equilon proposes. We discern no grounds for second-guessing the Legislature's considered policy judgment.

F. Application

[8] [9] [10] In light of the foregoing, we may summarize a court's task in ruling on an anti-SLAPP motion to strike as follows. Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."

When analyzed in this manner, the Court of Appeal's ruling is correct. The pleadings and the affidavits submitted by the parties establish that Equilon's action for declaratory and injunctive relief is one arising from Consumer Cause's activity in furtherance of its constitutional rights of speech or petition—viz., the filing of Proposition 65 intent-to-sue notices. (Health & Saf.Code, § 25249.7, subd. (d).) Since the trial court also found that Equilon had not established a probability of prevailing on its claim, the court properly granted the motion. (§ 425.16, subd. (b)(1); see also Briggs, supra, 19 Cal.4th at p. 1115, fn. 6, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

While it may well be, as Equilon asserts, that it had pure intentions when suing Consumer Cause, such intentions are ultimately beside the point. As demonstrated, Equilon's action for declaratory and injunctive relief expressly was based on Consumer Cause's activity in furtherance of its petition rights. The Court of Appeal correctly held that Consumer Cause, having satisfied its initial burden under the anti-SLAPP statute of demonstrating that Equilon's action was one arising from protected activity (§ 425.16, subd. (b)(1)), faced no additional requirement of proving Equilon's subjective intent.

**695** WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, CHIN, BROWN and MORENO, JJ.
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All Citations

Footnotes

1. The acronym was coined by Penelope Canan and George W. Pring, professors at the University of Denver. (See generally Canan & Pring, Strategic Lawsuits Against Public Participation (1988) 35 Soc. Probs. 506.)

2. This case has two companions. (See City of Cotati v. Cashman (2002) 29 Cal.4th 69, 124 Cal.Rptr.2d 519, 52 P.3d 694; Navellier v. Sletten (2002) 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703.)

3. “The Legislature’s 1997 amendment of the statute to mandate that it be broadly construed apparently was prompted by judicial decisions ... that had narrowly construed it to include an overall ‘public issue’ limitation.”

4. Equilon purports to have sought declaratory relief solely in order to “get clarification of what it had to do” to avoid Proposition 65 liability after receiving Consumer Cause's notices. Equilon neglects to mention, when arguing in this vein, that it also sought injunctive relief that expressly would restrict Consumer Cause's exercise of petition rights. We need not in this case, therefore, decide whether or when a pure declaratory relief action seeking mere clarification of past speech or petitioning, but alleging no “liability or defense” (§ 425.16, subd. (b)(2)) or remedy “against a person” (id., subd. (b)(1)) that significantly would burden future exercise of such rights, might evade anti-SLAPP scrutiny. Such questions in any event lie beyond the scope of our review.

La Liberte v. Reid, 966 F.3d 79 (2020)

966 F.3d 79
United States Court of Appeals, Second Circuit.
Roslyn LA LIBERTE, Plaintiff-Appellant,
v.
Joy REID, Defendant-Appellee.

No. 19-3574

August Term 2019

Argued: May 14, 2020

Decided: July 15, 2020

Synopsis

Background: Speaker at city council meeting brought defamation action against cable television personality, alleging that personality defamed her by posting her photograph on speaker's social media and attributing racist remarks to her, and by juxtaposing her photograph with historical image of white woman screaming execrations at Black child trying to go to school after desegregation.
The United States District Court for the Eastern District of New York, Dora L. Irizarry, Senior District Judge, granted personality's motion to dismiss for failure to state a claim and struck speaker's claim under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. Speaker appealed.

Holdings: The Court of Appeals, Jacobs, Circuit Judge, held that:

[1] as matter of first impression, California's anti-SLAPP statute was inapplicable in federal court;

[2] personality was not prevailing defendant on special motion to strike, as required to recover attorney fees under California's anti-SLAPP statute;

[3] personality did not have immunity under the Communications Decency Act;

[4] speaker was not limited purpose public figure required to allege actual malice; and

[5] personality's statement that “history sometimes repeats” could reasonably be read as provable assertion of fact accusing speaker of engaging in racist conduct.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion to Strike All or Part of a Pleading.

West Headnotes (27)

[1] Federal Courts ⇐ Pleading

The Court of Appeals reviews de novo a district court's grant of a motion to dismiss for failure to state a claim, construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. Fed. R. Civ. P. 12(b)(6).

5 Cases that cite this headnote


The Court of Appeals reviews de novo questions of law.

1 Cases that cite this headnote

[3] Pleading ⇐ Application and proceedings thereon

California's anti-SLAPP (strategic lawsuit against public participation) statute requires that a court engage in a two-step process when ruling on a motion to strike a claim: first, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, acts taken in furtherance of the defendant's right of petition or free speech, and, if so, the
court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. U.S. Const. Amend. 1; Cal. Civ. Proc. Code § 425.16(b)(1).

[4] **Federal Courts** Anti-SLAPP laws
The test for determining if federal courts may entertain the various state iterations of anti-SLAPP (Strategic Lawsuit Against Public Participation) special motions to strike is whether a Federal Rule of Civil Procedure answers the same question as the special motion; if so, the Federal Rule governs, unless it violates the Rules Enabling Act. 28 U.S.C.A. § 2072(b).

2 Cases that cite this headnote

[5] **Federal Courts** Anti-SLAPP laws
California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute was inapplicable in defamation action in federal court, where it established circumstances under which court must dismiss plaintiff's claim before trial, namely, when plaintiff could not establish probability that she would prevail on her claim, while that question was already answered differently by federal rules governing motions to dismiss for failure to state claim and for summary judgment, which did not require proof of probability of success on the merits. Cal. Civ. Proc. Code §§ 425.16(b)(1), 425.16(b)(3); Fed. R. Civ. P. 12(b)(6), 56(a).

1 Cases that cite this headnote

[6] **Federal Civil Procedure** Insufficiency in general
Under the rule governing motions to dismiss for failure to state a claim, the pleading burden is to allege enough facts to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

[7] **Federal Civil Procedure** Insufficiency in general
The rule governing motions to dismiss for failure to state a claim does not impose a probability requirement at the pleading stage. Fed. R. Civ. P. 12(b)(6).

[8] **Federal Civil Procedure** Insufficiency in general
A well-pleaded complaint may proceed even if it strikes a savvy judge, on a motion to dismiss for failure to state a claim, that actual proof of the facts alleged is improbable. Fed. R. Civ. P. 12(b)(6).

[9] **Federal Civil Procedure** Validity
Federal rules governing motions to dismiss for failure to state a claim and for summary judgment comply with the Rules Enabling Act, since they affect only the process of enforcing litigants' rights and not the rights themselves. 28 U.S.C.A. § 2072(b).

[10] **Costs** Particular Actions or Proceedings
Cable television personality was not "prevailing defendant" on special motion to strike, and, thus, she was not entitled to attorney fees under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute in defamation action brought against her in federal court by speaker at city council meeting, where federal court dismissed speaker's defamation claim for failure to state claim upon which relief could be granted, and not on special motion to strike under California's anti-SLAPP statute. Cal. Civ. Proc. Code § 425.16(c)(1); Fed. R. Civ. P. 12(b)(6).

1 Cases that cite this headnote
Libel and Slander ➡️ By others in general

Telecommunications ➡️ Persons and entities liable; immunity

Cable television personality did not have immunity under the Communications Decency Act, in defamation action brought by speaker at city council meeting, alleging that personality defamed her by posting her photograph on personality's social media and attributing racist remarks to her, and by juxtaposing her photograph with historical image of white woman screaming execrations at Black child trying to go to school after desegregation, where speaker's claim was based on social media posts authored by personality, not on information provided by another content provider; personality did not merely repeat what had been previously published by another content provider, but, rather, she was sole author of her postings. Communications Act of 1934 § 230, 47 U.S.C.A. §§ 230(c)(1), 230(f)(3).

Libel and Slander ➡️ Criticism and Comment on Public Matters; Public Figures

Immunity under the Communications Decency Act has three elements: (1) the defendant is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

Libel and Slander ➡️ Criticism and Comment on Public Matters; Public Figures

There are two kinds of public figures for purposes of a defamation claim under California law; (1) the all-purpose public figure, who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes, and (2) the limited purpose public figure, who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues.

Libel and Slander ➡️ Criticism and Comment on Public Matters; Public Figures

Under California law, speaker who expressed her opposition to California's sanctuary-state law at city council meeting was not limited purpose public figure with respect to sanctuary-state controversy, and, thus, speaker was not required to allege actual malice to state defamation claim against cable television personality, alleging that personality defamed her by posting her photograph on personality's social media and attributing racist remarks to her, and by juxtaposing her photograph with historical image of white woman screaming execrations at Black child trying to go to school after desegregation, where speaker lacked regular and continuing access to media prior to personality's postings.

Libel and Slander ➡️ Criticism and Comment on Public Matters; Public Figures

To be a limited purpose public figure for purposes of a defamation claim under California law, a person must maintain regular and continuing access to the media.

Libel and Slander ➡️ Criticism and Comment on Public Matters; Public Figures

One reason for imposing the burden of proving actual malice on public figures and limited purpose public figures, on a defamation claim under California law, is that they have media access enabling them to effectively defend their reputations in the public arena.
[17] **Libel and Slander**  ✶  Criticism and Comment on Public Matters; Public Figures

Regular and continuing access to the media is an element in the test for determining whether someone is a limited purpose public figure for purposes of a defamation claim under California law.

[18] **Libel and Slander**  ✶  Criticism and Comment on Public Matters; Public Figures

Under California law, media access that becomes available only after and in response to damaging publicity does not make someone a public figure for purposes of a defamation claim.

[19] **Libel and Slander**  ✶  Criticism and Comment on Public Matters; Public Figures

People become limited purpose public figures, for purposes of a defamation claim under California law, only when they voluntarily invite comment and criticism by injecting themselves into public controversies.

[20] **Libel and Slander**  ✶  Actionable Words in General

Cable television personality’s statement that “history sometimes repeats,” on her social media post juxtaposing photograph of speaker who expressed her opposition to California’s sanctuary-state law at city council meeting with historical image of white woman screaming excrections at Black child trying to go to school after desegregation, could reasonably be read as provable assertion of fact accusing speaker of engaging in racist conduct, rather than nonactionable statement of opinion under California defamation law.

[21] **Libel and Slander**  ✶  Construction of defamatory language in general

Whether a statement is nonactionable opinion is a question of law to be decided by the court on a defamation claim under California law.

[22] **Libel and Slander**  ✶  Actionable Words in General

The test for determining whether a statement is nonactionable opinion, on a defamation claim under California law, is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.

[23] **Libel and Slander**  ✶  Actionable Words in General

Under California law, accusations of concrete, wrongful conduct are actionable as defamatory while general statements charging a person with being racist, unfair, or unjust are not.

[24] **Libel and Slander**  ✶  Actionable Words in General

Under California law, a publication is “libelous per se” when a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense.

[25] **Libel and Slander**  ✶  Actionable Words in General

Under California law, a publication is “libelous per quod” if a reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons.
Libel and Slander Actionable Words in General

Under California law, a statement can be libelous per se if it contains a charge by implication from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter.

Libel and Slander Matter imputed

Under California law, a defendant in a defamation action is liable for what is insinuated, as well as for what is stated explicitly.

Appeal from the United States District Court for the Eastern District of New York (Irizarry, Ch. J.) rejected Reid's defense of immunity under section 230 of the Communications Decency Act, see 47 U.S.C. § 230(c)(1) (“Section 230”), but nevertheless dismissed La Liberte's defamation claim as to both of Reid's posts. The court deemed La Liberte to be a limited purpose public figure and held that she failed to allege actual malice as to the first post, and rejected the claim as to the second post on the ground that it was nonactionable opinion. Moreover, the court “struck” La Liberte's defamation claim--and imposed attorneys' fees (to be assessed)--under California's Anti-Strategic Lawsuits Against Public Participation (“anti-SLAPP”) statute for failure to establish “a probability that the plaintiff will prevail.” Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1). La Liberte appeals on the grounds that she was not a limited purpose public figure, that both posts were defamatory, and that California's anti-SLAPP statute is inapplicable in federal court. Reid argues that the court erroneously denied Section 230 immunity as to her first post.

As a matter of first impression in this Circuit, we hold that California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56 (Point I).

As to the merits, we agree with the district court that Reid cannot claim immunity under Section 230 of the Communications Decency Act (Point II). This lawsuit does not treat Reid as “the publisher or speaker of any information personality on cable television, retweeted that post, an act that is not alleged to be defamatory. The defamation claim is based on Reid's two later posts: her June 29 post showed the photograph and attributed the specific racist remarks to La Liberte; her July 1 post, to the same effect, juxtaposed the photograph with the 1957 image of a white woman in Little Rock screaming execrations at a Black child trying to go to school.

The teenager who was photographed with La Liberte soon after publicly explained that La Liberte did not scream at him and that they were having a civil discussion. La Liberte sued Reid for defamation in the United States District Court for the Eastern District of New York.

The district court (Irizarry, Ch. J.) rejected Reid's defense of immunity under section 230 of the Communications Decency Act, see 47 U.S.C. § 230(c)(1) (“Section 230”), but nevertheless dismissed La Liberte's defamation claim as to both of Reid's posts. The court deemed La Liberte to be a limited purpose public figure and held that she failed to allege actual malice as to the first post, and rejected the claim as to the second post on the ground that it was nonactionable opinion. Moreover, the court “struck” La Liberte's defamation claim--and imposed attorneys' fees (to be assessed)--under California's Anti-Strategic Lawsuits Against Public Participation (“anti-SLAPP”) statute for failure to establish “a probability that the plaintiff will prevail.” Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1). La Liberte appeals on the grounds that she was not a limited purpose public figure, that both posts were defamatory, and that California's anti-SLAPP statute is inapplicable in federal court. Reid argues that the court erroneously denied Section 230 immunity as to her first post.

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As to the merits, we agree with the district court that Reid cannot claim immunity under Section 230 of the Communications Decency Act (Point II). This lawsuit does not treat Reid as “the publisher or speaker of any information
La Liberte v. Reid, 966 F.3d 79 (2020)

provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added). To the contrary, she is the sole author of both allegedly defamatory posts.

We disagree with the rest of the district court's analysis under Rule 12(b)(6). La Liberte was not a public figure on the matter in controversy, primarily because she lacked the regular and continuing media access that is a hallmark of public-figure status. (Point III). Accordingly, she was not required to allege that Reid acted with actual malice as to either post. Moreover, *84 the court erred by characterizing Reid's second post as nonactionable opinion (Point IV). That post could be interpreted as accusing La Liberte of engaging in specific racist conduct, which is a provable assertion of fact and therefore actionable.

BACKGROUND

The facts are plentiful but straightforward. Roslyn La Liberte is a California citizen who avows that she is “passionate about this country's immigration policies.” (App. at 13.) She took a particular interest in California Senate Bill 54 (“SB 54”), a controversial 2017 law that limits cooperation between local law enforcement and federal immigration authorities. One provision is that state and local law enforcement officers are barred from disclosing (inter alia) an alien's address and date of release from prison. Cal. Gov't Code § 7284.6(a)(1). To register her opposition, La Liberte attended city council meetings in several cities, speaking out at some of them to urge resistance. On June 25th, 2018, La Liberte attended one such meeting in Simi Valley, California, along with hundreds of other people, where she spoke for about two minutes (the “Council Meeting”).

At some point during the Council Meeting, La Liberte was photographed interacting with a fourteen-year-old teenager who appears to be (and is) Hispanic (the “Photograph”). (See App. at 265.) The Photograph showed La Liberte with her mouth open and her hand at her throat in a gagging gesture. On June 28th, a social media activist named Alan Vargas tweeted the Photograph along with the following caption:

“You are going to be the first deported” [and] “dirty Mexican” [w]ere some of the things they yelled they yelled [sic] at this 14 year old boy. He was defending immigrants at a rally and was shouted down. Spread this far and wide this woman needs to be put on blast.

(App. at 67.) The Photograph went viral. The next day, Joy Reid, a personality on the MSNBC cable station, retweeted (i.e., shared) the Vargas tweet to her approximately 1.24 million followers. (La Liberte is not alleging defamation by Reid as to that communication.)

Later that same day (June 29), Reid posted the Photograph on her Instagram with the following caption:

He showed up to a rally to defend immigrants .... She showed up too, in her MAGA hat, and screamed, “You are going to be the first deported” ... “dirty Mexican!” He is 14 years old. She is an adult. Make the picture black and white and it could be the 1950s and the desegregation of a school. Hate is real, y'all. It hasn't even really gone away.

(the “June 29 Post”) (App. at 84.) Meanwhile, the teenager in the Photograph stated during an interview with Fox 11 Los Angeles that La Liberte did not yell any racial slurs and that their discussion was “civil.” (App. at 38, 47.) Still, La Liberte began receiving hate mail, including threats of mutilation and recommendations that she commit suicide.

Two days later (July 1), Reid published another post about La Liberte, this time on Instagram and Facebook. This post juxtaposed the Photograph of La Liberte with the 1957 photograph showing one of the Little Rock Nine walking past a screaming white woman. Reid added the following caption:

It was inevitable that this [juxtaposition] would be made. It's also easy to look at old black and white photos and think: I can't believe that person screaming at a child, with their face twisted in rage, is real. By [sic] every one of them were. History sometimes repeats. And it is full *85 of rage. Hat tip to @joseiswriting.
#regram #history #chooselove
La Liberte v. Reid, 966 F.3d 79 (2020)

(the “July 1 Post”) (App. at 87.) La Liberte hired a lawyer, who contacted Reid on July 2 to demand that she take down the posts and apologize. Reid responded that evening by removing them from her accounts and issuing the following statement: “It appears I got this wrong. My apologies to Mrs. La Liberte and [the teenager].” (App. at 116.)

La Liberte sued Reid for defamation in the Eastern District of New York, claiming that Reid's June 29 and July 1 posts falsely accused her of yelling racist slurs at the teenager in the Photograph. Applying California law by agreement of the parties, the district court dismissed La Liberte's claim under Rule 12(b)(6) and struck it under California's anti-SLAPP statute. And since that statute mandates fee shifting, the court “granted [Reid] leave to seek attorneys’ fees and costs.” (App. at 279.)

DISCUSSION

[1] [2] We review de novo a district court's grant of a motion to dismiss, “constru[ing] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.” Palin v. New York Times Co., 940 F.3d 804, 809 (2d Cir. 2019) (quoting Elias v. Rolling Stone LLC, 872 F.3d 97, 104 (2d Cir. 2017)). Likewise, whether California's anti-SLAPP statute can be applied in federal court raises a question of law, which we review de novo. Knight v. State Univ. of N.Y. at Stony Brook, 880 F.3d 636, 640 (2d Cir. 2018); Adelson v. Harris, 774 F.3d 803, 807, 809 (2d Cir. 2014).

1

We begin with the procedural issue posed by the court's decision to strike La Liberte's defamation claim under California's anti-SLAPP statute. For a category of cases related to a defendant's speech, that statute subjects any claim to dismissal “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b) (1). Many states have enacted “anti-SLAPP statutes” with the idea that they provide breathing space for free speech on contentious public issues. See Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015). The aim is “to decrease the ‘chilling effect’ of certain kinds of libel litigation and other speech-restrictive litigation ... by making it easier to dismiss defamation suits at an early stage of the litigation.” Id. (internal quotation marks omitted) (quoting Eugene Volokh, The First Amendment and Related Statutes 118 (5th ed. 2014)). Specifically, California's anti-SLAPP statute was enacted to provide “an efficient procedural mechanism for the early and inexpensive dismissal of nonmeritorious claims ‘arising from any act’ of the defendant ‘in furtherance of the person's right of petition or free speech ... in connection with a public issue.” Annette F. v. Sharon S., 119 Cal. App. 4th 1146, 1159, 15 Cal.Rptr.3d 100 (2004) (quoting Cal. Civ. Proc. Code § 425.16(b)(1)). A defendant is afforded 60 days from service of the complaint to file a “special motion to strike,” which must be granted “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b) (1), (f). Additionally, a prevailing defendant on this special motion “shall be entitled” to recover attorney's fees and costs. Id. § 425.16(c)(1).

[3] California courts resolve these motions in two steps. "First, the court decides *86 whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity [i.e.,] acts ... taken ‘in furtherance of the defendant's right of petition or free speech ....’ ” Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 67, 124 Cal.Rptr.2d 507, 52 P.3d 685 (2002) (alteration omitted) (quoting Cal. Civ. Proc. Code § 425.16(b)(1)). If so, the court “determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” Id. In doing so, “the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” Cal. Civ. Proc. Code § 425.16(b)(2).
Our sister circuits split on whether federal courts may entertain the various state iterations of the anti-SLAPP special motion. The Fifth, Eleventh, and D.C. Circuits hold that they are inapplicable in federal court on the ground that they conflict with Federal Rules of Civil Procedure 12 and 56. See Klocke v. Watson, 936 F.3d 240, 242 (5th Cir. 2019) (Texas); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018) (Georgia); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (D.C.). The First and Ninth Circuits see no such conflict with the statutes of Maine and California, respectively. See Godin v. Schenck's, 629 F.3d 79, 86-87 (1st Cir. 2010); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999). We have decided some cases involving these special motions, but we have not yet decided the question of applicability.3

*87 [4] The test is whether “a Federal Rule of Civil Procedure ‘answer[s] the same question’ as the [special motion to strike].” Abbas, 783 F.3d at 1333 (alteration in original) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–99, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010)). If so, the Federal Rule governs, unless it violates the Rules Enabling Act. Id. Applying that test, we first conclude that the special motion to strike in California's anti-SLAPP statute answers the same question as Federal Rules 12 and 56.

[5] [6] [7] [8] The special motion to strike requires outright dismissal unless the plaintiff can “establish[ ] a probability that he or she will prevail on the claim.” Cal. Civ. Pro. Code § 425.16(b)(3). The statute thus “establishes the circumstances under which a court must dismiss a plaintiff's claim before trial,” a question that is already answered (differently) by Federal Rules 12 and 56. Abbas, 783 F.3d at 1333-34. Under Rule 12(b)(6), the pleading burden is to allege “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This “does not impose a probability requirement at the pleading stage. ... [A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.” Id. at 556, 127 S.Ct. 1955. California's anti-SLAPP statute, however, “abrogates that entitlement ... by requiring the plaintiff to establish that success is not merely plausible but probable.” Carbone, 910 F.3d at 1353.

It also conflicts with Rule 56, which permits summary judgment only if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Rule thus enables plaintiffs to proceed to trial by identifying any genuine dispute of material fact, whereas California's anti-SLAPP statute “nullif[ies] that entitlement by requiring the plaintiff to prove that it is likely, and not merely possible, that a reasonable jury would find in his favor.” Carbone, 910 F.3d at 1353. Together, Rules 12 and 56 “express ‘with unmistakable clarity’ that proof of probability of success on the merits ‘is not required in federal courts’ to avoid pretrial dismissal.” Id. at 1351 (quoting Hanna v. Plumer, 380 U.S. 460, 470, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)). Therefore, California's special motion requires the plaintiff to make a showing that the Federal Rules do not require.

Reid urges us to follow the Ninth Circuit, which holds that California's anti-SLAPP statute and the Federal Rules “can exist side by side ... without conflict.” Newsham, 190 F.3d at 972 (internal quotation marks omitted). We disagree--as do a number of Ninth Circuit judges.4

*88 Amici curiae argue that “[a]s compared to Rules 12 and 56, the anti-SLAPP motion to strike 'serves the entirely distinct function of protecting those specific defendants that have been targeted with litigation on the basis of their protected speech' ” and that it “ 'supplements rather than conflicts with the Federal Rules.' ” (Amici Br. at 22 (first quoting Godin, 629 F.3d at 89; then quoting Makaef v. Trump University, LLC, 736 F.3d 1180, 1182 (9th Cir. 2013) (Wardlaw, J., concurring in the denial of rehearing en banc))). The idea that the more stringent requirement of the anti-SLAPP standard is a beneficial “supplement” to the Federal Rules is a policy argument—and fatal, because the more permissive standards of the Federal Rules likewise
reflect policy judgments as to what is sufficient. See \textit{Shady Grove}, 559 U.S. at 401, 130 S.Ct. 1431 (explaining that because “Rule 23 permits all class actions that meet its requirements, ... a State cannot limit that permission by ... imposing additional requirements”). Finally, \textit{amicus} warn that refusal to apply the anti-SLAPP statute will “encourage forum shopping” and lead to “an increased burden on federal courts in this Circuit.” (Amici Br. at 11.) That may be so; but our answer to a legal question does not turn on our workload; and in any event, the incentive to forum-shop created by a circuit split can be fixed, though not here.

\textbf{[9]} Since \textit{Rules 12 and 56} answer the same question as California's special motion to strike, they “govern in diversity cases in federal court, unless \textit{Rules 12 and 56} violate the Rules Enabling Act.” \textit{Abbas}, 783 F.3d at 1336. “So far, the Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act.” \textit{Id.} Neither Reid nor \textit{amicus curiae} invite us to deviate. Still, we briefly address the question for the sake of completeness. The test is “whether a rule really regulates procedure,--the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” \textit{Sibbach v. Wilson & Co.}, 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed. 479 (1941). Like the Eleventh Circuit, “[w]e have little difficulty concluding” that \textit{Rules 12 and 56} “comply with the Rules Enabling Act,” particularly because they “affect[] only the process of enforcing litigants’ rights and not the rights themselves.” \textit{Carbone}, 910 F.3d at 1357 (second alteration in original) (quoting \textit{Burlington N. R.R. Co. v. Woods}, 480 U.S. 1, 8, 107 S.Ct. 967, 94 L.Ed.2d 1, (1987)). Accordingly, federal courts must apply \textit{Rules 12 and 56} instead of California's special motion to strike.

\textbf{** **}

\textbf{[10]} Finally, Reid and \textit{amicus curiae} contend that she is entitled to attorneys’ fees under the anti-SLAPP statute based on the district court's separate \textit{Rule 12(b)(6)} dismissal. We disagree. “The Act does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal \textit{Rule 12(b)(6)}.” \textit{Abbas}, 783 F.3d at 1337 n.5; see also \textit{Klocke}, 936 F.3d at 247 n.6. (“Suffice to say that because [Texas's anti-SLAPP statute] does not apply in federal court, the district court erred by awarding fees and sanctions pursuant to it.”).

California's anti-SLAPP statute likewise awards attorneys' fees only to “a prevailing \textit{defendant on a special motion to strike}.” \textit{Cal. Civ. Pro. Code § 425.16(c)(1)} (emphasis added). So Reid cannot recover attorneys’ fees based on the district court's \textit{Rule 12(b)(6)} dismissal (which was nevertheless erroneous, as we explain below in Points III and IV). Nor may she recover them under the anti-SLAPP statute if she later prevails by other means.\textsuperscript{6}

\textbf{II}

\textbf{[11] \textit{[12]}} We agree with the district court that Reid does not enjoy immunity under Section 230 of the Communications Decency Act. See \textit{47 U.S.C. § 230(c)(1)} (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). This immunity has three elements: “(1) [the defendant] is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information.” \textit{FTC v. LeadClick Media, LLC}, 838 F.3d 158, 173 (2d Cir. 2016) (alteration in original) (internal quotation marks omitted) (quoting \textit{Jane Doe No. 1 v. Backpage.com, LLC}, 817 F.3d 12, 19 (1st Cir. 2016)). An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” \textit{47 U.S.C. § 230(f)(3)}.

The second element is dispositive here. La Liberte's claim is based on posts of which Reid is the \textit{author}, not on “information provided by another content provider.” Vargas had tweeted about vile remarks that “they yelled” at the meeting. (App. at 67 (emphasis added.) Vargas did not
attribute the remarks to La Liberte. The following day, Reid authored and published her own Instagram post (the June 29 Post), which attributed to La Liberte (albeit not by name) what Vargas attributed only generally to the unnamed “they.” (See App. at 84 (“She ... screamed, ‘You are going to be the first deported’... ‘dirty Mexican!’ ” (emphasis added)).) The post also included Reid's commentary on the conduct alleged: “Make the picture black and white and it could be the 1950s and the desegregation of a school. Hate is real, y'all. It hasn't even really gone away.” (App. at 84.)

As sole author of the June 29 Post, Reid alone was “responsible ... for [its] creation or development,” which makes her the sole “information content provider.” 47 U.S.C. § 230(f)(3). Moreover, she went way beyond her earlier retweet of Vargas in ways that intensified and specified the vile conduct that she was attributing to La Liberte. She accordingly stands liable for any defamatory content. And she is similarly the sole “information content provider” for her July 1 Post, a point she does not contest.

Reid argues that “[t]he issue ... is not whether a defendant posted or authored a publication, ... but rather whether the publication is materially different from a prior internet publication.” (Appellee's Br. at 42.) Thus Reid seeks Section 230 immunity on the ground that the June 29 Post *90 “merely repeated what countless others had previously published before her, including Vargas and at least eight other individuals who specifically stated that La Liberte made racial slurs at the Council Meeting.” (Appellee's Br. at 47.)

The contention is unsupported by fact or law. The June 29 Post did not “merely repeat[ ]” what Vargas had “previously published.” Among other salient differences, Reid's post accused La Liberte of yelling racist insults at the teenager. Nor did Reid simply retweet or share a post that someone else authored. 8 In effect, Reid is arguing that a plaintiff can sue only the first defamer. If that were so, a post by an obscure social media user with few followers, blogging in the recesses of the internet, would allow everyone else to pile on without consequence. No one's reputation would be worth a thing.

Reid relies more persuasively on the “material contribution” test that we recognized in LeadClick. See Force v. Facebook, Inc., 934 F.3d 53, 68 (2d Cir. 2019) (“[W]e have recognized that a defendant will not be considered to have developed third-party content unless the defendant directly and ‘materially’ contributed to what made the content itself ‘unlawful.’ ” (quoting LeadClick, 838 F.3d at 174)). We apply this test to “draw[ ] the line at the crucial distinction between, on the one hand, taking actions ... to ... display ... actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable.” Id. (alterations in original) (internal quotation marks omitted) (quoting Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 n.4 (9th Cir. 2016)).

That test does not serve Reid because she did not pass along or edit “third-party content”; she authored both Posts at issue. To illustrate: in Force, victims of Hamas-organized terrorist attacks in Israel sought to hold Facebook responsible on the ground that “Hamas ... used Facebook to post content that encouraged terrorist attacks in Israel.” 934 F.3d at 59. Facebook was immune under Section 230, as we held, because Facebook did not “‘develop’ the content of the ... postings by Hamas”; nor does Facebook “edit (or suggest edits) for the content that its users ... publish.” Id. at 69-70. On the other hand, in LeadClick, the defendant “had ‘developed’ third parties’ content by giving specific instructions to those parties on how to edit ‘fake news’ that they were using in their ads.” Id. at 69 (summarizing LeadClick, 838 F.3d at 176).

Since Reid cannot claim immunity, we turn to the substance of the defamation claim.

III

The district court ruled that La Liberte was a limited purpose public figure on the California sanctuary-state controversy, and dismissed her claim as to the June 29 Post for failure to plead actual malice. See Ampex Corp. v. Cargle, 128 Cal. App. 4th 1569, 1577, 27 Cal.Rptr.3d 863 (2005) (noting the actual malice requirement for limited purpose public figures).
[13] There are two kinds of public figures. “The all-purpose public figure ... has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes .... The limited *91[1] purpose public figure ... voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The district court answered affirmatively because La Liberte “thrust [herself] to the forefront” of the controversy, “invite attention and comment[,] ... [and] assume special prominence in [its] resolution.” Khawar v. Globe Int'l, Inc., 19 Cal. 4th 254, 263, 79 Cal.Rptr.2d 178, 965 P.2d 696 (1998) (internal quotation marks omitted) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)). The district court answered affirmatively because La Liberte “attended and spoke about SB 54 at multiple city council meetings” and “appeared in a photograph in the Washington Post about the SB 54 controversy” one month before the Simi Valley Council Meeting. (App. at 273.)

[14] [15] [16] [17] That is not nearly enough. Thin as the findings are to begin with, the district court did not take into account the requirement that a limited purpose public figure maintain “regular and continuing access to the media.” Hutchinson v. Proxmire, 443 U.S. 111, 136, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). One reason for imposing the actual malice burden on public figures and limited purpose public figures is that “[t]hey have media access enabling them to effectively defend their reputations in the public arena.” Khawar, 19 Cal. 4th at 265, 79 Cal.Rptr.2d 178, 965 P.2d 696 (citing Gertz, 418 U.S. at 344-45, 94 S.Ct. 2997). We have therefore made “regular and continuing access to the media” an element in our four-part test for determining whether someone is a limited purpose public figure. Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 617 (2d Cir. 1988). The California cases cited by the district court similarly turn on media access.

La Liberte plainly lacked such media access. The earlier photograph, which showed her conversing, was in a Washington Post photo spread of attendees at an SB 54 protest. The article did not name La Liberte, let alone mention her views. The single caption described everyone depicted as “[s]upporters and opponents of [SB 54] rally[ing] and debat[ing] outside Los Alamitos City Hall.” (App. at 140-41.) Such incidental and anonymous treatment hardly bespeaks “regular and continuing access to the media.”

Nor does La Liberte's participation at city council meetings. La Liberte is said to have “testified eight times around the state” (Appellee's Br. at 26 (citing App. at 102-05)); but Reid does not identify instances in which the media singled out La Liberte's participation as newsworthy. Nor does speech, even a lot of it, make a citizen (or non-citizen) fair game for attack. Imposition of the actual malice requirement on *92 people who speak out at government meetings would chill public participation in politics and community dialogue.

[18] True, La Liberte received media attention. Reid emphasizes that La Liberte appeared for a television interview after Vargas published his tweet but before Reid's posts were published. However, media access that becomes available only “after and in response to” damaging publicity does not make someone a public figure. Khawar, 19 Cal. 4th at 266, 79 Cal.Rptr.2d 178, 965 P.2d 696. By the time of the interview, the Photograph had gone viral, along with accusations that La Liberte had screamed vile racist remarks at a child. The interview was “only the media access that would likely be available to any private individual who found himself the subject of sensational and defamatory accusations.” Id. “If such access were sufficient ... any member of the media ... could confer public figure status simply by publishing sensational defamatory accusations against any private individual.” Id.

[19] It makes little sense to deem La Liberte a limited purpose public figure when she stepped forward solely to defend her reputation. People become limited purpose public figures only when they “voluntarily inject[ ] comment and criticism” by “injecting themselves into public controversies.” Id. at 265, 79 Cal.Rptr.2d 178, 965 P.2d 696 (emphasis added) (citing Gertz, 418 U.S. at 344-45, 94 S.Ct. 2997). La Liberte, however, did not use the interview to inject herself to the forefront of the sanctuary-state controversy; she was pulled into a spotlight. Her experience
suggests why the Supreme Court has only hypothetically recognized the notion of an involuntary public figure. 10

Since La Liberte was not a limited purpose public figure, the district court erred by requiring her to allege actual malice, and her claim as to the June 29 Post should not have been dismissed for failing to do so. On remand, the district court may assess whether La Liberte adequately alleged that Reid acted negligently with respect to that post, the standard for private-figure plaintiffs. See Khawar, 19 Cal. 4th at 274, 79 Cal.Rptr.2d 178, 965 P.2d 696; Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 742, 257 Cal.Rptr. 708, 771 P.2d 406 (1989) ("[A] private person need prove only negligence (rather than malice) to recover for defamation.").

IV

[20] The district court dismissed La Liberte's claim as to the July 1 Post on the ground that it “express[ed] nonactionable statements of opinion.” (App. at 275.) We disagree. A reader could have understood the July 1 Post as equating La Liberte's conduct with archetypal racist conduct, which is a provable assertion of fact, and therefore actionable.


[23] Relatedly, “accusation[s] of concrete, wrongful conduct” are actionable while “general statements charging a person with being racist, unfair, or unjust” are not. Overhill Farms, 190 Cal. App. 4th at 1262, 119 Cal.Rptr.3d 127. Overhill Farms is instructive: a press release and leaflets discussing a company's termination of immigrant workers were actionable because they did not “merely accuse [the company] of being ‘racist’ in some abstract sense.” Id. Rather, the press release “contain[ed] language which expressly accuse[d] [the company] of engaging in racist firings,” and the leaflets “refer[red] to [the company's] conduct as ‘racist and discriminatory abuse against Latina women immigrants.’ ” Id.

A reader could interpret the juxtaposition of the Photograph with the 1957 Little Rock image to mean that La Liberte likewise screamed at a child out of racial animus--particularly in light of Reid's comment that “[h]istory sometimes repeats.” (App. at 87.) That interpretation is bolstered by Reid's description of the white woman in the Little Rock photograph as a “person screaming at a child, with [her] face twisted in rage” and Reid's comment that it was “inevitable” that the photos would be juxtaposed. Reid thus portrayed La Liberte as a latter-day counterpart of the white woman in 1957 who verbally assaulted a minority child. Like the defendants in Overhill Farms, Reid “did not merely accuse [La Liberte] of being ‘racist’ in some abstract sense.” 190 Cal. App. 4th at 1262, 119 Cal.Rptr.3d 127. Rather, her July 1 Post could be understood as an “accusation of concrete, wrongful conduct,” which can be proved to be either true or false. Id. That makes it potentially defamatory.

Reid argues that readers could not understand the July 1 Post as defamatory absent familiarity with Reid's June 29 Post or the Little Rock image, and that La Liberte was therefore required to plead defamation by implication and special damages. We disagree.

[24] [25] To be sure, California defamation law (which governs) recognizes two categories of libel, one of which requires proof of special damages. A publication is libelous “per se” when “a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense.” Bartholomew v. YouTube, LLC, 17 Cal. App. 5th 1217, 1226, 225 Cal.Rptr.3d 917 (2017) (quoting Barnes-Hind, Inc. v. Superior Court, 181 Cal. App. 3d 377, 386-87, 226 Cal.Rptr. 354 (1986)). A publication is libelous “per quod” if a “reader would be
able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons.”

Id. at 1226-27, 225 Cal.Rptr.3d 917 (quoting Barnes-Hind, Inc., 181 Cal. App. 3d at 386-87, 226 Cal. Rptr. 354). And unlike libel per se, libel per quod “is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.” Cal. Civ. Code § 45a.

[26] Reid's argument confuses libel per quod, which imposes the special damages requirement, with libel by implication, which can be libel per se nevertheless. “A statement can also be libelous per se if it contains a charge by implication from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter.” McGarry v. Univ. of San Diego, 154 Cal. App. 4th 97, 112, 64 Cal.Rptr.3d 467 (2007).

Readers who were unfamiliar with the June 29 Post could still interpret the July 1 Post to mean that Liberte engaged in racist conduct. The Little Rock encounter is a “matter[] of common knowledge rationally attributable to all reasonable persons.” Bartholomew, 17 Cal. App. 5th at 1226-27, 225 Cal.Rptr.3d 917. Far from an obscure episode, it is a landmark event in one of the most vital historic developments of twentieth-century America, and the 1957 photograph is an indelible image of it. Presumably, that is why and how Reid used it.

[27] Moreover, even those with an impoverished frame of reference could interpret the post as accusing La Liberte of engaging in racist conduct. There was no need for “extrinsic aid beyond [a reader's] own intelligence and common sense.” Id. at 1226, 225 Cal.Rptr.3d 917. The 1957 photograph shows a white woman “screaming at a [Black] child, with [her] face twisted in rage.” (App. at 87.) When viewing that image next to La Liberte's Photograph and reading Reid's comment that “[h]istory sometimes repeats,” a reader could believe that La Liberte had likewise engaged in racist conduct. And Reid “is liable for what is insinuated, as well as for what is stated explicitly.” Bartholomew, 17 Cal. App. 5th at 1227, 225 Cal.Rptr.3d 917. Because that accusation is capable of being proven or disproven, the district court erred by characterizing the July 1 Post as nonactionable opinion.

* * *

Since the district court concluded that La Liberte adequately alleged malice with respect to the July 1 Post, 12 it follows that La Liberte adequately alleged negligence, the standard for private-figure plaintiffs. Her claim as to this post should proceed to discovery.

CONCLUSION

For the reasons stated above, the district court's judgment is VACATED and REMANDED for further proceedings consistent with this opinion.

All Citations

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Footnotes

1 For our purposes, these anti-SLAPP statutes are analogous to California's. Each raises the bar for plaintiffs to overcome a pretrial dismissal motion. See Carbone, 910 F.3d at 1348 (addressing Georgia's anti-SLAPP statute, which imposes the identical requirement: plaintiffs must "establish[] that there is a probability that the nonmoving party will prevail on the claim"); Abbas, 783 F.3d at 1332 (addressing D.C.'s anti-SLAPP statute, which similarly requires plaintiffs to demonstrate that "the claim is likely to succeed on the merits");
see also Klocke, 936 F.3d at 244 (addressing Texas's anti-SLAPP statute, which requires the non-movant to “establish[ ] by clear and specific evidence a prima facie case for each element of the claim in question”).

Maine's special motion requires dismissal “unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.”

Reid argues that we already held (or implied) that these special motions can be applied in federal court. Not so. She relies on Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 157 (2d Cir. 2013) (“Liberty I”), which vacated the denial of a California special motion to strike. But that case turned on choice-of-law principles under the Rules of Decision Act. Id. at 142, 157. The question on appeal was whether the district court could entertain California's special motion to strike notwithstanding that it was applying New York substantive law. (The case originated in California state court. It was removed to federal court and then transferred to the Eastern District of New York.) Id. at 143. Liberty I therefore did not consider whether the special motion conflicts with any Federal Rule, and a later decision in that case clarified as much, noting that Liberty I “expressly declined to reach” the issue of “whether California's anti-SLAPP statute is applicable in federal court.” Liberty Synergistics Inc. v. Microflo Ltd., 637 F. App’x 33, 34 n.1 (2d Cir. 2016) (summary order) (alteration omitted).

Reid also relies on Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014), which approved certain aspects of Nevada's anti-SLAPP statute. That case is inapposite because Nevada's statute is quite different. As the district court in Adelson recognized, “[t]he Nevada statute does not establish a ‘reasonable probability of success’ standard that must be met without discovery, like the California Anti–SLAPP law.” Adelson v. Harris, 973 F. Supp. 2d 467, 493 n.21 (S.D.N.Y. 2013). Instead, “the Nevada statute immunizes ‘good faith communication[s]’--defined as communications that are ‘truthful or ... made without knowledge of ... falsity’--thereby effectively raising the substantive standard that applies to a defamation claim.” Id. Accordingly, “even if the procedural elements of certain Anti–SLAPP statutes present [conflicts with the Federal Rules of Procedure], those problems [were] not presented in [Adelson], where the effects of the [Nevada] Anti–SLAPP law ... are substantive.” Id. (citation omitted).

See Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski Ch. J., Paez J., and Bea, J., dissenting from denial of rehearing en banc). Judge Watford explained that Newsham is no longer good law (to the extent it ever was) in light of the Supreme Court's intervening decision in Shady Grove, See id. at 1189 (“Just as the New York statute in Shady Grove impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 23 would allow them to proceed.”); see also id. (“The anti-SLAPP statute eviscerates Rule 56 by requiring the plaintiff to prove that she will probably prevail if the case proceeds to trial--a showing considerably more stringent than identifying material factual disputes that a jury could reasonably resolve in the plaintiff's favor.”).

Amici moved for leave to file their brief on February 19, 2020. That motion is now granted.

The California Legislature presumably could have awarded attorneys' fees to the prevailing party in any defamation action, but it chose not to do so. See Abbas, 783 F.3d at 1335 (“Had the D.C. Council simply wanted to permit courts to award attorney's fees to prevailing defendants in these kinds of defamation cases, it easily could have done so.”).
By only addressing the June 29 Post, Reid concedes that her July 1 Post does not qualify for Section 230 immunity.

La Liberte’s initial complaint included Reid’s retweet of the Vargas tweet; but since La Liberte later dropped that claim, we need not decide whether a retweet qualifies for Section 230 immunity. Nor are we called to decide whether Section 230 protects a social media user who copies verbatim (and without attribution) another user’s post, a question that may be complicated by issues as to malice and status as a public figure.

In Nadel v. Regents of the University of California, 28 Cal. App. 4th 1251, 34 Cal.Rptr.2d 188 (1994), one plaintiff was deemed to be a limited purpose public figure because he had “spoke[n] to print media reporters who included his comments in articles about the [controversy]” and had “been on 6 radio stations,” underscoring his “‘more realistic opportunity to counteract false statements than private individuals normally enjoy.’” Nadel, 28 Cal. App. 4th at 1269-70, 34 Cal.Rptr.2d 188 (quoting Gertz, 418 U.S. at 344, 94 S.Ct. 2997); see also Rudnick v. McMillan, 25 Cal. App. 4th 1183, 1190, 31 Cal.Rptr.2d 193 (1994) (reasoning that a cattle rancher became a limited purpose public figure by successfully prompting two newspapers to write articles about his dispute with California’s Bureau of Land Management).

The Court acknowledged the possibility of becoming an involuntary public figure but cautioned that “the instances of truly involuntary public figures must be exceedingly rare.” Gertz, 418 U.S. at 345, 94 S.Ct. 2997. As the Supreme Court of California elaborated, “assuming a person may ever be accurately characterized as an involuntary public figure, we infer ... that the [Supreme Court] would reserve this characterization for an individual who, despite never having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.” Khawar, 19 Cal. 4th at 265, 79 Cal.Rptr.2d 178, 965 P.2d 696 (last emphasis added). La Liberte is clearly not that exception. In any event, since Gertz, the Supreme Court has “emphasized the voluntary nature of the public-figure status.” Sack on Defamation: Libel, Slander, and Related Problems at 5-68 (5th ed. 2017).

“‘Special damages’ means all damages that plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and no other.” Cal. Civ. Code § 48a(d)(2).

The court reasoned that “it is plausible that [Reid] learned about the falsity of the content of the July 1 Post before publication,” including by way of emails from La Liberte’s son. (App. at 275.)

KeyCite Blue Flag – Appeal Notification
Appeal Filed by NATIONAL COALITION ON BLACK v. WOHL, 2nd Cir., February 8, 2021

2021 WL 480818
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

NATIONAL COALITION ON BLACK CIVIC PARTICIPATION, et al., Plaintiffs,
v. Jacob WOHL, et al., Defendants.

20 Civ. 8668 (VM)
Signed 01/12/2021

Attorneys and Law Firms


DECISION AND ORDER

VICTOR MARRERO, United States District Judge.


Now before the Court is Defendants’ letter motion requesting a pre-motion conference and seeking leave to file a motion to dismiss the Complaint. The Court construes the letter as a motion to dismiss pursuant to Federal Rule of Civil Procedure (“Federal Rule”) 12(b)(6) (the “Motion,” Dkt. No. 58). For the reasons discussed below, the Motion is DENIED.

I. BACKGROUND

A. FACTS AND PROCEDURAL BACKGROUND

This Order assumes familiarity with the Court’s prior Order granting Plaintiffs’ motion for a temporary restraining order, including the factual recitation contained therein. See “TRO Decision,” Dkt. No. 38; see also Nat’l Coal. of Black Civic Participation v. Wohl, No. 20 Civ. 8668, —— F.Supp.3d ———, 2020 WL 6305325 (S.D.N.Y. Oct. 28, 2020).

In brief, Plaintiffs allege that in late August 2020, thousands of voters in the United States, including voters in Illinois, Ohio, New York, and Pennsylvania, received robocalls that conveyed the following message:

Hi, this is Tamika Taylor from Project 1599, the civil rights organization founded by Jack Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail, your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The CDC is even pushing to use records for mail-in voting to track people for mandatory vaccines. Don’t be finessed into giving your private
Plaintiffs allege that this robocall message contains various false statements, including: (1) the claim that police will use vote-by-mail information to track persons with outstanding warrants; (2) the assertion that vote-by-mail information will be used by debt collectors; and (3) the claim that the Centers for Disease Control and Prevention (“CDC”) is seeking access to vote-by-mail information to conduct mandatory vaccinations.

Plaintiffs further allege that the robocalls were specifically designed to intimidate Black voters. Plaintiffs estimate that approximately 85,000 robocalls conveying this message were placed as of the filing of the Complaint. According to Plaintiffs, the calls targeted areas with large populations of Black voters, such as Detroit, Michigan, as well as urban areas with significant minority populations, such as New York City. Plaintiffs contend that the particular messages conveyed in the robocalls sought “to exploit racially charged stereotypes and false information” in order to dissuade Black voters from participating in the November 3, 2020 election. (Complaint ¶ 4.) Moreover, Plaintiffs allege that the purported speaker on the calls, Tamika Taylor, could be confused by call recipients with the mother of Breonna Taylor -- whose actual name is Tamika Palmer. Given the prominence of Breonna Taylor’s name and story, Plaintiffs allege that this reference lent further apparent legitimacy, and therefore duplicitousness, to the robocalls.

The Complaint further alleges that it was Wohl's and Burkman's intent to interfere with the November 3, 2020 election. Plaintiffs contend that this intent was made clear, when, for example, according to a February 26, 2019 article in USA Today, Wohl told reporters that he and Burkman were planning “ways to discredit Democrats in the 2020 election with lies and other disinformation, using his large following on social media to cause disarray similar to what Russians did during the 2016 election.” In addition, the Daily Beast published a document that Wohl later said was a draft of his business plan for the “Arlington Center for Political Intelligence.” The goal of this plan was to “suppress turnout.”

The Individual Plaintiffs attest that the robocalls caused them to be concerned about voting by mail. For example, plaintiff Gene Steinberg, who has an eighteen-year-old nonviolent criminal conviction, described receiving the call as “particularly traumatic.” (Steinberg Decl. ¶ 13.) The claim that law enforcement would use mail-in voters’ information to track persons with outstanding arrest warrants made Steinberg frightened and anxious given his criminal history.

Plaintiff Andrea Sferes also found the robocall to be distressing and “emotionally upsetting.” (Sferes Decl. ¶ 9.) Having outstanding medical debt, Sferes began to doubt whether her information would be shared if she voted by mail, and she “had to try and convince [herself] that [the robocall message] was not true.” (Id. ¶ 8.)

Plaintiff Nancy Hart, a journalist whose work focuses on the Black community in and around Pittsburgh, became “irate” when she received the call because she recognized it as a deceptive scheme designed to prey upon fears in the Black community about the police, predatory debt collectors, and government-mandated medical programs, and thereby scare Black voters from voting. (Hart Decl. ¶¶ 7-8.)

As a result of the robocalls, at least two Plaintiffs -- Steinberg and Winter -- decided against voting by mail, which they had originally planned to do, because of their fears of exposure to COVID-19. After receiving the call, Steinberg and Winter did not view voting by mail in the 2020 election as reliable.

Plaintiff NCBCP invests significant resources in the Black Women's Roundtable (“BWR”), an empowerment program that promotes Black participation in the Census and elections and engages in on-the-ground organizing. When the robocalls began in late August, NCBCP's BWR program in the Detroit area (“BWR Metro Detroit”) learned that Detroit community members were receiving the calls. BWR Metro Detroit became concerned that the calls would intimidate Black voters from participating in the upcoming elections or scare Black voters who would have voted by mail into voting in person, thereby increasing their risk of contracting COVID-19. Accordingly, BWR Metro Detroit diverted resources allocated toward increasing Census participation to...
addressing the disinformation communicated in the robocalls. For example, BWR Metro Detroit's co-chair switched from assisting community members with the completion of their Census forms to responding to the robocalls’ disinformation.

B. PROCEDURAL HISTORY
Shortly after filing the Complaint, Plaintiffs moved for a temporary restraining order enjoining Defendants from engaging in any further communications in violation of the VRA or KKK Act. (See “TRO,” Dkt. No. 12.) After hearing argument, the Court found that Plaintiffs had demonstrated a likelihood of success on the merits of their claims and that irreparable harm would result if a preliminary injunction was not issued. (See generally TRO Decision.) Therefore, the Court granted the motion, enjoined Defendants from engaging in communications in violation of the VRA or KKK Act, and further ordered Defendants to issue a curative robocall informing recipients of the Court's findings regarding the threatening and intimidating nature of Defendants’ original robocall. (Id.)

After the Court issued its TRO Decision, Defendants sought leave by letter to file a motion to dismiss the Complaint. (See Motion.) This Motion followed an exchange of letter correspondence between the parties in accordance with the Court's Individual Rules, which included Defendants’ letter dated November 17, 2020 (see Dkt No. 58-1), and Plaintiffs’ response dated November 24, 2020 (see Dkt No. 58-2). The Court denied leave to file a motion, finding that the pre-motion letters and material already contained in the record were sufficient for the Court to render its decision. (See Dkt. No. 61.) Nonetheless, Defendants submitted additional briefing regarding their motion to dismiss, (see Dkt No. 62), and Plaintiffs were provided an equivalent opportunity to respond (see Dkt. Nos. 63, 64). The Court has considered both the pre-motion letters and the parties’ supplemental briefing in connection with this Order.

C. THE PARTIES’ ARGUMENTS
*4 Defendants argue that (1) the robocalls at issue do not actually violate either the VRA or KKK Act; (2) the robocalls constitute protected free speech under the First Amendment; (3) the Individual Plaintiffs have alleged no compensable harm and therefore do not have standing to bring this action; (4) the robocalls are legally compliant with Federal Communications Commission (“FCC”) and Federal Trade Commission (“FTC”) rules; and (5) because the 2020 election has passed, and in light of the Court's TRO Decision, this case is now moot.

Plaintiffs respond that (1) the Court has already held that Plaintiffs are likely to succeed on the merits of their statutory claims and thus have adequately alleged a plausible claim; (2) the robocalls do not constitute protected First Amendment speech because they manifest “true threats” and intimidation; (3) the Individual Plaintiffs have adequately shown compensable harm even if they voted in the 2020 election; (4) compliance with FTC and FCC rules is irrelevant because Plaintiffs do not allege violations of those rules; and (5) because Plaintiffs request monetary damages, this case is not moot.

II. LEGAL STANDARDS

“To survive a motion to dismiss [pursuant to Federal Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). This standard is met “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently “raise a right to relief above the speculative level.” See Twombly, 550 U.S. at 555, 127 S.Ct. 1955. The task of the Court in ruling on a motion to dismiss is to “assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” In re Initial Pub. Offering Sec. Litig., 383 F. Supp. 2d 566, 574 (S.D.N.Y. 2005) (internal quotation marks and citation omitted). Unlike at the preliminary injunction stage, for purposes of a motion to dismiss, a Court must accept all well-pleaded factual allegations in the Amended Complaint as true and draw all reasonable inferences in Plaintiffs’ favor.

See Chambers, 282 F.3d at 152 (citing Gregory v.
Daly, 243 F.3d 687, 691 (2d Cir. 2001)). Thus, a plaintiff at the preliminary injunction stage has a “heavier burden” than a plaintiff “bears in pleading the plausible claim necessary to avoid dismissal.” New Hope Family Servs., Inc. v. Poole, 966 F.3d 145, 165 (2d Cir. 2020).

III. DISCUSSION

A. VIOLATIONS OF THE VRA AND THE KKK ACT

Defendants’ primary contention is that Plaintiffs’ allegations fail to establish a violation of either Section 11(b) of the VRA or Section 2 of the KKK Act. Defendants reiterate that the robocall message cannot be considered a threat or intimidation because it did not place recipients in fear of bodily harm. (Dkt. No. 62, at 2.) Defendants additionally argue that even if communications can constitute intimidation without being explicitly violent, in this case there is no violation of either statute because the message “was dispersed in English, does not name or target any individual or protected class, does not attempt to dissuade anyone from voting, and is facially neutral.” (Id. at 3.)

1. Section 11(b) of the VRA

Section 11(b) of the VRA states, in relevant part, that:

52 U.S.C. § 10307(b). As the Court previously recognized, this statute sweeps broadly in accordance with Congress's goal of realizing, enforcing, and protecting the Fifteenth Amendment's right to vote. See generally H.R. Rep. No. 89-439 (1965). The provision applies to private conduct and can be enforced through suit by a private individual. See League of United Latin Am. Citizens - Richmond Region Council v. County of Fairfield, 32 F.3d 65, 68 (2d Cir. 1994), the dictionary definitions of “intimidate” and “threaten” are of particular relevance. “Intimidate” means to “make timid or fearful” or “inspire or affect with fear,” especially “to compel to action or inaction (as by threats).” Webster’s Third New International Dictionary 1183 (1966). “Threaten” means to “utter threats against” or “promise punishment, reprisal, or other distress.” Id. at 2381.

In line with these definitions, courts have held that allegations of conduct that “put [an individual] in fear of harassment and interference with their right to vote” is “intimidation
sufficient to support [a] § 11(b) claim.” LULAC v. Smith, 2018 WL 3848404, at *4 (citing Damon v. Hukowicz, 964 F. Supp. 2d 120, 149 (D. Mass. 2013) ("Intimidation means putting a person in fear for the purpose of the compelling or deterring his or her conduct.” (citations omitted))). Likewise, courts addressing similar voting-rights statutes have held that nonviolent actions or threats constitute impermissible threats, intimidation, or coercion. See, e.g., United States v. Nguyen, 673 F.3d 1259, 1265 (9th Cir. 2012) (concluding that the wide distribution of a letter among Latino immigrants warning “that if they voted in the upcoming election their personal information would be collected” and could be provided to anti-immigration organizations constitutes sufficient evidence to find unlawful intimidation under California law); United States v. McLeod, 385 F.2d 734, 740-41 (5th Cir. 1967) (holding that a pattern of baseless arrests of Black individuals attending a voter-registration meeting was intimidating and coercive conduct given its “chilling effect” on voter registration); United States v. Bruce, 353 F.2d 474, 476-77 (5th Cir. 1965) (holding that a landowner’s restriction of an insurance collector’s access to the landowner’s property due to the insurance collector’s efforts to register voters constitutes unlawful intimidation); Beatty v. City of Lakewood, 288 F.2d at 654-57 (holding that the eviction of sharecroppers as punishment for voter registration constitutes unlawful intimidation).

*6 That subtle, nonviolent forms of intimidation are actionable under Section 11(b) is supported by two additional considerations. First, two other civil rights statutes -- the Fair Housing Act (“FHA”) and Americans with Disabilities Act (“ADA”) -- use analogous language and encompass subtle forms of intimidation. See, e.g., Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n, 388 F.3d 327, 330 (7th Cir. 2004) (finding that the defendants’ nonviolent actions, including writing “H-town property,” taking down flyers, and destruction of board meeting minutes, constitutes a FHA violation); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 223 (2d Cir. 2001) (holding that a jury could find the defendant had intimidated or threatened the plaintiff in violation of the ADA by sending a letter stating that if she continued her behavior, it would “have no choice but to address [her] behavior through legal channels”); see also Walker v. City of Lakewood, 272 F.3d 1114, 1128-29 (9th Cir. 2001) (holding that the relevant civil provision of the FHA “does not require a showing of force or violence for coercion, interference, intimidation, or threats to give rise to liability”); People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992). And when interpreting a civil rights statute, the Second Circuit has relied on other civil rights statutes with “language very similar” to that which is being interpreted. See, e.g., New York v. Davis, 411 F.2d 750, 753 (2d Cir. 1969); see also Smith v. City of Jackson, 544 U.S. 228, 233, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (noting “the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes”).

Second and relatedly, the interpretation of Section 11(b) detailed above as prohibiting both violent and nonviolent forms of intimidation accords with courts’ typical practice of reading remedial pieces of legislation broadly so as to give proper effect to the legislative intent. See Peyton v. Rowe, 391 U.S. 54, 65, 88 S.Ct. 1549, 20 L.Ed.2d 416 (1968) (noting the “canon of construction that remedial statutes should be liberally construed”); N.C. Freed Co. v. Bd. of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973) (“Since the statute is remedial in nature, its terms must be construed in liberal fashion ....”).

Based on the foregoing, the Court concludes that Plaintiffs’ allegations plausibly state an actionable Section 11(b) claim. Plaintiffs allege that the robocall message states that if recipients of the message were to vote by mail, the recipients’ personal information “will be” used by creditors and law enforcement to collect debts and execute old, outstanding warrants. (Complaint ¶ 29.) Similarly, it states that the CDC is attempting to use vote-by-mail records to track people for mandatory vaccinations. (Id.) Thus, the robocall message communicates threats of adverse legal, economic, and even physical consequences stemming from mail-in voting. These threats undoubtedly engender a “chilling effect” on voting-related activity and, as such, plausibly constitute intimidation. See McLeod, 385 F.2d at 740-41; see also, e.g., Lovejoy-Wilson, 263 F.3d at 208; Beatty,
Defendants’ arguments to the contrary are unavailing. Defendants attempt to distinguish LULAC and Nguyen. (See Dkt. No. 62, at 2-3.) While LULAC is not factually identical to the present case, any variance amounts to a distinction without a difference. In LULAC, the defendants “linked Plaintiffs’ names and personal information to a report condemning felonious voter registration in a clear effort to subject the named individuals to public opprobrium.” 2018 WL 3848404, at *4. In other words, the LULAC defendants disseminated the plaintiffs’ personal information in a manner that put them at risk of negative consequences. That dissemination was actionable because of its chilling effect; the defendants’ conduct plausibly “put [the plaintiffs] in fear of harassment and interference with their right to vote.” Id. Although Defendants in the present case did not themselves disseminate Plaintiffs’ personal information, their conduct, which warns Plaintiffs that information they provided in connection with mail-in voting will be obtained and used by various entities for adverse actions, has no less of a chilling effect because it too plausibly “put [Plaintiffs] in fear of harassment and interference with their right to vote.” Id. Although Defendants in the present case did not themselves disseminate Plaintiffs’ personal information, their conduct, which warns Plaintiffs that information they provided in connection with mail-in voting will be obtained and used by various entities for adverse actions, has no less of a chilling effect because it too plausibly “put [Plaintiffs] in fear of harassment and interference with their right to vote.” Id.

Defendants attempt to distinguish Nguyen on even flimsier grounds. First, Defendants argue that the letter sent in Nguyen “informed recipients that, if they voted in the upcoming election in November their personal information would be collected by a newly implemented government computer system.” (Dkt. No. 62, at 3.) But here, the Complaint alleges that the robocall message said that Plaintiffs’ information “will be used” by creditors and law enforcement. (Complaint ¶ 29.) The Court fails to see the analytical significance in the distinction between the language “would be collected” and “will be used” -- especially considering that the more affirmative “will be used” language of the robocall message conveys an arguably greater privacy violation and consequence. Second, Defendants seem to suggest that because their robocall message was allegedly disseminated in English, it is distinguishable from the letter in Spanish at issue in Nguyen. But nothing in Nguyen suggests that the court's analysis there turned on the language in which the message was communicated. Nor does the Court see any principled basis it should.

Defendants’ next argument contends that “Plaintiffs’ insinuation that the [robocall message] constitutes a threat of physical harm is untenable.” (Dkt. No. 62, at 3.) For instance, Defendants claim that the message contains no language threatening arrest because it “merely states that, ‘if you vote by mail, your personal information will be part of a public database that will be used by police departments to track down old warrants.’ ” (Id.) The Court finds Defendants’ assertion that this language does not communicate a threat of arrest astonishing. The plain reading of this message by any reasonable person is that if robocall message recipients vote by mail, those voters’ information will become public and will be used by law enforcement authorities to execute any outstanding arrest warrants against them. There is no other reasonable characterization of this message except as a threat or risk of arrest.

In addition, Defendants argue that the purported threat of mandatory vaccination is specious because the message does not target the Black community and merely states that the CDC was attempting to use mail-in voting records to track people to administer mandatory vaccines. (Id.) This argument too is unpersuasive. As an initial point, the Complaint unequivocally alleges that “Defendants [ ] specifically targeted their robocalls to areas with large Black populations” (Complaint ¶ 37), which the Court is required to accept as true at this stage of the litigation. Moreover, even though the robocall message stated only that the CDC was “pushing” to use mail-in voting information to track individuals for mandatory vaccines, the statement nonetheless has a chilling effect on mail-in voting. A reasonable recipient of the message may very well choose to not exercise the right to vote by mail based on this language, given the alleged historical mistrust of the medical community among Black populations. (See Complaint ¶ 35.)

For the foregoing reasons, as well as those detailed in the Court's TRO Decision, the Court holds that Plaintiffs have
sufficiently alleged a plausible violation of Section 11(b). Defendants’ counterarguments are devoid of merit.

2. Section 2 of the KKK Act

Section 2 of the KKK Act, 42 U.S.C. § 1985(3), prohibits conspiracy to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy.

As the Court noted in the TRO Decision, the terms “intimidation” and “threat” appear both here and in Section 11(b) of the VRA. The Court sees no reason to interpret these terms differently for purposes of the KKK Act, and Defendants provide none. To the contrary, as discussed above, canons of statutory interpretation support interpreting the same term consistently across similar statutes unless legislative intent indicates otherwise. See Smith, 544 U.S. at 233, 125 S.Ct. 1536 (noting “the premise that when Congress uses the same language in two statutes having similar purposes, ... it is appropriate to presume that Congress intended that text to have the same meaning in both statutes”). Therefore, the Court's analysis with respect to whether the alleged conduct violates Section 11(b)'s prohibition on intimidation and threats applies equally to defeat Defendants’ argument that there was no intimidation under Section 2 of the KKK Act. The Court accordingly concludes that Plaintiffs have pled sufficient facts, which, if true, would establish a violation of the KKK Act.

B. THE FIRST AMENDMENT

*8 As they did in opposing the TRO, Defendants argue in their motion to dismiss that the robocalls communicated a message entitled to First Amendment protection. But the Court is no more persuaded by these arguments now than it was at the TRO stage. In construing the statutes consistently with the First Amendment, as required, the Court previously held that the VRA and KKK Act prohibited the robocalls insofar as the calls’ message constitutes a “true threat,” and thus, Plaintiffs’ claims are not constitutionally barred. (See generally TRO Decision at 36-43.) Now, on a motion to dismiss, the Court's only task is to determine the legal feasibility of the Complaint. In re Initial Pub. Offering Sec. Litig., 383 F. Supp. 2d at 574. Having concluded already that Plaintiffs met their “heavier burden” of demonstrating a likelihood of success on the merits, see New Hope Family Servs., Inc., 966 F.3d at 165, the Court has no trouble finding here that the Complaint meets the less onerous standard of legal feasibility.

As a threshold matter, and as the Court previously recognized, the VRA and the KKK Act proscribe speech based on whether the content of the message is threatening or intimidating to voters. But not all content-based speech restrictions are unconstitutional. (See, e.g., TRO Decision at 37 (citing examples).) As relevant here, “true threats” are not entitled to First Amendment protection. See Watts v. U.S., 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

Speech amounts to a “true threat” when “an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.” United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013) (internal quotation marks and citations omitted); see also United States v. Santos, 801 F. App’x 814, 816 (2d Cir. 2020) (applying the Turner test). In addition, prohibitions on true threats are constitutional “even where the speaker has no intention of carrying them out.” Turner, 720 F.3d at 420. And the alleged threat need not be communicated explicitly or directly to qualify as a “true threat.” Id. at 421-23. Indeed, as the Second Circuit has explained, “rigid adherence to the literal meaning of a communication” would render restrictions “powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat.” Turner, 720 F.3d at 422 (quoting United States v. Malik,
Likewise, the Court previously concluded that under Black, the threatened injury need not be physical or violent to constitute a “true threat.” (TRO Decision at 40-41.) Instead, “true threat” prohibitions “protect[ ] individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.” Black, 538 U.S. at 360, 123 S.Ct. 1536 (internal quotation marks and citations omitted). This reasoning logically extends to threats of a nonviolent nature that nonetheless engender “disrupting fear.” Thus, in keeping with this rationale, the Second Circuit has signaled that threats of serious nonphysical harm are unprotected true threats. See Turner, 720 F.3d at 420 (explaining that a legislature could make it criminal for a person “to threaten a specific legal wrong grave enough to be likely either to cause substantial emotional disturbance ... or to require the employment of substantial resources for investigation or prevention”) (quoting Kent Greenawalt, Speech, Crime and the Uses of Language 91 (1989)); see also Lovejoy-Wilson, 263 F.3d at 213–14, 223 (holding that dismissal was inappropriate because a reasonable jury could find that an employee had been “intimidated” or “threatened” based on her employer's statement that “[i]f [she] continue[d] this behavior, we will have no choice but to address [the] behavior through legal channels”). The Turner test therefore requires only that a reasonable recipient “would interpret [the message] as a threat of injury,” physical or not. See Turner, 720 F.3d at 420 (emphasis added) (citation omitted).

The Court's conclusion that the robocall message at issue here may plausibly constitute a “true threat” is unaffected by the consideration that it remains unresolved whether “true threats” must be intended as such. (See TRO Decision at 42-43.) The Second Circuit in Turner declined to resolve this question because on the facts of that case, “a true threat was established pursuant to both the objective and subjective tests.” 720 F.3d at 420 n.4. So too here. The Court previously found that “Defendants’ prior conduct and expressed goals, together with the language of the robocall and its context, provide strong basis to support a reasonable conclusion that Defendants intended the robocall to harm Democrats by suppressing turnout among Black voters.” (TRO Decision at 55 (emphasis added).) In light of these considerations, even if intent is required for speech to constitute a “true threat,” the Turner standard has been plausibly met on the facts alleged here.

In their submissions on the instant motion, Defendants offer various propositions of law that, while generally uncontroversial, have no bearing on the present dispute. For example, Defendants argue that the robocall message is not categorically stripped of First Amendment protection because it was disseminated via telephone, rather than a newspaper or public square. (See, e.g., Dkt. No. 58-1, at 1; Dkt. No. 62, at 7.) The Court does not disagree. But the Court's conclusion that the First Amendment is inapplicable rests not on the robocall message's dissemination by telephone, but rather on its bearing all the hallmarks of an unprotected “true threat.”

Likewise, Defendants argue that that “the mere fact that a statement could ultimately be proven false does not deprive it of constitutional protection.” (Dkt. No. 58, at 2; see also Dkt. No. 62, at 4.) Indeed, the Court itself previously recognized that “[f]alse statements are not categorically excluded from First Amendment protection.” (TRO Decision at 37.) But again, this principle has no impact on the Court's finding that the Complaint alleges sufficient facts to plausibly meet the “true threat” standard. The Court's conclusion turns on the intimidating and threatening quality of the message, not on its falsity or truth.

The Court further recognizes, as Defendants repeatedly point out, that speech is not to be restricted merely because it expresses an unpopular view. (See, e.g., Dkt. No. 58, at 2.) But this proposition is yet again inapposite. Whether expressing an unpopular view or not, “true threats” are not protected by the First Amendment.

Lastly, the Court declines Defendants' repeated invitation to construe the facts according to their implausible characterizations. Nor would it be appropriate to do so on a motion to dismiss. Defendants argue that the robocall
message was a “political opinion” and “hyperbole.” (See Dkt. No. 62, at 4, 5-7.) But this argument, that the robocall message was merely “vigorously criticism of mail-in voting” (Dkt. No. 62, at 4), is not only inconsistent with the allegations in the Complaint but defies common sense. It also raises factual issues that go to the merits of the dispute and Defendants’ state of mind, and thus not properly resolved on a motion to dismiss. The robocall message stated that voting by mail would expose would-be voters’ private information to law enforcement, debt collectors, and potentially the CDC. It further threatened that these institutions would use the information to enforce outstanding warrants, collect debts, and perhaps force voters to take a vaccine. Far from merely criticizing mail-in voting, the robocall threatened -- falsely -- that real, serious injury would befall the specifically targeted Black voters if they voted by mail. In light of the history within the Black community that Plaintiffs describe or the Court notes entailing discriminatory policing, discriminatory lending and debt collection practices, and unethical medical procedures; these calls were communicated by a purportedly trusted source; and because the robocalls were placed directly to individual recipients, Plaintiffs plausibly allege that Defendants’ robocall message constituted a true threat. See Turner, 720 F.3d at 420 (holding that speech is unprotected by the First Amendment when “an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury” (citation omitted)).

*10 Generally, whether speech “constitutes a threat is an issue of fact for the trial jury.” United States v. Davila, 461 F.3d 298, 304 (2d Cir. 2006) (internal quotation marks and citation omitted). At this stage, the Court merely concludes that, on the facts alleged, the First Amendment does not bar Plaintiffs’ claims, and the Complaint is “legally feasible.” In re Initial Pub. Offering Sec. Litig., 383 F. Supp. 2d at 574.

C. INJURY
Next, Defendants appear to argue that the Individual Plaintiffs lack standing because they have failed to plead injury-in-fact as a result of the allegedly unlawful robocalls. 8 To establish an “injury in fact” sufficient to confer standing, a plaintiff must demonstrate an injury “that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Friends of the Earth, Inc. v. Laylaid Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181–82, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The Second Circuit has “repeatedly described” the requirement to show injury in fact on a motion to dismiss as “a low threshold.” John v. Whole Foods Mkt. Grp., Inc., 858 F.3d 732, 736 (2d Cir. 2017) (citation omitted).

Plaintiffs here meet this “low threshold.” In the Complaint, each Individual Plaintiff describes “concrete and particularized” harm he or she suffered as a result of the allegedly threatening or intimidating robocall message. (See Complaint ¶¶ 45-54.) Further, the Individual Plaintiffs submitted affidavits in support of their TRO, detailing how the robocalls affected them, including the emotional impact the calls had and whether the robocall message changed their election day voting plans, among other effects. (See Dkt. Nos. 15-22.) For example, Plaintiff Winter described how receiving the robocall “irreversibly undermined [her] confidence in voting by mail,” and she thus changed her voting plans. (See Dkt. No. 15 ¶ 12.) Plaintiff Steinberg described hearing the robocall as “particularly traumatic.” (See Dkt. No. 16 ¶ 13.) The other Individual Plaintiffs make similar allegations. On a motion to dismiss, these statements are sufficient to show a “concrete and particularized” injury for the purposes of standing. LULAC, 2018 WL 3848404, at *1 (denying a motion to dismiss in a case in which the individual plaintiffs alleged similar emotional harms); see also Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006) (“[A]esthetic, emotional or psychological harms also suffice for standing purposes.”).

Despite these allegations, Defendants argue that because each Individual Plaintiff voted in the 2020 election, they cannot have suffered actual injury. (See Dkt No. 62, at 7-8.) But the statutes at issue in this case do not proscribe only threatening and intimidating language that successfully prevents a person from voting. See 52 U.S.C. § 10307(b); 42 U.S.C. § 1985(3); see also United States v. Clark, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (“The success or failure of intimidation, threats or coercion, is immaterial, since ‘attempts’ are equally proscribed.”). Defendants point to no authority that supports their contention that Individual Plaintiffs cannot, as a matter of law, have suffered an “actual injury” simply because they voted.
Finally, although somewhat unclear, Defendants appear to suggest that Plaintiffs have suffered no “actual injury” sufficient to confer standing because any harm they suffered is not “compensable.” (Dkt. No. 62, at 7.) Having already found that Plaintiffs have plausibly pled actual injury, the amount of damages that may be awarded to them, even if eventually none, is irrelevant to the standing inquiry on a motion to dismiss.

D. MOOTNESS

Defendants next argue that because they complied with the Court's Order to cause issuance of a curative robocall, and because the election is now over, Plaintiffs' claims are moot. But “[i]t is well settled that a defendant's voluntary cessations of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” Friends of the Earth, 528 U.S. at 189, 120 S.Ct. 693 (internal quotation marks and citation omitted). The party asserting mootness bears a "formidable burden" to make "absolutely clear [that] the allegedly wrongful behavior could not reasonably be expected to recur.” Id. (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)).

Defendants do not carry their burden to establish mootness here. Although they argue that because the 2020 national election has concluded the conduct at issue cannot recur, Defendants ignore that other elections will continue to be held and present new opportunities for Defendants to employ similar tactics. Given Defendants’ own pre-lawsuit admissions of perpetrating lies, deceit, and disinformation (see Complaint ¶ 25), the Court is not persuaded that a few assurances from Defendants make it remotely close to “absolutely clear” that the alleged conduct would not recur on other occasions. Defendants’ argument ignores that compensatory damages, when warranted, seek not only to make plaintiffs whole for injuries caused by defendants, but embody a punitive element: to punish and deter similar conduct, both generally and by the particular defendant. See State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 426, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (noting that the award of compensatory damages for the injury at issue “likely were based on a component which was duplicated in the punitive award, as “[c]ompensatory damages ... already contain this punitive element”); see also Andrew W. Marrero, Note, Punitive Damages: Why the Monster Thrives, 105 Geo. L.J. 767, 789 (2017).

*12 Furthermore, even if the Defendants could adequately persuade the Court that the robocalls would not recur, “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” Chafin v. Chafin, 568 U.S. 165, 172, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013) (citation omitted). Because Plaintiffs bring causes of action for both injunctive relief and monetary damages, as long as Plaintiffs can properly recover monetary damages, this action is not moot. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 n. 1, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (holding that although the ordinance at issue expired, there remained “a live controversy between the parties over whether” the action taken pursuant to the ordinance was “unlawful and thus entitles appellee to damages”). And because the KKK Act is both privately enforceable and allows for the recovery of money damages, all Plaintiffs maintain a concrete interest in the outcome of this litigation. See 42 U.S.C. § 1985(3) (“[T]he party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation ....”) Therefore, this case is not moot.

E. FCC AND FTC RULES

Defendants’ arguments that the robocall message was legally compliant under FTC and FCC rules is entirely irrelevant because Plaintiffs have not alleged that Defendants violated any such rules. Accordingly, the Court will not address these arguments, as they have no bearing on the legal feasibility of the causes of action Plaintiffs asserted in the Complaint.

F. NEW YORK'S ANTI-SLAPP STATUTE

Finally, Defendants argue that New York's anti-SLAPP statute, New York Civil Rights Law § 76-a, authorizes them to seek dismissal of Plaintiffs’ claims because they are without merit and brought because Defendants exercised their First Amendment rights. (Dkt No. 58-1, at 3.) New York's statute states that:
In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

N.Y. Civ. Rights Law § 76-a(2). An “action involving public petition and participation” is a claim based on any communication in a public space or forum or “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.” Id. § 76-a(1)(a).

But because the Court is persuaded that Plaintiffs have plausibly alleged threats and intimidation in violation of the VRA and KKK Act, which do not receive First Amendment protection, Defendants’ alleged conduct is not “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest.” Accordingly, Defendants’ invocation of New York's anti-SLAPP law is unavailing.

IV. ORDER

Accordingly, for the reasons stated above, the letter-motion so deemed by the Court as filed by defendants Jacob Wohl, Jack Burkman, J.M. Burkman & Associates, LLC, Project 1599, and John and Jane Does 1 through 10 to dismiss the complaint of plaintiffs National Coalition on Black Civic Participation, Mary Winter, Gene Steinberg, Nancy Hart, Sarah Wolff, Karen Slaven, Kate Kennedy, Eda Daniel, and Andrea Sferes (Dkt. No. 58) is hereby DENIED.

SO ORDERED.

All Citations
--- F.Supp.3d ----, 2021 WL 480818

Footnotes

1 See Kapitalforeningen Lægernes Invest. v. United Techs. Corp., 779 F. App’x 69, 70 (2d Cir. 2019) (affirming the district court ruling deeming an exchange of letters as a motion to dismiss).

2 The factual background below, except as otherwise noted, derives from the Complaint and the facts pleaded therein, which the Court accepts as true for the purposes of ruling on a motion to dismiss. See Spool v. World Child Int’l Adoption Agency, 520 F.3d 178, 180 (2d Cir. 2008) (citing GICC Capital Corp. v. Tech. Fin. Grp., Inc., 67 F.3d 463, 465 (2d Cir. 1995)); see also Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). Except when specifically quoted, no further citation will be made to the Complaint or the documents referred to therein.

3 Although the Complaint states that the last line of the robocall message said, “stay home safe and beware vote by mail,” this was a transcription error, which Plaintiffs corrected in a subsequent filing. (See Dkt. No. 33.)


Id. (quoting Roig-Franzia & Reinhard, supra).

As before, the Court takes judicial notice of the historical existence of discriminatory policing, lending, debt collection, and medical practices within the Black community. (See TRO Decision at 49 n.23.) The Defendants do not challenge NCBCP's standing, and the Court notes it has already held that NCBCP has standing. (See TRO Decision at 20-22.)

The Court notes Plaintiffs may not even be required to show they are entitled to "compensable damages" for this case to proceed through verdict. Courts are empowered to award nominal damages based on the deprivation of constitutional rights. Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); Amato v. City of Saratoga Springs, 170 F.3d 311, 317 (2d Cir. 1999) (noting that under 42 U.S.C. § 1983, "a litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury."). "By making the deprivation of [absolute] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." Carey, 435 U.S. at 266, 98 S.Ct. 1042. "The primary purpose of nominal damages in these cases is thus to guarantee that a defendant's breach of these duties will remain actionable regardless of their consequences in terms of compensable damages." Amato, 170 F.3d at 318.

"SLAPP is an acronym for a 'strategic lawsuit against public participation,' which is a suit that is brought primarily to chill the valid exercise of a defendant's right to free speech ...." Ernst v. Carrigan, 814 F.3d 116, 117 (2d Cir. 2016).
United States District Court
Southern District of New York

Sarah Palin,

Plaintiff,

v.

The New York Times Company and James Bennet,

Defendants.

Jed S. Rakoff, U.S.D.J.

On June 27, 2017, plaintiff Sarah Palin brought a single defamation claim against The New York Times Company ("The Times") arising from The Times' editorial of June 14, 2017 titled America’s Lethal Politics regarding gun control (the "Editorial"). Dkt. No. 1. The now-operative complaint, filed on December 30, 2019, also named James Bennet, the author of the relevant segments of the Editorial. Dkt. No. 70.

Although plaintiff does not dispute that she is a "public figure," in a previously-filed motion for partial summary judgment, she argued that she is not required to prove actual malice, and prove it by clear and convincing evidence, on the ground that the federal constitutional rule imposing that burden in the case of public figures either is no longer good law or does not apply to this case. Dkt. No. 100. Defendants argued, among
other things, that the federal constitutional rule governed the case and that, in any event, New York law independently imposed an actual malice requirement. Dkt. No. 104. In an Opinion and Order dated August 28, 2020 (the “Opinion”), Dkt. No. 117, the Court held that the federal Constitution, under well-settled and binding precedent, imposed the actual malice requirement, id at 12-13 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), and declined to reach the question whether New York law independently imposed that burden, id. at 13 n.8. The case is now set for trial, pandemic permitting, on June 21, 2021.

Now before the Court is defendants’ motion, pursuant to Federal Rule of Civil Procedure 54(b), for an order modifying the Opinion to reflect the fact that on November 10, 2020, New York amended its “anti-strategic litigation against public participation” (“anti-SLAPP”) law to expressly require that public figures prove actual malice by clear and convincing evidence. Dkt. No. 120. Plaintiff opposes. Dkt. No. 123. For the reasons set forth below, the motion is granted.

Federal Rule of Civil Procedure 54(b) provides, in relevant part, that an interlocutory order “may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Of course, past decisions should not be revisited “without good reason.” *Official Comm. of*
the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003). But “an intervening change of controlling law” is just such a reason. Id.

Here, there has been just such an intervening change of law. It is true that New York’s anti-SLAPP law has long had an actual malice requirement, providing that:

[in an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

See N.Y. Civil Rights Law § 76-a(2). The prior version of the law, however, defined “an action involving public petition and participation” narrowly to include only claims “brought by a public applicant or permittee, and [that are] materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.” See Intl. Shoppes v. At the Airport, 131 A.D.3d 926, 928 (2d Dep’t 2015). 1

As a result, the actual malice requirement was effectively limited to cases initiated by persons or business entities that were

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1 Unless otherwise indicated, in quoting cases all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.
involved in controversies over a public application or permit. See Chandok v. Klessig, 632 F.3d 803, 819 (2d Cir. 2011) (“Uniformly, the New York courts have found that the persons properly alleged to be public applicants within the meaning of the anti-SLAPP statute were persons whose proposed actions required government permission.”).

On November 10, 2020, New York amended its anti-SLAPP law. See A.B. 5991-A. Among other things, the amendments substantially broadened the reach of the actual malice rule. As amended, the law defines an “action involving public petition and participation” to include a claim based upon:

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

N.Y. Civil Rights Law § 76-a(1)(a). The law further directs that the term “public interest” is to “be construed broadly, and shall mean any subject other than a purely private matter.” Id. § 76-a(1)(d). Also, although less directly relevant here, the amendments create an affirmative cause of action for certain
defendants to recover attorneys’ fees and other damages from plaintiffs in specified circumstances. \textit{Id.} § 70-a.\textsuperscript{2}

Defendants now ask the Court to rule that § 76-a, as amended on November 10, 2020, applies retroactively to this action and thus requires that plaintiff prove actual malice by clear and convincing evidence as a matter of New York law, separate and apart from the requirements of the federal Constitution. \textit{Def. Mem.} at 4. They contend that "a ruling now on the applicability of state law will inform the drafting of jury instructions at trial, simplify future proceedings including on appeal, and give effect to constitutional avoidance . . . ." \textit{Id.} at 5.

Plaintiff responds that defendants have not established extraordinary circumstances warranting reconsideration. Plaintiff’s Response to Defendants [sic] Memorandum of Law in Support of Motion for Reconsideration ("\textit{Pl. Mem."}), Dkt. No. 123, at 1. Plaintiff argues that the Court has already decided that the actual malice standard applies to this case, and that the source of the actual malice rule does not matter for the purposes of the upcoming trial. \textit{Id.} at 1-2. And, plaintiff contends, if she loses at trial and renews her challenge to the federal actual malice

\textsuperscript{2} Defendants do not ask the Court to apply § 70-a in this action, nor do they contend that the provision would even apply in federal court. See \textit{Defendants’ Memorandum of Law in Support of Motion for Reconsideration} ("\textit{Def. Mem."), Dkt. No. 120, at 4 n.4.
rule on appeal, defendants will have preserved their argument that New York independently imposes the requirement. Id. at 2. Therefore, according to plaintiff, nothing will be simplified by granting reconsideration; indeed, doing so “would amount to an advisory opinion.” Id. at 1-2.

The Court sees no reason why it should delay resolution of this plainly relevant issue. If, as defendants contend, § 76-a applies retroactively to this action, that will undoubtedly simplify proceedings on appeal; by contrast, if, as plaintiff insists, the statute does not have retroactive effect, then we are exactly where we began and, to prevail at trial, plaintiff will still have to prove actual malice as a matter of federal constitutional law. Either way, there is nothing to be gained from delay. In light of the intervening change of law, the Court now turns to the merits of defendants’ motion.

It is undisputed that § 76-a requires public figures, like plaintiff, to prove actual malice by clear and convincing evidence. It is also undisputed (albeit by virtue of neither party having raised the issue) that a federal court sitting in diversity must apply § 76-a because it is a substantive, rather than a procedural, provision. See Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014) (affirming the district court’s application of certain substantive provisions of Nevada’s anti-SLAPP law); see also La Liberte v.
Reid, 966 F.3d 79, 86 n.3 (2d Cir. 2020) (distinguishing between the applicability in federal court of substantive and procedural elements of state anti-SLAPP laws). The only question here is whether § 76-a should be given retroactive effect to this action, which was filed before the amendments took effect but has not yet gone to trial.

Under New York law, statutory amendments are generally “presumed to have prospective application unless the Legislature’s preference for retroactivity is explicitly stated or clearly indicated.” Matter of Gleason (Michael Vee, Ltd.), 96 N.Y.2d 117, 122 (2001). So-called “remedial legislation,” however, “should be given retroactive effect in order to effectuate its beneficial purpose.” Id. “Remedial statutes are those designed to correct imperfections in prior law, by generally giving relief to the aggrieved party.” Nelson v. HSBC Bank USA, 87 A.D.3d 995, 998 (2d Dep’t 2011). “Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be.” Gleason, 96 N.Y.2d at 122.
It is clear that § 76-a is a remedial statute that should be given retroactive effect. The Legislature conveyed a sense of urgency by directing that the amendment was to “take effect immediately.” See A.B. 5991-A § 4; see, e.g., Gleason, 96 N.Y.2d at 122. Moreover, the legislative history demonstrates that the amendments to § 76-a were intended to correct the narrow scope of New York’s prior anti-SLAPP law. As State Senator Brad Hoylman, the Senate sponsor of the amendments, explained: the prior anti-SLAPP law had been “strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a public application or permit, usually in a real estate development situation.” Sponsor Mem. of Sen. Hoylman (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52. “By revising the definition of an ‘action involving public petition and participation,’ this amendment to Section 76-a will better advance the purposes that the Legislature originally identified in enacting New York’s anti-SLAPP law” — namely, “to provide the utmost protection for the free exercise or speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.” Id. “These factors together persuade [the Court] that the remedial purpose of the amendment should be effectuated through retroactive application.” Gleason, 96 N.Y.2d at 123.
Plaintiff offers three reasons not to give § 76-a retroactive effect, but none is persuasive. First, plaintiff argues that while “the changes made to Section 70-a appear to be ‘remedial’ in nature, . . . the changes to Section 76-a are not.” Pl. Mem. at 2. For example, plaintiff points out that § 70-a states that it applies to “any person who commenced or continued such action,” (emphasis added), whereas § 76-a “contains no such temporal expression.” Id. at 4. That § 70-a might also be intended to have retroactive effect, however, does not undermine the clear evidence that the Legislature intended § 76-a to have retroactive effect. Nor is it any surprise that the Legislature did not expressly state that § 76-a would apply to any plaintiff who “continued” such an action; after all, any public figure would have already had to prove actual malice under the federal Constitution.³

Next, plaintiff argues that Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 N.Y.3d 332 (2020), a recent New York Court of Appeals decision, creates a presumption against retroactivity, where, as here, the amendment would “impact substantive rights.” Pl. Mem. at 3 (quoting Regina, ³ As the preceding analysis makes clear, the famously “intricate relationship between First Amendment and state libel law,” Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 176 (2d Cir. 2000), is especially pronounced where, as here, a state opts to conform aspects of its state law to the First Amendment.
35 N.Y.3d at 370). For at least two reasons, however, this argument is unpersuasive. The first is that Regina created no such rule. Instead, the Regina court simply restated well-established New York law: that legislation is typically presumed to apply prospectively but that the presumption could be overcome with “a clear expression of . . . legislative purpose.” 35 N.Y.3d at 369 (quoting Gleason, 96 N.Y.2d at 36). Nothing in Regina suggests that it is overturning the general rule that remedial legislation, like § 76-a, is presumed to have retroactive effect.4 Second, even assuming arguendo that Regina did articulate such a rule, § 76-a will not have any meaningful impact on plaintiff’s “substantive rights.” As already discussed, any public figure seeking to recover damages for defamation would already have had to prove actual malice as a matter of federal law separate and apart from the requirements of New York law.5

4 Indeed, Regina itself recognized that certain portions of the Housing Stability and Tenant Protection Act of 2019 were intended by the Legislature to have retroactive effect, although, as discussed below, it ultimately refused to effectuate that legislative intent on due process grounds. See 35 N.Y.3d at 387.

5 To be sure, states are free to subject to the actual malice rule plaintiffs who might otherwise fall outside the reach of the First Amendment. See, e.g., Nelson Auto Center, Inc. v. Multimedia Holdings Corporation, 951 F.3d 952, 957 (8th Cir. 2020) (“Minnesota is free to categorize corporations as public figures that must prove actual malice even if federal law does not.”). Because plaintiff is clearly a public figure under well-established
Finally, plaintiff, again relying on Regina, suggests that applying § 76-a retroactively would “raise a bevy of constitutional concerns,” including due process concerns. Pl. Mem. at 4-5. Specifically, plaintiff contends that “the retroactive application of Section 76-a would impose a significant element of proof (actual malice by clear and convincing evidence) upon Plaintiff on a claim based on conduct occurring over three years ago.” Id. at 5. Plaintiff is correct, of course, that retroactive legislation could, in certain cases, implicate due process concerns. This, however, is not such a case. As Regina itself recognizes, “due process requires a persuasive reason for the potentially harsh impacts of retroactivity.” Regina, 35 N.Y.3d at 375. Here, however, plaintiff fails to identify any “harsh impact” of retroactively applying § 76-a to the instant case.

Regina itself helps prove the point. There, the Court of Appeals held that the retroactive application of certain provisions of the Housing Stability and Tenant Protection Act of 2019 would violate the Due Process Clause. 35 N.Y.3d at 388. Relevant to the court’s holding was the fact that the retroactive application of the law would effectively penalize landlords for federal law, the Court need not and does not address whether § 76-a subjects to New York’s actual malice rule a broader collection of plaintiffs than does the First Amendment.
having disposed of tenant records years earlier, even though doing so at the time was perfectly legal. Id. at 379-80. By contrast, and by virtue of the First Amendment, plaintiff was never entitled to recover monetary damages absent a showing of actual malice.

Put differently, here, unlike the plaintiffs in Regina, plaintiff has not demonstrated any reasonable reliance interest. To the extent plaintiff invokes such a reliance interest, her claim would seem to be that, in first bringing this lawsuit in 2017, she relied on the prospect that the Supreme Court would overturn New York Times Co. v. Sullivan and allow her to recover damages without a showing of actual malice. While courts might, in some contexts, credit the “objectively reasonable reliance on binding appellate precedent,” cf. Davis v. United States, 564 U.S. 229, 231 (2011), there is no case law or principle of constitutional adjudication that would credit a litigant’s wishful reliance on the prospect that binding appellate precedent will one day be overturned. If anything, the retroactive application of § 76-a will protect the reliance interests of defendants, who published the Editorial in a media landscape long-governed by the actual malice rule, against possible changes of constitutional law at the federal level.

For the foregoing reasons, defendants’ motion is granted. The Court holds that N.Y. Civil Rights Law § 76-a, as amended on November 10, 2020, applies to this action and requires plaintiff,
as a matter of state law, to prove by clear and convincing evidence what she had already been tasked with establishing under the federal Constitution: that defendants made the allegedly defamatory statements in the Editorial “with knowledge of [their] falsity or with reckless disregard of whether [they were] false” -- that is, with actual malice. See § 76-a(2).

The Clerk of the Court is directed to close the entry at docket number 119.

SO ORDERED.

Dated: New York, NY
December 29, 2020
UNIFORM PUBLIC EXPRESSION PROTECTION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-NINTH YEAR
JULY 10–15, 2020

WITH PREFATORY NOTE AND COMMENTS

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ON UNIFORM STATE LAWS

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UNIFORM PUBLIC EXPRESSION PROTECTION ACT

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UNIFORM PUBLIC EXPRESSION PROTECTION ACT

Prefatory Note

Special Thanks. The Committee wishes to thank Thomas R. Burke, Stanley W. Lamport, Ben Sheffner, and Ashley H. Verdon, all of whom served as Observers during the drafting process, for their steady and valued input and expertise.

Introduction. In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief for harm or to vindicate one’s legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions “Strategic Lawsuits Against Public Participation,” or SLAPPs.

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

Anti-SLAPP Laws in the United States. To limit the detrimental effects SLAPPs can have, 32 states, as well as the District of Columbia and the Territory of Guam, have enacted laws to both assist defendants in seeking dismissal and to deter vexatious litigants from bringing such suits in the first place. An Anti-SLAPP law, at its core, is one by which a legislature imposes external change upon judicial procedure, in implicit recognition that the judiciary has not itself modified its own procedures to deal with this specific brand of abusive litigation. Although procedural in operation, these laws protect substantive rights, and therefore have substantive effects. So, it should not be surprising that each of the 34 legislative enactments have been performed statutorily—none are achieved through civil-procedure rules. The states that have passed anti-SLAPP legislation, in one form or another, are:

Many early anti-SLAPP statutes were narrowly drawn by limiting their use to particular types of parties or cases—for example, to lawsuits brought by public applicants or permittees, or to lawsuits brought against defendants speaking in a particular forum or on a particular topic. More recently, however, legislatures have recognized that narrow anti-SLAPP laws are ineffectual in curbing the many forms of abusive litigation that SLAPPs can take. To that end, most modern statutory enactments have been broad with respect to the parties that may use the acts and the kinds of cases to which the acts apply.

The recent trend further evidences a shift toward statutes that achieve their goals by generally employing at least five mechanisms:

1. Creating specific vehicles for filing motions to dismiss or strike early in the litigation process;
2. Requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they’re heard;
3. Requiring the plaintiff to demonstrate the case has some degree of merit;
4. Imposing cost-shifting sanctions that award attorney’s fees and other costs when the plaintiff is unable to carry its burden; and
5. Allowing for an interlocutory appeal of a decision to deny the defendant’s motion.

**The Need for a Uniform Anti-SLAPP Act.** Although there is certainly a movement toward broad statutes that utilize the five tools described above, the precise ways in which different states have constructed their laws are far from cohesive. This degree of variance from state to state—and an absence of protection in 18 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also contributes to what can be called “litigation tourism”; that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a state that lacks strong and clear anti-SLAPP protections. Several recent high-profile examples of this type of forum shopping have made the need for uniformity all the more evident.

The Uniform Public Expression Protection Act seeks to harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner. In doing so, the Act actually serves two purposes: protecting individuals’ rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

**The Uniform Public Expression Protection Act, Generally.** The Uniform Public Expression Protection Act follows the recent trend of state legislatures to enact broad statutory protections for its citizens. It does so by utilizing all five of the tools mentioned above in a motion practice that carefully and clearly identifies particular burdens for each party to meet at particular phases in the motion’s procedure.

The general flow of a motion under the Act employs a three-phase analysis seen in many states’ statutes. Upon the filing of a motion, all proceedings—including discovery—between the moving party and responding party are stayed, subject to a few specific exceptions. In the **first phase**, the court effectively decides whether the Act applies. It does so by first determining if the responding party’s (typically the plaintiff’s) cause of action implicates the moving party’s (typically the defendant’s) right to free speech, petition, or association. The burden is on the moving party to make the initial showing that the Act applies. If the court holds that the moving party has not carried that burden, then the motion is denied, the stay of proceedings is lifted, and the parties proceed to litigate the merits of the case (subject to the ability of the moving party to interlocutorily appeal the motion’s denial). If the court determines that the moving party has carried its burden, then the responding party can show its cause of action fits within one of the three exceptions to the Act. If it carries that burden—for example, by showing that its cause of action is against an agent of a governmental unit acting or purporting to act in an official capacity—then the Act does not apply, and the motion is denied. If it fails to carry that burden, then the court proceeds to the second step of the analysis.
In the **second phase**, the court determines if the responding party has a viable cause of action from a prima-facie perspective. In this phase, the burden is on the responding party to establish a prima-facie case for each essential element of the cause of action challenged by the motion. If the court holds that the responding party *has not* carried its burden to establish a prima-facie case, then the motion is granted, and the responding party’s cause of action is terminated with prejudice to refiling. The moving party is entitled to its costs, attorney’s fees, and expenses. If the court holds that the responding party *has* carried its burden, then—and only then—the court proceeds to the third step of the analysis.

In the **third phase**, the court determines if the responding party has a *legally* viable cause of action. In this phase, the burden shifts *back* to the moving party to show either that the responding party failed to state a cause of action upon which relief can be granted (for example, a claim that is barred by res judicata, or preempted by some other law), or that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (for example, if the cause of action, while perhaps factually viable, is time-barred by limitations). If the moving party makes such a showing, the motion is granted; if it fails to make such a showing, the motion is denied.
UNIFORM PUBLIC EXPRESSION PROTECTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Public Expression Protection Act.

Comment

Although “SLAPP”—an acronym for “Strategic Lawsuit Against Public Participation”—does not appear in the Act’s title, the Uniform Public Expression Protection Act should be considered an anti-SLAPP act. Although “[t]he paradigm SLAPP is a suit filed by a large developer against environmental activists or a neighborhood association intended to chill the
defendants’ continued political or legal opposition to the developers’ plans,” SLAPPs “are by no means limited to environmental issues, nor are the defendants necessarily local organizations with limited resources.” *Hupp v Freedom Commc’ns*, 163 Cal. Rptr. 3d 919, 922 (Cal. Ct. App. 2013). “[W]hile SLAPP suits ‘masquerade as ordinary lawsuits’ the conceptual features which reveal them as SLAPP’s are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.” *Id.*

**SECTION 2. SCOPE.**

(a) In this section:

(1) “Goods or services” does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(2) “Governmental unit” means a public corporation or government or governmental subdivision, agency, or instrumentality.

(3) “Person” means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(b) Except as otherwise provided in subsection (c), this [act] applies to a [cause of action] asserted in a civil action against a person based on the person’s:

(1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or

(3) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or [cite to the state’s constitution], on a matter of public concern.

(c) This [act] does not apply to a [cause of action] asserted:

(1) against a governmental unit or an employee or agent of a governmental unit
acting or purporting to act in an official capacity;

(2) by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety; or

(3) against a person primarily engaged in the business of selling or leasing goods or services if the [cause of action] arises out of a communication related to the person’s sale or lease of the goods or services.

Legislative Note: If a state does not use the term “cause of action”, the state should use its comparable term, such as “claim for relief” in subsections (b) and (c). The state also should substitute its comparable term for the term “[cause of action]” in Sections 3, 4(f), 7, 13, and 14.

Comments

1. Most courts explain the resolution of anti-SLAPP motions in terms of either a three- or two-pronged procedure. E.g., Younkin v. Hines, 546 S.W.3d 675, 679 (Tex. 2018) (“Reviewing a[n anti-SLAPP] motion to dismiss requires a three-step analysis.”); Wilson v. Cable News Network, Inc., 444 P.3d 706, 713 (Cal. 2019) (“A court evaluates an anti-SLAPP motion in two steps.”). Section 2 of the Act constitutes the first step of that procedure, where the moving party (typically the defendant) must show that the responding party’s (typically the plaintiff’s) cause of action arises from the movant’s exercise of First Amendment rights on a matter of public concern. This step focuses on the movant’s activity, and whether the movant can show that it has been sued for that activity. See, e.g., Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002) (“The anti-SLAPP statute’s definitional focus is not [on] the form of the plaintiff’s cause of action but, rather, the defendant’s activity that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning.” (emphasis original)). If the movant cannot satisfy the first step—in other words, cannot show that the cause of action is linked to First Amendment activity on a matter of public concern—then the court will deny the motion without ever proceeding to the second or third step. Thomas R. Burke, Anti-SLAPP Litigation § 1.2 (2019). Further discussion of how a court adjudicates the first step, including the parties’ burdens and the materials a court should review, appears in Comments 2 and 3 to Section 7.

2. Although the Act operates in a procedural manner—specifically, by altering the typical procedure parties follow at the outset of litigation—the rights the act protects are most certainly substantive in nature. See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 972-973 (9th Cir. 1999) (applying California’s anti-SLAPP law to diversity actions in federal court because the statute was “crafted to serve an interest
not directly addressed by the Federal Rules: the protection of ‘the constitutional rights of freedom of speech and petition for redress of grievances.’

Otherwise stated, the Act’s procedural features are designed to prevent substantive consequences: the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit. 

Williams v. Cordillera Comms., Inc., No. 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014). As stated by one California court, “[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights.” 


3. The statute is only applicable to civil actions. It has no applicability in criminal proceedings.

4. The term “civil action” should be construed consistently with Fed. R. Civ. P. 1.

5. The term “cause of action” refers to a group of operative facts that give rise to one or more bases for recovery in a civil action. The term contemplates that in one civil action, a party seeking relief may assert multiple causes of action that invoke different facts and theories for relief. In some jurisdictions, other terms of art, such as “claim for relief,” “ground of action,” “right of action,” or “case theory,” might be more appropriate than “cause of action.” See, e.g., Baral v. Schnitt, 376 P.3d 604, 616 (Cal. 2016) (holding that when the California Legislature used the term “cause of action” in its anti-SLAPP statute, “it had in mind allegations of protected activity that are asserted as grounds for relief” (emphasis original)). Regardless of the term used by a state, the Act can be utilized to challenge part or all of a single cause of action, or multiple causes of action in the same case. See id. at 615 (“A single cause of action . . . may include more than one instance of alleged wrongdoing.”). Otherwise stated, a single civil action can contain both a cause of action subject to the Act and one not subject to the Act.

6. Sections 2(b)(1) and (2) apply to a cause of action brought against a person based on the person’s communication. “Communication” should be construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment. See Texas v. Johnson, 491 U.S. 397, 404 (1989) (“[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word.”); Spence v. Washington, 418 U.S. 405, 409-11 (1974) (holding that conduct constitutes “communication” when it is accompanied by an intent to convey a particularized message and, given the surrounding circumstances, the likelihood is great that the message will be understood by those who view it); Rumsfeld v. Forum for Acad. and Institutional Rights, 547 U.S. 47, 65-66 (2006); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969). Conduct is not specifically mentioned in the Act so as to avoid parties from attempting to use it to shield themselves from liability for nonexpressive conduct that nevertheless tangentially relates to a matter of public concern. See United States v. O’Brien, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”). But
the Act is intended to protect expressive conduct. For example, a person’s work on behalf of a political campaign might include constitutionally protected expressive conduct, such as putting up campaign signs or organizing a rally. The Act would protect that conduct. But a person who damages another candidate’s campaign signs or physically threatens attendees at an opposing rally would not be engaging in expressive conduct, and therefore should not be able to utilize the Act, even though the conduct tangentially relates to matters of public concern.

7. Sections 2(b)(1)-(3) identify three different instances in which the Act may be utilized. Section 2(b)(1) protects communication that occurs before any legislative, executive, judicial, administrative, or other governmental proceeding—effectively, any speech or expressive conduct that would implicate one’s right to petition the government. Section 2(b)(2) operates similarly, but extends to speech or expressive conduct about those matters being considered in legislative, executive, judicial, administrative, or other governmental proceedings—the speech or conduct need not take place before the governmental body. Section 2(b)(3) operates differently than (1) and (2) and provides the broadest degree of protection; it applies to any exercise of the right of free speech or press, free association, or assembly or petition, so long as that exercise is on a matter of public concern.

8. The terms “freedom of speech or of the press,” “the right to assemble or petition,” and “the right of association” should all be construed consistently with caselaw of the Supreme Court of the United States and the state’s highest court.

9. The term “matter of public concern” should be construed consistently with caselaw of the Supreme Court of the United States and the state’s highest court. See, e.g., Snyder v. Phelps, 562 U.S. 443, 453 (2011) (holding that “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public’” (citations omitted)); Brown v. Entm’t Merchs. Ass’n, 564 U.S. 786, 790 (2011) (“The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”). “The [matter-of-public-concern] inquiry turns on the ‘content, form, and context’ of the speech.” Lane v. Franks, 573 U.S. 228, 241 (2014) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)). The term should also be construed consistently with terms like “public issue” and “matter of public interest” seen in some state statutes. See, e.g., CAL. CIV. PROC. CODE § 425.16 (employing the terms “public issue” and “issue of public interest”); FilmOn.com Inc. v. DoubleVerify Inc., 439 P.3d 1156, 1164-65 (Cal. 2019).

The California Supreme Court breaks “matter of public concern” (or in its statute, “public issue” or “issue of public interest”) into a two-part analysis. FilmOn.com, 439 P.3d at 1165. “First, we ask what ‘public issue or [ ] issue of public interest’ the speech in question implicates—a question we answer by looking to the content of the speech. Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful.” Id. (citation omitted). The
court observed that the first step is typically not difficult for the movant: “[V]irtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest.” *Id.* But the second step is where many movants fail. The inquiry “demands ‘some degree of closeness’ between the challenged statements and the asserted public interest.” *Id.* (citation omitted). As other California courts have noted, “it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.” *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Cal. Ct. App. 2004); *see also Dyer v. Childress*, 55 Cal. Rptr. 3d 544, 548 (2007) (“The fact that ‘a broad and amorphous public interest’ can be connected to a specific dispute is not enough.” (citation omitted)).

The California Supreme Court explains that what it means to “contribute to the public debate” “will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest.” *FilmOn, Inc.*, 439 P.3d at 1166.

Further discussion of how a court adjudicates whether a cause of action is based on the moving party’s exercise of First Amendment rights on a matter of public concern, including the movant’s burden and the materials a court should review, appears in Comment 2 to Section 7.

10. Section 2(c) provides a list of exemptions, or situations to which the Act does not apply. It is the burden of the responding party to establish the applicability of one or more exemptions. Thus, even if a movant can show the Act applies under Section 2(b), the Act may nevertheless not apply if the non-movant can show the cause of action is exempt. Further discussion of how a court adjudicates whether a cause of action is exempt, including the responding party’s burden and the materials a court should review, appears in Comment 3 to Section 7.

11. The term “governmental unit or an employee or agent of a governmental unit acting in an official capacity” includes any private people or entities working as government contractors, to the extent the cause of action pertains to that government contract.

12. The term “dramatic, literary, musical, political, journalistic, or artistic work” used in Section (a)(3) should be construed broadly to include newspapers, magazines, books, plays, motion pictures, television programs, video games, or Internet websites or other electronic mediums.

13. Section 2(c)(3) carves out from the scope of the Act “communication[s] related to [a] person’s sale or lease of [ ] goods or services” when that person is primarily engaged in the selling, leasing, or licensing of those goods or services. In other words, “commercial speech” is exempted from the protections of the Act. By way of illustration, if a mattress store is sued for false statements made in its advertising of mattresses—whether by an aggrieved consumer or a competitor—the mattress store would not be able to avail itself of the Act. But if the same
mattress store were sued for tortious interference for organizing a petition campaign to oppose the building of a new school, its activity would not be related to the sale or lease of goods or services, and it could use the Act for protection of its First Amendment conduct.

But the “commercial-speech exemption” does not apply to the creation, dissemination, exhibition, or advertisement of a dramatic, literary, musical, political, journalistic, or artistic work. This is consistent with the holdings of most courts that the contents of works protected by the First Amendment are not considered “goods or services,” even if sold for profit. See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”); Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1036 (9th Cir. 1991) (ideas and expressions in a book are not a product); Way v. Boy Scouts of Am., 856 S.W.2d 230, 239 (Tex. 1993) (“We conclude that the ideas, thoughts, words, and information conveyed by the magazine . . . are not products.”). This ensures that claims targeting those in the business of making and selling works protected by the First Amendment are not denied the ability to invoke the Act. See Dyer v. Childress, 147 Cal. App. 4th 1273, 1283 (2007) (expressive works exception to the commercial speech exemption was “intended to exempt the news media and other media defendants (such as the motion picture industry) from the [commercial-speech exemption] when the underlying act relates to news gathering and reporting to the public with respect to the news media or to activities involved in the creation or dissemination of any works of a motion picture or television studio.” (citations omitted)).

SECTION 3. SPECIAL MOTION FOR EXPEDITED RELIEF. Not later than [60] days after a party is served with a [complaint] [petition], crossclaim, counterclaim, third-party claim, or other pleading that asserts a [cause of action] to which this [act] applies, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to [dismiss] [strike] the [cause of action] or part of the [cause of action].

Legislative Note: A state should use the term “complaint” or “petition”, or both, to describe any procedural means by which a cause of action may be asserted.

A state should title its motion one to “dismiss” or “strike” in accordance with its procedures and customs. The state also should substitute its term for the term “[dismiss] [strike]” in Section 7(a).

A state may need to amend its statutes or rules of civil procedure to prevent a motion under this section from being considered a first pleading or motion that waives a defense or precludes the filing of another pleading or motion.
Comments

1. Unlike a defense under Fed. R. Civ. P. 12(b), the motion need not be filed prior to other pleadings in the case, and a party should not be estopped from filing a motion by taking any other actions in the case.

2. The Act should apply not just to initial claims brought by a plaintiff against a defendant, but to any claim brought by any party who seeks to punish or intimidate another party for the exercise of its constitutional rights. In this connection, initial defendants frequently use their ability to bring counterclaims and crossclaims for abusive purposes, and the Act should be available to seek dismissal of such claims.

3. The terms “complaint” and “petition” are intended to include any amended pleadings that assert a cause of action for the first time in a case.

4. “Crossclaim” means a cause of action asserted between co-plaintiffs or co-defendants in the same civil action.

5. “Counterclaim” means a cause of action asserted by a party against an opposing party after an original claim has been made by that opposing party. The term should be construed synonymously with terms like “counteraction,” “countersuit,” and “cross-demand.”


7. “Good cause” means a reason factually or legally sufficient to appropriately explain why the motion was not brought within the prescribed deadline. This section should not be construed to require a party to seek leave of court prior to filing a motion later than the prescribed deadline. Instead, a court should make any good-cause determination as part of its ruling on the motion under Section 8.

8. Some states may choose to title their special motion one to “dismiss,” while others may title it one to “strike.” The choice of title is not substantive in nature and does not affect uniformity or construction of the statute.

SECTION 4. STAY.

(a) Except as otherwise provided in subsections (d) through (g), on the filing of a motion under Section 3:

(1) all other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed; and
(2) on motion by the moving party, the court may stay a hearing or motion involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the motion under Section 3.

(b) A stay under subsection (a) remains in effect until entry of an order ruling on the motion under Section 3 and expiration of the time under Section 9 for the moving party to appeal the order.

(c) Except as otherwise provided in subsections (e), (f), and (g), if a party appeals from an order ruling on a motion under Section 3, all proceedings between all parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

(d) During a stay under subsection (a), the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under Section 7(a) and the information is not reasonably available unless discovery is allowed.

(e) A motion under Section 10 for costs, attorney’s fees, and expenses is not subject to a stay under this section.

(f) A stay under this section does not affect a party’s ability voluntarily to [dismiss] [nonsuit] a [cause of action] or part of a [cause of action] or move to [sever] a [cause of action].

(g) During a stay under this section, the court for good cause may hear and rule on:

(1) a motion unrelated to the motion under Section 3; and

(2) a motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.
Legislative Note: In subsection (f), a state should use the term “dismiss” or “nonsuit” in accordance with its procedures and customs. The state also should substitute its term for the term “[dismiss] [nonsuit]” in Section 7(b) and (c).

If a state does not use the term “sever” to describe a motion to sever, the state should use its comparable term in subsection (f).

Comments

1. Section 4 furthers the purpose of the Act by protecting a moving party from the burdens of litigation—which include not only discovery, but responding to motions and other potentially abusive tactics—until the court adjudicates the motion and the moving party’s appellate rights with respect to the motion are exhausted.

2. Section 4(a)(1) provides that the stay only applies to proceedings between the parties to the motion, but Section 4(a)(2) allows the moving party to seek a stay of proceedings and discovery between other parties if there are legal or factual issues at play in those proceedings that are material to the party’s motion. Otherwise stated, if a defendant moves to dismiss a plaintiff’s cause of action, that motion should not stay proceedings or discovery between the plaintiff and other defendants—or between other defendants themselves—unless those proceedings involve legal or factual issues that are material to the motion, or the discovery is relevant to the motion.

By way of illustration, a candidate for political office sues two defendants—his opponent, for defamation over comments made about the plaintiff during the campaign, and his opponent’s campaign manager, for hacking into the plaintiff’s campaign’s computer files and erasing valuable donor lists and other data. Only the plaintiff’s opponent moves to dismiss under the Act; the campaign manager does not. In that case, the plaintiff could still proceed with discovery and dispositive motions against the campaign manager, because the claim concerning the hacking is entirely unrelated to the defamation claim. The moving defendant has no interest that would be affected by the hacking claim. But under slightly altered facts, a different outcome might exist: The plaintiff alleges that (1) the opposing campaign manager violated the plaintiff’s privacy rights by stealing sensitive personal information in the hacking incident; and (2) the opposing candidate violated the plaintiff’s privacy rights by disclosing that sensitive personal information in a speech. Again, the opposing candidate moves to dismiss under the Act; the campaign manager does not. In that case, the causes of action are so interrelated that the moving defendant would not be able to protect his interests without participating in the case against his co-defendant—something he would not have to do if he prevails on the motion. In such an example, the court should grant a request to stay the proceedings as between the plaintiff and non-moving defendant, because the moving defendant would have no way of protecting his interests without participating in the case.

3. Section 4(c) provides that all proceedings between all parties in the case are stayed if a party appeals an order under the Act. This subsection protects a moving party from having to battle related claims—some of which might be subject to a motion under the Act and some
which are not—at the same time in two different courts. For example, if two plaintiffs file causes of action against a single defendant, and the defendant only moves to dismiss against one plaintiff but not the other, the defendant should be able to appeal a denial of that motion without also having to simultaneously defend related causes of action (albeit ones not subject to the Act) in the trial court brought by the other plaintiff.

By way of illustration, multiple plaintiffs—all contestants on a reality TV show contest—sue one defendant—the TV producer—in a single case for their negative treatment on the show. Each plaintiff’s claim is distinct and centers on separate statements. The defendant files a motion to dismiss under the Act against only one plaintiff. The motion is denied; the defendant appeals under Section 9. At that point, all the proceedings are stayed, because the defendant should not be required to try claims in the trial court while appealing other claims from the same case in the appellate court.

To the extent any party not subject to the motion desires to move forward in the trial court on what it believes are unrelated causes of action while the appeal of the motion’s order is pending, it retains the right under Section 4(f) to request a severance of those causes of action.

4. Section 4(d) provides the court with discretion to permit a party to conduct specified, limited discovery aimed at the sole purpose of collecting enough evidence to meet its burden or burdens under Section 7(a) of the Act. This provision recognizes that a party may not have the evidence it needs—for example, evidence of another individual’s state of mind in a defamation action—prior to filing or responding to a motion. The provision allows the party to attempt to obtain that evidence without opening the case up to full-scale discovery and incurring those burdens and costs.

5. Section 4(g) serves the ultimate purpose of the Act: to allow a party to avoid the expense and burden of frivolous litigation until the court can determine that the claims are not frivolous. In that connection, a court should be free to hear any motion that does not affect the moving party’s right to be free from an abusive cause of action, including a motion to conduct discovery on causes of action unrelated to the cause of action being challenged under the Act, and motions for preliminary injunctive relief seeking to protect against an imminent threat to public health or safety.

**SECTION 5. HEARING.**

(a) The court shall hear a motion under Section 3 not later than [60] days after filing of the motion, unless the court orders a later hearing:

(1) to allow discovery under Section 4(d); or

(2) for other good cause.
(b) If the court orders a later hearing under subsection (a)(1), the court shall hear the motion under Section 3 not later than [60] days after the court order allowing the discovery, unless the court orders a later hearing under subsection (a)(2).

Comments

1. Section 5 should not be construed to prevent the parties from agreeing to a later hearing date and presenting that agreement to the court with a request to find “other good cause” for a later hearing. Nevertheless, the court, and not the parties, is responsible for controlling the pace of litigation, and the court should affirmatively find that good cause does exist independent of a mere agreement by the parties to a later hearing date.

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

3. State law and local customs of the jurisdiction should dictate the consequences for a court failing to comply with the timelines set forth in this section.

SECTION 6. PROOF. In ruling on a motion under Section 3, the court shall consider the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under [cite to the state’s statute or rule governing summary judgment].

Comments

1. The Act establishes a procedure that shares many attributes with summary judgment. See Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co., 434 P.3d 1152, 1157 (Cal. 2019) (describing the California statute as a “summary-judgment-like procedure”); Gundel v. AV Homes, Inc., 264 So. 3d 304, 312-13 (Fla. Dist. Ct. App. 2019) (equating a motion under Florida’s law to one for summary judgment). So, consistent with summary-judgment practice, parties should submit admissible, competent evidence—such as affidavits, deposition testimony, or tangible evidence—for the court to consider. See Sweetwater Union High Sch. Dist., 434 P.3d at 1157 (“There are important differences between [anti-SLAPP motions and motions for summary judgment]. Chief among them is that an anti-SLAPP motion is filed much earlier and before discovery. However, to the extent both schemes are designed to determine whether a suit should be allowed to move forward, both schemes should require a showing based on evidence potentially admissible at trial presented in the proper form.”). A court should use the parties’ pleadings to frame the issues in the case, but a party should not be able to rely on its own pleadings as substantive evidence. See id.; Church of Scientology v. Wollersheim, 49 Cal. Rptr.

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

**SECTION 7. [DISMISSAL OF] [STRIKING] CAUSE OF ACTION IN WHOLE OR PART.**

(a) In ruling on a motion under Section 3, the court shall [dismiss] [strike] with prejudice a [cause of action], or part of a [cause of action], if:

1. the moving party establishes under Section 2(b) that this [act] applies;

2. the responding party fails to establish under Section 2(c) that this [act] does not apply; and

3. either:

   (A) the responding party fails to establish a prima facie case as to each essential element of the [cause of action]; or

   (B) the moving party establishes that:

      (i) the responding party failed to state a [cause of action] upon which relief can be granted; or

      (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the [cause of action] or part of the [cause of action].
(b) A voluntary [dismissal] [nonsuit] without prejudice of a responding party’s [cause of action], or part of a [cause of action], that is the subject of a motion under Section 3 does not affect a moving party’s right to obtain a ruling on the motion and seek costs, attorney’s fees, and expenses under Section 10.

(c) A voluntary [dismissal] [nonsuit] with prejudice of a responding party’s [cause of action], or part of a [cause of action], that is the subject of a motion under Section 3 establishes for the purpose of Section 10 that the moving party prevailed on the motion.

Comments

1. Section 7(a) recognizes that a court can strike or dismiss a part of a cause of action—for example, certain operative facts or theories of liability—and deny the motion as to other parts of the cause of action. E.g., Baral v. Schnitt, 376 P.3d 604, 615 (Cal. 2016) (holding that California’s statute can be utilized to challenge all or only part of a single cause of action, because a single cause of action may rely on multiple instances of conduct, only some of which may be protected).

2. Section 7(a)(1) establishes “Phase One” of the motion’s procedure—applicability. In this phase, the party filing the motion has the burden to establish the Act applies for one of the reasons identified in Section 2(b). To use the Act, a movant need not prove that the responding party has violated a constitutional right—only that the responding party’s suit arises from the movant’s constitutionally protected activity. THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 3.2 (2019). Nor does the moving party need to show that the responding party intended to chill constitutional activities (motivation is irrelevant to the phase-one analysis) or prove that the responding party actually chilled the movant’s protected activities. Id. But “[t]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been ‘triggered’ by protected activity does not entail it [as] one arising from such.” Navellier v. Sletten, 52 P.3d 695, 708-09 (Cal. 2002). Rather, the Act is available to a moving party if the conduct underlying the cause of action was “itself” an “act in furtherance” of the party’s exercise of First Amendment rights on a matter of public concern. See City of Cotati v. Cashman, 52 P.3d 695, 701 (2002). The moving party meets this burden by demonstrating two things: first, that it engaged in conduct that fits one of the three categories spelled out in Section 2(b); and second, that the moved-upon cause of action is premised on that conduct. See id. In short, the Act’s “definitional focus is not the form of the [non-movant’s] cause of action but, rather, the [movant’s] activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” Navellier, 52 P.3d at 711.
In many instances, the moving party will be able to carry its burden simply by using the responding party’s pleadings. See Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017) (“When it is clear from the plaintiff’s pleadings that the action is covered by the Act, the defendant need show no more.”). As pointed out in Comment 2 to Section 6, a party is always free to use an opposing party’s pleadings as stipulations and admissions, and when the Complaint spells out the cause of action and the activity underlying that cause of action, the moving party will be able to satisfy its burden rather easily. For example, if a defendant is sued by a public official for defamation, and the Complaint identifies the allegedly defamatory statement made by the defendant, then the defendant should need to do no more than attach the Complaint as an exhibit to its motion—the Complaint itself would clearly demonstrate that the defendant is being sued for speaking out about a public official (undoubtedly a matter of public concern).

In other instances, the moving party will have to attach evidence to its motion to establish that the cause of action is based on the exercise of protected activity. That’s because a creative plaintiff can disguise what is actually a SLAPP as a “garden variety” tort action. “Thus, a court must look past how the plaintiff characterizes the defendant’s conduct to determine, based on evidence presented, whether the plaintiff’s claims are based on protected speech or conduct.” BURKE, supra at § 3.4.

But the fact that the movant’s burden must be carried with evidence—whether that be the responding party’s pleadings or evidence the movant presents—does not mean the inquiry is a factual one. On the contrary, the motion is legal in nature, and the burden is likewise legal. Thus, the court should not impose a factual burden on the moving party—like “preponderance of the evidence” or “clear and convincing evidence”—typically seen in fact-finding inquiries. Rather, like other legal rulings, the court should simply make a determination, based on the evidence produced by the moving party, whether a cause of action brought against the moving party is based on (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding; (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or (3) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, on a matter of public concern. It should do so without weighing the parties’ evidence against each other, but instead by determining whether the evidence put forth by the movant establishes the legal standard. If the moving party fails to prove the Act applies, the motion must be denied.

3. Section 7(a)(2) is also part of “Phase One” of the motion’s procedure. Even if the Act applies for one of the reasons identified in Section 2(b), the Act may nevertheless not apply if the party against whom the motion is filed can establish the applicability of an exemption identified in Section 2(c). A party seeking to establish the applicability of an exemption bears the burden of proof on that exemption. Like establishing applicability under Section 2(b), the burden to establish non-applicability under Section 2(c) is legal, and not factual. The responding party may use the moving party’s motion, or affidavits or any other evidence admissible in a summary judgment proceeding, to carry its burden. And like the Section 2(b) analysis, the court should decide whether the cause of action is
exempt from the act without weighing the evidence against that of the moving party, but instead by determining whether the evidence produced by the responding party establishes the applicability of an exemption. If the responding party so establishes, the motion must be denied. If the moving party proves the Act applies and the responding party cannot establish the applicability of an exemption, the court moves to “Phase Two” of the motion’s procedure.

4. Section 7(a)(3)(A) establishes “Phase Two” of the motion’s procedure—prima-facie viability. Anti-SLAPP laws “do not insulate defendants from any liability for claims arising from protected rights of petition or speech. [They] only provide[] a procedure for weeding out, at an early stage, meritless claims arising from protected activity.” Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co., 434 P.3d 1152, 1157 (Cal. 2019) (emphasis original) (citations omitted). Phase Two (as well as Phase Three) is where that “weeding out” occurs.

In this phase, the party against whom the motion is filed has the burden to show its case has merit by establishing a prima-facie case as to each essential element of the cause of action being challenged by the motion. See Baral v. Schnitt, 376 P.3d 604, 613 (Cal. 2016) (holding that a responding party cannot prevail on an anti-SLAPP motion by establishing a prima-facie case on any one part of a cause of action). The moving party has no burden in this phase. “Prima facie” means evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. Dallas Morning News, Inc. v. Hall, 579 S.W.3d 370, 376-77 (Tex. 2019) (prima-facie evidence “is ‘the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true’”); Wilson v. Parker, Covert & Chidester, 50 P.3d 733, 739 (Cal. 2002) (“[T]he plaintiff must demonstrate that the complaint is [ ] supported by a sufficient prima-facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”).

Precisely how the responding party carries its burden to establish a prima-facie case “will vary from case to case, depending on the nature of the complaint and the thrust of the motion.” Baral, 376 P.3d at 614. But the responding party should be afforded “a certain degree of leeway” in carrying its burden “due to ‘the early stage at which the motion is brought and heard and the limited opportunity to conduct discovery.’” Integrated Healthcare Holdings, Inc. v. Fitzgibbons, 44 Cal. Rptr. 3d 517, 529 (2006) (citations omitted). California courts have “repeatedly described the anti-SLAPP procedure as operating like an early summary judgment motion.” THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 5.2 (2019). “[A] plaintiff’s burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment.” Yu v. Signet Bank/Virginia, 126 Cal. Rptr. 2d 516, 530 (Cal. Ct. App. 2002) (disapproved of on other grounds by Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, 413 P.3d 650 (Cal. 2018)).

Accordingly, all a responding party must do to satisfy its burden under Phase Two is produce evidence that, if believed, would satisfy each element of the challenged cause of action. A court may not weigh that evidence, but rather must take it as true and determine whether it meets the elements of the moved-upon cause of action. Sweetwater Union High Sch. Dist., 434
P.3d at 1157. If the responding party cannot establish a prima-facie case, then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the responding party does establish a prima-facie case, then (and only then) the court moves to “Phase Three” of the motion’s procedure.

5. Section 7(a)(3)(B) establishes “Phase Three” of the motion’s procedure—legal viability. Even if a responding party makes a prima-facie showing under Section 7(a)(3)(A), the moving party may still prevail if it shows that the responding party failed to state a cause of action upon which relief can be granted or that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law—in other words, that the cause of action is not legally sound. In this phase, the burden shifts back to the moving party. If the moving party makes a showing under Section 7(a)(3)(B), then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the moving party does not make such a showing—and the responding party successfully established a prima-facie case in “Phase Two”—then the motion must be denied.

For example, a plaintiff desiring to build a “big box” store sues a defendant for tortious interference based on the defendant’s efforts to organize a public campaign adverse to the plaintiff. The defendant moves to dismiss under the Act and establishes that the suit targets her First Amendment activity on a matter of public concern. Thus, the motion moves to Phase Two. In that phase, the plaintiff is able to establish a prima-facie case on each essential element of its tortious interference cause of action. Thus, the motion moves to Phase Three. But in that final phase, the defendant shows that the claim is barred by limitations. In such an instance, the court must grant the motion, because the defendant showed itself to be entitled to judgment as a matter of law.

Although Phase Three uses traditional summary judgment and Fed. R. Civ. P. 12(b)(6) language, it does not serve as a replacement for those vehicles. On the contrary, summary judgment and other dismissal mechanisms remain options for defendants who cannot establish that they have been sued for protected activity. In other words, to get to Phase Three—and be entitled to the Act’s sanctions under Section 10—a movant must first prevail under Phase One by showing the Act’s applicability. But by employing a legal-viability standard, the Act recognizes that a SLAPP plaintiff can just as easily harass a defendant with a legally nonviable claim as it can with a factually nonviable one.

6. Sections 7(b) and (c) recognize that a party may desire to dismiss or nonsuit a cause of action after a motion is filed in order to avoid the sanctions that accompany a dismissal under Section 10. Both sections serve to maintain the moving party’s ability to seek attorney’s fees and costs—even though the offending cause of action has been dismissed—because the filing of a motion under the Act is costly, and many plaintiffs refuse to voluntarily dismiss their claims until a motion has been filed. But a prudent moving party should take efforts to inform opposing parties that it intends to file a motion under the Act, so as to give them an opportunity to voluntarily dismiss offending claims.
before a motion is filed. Courts may take a moving party’s failure to do so into account when calculating the reasonableness of the moving party’s attorney’s fees.

7. Section 7(b) protects a moving party from the gamesmanship of a responding party who dismisses a cause of action after the filing of a motion, only to refile the offending cause of action after the motion is rendered moot by the claim’s dismissal.

8. Once a motion has been filed, a voluntary dismissal or nonsuit of the responding party’s cause of action does not deprive the court of jurisdiction.

9. State law should dictate the effect of a dismissal of only part of a cause of action.

SECTION 8. RULING. The court shall rule on a motion under Section 3 not later than [60] days after a hearing under Section 5.

Comment

State law and local customs of the jurisdiction should dictate the consequences for a court not complying with the timelines set forth in this section.

SECTION 9. APPEAL. A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under Section 3. The appeal must be filed not later than [21] days after entry of the order.

Legislative Note: A state should insert a time to appeal consistent with other interlocutory appeals.

This section may require amendment of a state’s interlocutory appeal statute or court rule.

Comments

1. “If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court’s denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. Thus, [anti-SLAPP statutes] protect the defendant from the burdens of trial, not merely from ultimate judgments of liability.” Batzel v. Smith, 333 F.3d 1018, 1025 (9th Cir. 2003) (superseded by statute on unrelated grounds as stated in Fyk v. Facebook, Inc., No. 19-16232, 2020 WL 3124258, at *2 (9th Cir. June 12, 2020)).
2. This section should not be construed to foreclose an interlocutory appeal of an order granting, in whole or in part, a motion under Section 3, if state law would otherwise permit such an appeal.

3. This section is not intended to affect any separate writ procedure a state may have.

4. This section is not intended to prevent a court from entering an order certifying a question or otherwise permitting an immediate appeal of an order that dismisses only part of a claim.

5. A party who chooses not to interlocutorily appeal under this section should not be foreclosed from filing an ordinary, non-interlocutory appeal of a court’s denial of a motion under Section 3 following the entry of a final, appealable judgment.

SECTION 10. COSTS, ATTORNEY’S FEES, AND EXPENSES. On a motion under Section 3, the court shall award court costs, reasonable attorney’s fees, and reasonable litigation expenses related to the motion:

(1) to the moving party if the moving party prevails on the motion; or

(2) to the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

Comments

1. The mandatory nature of the relief provided for by this section is integral to the uniformity of the Act. States that do not impose a mandatory award upon dismissal of a cause of action will become safe havens for abusive litigants. Without the prospect of having to financially reimburse a successful moving party, SLAPP plaintiffs will be able to file their frivolous suits in such states with impunity, knowing that, at worst, their claims will only be dismissed. But because moving parties would be financially responsible for the expense of obtaining that dismissal, the effect of the abusive cause of action is nevertheless achieved. The only way to assure a truly uniform application of the Act is to require the award of attorney’s fees to successful moving parties.

2. Nothing in this section should be construed to prevent a court, in appropriate circumstances, from awarding sanctions under other applicable law or court rule against a party, the party’s attorney, or both. For instance, many states have adopted court rules analogous to Fed. R. Civ. P. 11, and the constricted breadth of Section 10 should not act as a shield or restriction against the imposition of such sanctions where they would be otherwise warranted.
3. The term “costs” includes filing fees, as well as other monetary amounts a state may define as a “cost.”

4. The term “attorney’s fees” means the fees paid to the attorney to compensate for his or her time and effort in the prosecution or defense of the motion.

5. The term “litigation expenses” means the hard costs an attorney incurs in the prosecution or defense of the motion. Typical expenses in a case can include copies and faxes, postage, couriers, expert witnesses, consultants, private court reporters, and travel.

SECTION 11. CONSTRUCTION. This [act] must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or [cite to the state’s constitution].

Comment

Similar expressions of intent by states that their anti-SLAPP statutes be broadly construed have been pivotal to courts’ interpretations of those statutes. See, e.g., ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 898 (Tex. 2017) (recognizing that the Texas Legislature “has instructed that the [statute] ‘shall be construed liberally to effectuate its purpose and intent fully’”); Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564, 573 (Cal. 1999) (“The Legislature’s 1997 amendment of [California’s anti-SLAPP statute] to mandate that it be broadly construed apparently was prompted by judicial decisions . . . that had narrowly construed it . . . That the Legislature added its broad construction proviso . . . plainly indicates these decisions were mistaken in their narrow view of the relevant legislative intent.”).

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. TRANSITIONAL PROVISION. This [act] applies to a civil action filed or [cause of action] asserted in a civil action on or after [the effective date of this [act]].

[SECTION 14. SAVINGS CLAUSE. This [act] does not affect a [cause of action] asserted before [the effective date of this [act]] in a civil action or a motion under [cite to the state’s current anti-SLAPP law] regarding the [cause of action].]
Legislative Note: A state should include this section if the state has an existing procedure for a special motion for expedited relief that is being repealed because this act replaces it.

[SECTION 15. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.

[SECTION 16. REPEALS; CONFORMING AMENDMENTS.

(a) . . .

(b) . . .

(c) . . .]

Legislative Note: Section 9 may require amendment of a state’s interlocutory appeal statute or court rule.

A state may need to amend its statutes or rules of civil procedure to prevent a motion under this act from being considered a first pleading or motion that waives a defense or precludes the filing of another pleading or motion.

SECTION 17. EFFECTIVE DATE. This [act] takes effect . . . .
SILVERCORP METALS INC., Plaintiff,


Synopses

Background: Silver producer with mining exploration projects in China and Canada brought defamation and fraud action against stock watch company that allegedly disseminated two letters and published defamatory statements on the internet on three separate occasions about producer in order to drive down price of its stock for personal gain through “short selling” scheme. Defendant filed counterclaim under New York’s anti-SLAPP (strategic lawsuit against public participation) statute, claiming that silver producer commenced action to “silence” it “as part of a public relations and legal SLAPP ... campaign to retaliate against, intimidate, and deter good-faith criticism of (producer's) business practices made to appropriate authorities and experts.” Plaintiff moved to dismiss counterclaim for failure to state a cause of action.

Holdings: The Supreme Court, New York County, Carol R. Edmead, J., held that:

[1] counterclaim sufficiently pled that plaintiff/counterclaim defendant was a “public applicant or permittee” within meaning of anti-SLAPP law, but

[2] statements in counterclaim did not pose direct challenge to any application for public offering of stock or impending application for same.

Motion granted.
In order to state counterclaim for retaliatory “strategic lawsuit against public participation” (SLAPP), defendant must identify application or permit being challenged or commented on, and his communications must have been substantially related to such application or permit. McKinney's Civil Rights Law §§ 70–a, 76–a(1)(a).

In silver producer's defamation and fraud action against stock watch company, counterclaim sufficiently pled that producer was a “public applicant or permittee” within meaning of anti-SLAPP law; counterclaim alleged that producer applied for and received permission to act, i.e., issue shares of stock which were publicly traded on Toronto and New York Stock Exchanges, from Securities and Exchange Commission (SEC) and British Columbia Securities Commission (BCSC). McKinney's Civil Rights Law § 76–a(1)(a, b).

Counterclaimant's statements did not pose direct challenge to any application for public offering of silver corporation's stock or impending application for same and action did not fall within anti-strategic lawsuit against public participation (SLAPP) suit definition of “action involving public petition and participation”; challenge to accuracy of corporation's financial disclosures, in and of itself, failed to rise to level of a challenge to corporation's permission for issuance of its shares. McKinney's Civil Rights Law §§ 70–a, 76–a(1)(a).

In response, Anthion asserted a counterclaim pursuant to N.Y. Civil Rights Law §§ 70–a and 76–a (the “anti-SLAPP [Strategic Lawsuit Against Public Participation] statute”). Anthion claims that Silvercorp commenced this
action to “silence” it “as part of a public relations and legal SLAPP ... campaign to retaliate *662 against, intimidate, and deter good-faith criticism of Silvercorp's business practices made to appropriate authorities and experts.” (Pg. 14, ¶ 1; pg. 15, ¶ 3).

Anthion allegedly discovered inconsistencies in Silvercorp's financial information as reported to Chinese financial regulators and the Securities and Exchange Commission (“SEC”), indicating that Silvercorp was engaged in accounting fraud. Anthion prepared a preliminary report (the “August 29 report”), and sent it anonymously to security regulators, Silvercorp's auditors, and six of the United States and Canada's most prestigious business journalists from the Wall Street Journal and The New York Times. ² Thereafter, on September 2, 2011, Silvercorp issued a press release labeling the August 29 report as a short seller “manipulation scheme” and threatened to pursue all legal options to recover damages incurred by the August 29 report.

Following an announcement by the British Columbia Securities Commission (“BCSC”) that it was investigating the anonymous allegations, Silvercorp issued another press release claiming that the BCSC and SEC were carrying out an investigation of the fraud.

Defendant then prepared a 17–page final report (the “Final report”) (referred to in the complaint as the September 14 letter) concerning Silvercorp's valuation and financial reporting, and sent it to the BCSC and Silvercorp's outside auditors, and posted a copy on www.chinastockwatch.com. It is alleged that by providing this document to Silvercorp's governmental regulators, Anthion was “commenting on, and challenging the permission Silvercorp enjoys from government regulators to offer securities to the public.”

Silvercorp responded by issuing a press release on September 19, 2011 labeling Anthion's reports as a manipulation scheme and again, threatening to pursue legal action. Three days later, Silvercorp commenced this action against Anthion, and threatened in another press release on September 23, 2011 to “hold participants in this scheme ... accountable.” In connection **898 with this action, Silvercorp issued multiple third-party subpoenas to banks, investors and attorneys for financial records and *663 documents related to Silvercorp. Silvercorp also announced that it had filed criminal complaints in Canada.

Silvercorp now moves to dismiss the counterclaim for failure to state a cause of action. Anthion contends that under § 70–a(1), which must be narrowly construed, a defendant in an action involving public petition and participation may maintain a counterclaim against any person who commenced such action. A public petition is a “SLAPP” action brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

There is no authority indicating that Silvercorp is a “public applicant or permittee” by virtue of its status as a publicly held corporation that must obtain “permission” from securities regulators before issuing shares of stock to be traded on the New York and Toronto stock exchanges. Such an expansive definition of “public applicant or permittee” would effectively subject every publicly held corporation filing a defamation suit in New York to an anti-SLAPP counterclaim. The statute was intended to protect those local citizens who, usually before a government agency, publicly challenge applications by developers or other businesses for environmental and land use permits, leases, and licenses, and the regulatory approval purportedly sought by Silvercorp is non-local in nature. Anthion's allegations, which are directed at Silvercorp's filings made with federal securities regulators in the United States and Canada, is not what the Legislature envisioned in enacting the anti-SLAPP statute.

Additionally, Anthion's defamatory statements did not directly challenge any pending stock offering or application by Silvercorp to U.S. or Canadian securities regulators for a public offering of stock. Nor did Anthion's accusations against Silvercorp have any bearing on a decision by regulators to approve any offering of Silvercorp stock.

And, Anthion, which operates a private hedge fund based in New York City, is not a financially-disadvantaged “citizen activist” in need of protection under the anti-SLAPP statute. Anthion does not seek to expose fraud or wrongdoing for the public good, and did not publish its attacks on Silvercorp until after it established a short position in Silvercorp's stock.
In opposition, Anthion argues that the counterclaim falls within the anti-SLAPP statute. Courts have applied the anti-SLAPP statute to applicants or permittees regulated under state and federal statutes. An entity is not a “public applicant or permittee” in circumstances where a government process is optional, and here, Silvercorp is obligated to register its shares, adhere to Canadian and U.S. securities laws and provide regular, accurate financial disclosures to continue listing its shares on the Toronto and New York Stock Exchanges. Silvercorp is subject to regulators with authority to investigate Silvercorp, revoke its registration, or suspend trading of Silvercorp's shares for failure to comply with securities laws and financial disclosure requirements.

Further, as the anti-SLAPP statute governs non-local conduct by permittees, by defining “Government body” to include the federal government, there is no requirement that the conduct of applicants or permittees under the anti-SLAPP statute be local in nature.

And, the anti-SLAPP statute's protections are not limited to financially disadvantaged individuals. Thus, Anthion's financial position is irrelevant to this case.

Anthion argues that its criticisms of Silvercorp, made to the appropriate regulators, directly challenged Silvercorp's permission to continue listing its stock on public exchange bodies. The August 29 and September 14 reports were delivered to Canadian regulators, members of the financial press, Silvercorp's auditors and to the SEC and the public. Silvercorp's ability to offer shares of its stock publicly is in the nature of a continuing license in that the registration and offering of securities is “ongoing and subject to regulators' continued oversight, and failure to comply with securities laws can cause the revocation of that permission.” Anthion's complaints were made directly to Canadian regulators and subsequently the SEC, both of which have the authority to suspend that permission. Thus, whether an additional stock offering was pending at the time Anthion made its complaints is irrelevant.

In matters of public concern, courts have held that the anti-SLAPP statute is not limited to complaints made directly to a government agency but rather includes complaints made to the press.

In reply, Silvercorp argues that Anthion never asked that Silvercorp's permission to list its stock be revoked. The intended audience of the letters Anthion sent was other investors, and not to comment or oppose Silvercorp's permission to trade its stock publicly. Silvercorp points out that Anthion profited “handsomely after its anonymous letter and internet posting drove down Silvercorp's stock price.” (Reply, p. 3). While the the August 29th report was addressed to the BCSC, Anthion did not actually send the letter there; nor did Anthion send the September 14, 2011 report to the SEC, but to Canadian regulators. The anti-SLAPP statute does not encompass communications with foreign regulators, such as the BCSC and Ontario Securities Commission. Further, statements to the press and not to a governmental body as that term is defined in the statute, are insufficient.

Discussion

[1] [2] “On a motion to dismiss for failure to state a cause of action, the pleading is to be afforded a liberal construction” (McRedmond v. Sutton Place Restaurant and Bar, Inc., 48 A.D.3d 258, 851 N.Y.S.2d 478 [1st Dept. 2008]). The Court must accept the facts as alleged in the pleading as true, accord the claimant “the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (McRedmond, supra citing Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]).

Civil Rights Law § 70–a “provides a cause of action for alleged victims of SLAPP suits, which allows”[a] defendant in an action involving public petition and participation ... [to] maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action” (Harfenes v. Sea Gate Assn., 167 Misc.2d at 652–653, 647 N.Y.S.2d 329 [Sup. Ct., New York County 1995]) citing Civil Rights Law § 70–a(1). An “action involving public petition and participation” is defined by section 76–a(1)(a) as “an action ... for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on ... challenge or oppose such application or permission.” (Id.)
Section 76–a(1)(b) then defines “public applicant or permittee” as any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body.


[4] “In order to state an anti-SLAPP counterclaim, a defendant must ‘identify ... the application or permit being challenged or commented on,’ and his communications must have been “substantially related to such application or permit” (Bridge Capital Corp. v. Ernst, supra ). Because “the anti-SLAPP law is in derogation of common law, it must be narrowly construed” (Hariri v. Amper, 51 A.D.3d 146, 854 N.Y.S.2d 126 [1st Dept. 2008] (“the anti-SLAPP law is in derogation of the common law and must be strictly construed”); Guerrero v. Carva, 10 A.D.3d 105, 779 N.Y.S.2d 12 [1st Dept. 2004] citing Harfenes v. Sea Gate Assn., 167 Misc.2d at 652–653, 647 N.Y.S.2d 329). Thus, defendant “must directly challenge a license or permit application in order to establish a cause of action under Civil Rights Law § 70–a” (Harfenes, 167 Misc.2d at 653, 647 N.Y.S.2d 329).

[5] Contrary to Silvercorp’s contention, the counterclaim sufficiently pleads that Silvercorp is a “public applicant or permittee” within the meaning of the anti-SLAPP law. A “public applicant or permittee,” is defined in Civil Rights Law § 76–a(b) as “any person who has applied for or obtained a permit ... license, certificate or other entitlement for use or permission to act from any government body.” Government body is defined as “any municipality .... federal government, any public benefit corporation, or any public authority, board or commission.”


The counterclaim alleges that Silvercorp applied for and received permission to act, i.e., issue shares of stock which are publically traded on the Toronto and New York Stock Exchanges from the SEC and BCSC, and this allegation is sufficient to state that Silvercorp is a public applicant or permittee. It cannot be contested that Silvercorp cannot sell shares on the New York Stock Exchange without the proper permission from the SEC. Silvercorp is not simply an entity advocating a position to a Town Board, or an entity seeking governmental funding (cf. Hariri v. Amper, 51 A.D.3d 146, 854 N.Y.S.2d 126 [1st Dept. 2008]; Chandok, supra ).
Silvercorp must obtain permission from the SEC in order to issue shares on New York Stock Exchange, and continues to be subject to its rules and regulations (see Adelphi Univ. v. Committee to Save Adelphi, N.Y.L.J., Feb. 6, 1997, at 33, col. 2. [Sup. Ct., Nassau County 1997]).

[6] However, Anthion's statements did not pose a direct challenge to any application for public offering of Silvercorp's stock or impending application for same (Guerrero, supra (“A narrow construction of the anti-SLAPP law requires that a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action under the Civil Rights Law”) (emphasis added)). There is no indication that Anthion's attacks on Silvercorp in August and September 2011 were directly related to the filing, approval or continued approval of an offering of Silvercorp shares of stock. Indeed, it cannot be said that Anthion's statements challenged any petition or application by Silvercorp given that no such petition or application was alleged to have been pending at the time the statements were made (see Guerrero, 10 A.D.3d at 117–18, 779 N.Y.S.2d at 22–22 (defendants failed to “identify any particular application or permit that Silvercorps have sought or received” or “cite any specific proceeding pending before an administrative agency in which they were advocating in opposition to the plaintiffs”); 668 Foley v. CBS Broadcasting, Inc., 2006 WL 6619947 at *2, 2006 N.Y. Misc. LEXIS 9327 at *4–5 (reporting on proceedings by the New York City Consumer Affairs Department against plaintiff “did not oppose, or comment on, a pending application before the DCA,” and “therefore do not fall within the narrow construction given to the anti-SLAPP law”); Harfenes, 167 Misc.2d 647, 652, 647 N.Y.S.2d 329, 332 (“plaintiffs were unaware of the Association's application to the DEC at the time it was made, and never participated in the application process in any manner”)). And, while Anthion challenged the accuracy of Silvercorp's financial disclosures, this type of challenge, in and of itself, fails to rise to the level of a challenge to Silvercorp's permission for the issuance of its shares. Anthion's complaints did not go directly to Silvercorp's ability to maintain its permission to offer its shares publicly.

While one court declined to limit anti-SLAPP statute protection to statements made directly to a governmental body (see Duane Reade, Inc. v. Clark, 2 Misc.3d 1007(A), 784 N.Y.S.2d 920 [Sup. Ct., New York County 2004] (applying protection to defendant's “newspaper publicity campaign”); see Adelphi Univ. v. Committee to Save Adelphi, supra.), Anthion's challenge to the financial statements of Silvercorp did not target any pending application to the SEC.

Thus, in the absence of any allegation that Anthion was “petitioning an agency **902 regarding an application or permission” of Silvercorp, the Court holds that Silvercorp's action “did not affect defendant[s'] rights of public petition and participation before public agencies and, accordingly,” fails to state a claim under Civil Rights Law §§ 70–a and 76–a (see Guerrero, supra at 118, 779 N.Y.S.2d 12).


Conclusion
Therefore, based on the foregoing, it is hereby

ORDERED that the motion by Silvercorp Metals Inc. pursuant to CPLR 3211(a)(7) to dismiss the counterclaim of defendant Anthion Management LLC is granted, and said counterclaim is hereby severed and dismissed; and it is further

ORDERED that Silvercorp serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

All Citations

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Footnotes

1. It is alleged that Anthion participated in and disseminated letters asserting defamatory and fraudulent statements about Silvercorp, dated August 29, 2011 and dated September 14, 2011, and internet postings dated on September 13, 14, and 19, 2011.
   A “short sale” transaction proceeds as follows: “The short seller identifies securities she believes will drop in market price, borrows these securities from a broker (prime brokers have the greatest market share), sells the borrowed securities on the open market, purchases replacement securities on the open market, and returns them to the broker—thereby closing the short seller's position. The short seller's profit (if any) is the difference between the market price at which she sold the borrowed securities and the market price at which she purchased the replacement securities, less borrowing fees, brokerage fees, interest, and any other charges levied by the broker (Electronic Trading Group, LLC v. Banc of America Securities LLC, 588 F.3d 128, 132 [2d Cir.2009]).

2. The August 29 report disclosed that the readers “should assume its authors hold a short position” in Silvercorp’s stock and would “stand [...] to realize significant gains in the event the price of [Silvercorp's] stock declines.” (¶ 27).
What Is a ‘Substantial Basis’ Under New York’s Anti-SLAPP Law?

On Nov. 10, New York enacted legislation intended to strengthen free speech protections by modifying its nearly 30-year-old Anti-SLAPP law. But the vitality of these new protections will depend on how courts interpret a key concept in the statute.

By Daniel Novack and Christina Lee | November 17, 2020

For nearly three decades, New York—the nation’s media capital—has had one of the country’s least protective Anti-SLAPP statutes. These statutes—designed to protect our First Amendment rights from frivolous litigation—generally [1] impose heightened pleading standards for claims predicated on speech and provide for fee shifting for prevailing defendants.

On Nov. 10, 2020, New York enacted legislation intended to strengthen free speech protections by modifying its nearly 30-year-old Anti-SLAPP law. But the vitality of these new protections will depend heavily on how courts interpret a key concept in the statute—whether a plaintiff's case has a “substantial basis.”

Background

The new law is composed of four components:

1. CPLR Section 76-A, which enumerates the First Amendment conduct protected by the law.

2. CPLR Section 70-A, which defines the penalties associated with filing a SLAPP, including attorney fee awards for prevailing defendants.

3. CPLR Section 3211(g), which dictates that a court must grant a motion to dismiss unless the plaintiff demonstrates a “substantial basis” in law (or substantial argument for an extension, modification or reversal of existing law).

4. CPLR Section 3212(h), which dictates that a court must grant a motion for summary judgment against the plaintiff unless they demonstrate a “substantial basis in fact and law” (or substantial argument for an extension, modification or reversal of existing law).
The new law differs in three principal respects from its predecessor: First, CPLR § 76-A has expanded the scope of protected conduct. Under the old regime, only a narrow class of conduct relating to public permits was covered. In contrast, the new law is broad. It covers:

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

New York Senate Bill S52-A (2019-2020 Legislative Session).

Second, CPLR § 3211(g) now requires an immediate stay of discovery during the pendency of a motion to dismiss. Id.

Third, while the prior regime made the award of fees discretionary, CPLR § 70-A now provides for mandatory attorneys' fees in instances where a suit was “commenced or continued without a substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.” Id. This language tracks CPLR §§ 3211(g) and (h)'s guidance on the standards applicable for an anti-SLAPP motion to dismiss and for summary judgment.

Because of the narrow class of claims covered by the prior Anti-SLAPP law, it was rarely applied in New York courts. The dramatic expansion in coverage is likely to lead to more frequent litigation and renewed interest in how courts assess whether a “substantial basis” exists in the contexts of dismissal and fees.

Plain Language & New York Pleading Standards

Unfortunately, New York's Anti-SLAPP law does not offer a definition of “substantial basis” or guidance on how it compares to the ordinary motion to dismiss and summary judgment standards, § 3211(g), (a)(7), and § 3212, respectively. All roads, however, point to a clear intent that courts impose a heightened standard.

First, the ordinary motion to dismiss and summary judgment standards:

- On a motion to dismiss, a court need only ascertain “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” Guggenheimer v. Ginzberg, 43 NY2d 268, 274-75 (1977). What is “cognizable?” CPLR § 3013 requires that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” [2]
- At summary judgment, the burden is on the defendant to show “no material and triable issue of fact is presented,” and summary judgment “should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable.” In re New York City Asbestos Litigation, 33 N.Y.3d 20, 25 (2019).

Given that § 3211(g), (a)(7), and § 3212(h) appear within the same statute as the ordinary motions, it is clear that the Legislature intended them to be a distinct standard. Otherwise, each would have no operative effect. Under the rule against surplusage, a court's reading must not render statutory language extraneous. Andryevya v. New York Health, 33 NY 3d 152, 177 (2019).

Distinct how? The plain language of § 3211(g) and § 3212(h) indicates a heightened standard. On its face, the word “substantial” is more stringent than “cognizable.” [3]

Finally, the protective purpose of the statute militates in favor of a heightened standard. People v. Andujar, 30 N.Y.3d 160, 166 (2017) (holding that a court's primary consideration in statutory interpretation is to give effect to the intention of the Legislature). The Legislature's goal [4] of disincentivising lawsuits attacking free speech can only be effectuated if they are procedurally and substantively easier to defeat. The clear legislative intent is also evident in the statute's burden shift from defendant to plaintiff.

Historical Application

This construction is generally consistent with New York courts' treatment of “substantial basis” under the prior version of the Anti-SLAPP law. Over the past 30 years, New York courts have evaluated the “substantial basis” standard under New York's former Anti-SLAPP statute dozens of times. [5] The cases are summarized in an appendix below.

Appellate Division

All four departments of the Supreme Court, Appellate Division have had an opportunity to apply the substantial basis standard. Our review of 14 Appellate Division cases revealed:

- Four involved review of a successful motion to dismiss. The courts affirmed all four dismissals in favor of defendants (100%).
- Five involved review of a denial of a motion to dismiss. The courts overturned one denial (20%).
- Four cases affirmed the grant or denial of a defendant's motion for summary judgment. The court ruled in favor of defendants 2 out of 4 times (50%).
- Of the 14 opinions reviewed, eight cited a heightened standard (57%). [6]
- Within that subset, four decisions referenced the “clear and convincing evidence” standard (26% of total appellate opinions reviewed).
- [7] Defendants won both motions to dismiss (100%) and both motions for summary judgment (100%).
- In the remaining six cases, the court declined to substantively address the “substantial basis” analysis one way or the other, leaving it undefined.
- Overall: Defendants won 6 out of 10 motions to dismiss (60%) and 2 out of 4 motions for summary judgment (40%).

Supreme Court

Our review of 28 trial level cases that applied the “substantial basis” standard revealed:
What Is a ‘Substantial Basis’ Under New York’s Anti-SLAPP Law? | Ne... https://www.law.com/newyorklawjournal/2020/11/17/what-is-a-substanti...
Rather than dance on the head of a pin to try to explain how a nonplausible claim could have a substantial basis, federal courts should instead reach for the common sense conclusion that a SLAPP dismissal necessarily requires an award of fees.

**Conclusion**

Given the plain language of New York's Anti-SLAPP statute, the policy intention animating the law, and the manner in which state courts have applied it, "substantial basis" should be understood as a heightened standard, one that requires plaintiffs to plead persuasive factual evidence in support of their claims. And when SLAPP claims are dismissed, fees should follow.

_Daniel Novack_ is the chair of the New York State Bar Association Committee on Media Law and senior counsel at Penguin Random House. His committee supported the Anti-SLAPP legislation. _Christina Lee_ is a third-year law student at Cornell Law School.

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[1] See, e.g., Cal. Civ. Proc. Code § 425.16(b)(1) (requiring dismissal of SLAPP claim unless plaintiff establishes "that there is a probability that the plaintiff will prevail on the claim.").

[2] For instance, in the realm of defamation law, where Anti-SLAPP is most likely to apply, CPLR § 3016 requires that "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." NY CLS CPLR R 3016.


[4] It also bears mention that if the legislature was concerned that courts have applied the "substantial basis" standard too aggressively, it could have modified that provision of the law along with the other sections. Instead, it left "substantial basis" undisturbed.

[5] See Index A (https://beta.documentcloud.org/documents/20412398-index-a-ny-anti-slapp-substantial-basis-cases) for a detailed breakdown of these cases. To find relevant caselaw, we conducted two searches on LexisNexis, first using the search terms ("Anti-SLAPP" & ("motion to dismiss" or "motion for summary judgment")) narrowed by New York jurisdiction and secondly, using the terms ("Civil Rights Law 70-a" or "3211(g)" or "3212(ii)" & "substantial basis") narrowed by New York Jurisdiction. This yielded 42 total reported opinions in which the standard was directly applied. We also found additional cases that discuss the "substantial basis" standard in dicta. See, e.g., Guerrero v. Caru, 10 A.3d 195 (App. Div. 1st Dept 2004) (declining to designate case as a SLAPP but remarking that "[a] finding that an action is a SLAPP suit entails serious consequences to the plaintiff: a heightened standard of proof is imposed upon the plaintiff to avoid dismissal of the action.").


[7] See, e.g., Southampton Day Camp Realty, LLC v. Gorman, 118 A.3d 976, 990 (App. Div. 1st Dept 2014) (affirming trial court holding that to avoid dismissal, "plaintiffs bear the burden of establishing, by clear and convincing evidence that defamatory false statements were made with knowledge of their falsity or with reckless disregard to whether the statements were true or false").

[8] See, e.g., Waterways at Bay Pointe Homeowners Assn., 969 N.Y.S.2d 807 (Sup. Ct. 2013) (holding that a "heightened standard of proof is imposed upon the plaintiff to avoid dismissal of the action."); 149 Mercer Owner LLC v. 151 Mercer Retail LLC, 2017 N.Y. Misc. LEXIS 46555, *10-11 (holding that § 3211a(7) is a "less burdensome standard" than § 3211(g)).

[9] With respect to the "clear and convincing evidence" standard, one court held that "In order to avoid dismissal of its SLAPP suit complaint," a plaintiff "must establish by clear and convincing evidence a 'substantial basis' in fact and law for its claim." The court found that "[t]he Legislature viewed 'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." Duane Reade, Inc. v. Clark, 784 N.Y.S.2d 920, 920 (Sup. Ct. 2004) (citing Siege, Pratice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:73) (emphasis added).

[10] See also Int'l Shoppes, Inc. v. At the Airport, LLC, 16 N.Y.S.3d 72, 75-76 (App. Div. 2nd Dept 2015) (finding that "the plaintiffs came forward with allegations and supporting evidence" indicating that defendant knew his claims were false, in addition to offering "evidence demonstrating that [an] ensuing investigation resulted in a finding that [plaintiffs] committed no wrongdoing.").

[11] See, e.g., Ginx, Inc. v. Soho Alliance, 720 F. Supp. 2d 342, 366 (S.D.N.Y. 2010) (declining to apply Anti-SLAPP but finding that "New York's legislature may have adopted the Anti-SLAPP law to elevate a plaintiff's burden at the pleading stage above 'plausibility' . . . to 'substantial basis'.")

[12] While the Reid court held that the plausibility standard was the correct standard to apply to a Motion to Dismiss, that does not mean New York's Anti-SLAPP has no bearing in these contexts. Because §76-A raises the liability and evidentiary bar for successful defamation claims to "knowledge" or "reckless disregard" of falsity, via "clear and convincing evidence," (akin to the actual malice standard set forth by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), federal courts must use that high barrier to success in making a determination whether a claim is plausible. See, e.g., Adelson v. Harris, 774 F.3d 803 (2d Cir. 2014); see also Daniel Novack and Christina Lee, How New York Anti-SLAPP Law Could Survive The 2nd Circuit, Law360 (Aug. 12, 2020), https://www.law360.com/articles/1300073/how-new-york-anti-slapp-law-could-survive-the-2nd-circuit/ (https://www.law360.com/articles/1300073/how-new-york-anti-slapp-law-could-survive-the-2nd-circuit/).


[14] In Iqbal, the Supreme Court announced stricter pleading requirements mandating that plaintiffs plead claims that are plausible on their face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[15] Both Mullen and Zalmayev approvingly cite West Branch, but in that case, the Third Department merely affirmed that a court had discretion to deny fees "even if the defendant establishes that the suit is a SLAPP suit brought under circumstances that entitle it to and that it is entitled to damages." West
[16] The Court also cited a Third Department case, Clemente v. Impastato, 290 A.D.2d 864 (App. Div. 3d Dept 2002), as an example of a state court denying fees despite dismissing the claim. However, this case is an outlier among state court decisions, particularly because it failed to apply the "substantial basis" test to both the dismissal and fee questions, which is plainly erroneous. The primary case cited by the court for this proposition was Niagara Mohawk Power Corp. v. Testone, 272 A02d 910, 912, which turned on a substantial argument for the extension, modification or reversal of existing law.

[17] With respect to the Zalmayev court's apparent view that, substantial basis aside, the baseline level of scrutiny is higher in Federal Rules than in New York state courts, no evidence is offered for this proposition. To wit, the standards are described quite similarly. Compare Campaign for Fiscal Equity, Inc. v. State, 86 NY2d 307, 318 (1995) (“In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), our well-settled task is to determine whether, “accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.”)(citations omitted); with Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (“A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).
§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Credits
(L.1909, c. 14.)

Current through L.2021, chapters 1 to 49, 61 to 68. Some statute sections may be more current, see credits for details.
§ 201. Ownership of copyright, 17 USCA § 201

United States Code Annotated
Title 17. Copyrights (Refs & Annos)
Chapter 2. Copyright Ownership and Transfer (Refs & Annos)

17 U.S.C.A. § 201

§ 201. Ownership of copyright

Currentness

(a) Initial Ownership.--Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire.--In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works.--Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.--

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer.--When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

CREDIT(S)

§ 201. Ownership of copyright, 17 USCA § 201

17 U.S.C.A. § 201, 17 USCA § 201
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.
Digital imaging and the Internet are among the wonders of our age. In combination, they permit the virtually instant and worldwide electronic dissemination of high quality images that can be, and often are, copied and redisseminated by others. Nonetheless, this circumstance has created problems for professional photographers and publishers of images that were unimaginable in the relatively recent past. It has led also to the creation of a lawyer business model that has deluged this Court with photographic copyright infringement cases since early 2016. This deluge is attributable to plaintiff's counsel in this case, Richard Liebowitz. According to the Court's records, Mr. Liebowitz, who was admitted to practice in this Court in October 2015, filed 1,110 lawsuits in this Court from the beginning of 2016 through September 16, 2019. That is an average of more than one new case on every day the Court has been open for business. Each and every one of those 1,110 cases has been a copyright infringement suit. Many – probably all or nearly so – have been brought on behalf of photographers who assert that their images have been infringed by Internet web sites and other publishers. This case is part of the downpour.

Of course, photographers who create copyrighted images should be fairly compensated for their work. Those who infringe by using such images in violation of the rights of a copyright holder should be held to account. On the other hand, as I noted in a prior case, “[t]here may well be justification for [the] implication [that a significant portion of the 1,110 cases] ... [have been] strike suits, designed to extort settlements from defendants on the basis that the defense costs would exceed what plaintiff would accept in settlement.”¹ Indeed, another judge of this Court has referred to Mr. Liebowitz as a “copyright troll” – one who is “more focused on the business of litigation than on selling a product or service or licensing their copyrights to third parties to sell a product or service. A copyright troll plays a numbers game in which it targets hundreds or thousands of defendants seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.”² Moreover, Mr. Liebowitz has been sanctioned, reprimanded, and advised to “clean up [his] act” by other judges of this Court. As Judge Furman recently observed, “there is a growing body of law in this District devoted to the question of whether and when to impose sanctions on Mr. Liebowitz.”³ And that is what I am asked to do here by defendant's motion to dismiss the action as a sanction for alleged discovery misconduct or, alternatively, to strike portions of the evidence that plaintiff has submitted in support of a motion for summary judgment or require a bond as security for costs and fees pursuant to Local Civ. R. 54.2.

Facts

² This case concerns two images allegedly taken by plaintiff Steve Sands of the well known model, Emily Ratajkowski.

The Shooting of the DKNY Campaign Video and the Capture of the Allegedly Infringed Images

It appears that Ms. Ratajkowski was engaged by or on behalf of the women's wear company, DKNY, to appear in a video
commercial promoting a new line of intimate wear and related products that was to be introduced in connection with the hashtag #GoodMorning DKNY. Plaintiff Sands, a professional photographer who allegedly had nothing to do with shooting the commercial, 4 captured two or more still images of Ms. Ratajkowski, apparently as she was performing, posing, or rehearsing for the video. He claims to hold copyright in the still images he took, as distinguished from the images on the commercial or any others shot on behalf of DKNY or others.

On January 19, 2017, the day before the photo shoot, Ms. Ratajkowski posted on her Instagram account a photo of herself clad only in underwear and reclining on a sofa or ottoman. Her accompanying comment stated “Secret project in NYC today ... coming to you March 2017.” 5

On the following day, January 20, 2017, Ms. Ratajkowski posted to her Instagram a photo of herself in lace underwear to which plaintiff claims copyright. 6 It appeared with the description “Shooting today in NYC mid-January in 40 degree weather in MY UNDERWEAR. Working hard lol” followed by three emoji. Based on a screenshot of this photo submitted by defendant – the post at issue is no longer on Instagram – no photo credit appears alongside the photograph. The post made no reference to plaintiff. 7

On January 28, Ms. Ratajkowski posted another photograph of herself to Instagram holding a cup of coffee and wearing what appears to be the same lace underwear. Again based on defendant's screenshot, the photograph is uncredited and the posting makes no reference to plaintiff. 8

The record is unclear as to how Ms. Ratajkowski obtained those two images – images allegedly shot by Mr. Sands – in order to have been able to post them on her Instagram account, in one case on the very day it was taken.

The DKNY Campaign Goes Public
The DKNY campaign – and, in particular, the video shot on January 20 – went fully public on or about March 13, 2017. The video commercial appears on Instagram and remains available on web sites. 9

The commercial opens with Ms. Ratajkowski lying in bed clad only in lace underpants. She arises, dons a lace bra, leaves an apartment, and walks a dog down a New York street clad only in boots and the lace underwear. The video closes with her looking into the camera and saying “good morning New York.”

*3 The video, its promotional use by DKNY, and images of Ms. Ratajkowski as she appeared in the video were eye catching and unusual. While it often is said that “anything can happen in New York,” that is an exaggeration. The frequency with which attractive models of any gender walk their dogs down New York City streets clad – in the dead of winter – only in lace underwear is virtually non-existent. Reasonable triers of fact reasonably could conclude that the events depicted in the video and in Mr. Sands' images, and the use to which images of those events was being put, were newsworthy. 10

Defendant Bauer Media Group USA LLC (“Bauer”) operates the web site FHM.com. FHM.com was among the many media outlets that ran stories about the DKNY video on March 13, 2017, its story being entitled Emily Ratajkowski's New DKNY Ad Is Just Her Walking A Dog In Lingerie. 11 The article was accompanied by a set of photographs that included the two images in which plaintiff claims copyright. The article reported and commented on the release of the DKNY video. It attributed each of the photos on its web page – including the two allegedly infringed Sands images, both of which had appeared on Ms. Ratajkowski's January Instagram posts – to “Instagram/emrata,” “emrata” being Ms. Ratajkowski's Instagram handle. 12

Prior Proceedings
Discovery
This action was commenced in December 2017. The Court held an initial pretrial conference on February 6, 2018, during which Bauer expressed its intention to raise a defense of fair use, plaintiff announced a $25,000 settlement demand, and Bauer stated its wish to litigate the matter – if necessary – in a speedy and efficient manner, so that the prospect of substantial legal fees would not effectively force it to accede to plaintiff's demand regardless of the merit and value of the claim. It was abundantly clear at the conference that the licensing history of the two allegedly infringed photos would
be highly relevant to any disposition of the case. They would be relevant to, perhaps among other issues, (1) one of the key factors bearing on Bauer's fair use defense, the impact of the alleged infringement on the market for plaintiff's work, and (2) plaintiff's claim for actual damages, which were demanded in the complaint in addition to statutory damages.

Mr. Sands' counsel, a former associate of Mr. Liebowitz, readily represented at the conference that plaintiff had licensing history information for these photographs and that plaintiff would produce it. Independent of that representation, Sands was obliged by Rule 26(a)(1)(A) to identify anyone with information on documents that Sands might use to support his claims. Rule 26(a)(1)(A) certainly covered information concerning any licensing history of these photos given their relevance to the actual damages claim and their potential utility to plaintiff in meeting the fair use defense. In any case, the Court directed both sides to produce the required Rule 26(a) disclosure on or before March 9, 2018. In addition, Bauer subsequently sought information concerning the licensing history of the allegedly infringed photographs through requests for production of documents.

*4 Sands' Rule 26(a) disclosure identified only himself as a person likely to have such information. The documents he produced, while containing some information about other photos, contained absolutely nothing before the close of discovery concerning any licensing history of the allegedly infringed photos.

Sands' Partial Summary Judgment Motion Reveals Some Licensing History

On September 7, 2018, after the close of discovery, Sands moved for partial summary judgment as to liability, which involved among other things seeking summary judgment of dismissal of Bauer's fair use and other defenses. The motion was supported by declarations of Messrs. Sands and Liebowitz and a Ms. Halperin.

Mr. Sands' declaration asserts that he licensed the two allegedly infringed photos to Getty Images on the day the images were shot, January 20, 2017, and one of the two (called the Dogwalk Photo) to Matrix Pictures, a UK stock agency. He attaches to the declaration as Exhibit C copies of screen shots from the Matrix web site showing the Dogwalk Photo and others taken on the same occasion and offering them for license. Mr. Sands has submitted no documentary evidence of his alleged licensing of these two photos to Getty Images or Matrix.

Mr. Sands' declaration makes it abundantly clear that he was aware of his alleged licensing of his own two allegedly infringed photos – in the case of Getty from January 20, 2017 onward and in the case of Matrix from whenever he concluded that license. Yet he failed to identify either Getty or Matrix in his Rule 26(a) disclosure despite the fact that they, to Sands' certain knowledge, were persons with information that Sands might use in support of his claims – as indeed he used them in support of his motion for partial summary judgment.

Following the filing of the Sands motion for partial summary judgment, Bauer filed the present motion to dismiss and sought a stay of briefing of the Sands motion pending the disposition of this one. Bearing in mind that the resolution of this motion could moot the Sands motion, the Court granted that stay.

Discussion

Bauer contends that the conduct of Sands and his counsel warrants dismissal as a sanction under Fed. R. Civ. P. 16(f), 26(e), 37(b), and/or 37(c). Alternatively, it seeks to have the Court strike Mr. Sands' licensing-related testimony and exhibit from his declaration, preclude him from asserting that the allegedly infringed photos had any licensing history or economic value, and require him, pursuant to Local Civ. R. 54.2, to post a bond in the amount of $50,000 to satisfy any judgment in Bauer's favor for costs and attorney's fees under Section 505 of the Copyright Act.

The failure of Mr. Sands and his counsel, Mr. Liebowitz, to identify Getty and Matrix violated their obligations under Rule 26(a). Indeed, they so concede, calling it “a mere oversight of counsel amounting to no more than simple negligence.” As will appear, however, this likely was more than a mere oversight, and it should have consequences.

*5 Rule 37(c)(1) provides:
“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).”

The sanctions available under Rule 37(b)(2)(A)(i)-(vi) include, among other things, dismissal of an action and prohibiting the offender from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.

The standards governing determination of sanctions issues under Rules 26 and 37(c), as outlined by the Second Circuit, are straightforward:

“In determining whether the District Court abused its discretion in imposing the sanction under Rule 37, we are governed by the standard set forth in Patterson v. Balsamico, 440 F.3d 104 (2d Cir. 2006). In Patterson, two defendants violated Rule 26(a)(3) by not timely disclosing the names of witnesses they planned to call at trial. Id. at 117. The District Court granted the plaintiff's motion to preclude, except as to one witness who was named in the original complaint and whose testimony reasonably could have been anticipated. Id. On appeal to this Court, we held that “[i]n determining whether the district court acted within its discretion, this Court [must] consider[ ] ‘(1) the party's explanation for the failure to comply with the [disclosure requirement]; (2) the importance of the testimony of the precluded witness[es]; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance.’” Id. (citing Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc., 118 F.3d 955, 961 (2d Cir. 1997)) (brackets in Patterson). Thus, although a ‘bad-faith’ violation of ...Rule 26 is not required in order to exclude evidence pursuant to Rule 37, it can be taken into account as part of the party's explanation for its failure to comply.”

First, plaintiff's excuse for the failure to identify Getty and Matrix is lame, He concedes that he was obliged to do so, but contends instead in his unsworn memorandum his failure was “a mere oversight of counsel amounting to no more than simple negligence.” But neither plaintiff Sands nor his counsel has submitted any affidavit or declaration to support that readily advanced excuse under oath. Moreover, they certainly had a motive to withhold the licensing history of these photographs for as long as possible. As Bauer argues:

“Withholding licensing information for the Photos kept alive the possibility that Bauer would tire of litigation expenses and give in to Sands' shakedown – a classic “copyright troll” strategy in line with the hundreds of other cases brought by Sands' counsel in this District, if not the dozens of cases filed on Sands' own behalf.”

*6 Equally important, this not the first time that Mr. Liebowitz has gotten into difficulty in this Court for what at best often is a slap dash approach to pursuing the enormous volume of cases of this nature that he has filed. A “mere oversight” that happens once or twice is one thing, A pattern of discovery and related abuse is quite another, and rings of deliberate indifference to an attorney's obligation to behave in a professional, responsible, and competent manner in each and every case he handles. And if the attorney has filed a deluge of cases, such that his workload is too great to discharge that obligation, the volume of cases must be reduced to a number that may be managed responsibly or the number of responsible and competent attorneys tasked with handling it must be increased.

In sum, plaintiff has offered no satisfactory excuse for his failure to comply with Rules 26(a) and (e).

Second, the testimony of Getty and Matrix is likely to prove important to the proper resolution of this case. Among Bauer's defenses is that of fair use. The Copyright Act provides that:

“[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of
copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.”

As the Second Circuit wrote recently:

“In fair use litigation, courts undertake a “case-by-case analysis” in which each factor is considered, “and the results [are] weighed together, in light of the purposes of copyright.” Campbell v. Auff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994). The factors are non-exclusive, but consideration of each is mandatory. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 81 (2d Cir. 2014). Some of the factors are more important than others, with the fourth (market impact) being “the single most important element.” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).”

Getty and Matrix allegedly are licensed to sublicense not only the two allegedly infringed photos, but other photos from the same startling event, as well as still others of Ms. Ratajkowski. Accordingly, they almost certainly have evidence bearing substantially on the potential market for or value of the allegedly infringed photos in particular, others similar to them, and the effect, if any, of infringement on the potential market for the images. Similar evidence from them would have a significant bearing on any actual damages (which plaintiff demands in the complaint along with statutory damages) as well as on the determination of any statutory damages.

Third, plaintiff's withholding of this information has prejudiced Bauer, a fact that comes into clear focus when one considers the unusual context in which this conduct occurred. From the very outset, defendant's objective – as it made clear in the initial conference with the Court and its adversary – was to dispose of this case with a minimum investment of time and effort. It was on that basis that the discovery plan agreed and decided upon included only limited and only written discovery followed, if appropriate, by a summary judgment motion or motions and perhaps a very short trial. Obviously important to these proceedings was the licensing history of the allegedly infringed photos, which could have a significant bearing on the fair use defense, actual damages in the event of liability, and perhaps other issues as well. And in view of the representation of plaintiff's counsel at the initial conference that plaintiff had such information, defense counsel had every right to anticipate that documents evidencing any such licensing history would be forthcoming pursuant to Rule 26(a) and their document request. But none were. And Bauer now finds itself – post the close of the discovery period – facing a motion for partial summary judgment motion as to liability, a previously unmade claim that these photos had been licensed to Getty and Matrix, and still no documentary evidence of any such licenses, let alone any information at all about the economic terms of any such licenses. Now it has before it a need for reopened discovery of plaintiff, Getty, and Matrix – the last of which is based in the United Kingdom and may not be subject to process here – and a waste of some level of effort between the date of the initial conference and the present. Of course, much of this harm may be remedied by appropriate relief. But this simply is not the way in which this case should have been handled by plaintiff's counsel.

*7 That said, dismissal “is a drastic remedy that should be imposed only in extreme circumstances.” The fact that much of the harm that plaintiff's counsel has caused can be undone militates strongly against it. Nevertheless, the imposition of sanctions is appropriate.

Conclusion

For the foregoing reasons, defendant's motion to dismiss the action as a sanction for alleged discovery misconduct or, alternatively, to strike portions of the evidence that plaintiff has submitted in support of a motion for summary judgment or require a bond as security for costs and fees pursuant to Local Civ. R. 54.2 [DI 38], is granted to the extent that plaintiff's counsel, Mr. Liebowitz, shall pay defendant's reasonable attorney's fees, for making and litigating this
motion, and plaintiff shall show cause, on or before October 2, 2019, why the Court should not condition plaintiff's ability to proceed with this action on the posting of a bond or other sufficient security in the amount of $50,000 for costs and attorney's fees in this action, and otherwise denied. Plaintiff's motion for partial summary judgment [DI 25] is denied.

SO ORDERED.

All Citations

Slip Copy, 2019 WL 4464672

Footnotes

1 Konangataa v. Am. Broadcasting Cos., Nos. 16-cv-7382, 7383 and 7472 (LAK), 2017 WL 2684067, at *2 (S.D.N.Y. June 21, 2017). See also, e.g., Pereira v. 3072541 Canada Inc., No. 17-cv-6945 (RA), 2018 WL 5999636, at *3 (S.D.N.Y. Nov. 15, 2018) (describing Mr. Liebowitz's litigation tactics as "an apparent attempt to increase costs and to extort unwarranted settlements").


4 Cpt. ¶ 7 & Ex. A.

Mr. Sands asserts that he had nothing to do with making the video and was not hired by anyone to photograph Ms. Ratajkowski that day. He states that he understood that she was shooting a commercial for DKNY that day and that "[s]he was in public view at the time I photographed her and she could have been photographed by anyone." Sands Decl. (DI 27) ¶¶ 4-5.

5 Ans. ¶ 11 n.2 & Ex. B, at 3.


7 Id.

8 Id. Ex. B, at 1.


11 Ans. ¶ 11 & Ex. A.

12 Id.

13 DI 16, DI 17.

14 Keegan Decl. ¶ 10.
The document request is not of record, but Bauer's counsel asserts that it called for this information. Plaintiff does not dispute this. He does, however, claim in an unsworn statement in his memorandum that “Sands produced all documents in his possession that were responsive to Bauer's requests. [Sands Declr. 11].” DI 43, at 30. In fact, however, paragraph 11 of Mr. Sands’ declaration reads, in its entirety: “At the time I took the Photographs, I personally observed other photographers on the scene taking photographs of Ms. Ratajkowski.” DI 27, ¶ 11. The declaration nowhere addresses either Bauer's document request or Sands' response to it.

Keegan Decl. ¶¶ 8, 11.

The latter two are immaterial for purposes of the matters now before the Court.

Sands Decl. (DI 27) ¶¶ 12-14.

Id. & Ex. C.

It of course is highly likely that he has such documentation.

DI 40, at 6-7.


DI 43, at 34 (citation and internal quotation marks omitted).

Design Strategy, Inc. v. Davis, 469 F.3d 284, 296 (2d Cir. 2006).

DI 43, at 34 (citation omitted).

Def. Reply Mem. [DI 49], at 6.

See note 3, supra.


John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988).