No. 17-190

IN THE

Supreme Court of the United States

DEFENSE DISTRIBUTED, ET AL,

PETITIONERS,

V.

U.S. DEPARTMENT OF STATE, ET AL,

RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is there an exception in First Amendment cases to the general requirement that courts evaluate the plaintiff's likelihood of success on the merits when determining whether to grant a preliminary injunction?

2. Do the International Traffic in Arms Regulations (ITAR) operate as a content-based prior restraint of speech in violation of the First Amendment?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests Cato because content-based prior restraints that are "presumptively unconstitutional" should not evade scrutiny merely because the government invokes "national security."

INTRODUCTION AND SUMMARY OF ARGUMENT

Fully understanding what this claim means, *amicus* believes that this case deserves summary reversal. Such a disposition is proper when a facially content-based prior restraint of protected speech escapes review because the government invokes "national security." The decision below fundamentally alters the preliminary injunction standard that should be applied to the most egregious abridgements of speech. It incentivizes government officials to be almost flippant when imposing prior restraints, particularly if they can say "national security" to make it all go away. And it endangers much more speech than the CAD files at issue here. It should not be allowed to stand.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief, and have consented. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

Dissenting from denial of rehearing *en banc*, Judge Elrod put it succinctly: "The panel opinion's flawed preliminary injunction analysis permits perhaps the most egregious deprivation of First Amendment rights possible: a content-based prior restraint." App. 93a.

When a court considers whether to grant a preliminary injunction, it *must* evaluate the merits of a plaintiff's claim to determine which party stands to suffer the most harm, how potential harms are to be weighed, and whether granting the injunction would be in the public's interest. This is an especially vital inquiry when examining a First Amendment claim alleging that the government imposed either a prior restraint or a content-based restriction on the dissemination of ideas and information. Here it has done both.

As the fundamental and highest law of the land, the Constitution is *ipso facto* in the public interest. It's surreal that the Fifth Circuit needs to be reminded of that. If a provision violates the Constitution, then a preliminary injunction is in the public interest. The government cannot be harmed if its own unconstitutional activity is enjoined. The court below elected to abandon this Court's requirement that the merits of a First Amendment claim be examined, instead allowing a fatally flawed district court opinion to stand. Judge Elrod again: "A court that ignores the merits of a constitutional claim cannot meaningfully analyze the public interest, which, by definition, favors the vigorous protection of First Amendment rights." App. 94a.

An injunction in this case is in the public interest. Moreover, because the International Traffic in Arms Regulations (ITAR) operate against the petitioner as a content-based prior restraint of speech, they must be subject to strict scrutiny. Even assuming a compelling

interest in national security and defense, the regulations are still overbroad and underinclusive: they exempt speech that may incidentally reach foreigners in the same way that information "exported" to the internet may incidentally reach foreigners, and they fail to address the same or similar types of speech already available in myriad places.

Finally, the State Department's definition of "export" as applied through the ITAR already severely restricts protected speech. Yet if the current scheme is allowed to prevail and other agencies adopt the same definition and application of "export," the implications for free speech rights are dangerous and expansive. This Court needs to intervene to summarily reverse the decision of the lower court to protect the fundamental right to the free exchange of ideas and information enshrined in the First Amendment.

ARGUMENT

I. WHEN CONSDERING A PRELIMINARY INJUNCTION AGAINST A CONTENT-BASED PRIOR RESTRAINT ON SPEECH, COURTS MUST EVALUATE THE PLAINTIFF'S LIKELIHOOD OF SUCCESS ON THE MERITS

This Court has held that when "deciding whether to grant a preliminary injunction, a district court must consider whether plaintiffs have demonstrated that they are likely to prevail on the merits." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Without that requisite first consideration, it is impossible to properly determine whether granting an injunction is in the public interest, if there is a potential of harm to the defendant, and where the balance of equities lies.

Contrary to the Fifth Circuit's approach, 10 other circuits require that a court carefully consider whether a First Amendment plaintiff is likely to succeed on the merits before assessing the irreparable nature of potential harm, balancing competing harms against each other, or considering the public interest in awarding an injunction. *See* Pet. at 25-27 (collecting cases illustrating agreement among the several circuit courts of appeals regarding the importance of the merits prong of a preliminary injunction analysis). When a First Amendment plaintiff is likely to succeed on the merits of their claim, the need to separately balance harm or consider whether granting an injunction is in the public interest evaporates completely.

A. Enforcing the Constitution Is in the Public Interest

The Constitution is the fundamental law of the land, so enforcing it is always in the public interest. The government can have no legitimate interest in enforcing unconstitutional regulations and suffers no harm when unconstitutional regulations are enjoined.

The Fifth Circuit's failure to properly assess the merits of the First Amendment claim was a failure to acknowledge this constitutional primacy. In contrast, the Sixth Circuit recently conducted an appropriate analysis that acknowledged the Constitution's role by finding that a "determination of where the public interest lies is dependent on a determination of the likelihood of success on the merits…because it is always in the public interest to prevent the violation of a party's constitutional rights." *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) (internal quotations omitted). Further, "because the questions of harm to the parties and the public interest generally cannot be

addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is . . . whether the statute at issue is likely to be found constitutional." *Id.*

B. The Free Flow of Information in the Public Domain Is in the Public Interest

There are many public interests enshrined in the First Amendment; the free flow of information is just one of them. Aside from the strong general interest in enforcement of free-speech rights, the sheer number of comments elicited in response to the State Department's proposed changes illustrate that a preliminary injunction is also in the public interest for more practical, informational reasons.[2] If the proposed "harmonization" and application of "export" and "public domain" are allowed to stand, it is likely that academic and research-related public speech will suffer a significant chilling effect. International Traffic in Arms: Revisions to Definition of Export and Related Definitions, 81 Fed. Reg. 35,611, 35,616 (June 3, 2016); International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain, 80 Fed. Reg. 31,525, 31,535 (proposed June 3, 2015).

Information currently in the public domain is excluded from prepublication requirements, but the government does not give information outside the public domain the same treatment, seemingly freezing the

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[2] Regulations.gov reports that 9,985 public comments were received in response to the proposed harmonization rule found at 80. Fed. Reg. 31525 (June 3, 2015). *See* International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, http://bit.ly/2woPMiI.

public domain in amber. In the 1980s, the Justice Department was concerned that "ITAR could be unconstitutional if used to limit scientific communication amongst peers, academic publication and/or education instruction." *See* Public Comments, International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, http://bit.ly/2wp83MA. Apparently the government has now abandoned such legitimate concerns. Because there is no clear way in which potentially implicated information makes it into the public domain, a variety of parties expressed concern about their continued ability to expand knowledge through the exchange of information.

The University of Oklahoma noted that, "[a]s currently drafted, this provision could be interpreted as requiring government approval for activity that has traditionally been understood as protected expression under the First Amendment." *Id.* Oregon State University protested that "[i]t is not clear how data or software that already has been publicly shared through one or more of the means provided for in § 120.11(a) cannot be considered as in the public domain," and "[m]oreover the scope is not limited to government funding, and could apply to a very wide range of information from many different sources. This provision raises very serious legal and policy issues as currently written." *Id.* The University of Minnesota asserted that proposed paragraph "120.11(b) states categorically that data and software are not in the public domain unless the U.S. Government authorizes their dissemination to the public. In other words, as a practical matter, there would be only one safe, unambiguous

mechanism for potentially-controlled technical information about defense articles to enter the public domain—prior U.S. Government authorization for public release." *Id.* "The requirement appears to reflect a presumption that even nonproprietary technical information directly related to a defense article is ITAR-controlled and may not be publicly shared in the absence of affirmative U.S. Government approval." *Id.*

These comments represent a real and reasonable fear that allowing ITAR to be implemented as a prior restraint of speech will significantly chill the free expression and exchange of ideas and information. By ratifying the district court's refusal to consider the petitioner's likelihood of success on the merits, the court below foreclosed an important inquiry that concerns many of our institutions of higher learning.

II. THE CONTENT-BASED PRIOR RESTRAINT OF PROTECTED SPEECH HERE MUST FAIL JUDICIAL SCRUTINY

Computer Aided Design (CAD) files are protected speech. This Court has held "that the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). "If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (internal citations omitted).

The government told petitioners that "all such data should be removed from public access immediately" pending a "commodity jurisdiction" determination. Pet. at 10. Requiring prior authorization to upload

CAD files because of the communicative content of those files is unquestionably a content-based prior restraint. Such a regulation is "presumptively unconstitutional and may be justified only if the government proves [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Like petitioners, *amicus* concedes that many restrictions on transferring sensitive information to foreign nationals could satisfy strict scrutiny. That does not mean, however, that the government need merely intone the words "national security" as a magic spell against all challenges. Strict scrutiny is required, and the ITAR restrictions as applied to Defense Distributed's CAD files fail that scrutiny.

A. Because ITAR Is a Content-Based Prior Speech Restraint, It Merits Strict Scrutiny

1. Under ITAR, the government selects which protected speech it wants to restrict based on the content of the communication. The highest level of scrutiny is applied to content-based restrictions on protected speech, and, as this Court has stated repeatedly, "[c]ontent-based restrictions are presumptively invalid." *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). As Judge Jones wrote in her dissent from the Fifth Circuit's majority opinion, "intermediate scrutiny is inappropriate for the content-based restriction at issue." *Defense Distributed*, 838 F.3d 451, 463 (5th Cir. 2016) (Jones, J. dissenting).

The Arms Export Control Act (AECA) controls the import and export of defense articles and services. 22 U.S.C. § 2778(a)(1). The International Traffic in Arms Regulations (ITAR) includes the U.S. Munitions List (munitions list) as part of the regulations created by the State Department to implement the AECA. *Id.* The

munitions list is comprised of items designated by the State Department (to whom the president delegated this authority) as "defense articles and defense services." *Id.* Items on the munitions list, including "related technical data" (information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles) require prior approval before they can be "exported." 22 C.F.R. §§ 121.1, 120.10.

Like the ordinance in *Town of Gilbert* that restricted signage, *Reed*, 135 S. Ct. at 2227, ITAR distinguishes between permissible and impermissible speech based on its content. The assertion that speech is not restricted based on a particular viewpoint does not save ITAR as currently applied because "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980).

But prohibiting constitutionally protected speech based on the content or topic of that speech is precisely what the State Department seeks to accomplish through the ITAR by requiring prior approval for dissemination of information if it pertains or relates to items on the munitions list.

2. Since receiving notification from the government that its CAD files were restricted by ITAR, Defense Distributed has had a prior restraint on its speech. Prepublication schemes like the one at issue here were a motivating force for creating the First Amendment. *See* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648-671 (Fall 1955)

("And there can be little doubt that the First Amendment was designed to foreclose in America the establishment of any system of prior restraint on the pattern of the English censorship system"). Again, similar to content-based restrictions of speech, prepublication licensing schemes such as the one imposed by the ITAR "are 'prior restraints,' which are presumed invalid and subject to an exceptional burden of justification." Constitutionality of Proposed Revisions of the Export Administration Regulations, 5 Op. O.L.C. 230, 231-33 (1981), http://bit.ly/2woRqk2. "The courts have never held that the technical and scientific materials involved here—which, to be sure, do not contain political speech—are entitled to less than full protection under the First Amendment." *Id.* at 232-33.

This Court has made clear that "the First Amendment protects the right of Americans to communicate with foreigners, even if the foreigners are citizens of adversaries of the United States." *Id.* at 232. Absent the rarest of situations, a prior restraint cannot be imposed on protected speech. Those exceptional circumstances arise only when there is a "grave and immediate threat to national security, as where important military information is being communicated to an adversary for current use against the United States." *Id.* If the information in the Pentagon Papers was not sufficiently threatening to national security to justify a prior restraint in a time of war, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), it is difficult to see how the CAD files at issue here could be found to be sufficiently dangerous to justify prohibiting otherwise protected speech. Still, the Fifth Circuit was "willing to overlook [this imminent threat to protected speech] with a rote incantation of national security." *Defense Distributed*, 838 F.3d at 462 (Jones, J., dissenting).

Even in those most rare situations that may allow for a prior restraint of speech, this Court has required that such schemes comport with strict procedural safeguards. *See Freedman v. Maryland*, 380 U.S. 51, 56-60 (1965). Restraint before judicial review can only be imposed for a specified brief period during which the status quo must be maintained; there must be expeditious judicial review of that decision; and the censor must bear the burden of going to court to suppress speech—and the burden of proof once in court. *Id*. As applied to petitioner's design files, ITAR cannot meet any of these burdens—not only does the jurisdiction determination take an indefinite amount of time (almost 2 years in this case rather than the promised 45 days—which itself may not qualify as a "brief" time period); the regulations also purport to remove judicial review of any decision about items added to the United States Munitions list. 22 U.S.C. § 2778 (h); 22 C.F.R. § 128.1.

The First Amendment demands the highest scrutiny for the ITAR prepublication licensing scheme. As this Court has held, "[a] scheme making the 'freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion) (quoting *Shuttlewsworth v. Birmingham*, 395 U.S. 147, 151 (1969)).

B. The ITAR Restrictions Here Fail Both Strict Scrutiny and the Intermediate Scrutiny Advocated by the Government

1. Surviving strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (internal citations omitted). As applied to petitioner's CAD files, ITAR fails strict scrutiny because, even assuming a compelling state interest in national defense and security concerns, the regulations are not sufficiently narrow to avoid rampant First Amendment violations.

To be a narrowly tailored means that, in furthering a compelling end, a regulation cannot be "significantly overinclusive." *Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 121 (1991). As Judge Jones states in her dissent, however, "'[s]ignificantly overinclusive' . . . aptly describes the Government's breathtaking assertion of prepublication review and licensing authority as applied to this case." *Defense Distributed*, 838 F.3d at 470 (Jones, J. dissenting). The regulations sweep up a large swathe of protected, lawful speech by American citizens by requiring "all domestic posting on the internet of 'technical data' to be pre-approved or licensed." *Id.*

The regulations, as applied here, are also underinclusive. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (illustrating unconstitutional underinclusiveness). While the State Department has proposed changes to harmonize the regulations which would make it very difficult to get otherwise ITAR controlled items into the public do-

main, the regulations still specifically exempt technical information disseminated in particular places and ways, mainly through standard educational programs and exchanges. *See* 22 C.F.R. § 120.17; International Traffic in Arms: Revisions to Definition of Export and Related Definitions, 81 Fed. Reg. 35,611, 35,616 (June 3, 2016); International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain, 80 Fed. Reg. 31,525, 31,535 (proposed June 3, 2015). Those exceptions illustrate that the government's purpose in restricting the otherwise lawful speech at issue is not compelling and that the means used to achieve the allegedly compelling end are not sufficiently tailored to accomplish their goal. *See, e.g., Church of Lukumi*, 508 U.S. 520.[3]

Likewise, and contrary to the district court's assessment, the *purpose* of either a content-based speech restriction or a prior restraint has nothing to do with which standard of scrutiny should be applied. Many complications associated with First Amendment jurisprudence—complications at least as far as the government is concerned—could be eliminated by asking the government its purpose in restricting speech and then taking them at their word. To do so, however, would be to abrogate the protections guaranteed by the First Amendment, all distinction in levels of scrutiny, and this Court's precedents on the topic. "The 'starch' in

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[3] Also, contrary to the district court's determination, petitioner's speech is not subject to the standard of review typically reserved for commercial speech. CAD open-source files were posted for anyone to take and utilize for free. The goal was the dissemination of information, not profit. *Defense Distributed v U.S. Dep't of State*, 121 F. Supp. 3d 680, 687 (W.D. Tex. 2015).

our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *United States v. Playboy Entm't Group*, 529 U.S. 803, 830 (2000) (Thomas, J., concurring).

2. Finally, the State Department advocates for applying only intermediate scrutiny to determine whether the ITAR functions as an impermissible exercise of government authority. *Defense Distributed v U.S. Dep't of State*, 121 F. Supp. 3d 680, 693-96 (W.D. Tex. 2015). Even if the lower, inappropriate level of scrutiny is applied, the regulations are not constitutional. Not only has the government failed to show real harm that will be suffered by the continued publication of protected speech, it has also failed to show that those "real" harms are alleviated in a "direct and material way" by the regulations. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994).

In sum, the regulations fail to *substantially advance* any important or significant purpose. If subject to intermediate scrutiny, government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

III. THE FIFTH CIRCUIT DECISION DEVALUES SPEECH RIGHTS AND ALLOWS FURTHER RESTRICTIONS ON THE EXCHANGE OF INFORMATION AND IDEAS

A. The State Department's Tortured Definition of "Export" Is Dangerous to Free Speech

To justify requiring prepublication approval of protected, unclassified, public speech, the State Department has contorted the meaning of "export" beyond

any reasonable, recognizable, or deference-deserving bounds, rendering the regulations "incoherent and unreasonable." *Defense Distributed*, 838 F.3d at 466 (Jones, J., dissenting). "Export" is not ambiguous, is not a legal term of art, and is not defined in the AECA, it is commonly meant to refer to the shipping or taking of commodities from one country to another for the purposes of trade. *Id.* at 466-67 (Collecting definitions and describing the traditional nature of "export").

Instead of applying the plain, commonly understood and judicially accepted meaning of "export," the State department insists that "disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad" now qualifies as an "export" as that term appears in the AECA. *See* 22 C.F.R. § 120.17(a)(4); International Traffic in Arms: Revisions to Definition of Export and Related Definitions, 81 Fed. Reg. 35,611, 35,616 (June 3, 2016). This tortured definition of "export" leads to absurd results, particularly if adopted by other agencies.

B. If Other Agencies Adopt the Same Definition of "Export," the Implications for Speech Rights Are Catastrophic

Consider the definition of "export" in the Export Administration Regulations (EAR), promulgated by the Department of Commerce, which includes "oral and visual disclosures to foreign persons in the United States or abroad." Since 1984 the Department of Commerce has adhered to a Department of Justice opinion explaining why the First Amendment and this Court's precedents cannot tolerate EAR's expansive definition of "export" due to its operation as a prior restraint of speech. *See* Constitutionality of Proposed Revisions of

the Export Administration Regulations, 5 Op. O.L.C. 230 (1981). But there is nothing to stop the Commerce Department from unilaterally changing its position to one that severely restrict lawful, protected public speech, just as the State Department did here. Innocuous activities, such as posting instructions on the internet for how to assemble a bike, could be restricted should they happen to be related to commercial technology, 15 C.F.R. § 734.3. If this Court leaves the lower court decision in place, challenging such restrictions will be very difficult.

True, it seems unlikely that the Commerce Department would restrict such innocuous speech, but it is also common for agencies to switch course and promulgate regulations that unconstitutionally restrict protected speech. That's what the State Department did here. Before the Fifth Circuit ruling, there was some assurance that courts would quickly enjoin the government from enforcing novel interpretations that clearly curtailed First Amendment rights. No longer.

Consider a situation in which the United States has instituted a complete or near complete ban of all trade with another country, as was the case with Cuba for decades and is still true of several other countries. 15 C.F.R. § 746.1(a)(1). If the proposed application of ITAR definitions hold and are adopted by other agencies, then activities from posting your grandmother's cookie recipe to uploading plans for modifying a guitar amplifier could theoretically be prohibited if the speaker fails to receive prior permission.

Moreover, researchers and academics at any number of institutions may no longer be able to freely share and disseminate information for fear that incidental foreign persons may stumble across their speech in the

physical or virtual public square. Other concern-inducing examples abound. Indeed, they are essentially limitless, because, to use an earlier example, if the Commerce Department interpreted EAR like ITAR, the government could, based on the decision below, insist that citizens receive permission to post on the internet any number of mundane things.

If this Court fails to intervene, the situation could devolve further, potentially restricting all manner of protected speech on a wide variety of topics. Particularly if the definition were to spread further than the Commerce Department. What if the FDA or EPA adopted a similar definition? Could an individual be restrained from posting otherwise lawful information about a drug or treatment not approved by the FDA? What about discussion of the benefits and detriments of different energy sources? Could the EPA prohibit those without preapproval as well? These examples may seem silly; one wonders what interest the agencies might have in such prohibitions. Nevertheless, the Fifth Circuit has made it extremely difficult to challenge such absurd laws. And as decades of prior ITAR application shows, what an agency says does not affect what it may do in the future. See, *e.g.*, International Traffic in Arms: Revisions, *supra*.

As the Court held mere months ago, "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet'" *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (*citing Reno v. ACLU*, 521 U. S. 844, 868 (1997)). If the Court does not step in to require the government to adhere to particular standards when issuing a prior

restraint or content-based regulation of speech (never mind a combination of the two), then where does the potential for rampant, unchecked violations of the First Amendment stop?

CONCLUSION

To insist that lower courts properly and consistently assess the validity of First Amendment claims when determining if a preliminary injunction is appropriate and to prevent dangerous restrictions of protected speech, the Court should grant a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,

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