No. 17-

IN THE

Supreme Court of the United States

STAGG, P.C.,

Petitioner,

v.

U.S. DEPARTMENT OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, AND REX W. TILLERSON, SECRETARY OF STATE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Together, the International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130, and Arms Export Control Act, 22 U.S.C. § 2778, require a license before an individual can "export" technical information related to defense articles. This scheme (1) allows the Government to deny a license for any reason, (2) does not contain a meaningful time limit within which a license decision must be made, and (3) prohibits judicial review of licensing decisions.

Recently, the Government revealed that it is applying this licensing scheme to domestic pure speech, including republication of public information. Petitioner Stagg, P.C. sought an injunction against this prior restraint. The district court assumed that this restraint was unconstitutional and found that it irreparably harmed Stagg. Nonetheless, the district court found that the Government's asserted interest in national security controlled, and denied Stagg's request. On appeal, the Second Circuit refused to consider Stagg's likelihood of success on the merits or its irreparable harm, and affirmed based on only the public interest and balance-of-equities factors.

The questions presented are:

1. Did the lower courts err in refusing to address whether Stagg was likely to succeed on the merits of its First Amendment claims when evaluating Stagg's request for a preliminary injunction?

2. Did the lower courts err in denying a preliminary injunction solely because they deferred to the Government's assertion that the licensing scheme was necessary for national security, regardless of its unconstitutionality?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties appear on the caption to the case on the cover page. Petitioner Stagg, P.C. was Appellant below. Stagg has no corporate parent, and no publicly held company owns 10% or more of its interests.

Respondents the U.S. Department of State, Directorate of Defense Trade Controls, and Rex W. Tillerson,[1] in his official capacity as Secretary of State, were the Appellees below.

[1] In the proceedings below, John F. Kerry was named as a defendant in his official capacity as Secretary of State. Pursuant to Supreme Court Rule 35, Rex. W. Tillerson has been substituted for John F. Kerry.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Stagg, P.C. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a–9a) is reported at 673 F. App'x 93. The decision of the district court (App. 10a-24a) is reported at 158 F. Supp. 3d 203.

JURISDICTION

The court of appeals entered its summary order and judgment on December 16, 2016, and denied Stagg's petition for rehearing *en banc* on February 17, 2017 (App. 26a-27a). On May 10, 2017, Justice Ginsburg extended the time for filing this petition for certiorari to and including July 17, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are set forth in Appendix D (App. 28a-92a).

INTRODUCTION

This case involves a prior restraint—a pre-publication licensing requirement—on pure speech, including the republication of publicly-available information. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Even when the Government contends that speech will harm national security, this Court has routinely rejected the

Government's efforts to preemptively restrain domestic publication. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 527-35 (2001); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) ("[W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.").

In recent months, however, two Circuits have upended this Court's protection of First Amendment rights from prior restraints, and created a substantial circuit split in the process. Both the Second Circuit below and the Fifth Circuit in *Defense Distributed v. Department of State*, 838 F.3d 451 (5th Cir. 2016), *reh'g en banc denied*, --- F.3d ----, 2017 WL 1032309, denied requests for preliminary injunctions against unconstitutional prior restraint licensing schemes without analyzing the plaintiffs' likelihood of success on the merits, based solely on the Government's assertion that the licensing scheme advanced national security.

This Court's review is warranted.

First, this Court should resolve the circuit split over whether courts must analyze a plaintiff's likelihood of success on the merits of a First Amendment challenge when determining whether to issue a preliminary injunction. The Second and Fifth Circuits permit courts to ignore whether the plaintiff is likely to succeed on the merits. That departs from the law of ten other Circuits. And it is wrong: to conduct a meaningful preliminary injunction analysis

when a plaintiff raises a First Amendment challenge, a court must analyze the plaintiff's likelihood of success on the merits of that challenge. The plaintiff's likelihood of success on the merits is the "linchpin" of the preliminary injunction analysis in the First Amendment context, and also affects the analysis of the other preliminary injunction factors. *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10-11 (1st Cir. 2012) (per curiam) ("*Sindicato*"). For example, a court cannot meaningfully analyze whether an injunction would be in the public interest without assessing the likelihood that the prior restraint is unconstitutional, because "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (noting that the public interest factor "is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge"). The same is true of the other preliminary injunction factors. Thus, when the plaintiff challenges a prior restraint as a violation of the First Amendment, a court must analyze the plaintiff's likelihood of success on the merits before addressing the other preliminary injunction factors.

Second, this Court should clarify that the public interest prong of the preliminary injunction analysis cannot outweigh a certainty of success on the merits of a First Amendment challenge to a prior restraint, even when the Government asserts that the prior restraint promotes national security. The lower courts here denied Stagg's request for a preliminary injunction on the basis that the injunction would not

be in the public interest because the Government had asserted that the prior restraint advanced national security. That is wrong; the Government cannot subvert the Constitution's protections so easily.

For the reasons discussed more fully below, this Court should grant a writ of certiorari.

STATEMENT OF THE CASE

This case concerns a broad prior restraint on domestic speech, including republication of publicly-available information, under an export licensing scheme called the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120-130. The ITAR implements the Arms Export Control Act, a criminal statute that controls the export of defense articles, defense services, and technical data. 22 U.S.C. § 2778(a)(1). The traditional purpose of the Act, as implemented by the ITAR, has been to prevent trafficking of arms and other items from the United States to foreigners without the State Department's authorization. But the Government recently admitted that it applies the ITAR's onerous criminal and civil penalties well beyond this core function to reach domestic publication, including republication of publicly-available information. This case arises out of Stagg's motion for a narrow preliminary injunction to return to the status quo before the Government expanded the ITAR's scope to cover First Amendment-protected pure speech.

A. The ITAR's Prior Restraint On Pure Speech

1. The Act prohibits the "export" of twenty-one categories of controlled items set out in the U.S. Munitions List. 22 U.S.C. § 2778(a)(1). That broad,

open-ended list includes items with civilian, commercial, recreational, and scientific applications. 22 C.F.R. § 121.1.

Each of the twenty-one categories also contains a catch-all entry for "technical data," *id.*, broadly defined as any "[i]nformation . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of" something in the delineated categories, 22 C.F.R. § 120.10(a)(1). Technical data can come in any form, including "blueprints, drawings, photographs, plans, instructions or documentation." *Id.* It includes information that has civilian applications but that may have "eventual military use." *United States v. Roth*, 628 F.3d 827, 833 (6th Cir. 2011). The Government acknowledged below that this provision implicates the First Amendment.

2. Technical data may not be "export[ed]" without a license. "Export" is defined broadly to include "[r]eleasing or otherwise transferring technical data to a foreign person in the United States." 22 C.F.R. § 120.17(a)(2). Thus, the Government contends that the ITAR governs the domestic publication of technical data on the basis that foreign persons might gain incidental access to it from places such as public libraries. As such, the Government imposes a prior restraint on purely domestic speech made within the United States.

Anyone who wishes to publish information covered by the Act must go through a lengthy and expensive registration and licensing process. First, the person must register with the Directorate of Defense Trade

Controls and pay an annual registration fee costing at least $2,250. 22 U.S.C. § 2778(b)(1); 22 C.F.R. § 122.1(c). There is no deadline for the Government to complete a registration request.

After registering, the person must then also obtain a license that approves the speech. 22 U.S.C. § 2778(b)(2). Filing for licenses can increase the amount of the registration fee. 22 C.F.R. § 122.3(a). Although guidelines provide that a license application should be ruled on within sixty days, that window can be expanded indefinitely by numerous open-ended exceptions. *See* 74 Fed. Reg. 63,497, 63,497 (Dec. 3, 2009) (no time limit for exception when "[t]he Department of Defense has not yet completed its review"). And a license application may be denied if the Government believes it is "otherwise advisable" to do so. 22 C.F.R. § 126.7(a)(1). In other words, a license can be denied for any reason—and that decision is unreviewable by the courts, 22 C.F.R. § 128.1.

A person who speaks without obtaining a license faces twenty years in prison and fines of more than $1,000,000 for a knowing violation, and civil penalties of more than $500,000 on a strict liability basis. 22 U.S.C. § 2778(b)(2), (c), & (e).

B. The Government Ignores The ITAR's Public Domain Exclusion And The Repeal Of The ITAR's Pre-Publication Licensing Requirement

1. On its face, the ITAR excludes from the technical data definition "information which is published and which is generally accessible or available to the public," such as "[a]t libraries open to

the public" or "[t]hrough sales at newsstands and bookstores." 22 C.F.R. §§ 120.10(b) & 120.11(a). "[T]he public domain exclusion ensures that the government cannot place anything it wants on the Munitions List." *United States v. Hoffman*, 10 F.3d 808, 1993 WL 468713, at *7 (9th Cir. 1993); *see also United States v. Posey*, 864 F.2d 1487, 1497 (9th Cir. 1989) ("It would hardly serve First Amendment values [for] the government to purge the public libraries of every scrap of data whose export abroad it deemed for security reasons necessary to prohibit.").

However, the Government now asserts (and retroactively) that this exclusion applies only to information that it has specifically authorized for publication. For example, an individual risks facing the ITAR's civil and criminal penalties if that person republishes such information found in bookstores and libraries—even if it has been publicly available since the 1950s—if the Government did not issue a license allowing the original publication. *See* 80 Fed. Reg. 31,525, 31,528 & 31,535 (June 3, 2015) (taking the position that this prior restraint was "not new"); App. 4a n.1 ("[T]he government unambiguously confirmed at oral argument that Stagg correctly characterizes the government's interpretation of the existing regulatory scheme."); *Id.* at 8a ("[G]overnment counsel argued that ITAR applies to *republication* of information already in the public domain.").

2. Before 2015, the Government took a different view:

a. The ITAR was created in the 1950s. *See, e.g.*, 22 C.F.R. § 121.1(a) (1958). In one of its early iterations, before the "public domain" exclusion was

added, the ITAR contained a prior restraint on domestic public speech about unclassified "technical data," including that which was privately generated. *See* 22 C.F.R. § 125.11 n.3 (1984) ("The burden for obtaining appropriate U.S. Government approval for the publication of technical data falling within the definition in § 125.01, including such data as may be developed under other than U.S. Government contract, is on the person or company seeking publication.").

In legal opinions issued in 1978, 1981, and 1984, the Justice Department's Office of Legal Counsel advised the White House and the State Department that this prior restraint violated the First Amendment. *See, e.g.*, Office of Legal Counsel, U.S. Department of Justice, *Constitutionality Under the First Amendment of ITAR Restrictions on Public Cryptography* (May 11, 1978) ("DOJ 1978 Memo") (advising that ITAR's content-based prior restraint was unconstitutional because it did not cabin official discretion in licensing determination, and did not provide an adequate opportunity for judicial review). The U.S. House of Representatives expressed similar concerns. *See* H.R. Rep. No. 96-1540, at 188-89 (1980).

In response, the Government repealed the prior restraint in 1984 by removing the pre-publication approval requirement and adding the "public domain" exclusion discussed above. *See* 49 Fed. Reg. 47,682, 47,683 (Dec. 6, 1984); App. 14a (noting that the December 6, 1984 final rule "repealed this prior restraint effective January 1, 1985"). Through these revisions, the ITAR no longer treated as technical data any information published in the places listed in

the public domain exclusion. Accordingly, after the 1984 revision, people could publish technical data without the Government's approval if the publication was "made generally available to the public" by placing it into "libraries open to the public" or selling it "at newsstands and bookstores." *See* 67 Fed. Reg. 15,099, 15,100 (Mar. 29, 2002) (restating the public domain exclusion). Since repealing the prior restraint in 1984, the ITAR has not been amended to reimpose that restraint.[2]

b. Since 1984, the Government has consistently represented to the public and the courts that the ITAR does not regulate publication of unclassified technical data. *Bernstein v. U.S. Dep't of State*, 945 F. Supp. 1279, 1285 (N.D. Cal. 1996) (referencing the Government's statement that the ITAR does not regulate publication of technical data); 67 Fed. Reg. at 15,100 (encouraging the public to publish technical data without prior approval).

In particular, the Government confirmed in *Bernstein* that the ITAR does not prohibit the domestic publication of technical data without a license: "With respect to the two items determined to be technical data, [the Government] clarified that their publication or teaching would not be regulated." 945 F. Supp. at 1285. The Government also expressly rejected the plaintiff's argument that the

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[2] If anything, the Government has done the opposite by expanding the scope of the public domain exclusion to cover more areas where technical data may be freely published and thus excluded from the ITAR. *See* 58 Fed. Reg. 39,280 (July 22, 1993).

ITAR's public domain exclusion could impose a prior restraint:

> Plaintiff sees a "Catch-22" "lurking" in the provision that, unless something is already published, it is subject to export controls. He would construe the definition to mean, in other words, that nothing can be published without the government's approval. Not only is this wrong as a factual matter, . . . it is by far the most **un**-reasonable interpretation of the provision, one that people of ordinary intelligence are least likely to assume is the case.

App. 95a-96a (emphasis in original). The Government has made similar representations since then, including in 2011 before the Ninth Circuit in *United States v. Chi Mak*, 683 F.3d 1126 (9th Cir. 2012).

3. In 2015, however, the Government rewrote history when it announced in the Federal Register that it has always imposed, and currently imposes, a prior restraint by requiring a license to publish technical data into the public domain. 80 Fed. Reg. at 31,528 & 31,535. This means that even information that has been available from public libraries since the 1950s remains subject to the ITAR if the original publishers did not receive a license from the Government before publishing that information into the public domain. *Id.* Thus, even to re-publish publicly available materials, a person must obtain prior approval from the Government. *See* App. 4a n.1 & 8a.

C. Stagg Sought A Narrow Injunction Against The Prior Restraint

1. Stagg is a law firm headquartered in New York City that advises clients about the ITAR and other strategic matters involving export control laws. Like many other law firms, Stagg gives presentations at conferences and bar association events concerning developing legal issues. In particular, Stagg's presentations seek to educate the public about how the Government is administering and enforcing the ITAR. To do so, Stagg wishes to use as examples and demonstratives information that would otherwise constitute technical data, but falls within the ITAR's public domain exclusion because it has previously been published and is generally accessible through public libraries and bookstores. Stagg's presentations would also raise and discuss criticisms of certain aspects of the Government's enforcement of the ITAR in order to encourage revisions to the law through informed debate. Stagg wishes to give a variety of such presentations, and to do so on an ongoing basis.

But Stagg has been silenced by the threat that by using such information, it would be subject to the ITAR's civil and criminal penalties. Knowing that the publicly-available information it wishes to use was not previously authorized for release by the Government, and thus knowing that it would expose itself to substantial criminal or civil liability for speaking, Stagg's domestic speech has been silenced.

Accordingly, Stagg sought a preliminary injunction to return to the status quo understanding of the ITAR's public domain exclusion, thereby preserving

Stagg's First Amendment rights while leaving in place the remainder of the ITAR's export controls.

2. The district court denied Stagg's motion. App. 10a–24a. The court assumed that Stagg had a substantial likelihood of success on the merits of its First Amendment challenge, and noted that the Government's merits arguments were suspect. *Id.* at 20a-21a. The court also found that Stagg had been irreparably harmed. *Id.* at 20a. Nevertheless, it denied Stagg's motion for a preliminary injunction on the basis that the Government's asserted interest in national security trumped the other preliminary injunction factors, regardless of how strongly those other factors weighed in Stagg's favor. *Id.* at 20a-23a.

3. Although it also expressed "concern" with the Government's position on the merits, the Second Circuit affirmed. Unlike the district court, which had assumed Stagg's likelihood of success on the merits of its constitutional challenge, the Second Circuit refused to consider the merits at all, finding that the Government's asserted national security interest meant that the court "need not decide whether Stagg is likely to succeed on the merits or to suffer irreparable harm." *Id.* at 8a. Instead of independently evaluating the equities or public interest, the Second Circuit granted considerable deference to the Government's appraisal of the public interest in light of the Government's assertion that the prior restraint advanced national security,

without considering the public's overriding interest in not enforcing an unconstitutional law.[3]

4. In support of the proposition that it need not consider Stagg's likelihood of success on the merits, the Second Circuit cited the Fifth Circuit's recent decision in *Defense Distributed*, 838 F.3d at 458. In that case, as here, Defense Distributed sought an injunction against the ITAR's prior restraint. *Id.* at 454-55. The majority there, as here, denied a preliminary injunction without considering the merits of Defense Distributed's First Amendment challenge. *See id.* at 458 ("[W]e decline to address the merits requirement.").[4]

The Fifth Circuit denied a petition for rehearing en banc. *See* 2017 WL 1032309, at *1. Four judges dissented from the denial, and made points particularly salient here. *See id.* (Walker Elrod, J.,

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[3] The Second Circuit also erroneously characterized the proposed injunctive relief as broad. But by refusing to analyze the merits to understand what about the licensing scheme is unconstitutional, the Second Circuit had no basis to determine the appropriate scope of the injunction "to maintain the [law] in so far as it is valid." *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *see also Gordon*, 721 F.3d at 654-55 (noting that in the constitutional context, the scope of the injunction should be addressed last so as to not "put the cart before the horse").

[4] The sole basis for the Fifth Circuit's decision not to address the merits was a trademark case that did not involve a constitutional challenge. *See id.* at 457 (citing *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185 (5th Cir. 1982)). Likewise, the district court here also only relied on cases that did not involve constitutional challenges. App. 19a-23a.

Jones, J., Smith, J., and Clement, J., dissenting from denial of rehearing en banc).

First, the dissenting judges noted that by failing to review Defense Distributed's likelihood of success on the merits, the panel created a circuit split. *Id.* This failure also "denie[d] Defense Distributed a meaningful review of the public interest factor" of the preliminary injunction test, because "[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." *Id.*

Second, the dissent faulted the panel for relying "on a mere assertion of a national security interest" to overcome the "paramount public interest in the exercise of constitutional rights, particularly those guaranteed by the First Amendment." *Id.* at *2. Allowing the Government's "assertion of national security interests to justify a grave deprivation of First Amendments rights treats the words 'national security' as a magic spell, the mere invocation of which makes free speech instantly disappear." *Id.*

Finally, the dissenting judges noted that ignoring Defense Distributed's likelihood of success on the merits also infected the panel majority's evaluation of irreparable harm, because "irreparable harm occurs whenever a constitutional right is deprived, even for a short period of time." *Id.* (citation omitted).

REASONS FOR GRANTING THE PETITION

1. Neither the district court nor the Second Circuit disagreed that the ITAR's prior restraint scheme on pure speech was facially unconstitutional:

First, it is unconstitutional because the ITAR prohibits judicial review of licensing denials. A prior restraint scheme that does not allow for judicial review of a license denial is unconstitutional. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990). Here, the ITAR expressly prohibits judicial review of license decisions. 22 C.F.R. § 128.1. *See Bernstein*, 945 F. Supp. at 1289 (the ITAR does "not provide for judicial review of licensing decisions, prompt or otherwise"). It is therefore unconstitutional. *See FW/PBS*, 493 U.S. at 227.

Second, the scheme is unconstitutional because licensing determinations can be delayed indefinitely. Speech-licensing schemes must provide a "specified brief period" in which the licensing determination must be made. *Id.*; *Freedman v. Maryland*, 380 U.S. 51, 56-60 (1965). Moreover, when a licensing review is conditioned on another agency's approval, and that other agency is not constrained to make a decision within a "specified brief period," then the licensing scheme is unconstitutional. *See FW/PBS*, 493 U.S. at 227.

Here, the ITAR's 60-day guideline for issuing a license determination can be expanded indefinitely by numerous open-ended exceptions for other agencies' reviews. *See* 74 Fed. Reg. at 63,497 (placing no time limit on exception when "[t]he Department of Defense has not yet completed its review"). Thus, the ITAR does not provide a "specified brief period" for review, and its prior restraint scheme is unconstitutional. *See FW/PBS*, 493 U.S. at 227; *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968) (per curiam) (licensing review of 50-57 days unconstitutional).

Third, the scheme is unconstitutional because it gives the Government unbridled discretion to deny a license for any reason. Speech licensing schemes must contain "narrow, objective, and definite standards" to limit the Government's discretion to deny a license. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). A scheme that grants an official "unfettered discretion to deny a" license—for example, the discretion to deny a license if it was "in the public interest"—is unconstitutional because it makes judicial review of content-based censorship impossible, and leads to self-censorship on the part of speakers. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-59, 769-70, 772 (1988).

Here, the ITAR grants the Government unbridled discretion to deny a license if the Government believes it is "otherwise advisable" to do so based on a review of the actual content of the intended speech. 22 C.F.R. § 126.7(a)(1). Like the unconstitutional "not in the public interest" standard in *Lakewood*, the ITAR's "otherwise advisable" standard does not provide a meaningful constraint on the Government's ability to censor speech it disagrees with. The ITAR's "otherwise advisable" standard is therefore unconstitutional. *See Lakewood*, 486 U.S. at 769-70, 772. *See also Bernstein*, 945 F. Supp. at 1289 (finding ITAR unconstitutional because it contains "nothing . . . that places even minimal limits on the discretion of the licensor").

Fourth, the scheme is unconstitutional because it applies to the republication of publicly-available information, such as materials that are available from public libraries. *See Bartnicki*, 532 U.S. at 525, 534-35; *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33

(1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *N.Y. Times Co.*, 403 U.S. at 733 (White, J., concurring). Here, the Government confirmed that it uses the ITAR to control the republication of publicly-available information. *See* App. 4a n.1; *Id.* at 8a. Thus, the prior restraint scheme is unconstitutional under *Bartnicki* as well.

Finally, the prior restraint is also unconstitutionally vague. In 1984, the Government repealed the ITAR's prior restraint on publishing technical data and making it publicly available, leaving nothing in the current law to put the public on notice. And because the ITAR applies to speech, it faces "[s]tricter standards of permissible statutory vagueness," which it fails. *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) (citation omitted).

2. Neither the Second Circuit nor the district court below disagreed with any of this. (Indeed, the district court assumed the prior restraint was unconstitutional, and noted that the Government's merits arguments were weak.) Against this backdrop, the questions are whether the lower courts (1) were required to consider the prior restraint's unconstitutionality in deciding whether to grant a preliminary injunction, and (2) could find that the Government's invocation of national security is sufficient to deny an injunction against an unconstitutional scheme. Each question arises out of a circuit split, in the context of a recurring and important issue, and should be resolved by this Court.

I. THERE IS A SUBSTANTIAL AND INTRACTABLE SPLIT OVER WHETHER A COURT MUST ANALYZE A PLAINTIFF'S LIKELIHOOD OF SUCCESS ON THE MERITS OF A CONSTITUTIONAL CHALLENGE TO A PRIOR RESTRAINT.

In the context of First Amendment-protected speech, a plaintiff's likelihood of success on the merits of the constitutional challenge is the most important factor in the preliminary injunction analysis and is deeply intertwined with the other factors considered by the court. It therefore must be considered by a court deciding whether to grant a preliminary injunction. The Second and Fifth Circuits have now created a sharp circuit split by permitting lower courts to decide whether to grant a preliminary injunction without considering the merits, based solely on the public interest and balance-of-equities factors.

Resolving this split is important. A plaintiff's likelihood of success influences the other preliminary injunction factors, because neither the equities nor the public favor an unconstitutional law, and being deprived of constitutional rights for even a short period of time constitutes irreparable harm. Thus, if a court does not analyze the merits of a plaintiff's constitutional challenge, it will be unable to adequately analyze the other injunction factors, and thus will not be in a position to accurately and meaningfully assess whether an injunction is warranted.

Accordingly, this Court should grant certiorari.

A. The Circuit Courts Are Divided 10-2.

The Second and Fifth Circuits have created an openly acknowledged split in the Circuits over whether a court must analyze a plaintiff's likelihood of success on the merits of the plaintiff's First Amendment challenge when deciding whether to issue a preliminary injunction.

1. The Second and Fifth Circuits have held that a court need not analyze a plaintiff's likelihood of success on the merits of the plaintiff's constitutional challenge in determining whether to issue a preliminary injunction. *See* App. 8a ("[W]here the balance-of-equities and public interest factors weigh so heavily against a preliminary injunction, we need not decide whether Stagg is likely to succeed on the merits or to suffer irreparable harm."); *Def. Distributed*, 838 F.3d at 458 ("Because we conclude the district court did not abuse its discretion on its non-merits findings, we decline to address the merits requirement.").

These courts reason that the balance of the equities and the public interest prongs can weigh so heavily against issuing a preliminary injunction that even a certainty of success under the First Amendment would not be enough to warrant a preliminary injunction. *See, e.g.*, App. 8a. In other words, whether the Government's actions are unconstitutional can be irrelevant.

2. Ten Circuits take the opposite view.

Five Circuits explicitly state that "a district court *must* consider . . . whether the plaintiff has shown a likelihood of success on the merits" of the First Amendment challenge when "deciding whether a

preliminary injunction should issue." *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 577 (9th Cir. 2014) (First Amendment challenge to licensing scheme) (emphasis added). *See also Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689-90 (6th Cir. 2014) ("[T]he court *must* determine 'whether the plaintiff has established a substantial likelihood or probability of success on the merits' of his [First Amendment] claim.") (emphasis added); *Sindicato*, 699 F.3d at 10-11 ("In the First Amendment context . . . . [i]t was [] incumbent upon the district court to engage with the merits before moving on to the remaining prongs of its analysis."); *Mom N Pops, Inc. v. City of Charlotte*, No. 97-2359, 1998 WL 537928, at *1 (4th Cir. Aug. 19, 1998) (per curiam) ("[A] court *must* consider . . . the plaintiff's likelihood of success on the merits of the [First Amendment] case.") (emphasis added); *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1010 (7th Cir. 1990) (First Amendment challenge to permit scheme; "the district court *must* consider" the plaintiff's likelihood of success on the merits) (emphasis added).

Five other circuits recognize that in the First Amendment context, the preliminary injunction factors often collapse into the analysis of whether the plaintiff is likely to succeed on the merits, and thus instruct lower courts to pay particular attention to the merits of the plaintiff's First Amendment challenge. *See, e.g.*, *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) ("In the First Amendment context, 'the likelihood of success on the merits will often be the determinative factor.'"); *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (same); *Child Evangelism Fellowship of*

Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1000 (8th Cir. 2012) ("*Child Evangelism*") ("[W]e focus our discussion on CEF's likelihood of success on the merits of its First Amendment claim."); *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) ("Because this action involves the alleged suppression of speech in violation of the First Amendment, we focus our attention on . . . whether Stilp is likely to succeed on the merits of his constitutional claim."); *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) (treating the likelihood of success on the merits as dispositive).[5] Given the emphasis these five Circuits place on the plaintiffs' likelihood of success on the merits, analysis of that factor is effectively required. *See, e.g.*, *Child Evangelism*, 690 F.3d at 1000; *Stilp*, 613 F.3d at 409.

These ten Circuits reason that likelihood of success on the merits in the First Amendment context is crucial to the other factors, because the loss of First Amendment freedoms constitutes irreparable injury, and neither equity nor the public have an interest in

[5] Of course, many of the Circuits that mandate that lower courts analyze the plaintiff's likelihood of success on the merits also recognize the importance of that factor in the First Amendment context. *See, e.g.*, *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Sindicato*, 699 F.3d at 10 ("likelihood of success on the merits" is the "sine qua non of" the preliminary injunction inquiry); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp. (SMART)*, 698 F.3d 885, 890 (6th Cir. 2012) ("[I]n the First Amendment context, the other factors are essentially encompassed by the analysis of the movant's likelihood of success on the merits."); *WV Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

enforcing an unconstitutional law. *See, e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 324 (3d Cir. 2013) (en banc) ("[A]llowing a[n] . . . unconstitutional speech restriction to continue 'vindicates no public interest.'"); *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) ("[T]he State . . . is in no way harmed by . . . an injunction that prevents the state from enforcing unconstitutional restrictions. . . . [U]pholding constitutional rights is in the public interest."); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("[E]ven a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and the city has no legitimate interest in enforcing an unconstitutional ordinance. For similar reasons, ... [t]he public has no interest in enforcing an unconstitutional ordinance."); *Connection Distrib. Co.*, 154 F.3d at 288 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

Thus, courts in these Circuits consider the plaintiff's likelihood of success on the merits first, recognizing that they cannot properly weigh the other preliminary injunction factors without understanding the plaintiff's likelihood of success—that is, without first analyzing whether the law is constitutional. *See Sindicato*, 699 F.3d at 10-11 (noting that because of the importance of the merits in the preliminary injunction analysis in the First Amendment context, the district court must "engage with the merits before moving on to the remaining prongs of its analysis").

The Second Circuit below and the Fifth Circuit in *Defense Distributed*, by contrast, believe that even a

certainty that the Government's actions are unconstitutional can be outweighed by national security, and thus that a court may begin and end its analysis with the public interest and balance of hardships alone. *See* App. 8a; *Def. Distributed*, 838 F.3d at 458. *See supra.*

B. The Proper Analysis For A Preliminary Injunction Challenging The Constitutionality Of A Statute Is An Important And Recurring Issue.

Resolving the divide in the lower courts over the need to analyze a plaintiff's likelihood of success on the merits of the plaintiff's constitutional challenge inarguably presents an important issue for this Court.

1. Under the current Circuit split, whether a preliminary injunction will issue against a facially unconstitutional law depends primarily on where the plaintiff challenging that law files suit. In the Second and Fifth Circuits, a court may deny a preliminary injunction after only looking at the balance of the equities and the Government's assertion that the law implicates national security. *See, e.g.*, App. 8a. Not only will the court in those Circuits be deciding whether to grant a preliminary injunction without studying the most important factor in the analysis, *see Verlo*, 820 F.3d at 1126, but it will also be ignorant of the impact of the merits on the equities and public interest factors it did consider, *see B.H.*, 725 F.3d at 324; *Legend Night Club*, 637 F.3d at 302-03; *KH Outdoor,* 458 F.3d at 1272.

If Stagg brought suit in Philadelphia (within the Third Circuit) or Boston (within the First Circuit), rather than in New York, the district court would have begun by analyzing the merits of Stagg's First Amendment challenge to the ITAR's prior restraint scheme. *See Sindicato*, 699 F.3d at 10-11; *Stilp*, 613 F.3d at 409. In doing so, the court would have found the prior restraint here to be unconstitutional under the First Amendment as discussed above. *See supra*. Thus, the court would have found Stagg certain to succeed on the merits.

With this in mind, the court would then have found that each of the remaining factors weighed in favor of a preliminary injunction: (1) Stagg was being irreparably harmed by having its speech restricted by the unconstitutional prior restraint, *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), (2) the balance of the equities favored an injunction because the government "is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions," *Legend Night Club*, 637 F.3d at 302-03, and (3) an injunction would be in the public interest because "enforcement of an unconstitutional law is always contrary to the public interest," *Gordon*, 721 F.3d at 653. Thus, a district court in any of those Circuits that require courts to analyze the plaintiff's likelihood of success on the merits would have found that all four factors weigh in favor of the preliminary injunction sought by Stagg.

Take, for example, *Sindicato*. There, as here, the district court "declined to determine whether

plaintiffs had shown a likelihood of success on the merits" and instead focused its analysis on the other three factors. 699 F.3d at 7. Having ignored "the most important part of the preliminary injunction assessment," *id.*, the district court found that the other three factors warranted denying the requested preliminary injunction, *id.* at 7-8.

The First Circuit reversed. It held that, by not beginning the analysis with the plaintiffs' likelihood of success on the merits, the district court went astray in its analysis of the remaining factors. *See id.* at 10-16. Starting with the merits, the First Circuit found that the plaintiffs had made a strong showing that the law at issue was unconstitutional, which in turn colored the court's analysis of the remaining factors. *See, e.g.*, *id.* at 15. Because the law was likely to be found unconstitutional, the plaintiffs' injury was irreparable and the public had no interest in enforcing an unconstitutional law. Thus, the First Circuit ordered that a preliminary injunction be granted. *Id.* at 16.

The result should have been the same here.

2. The potential impact of this Circuit split is broad and the question presented likely to recur. First, the split affects thousands of motions filed each year seeking injunctive relief. For example, a search of Westlaw and Lexis reveals well over 2,000 preliminary injunction motions decided by the federal courts in each of the last three years. Each of those decisions is affected by the Circuit split here.

Second, although the split at issue here focuses on challenges brought under the First Amendment, it applies with equal force to preliminary injunctions

sought against laws that are infirm under other constitutional provisions as well. *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc) (Establishment Clause and Equal Protection), *cert. granted* 137 S. Ct. 2080 (2017); *Hawaii v. Trump*, No. 17-00050, --- F. Supp. 3d ----, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) (Establishment Clause), *aff'd in part and vacated in part*, 859 F.3d 741 (9th Cir.), *cert. granted* 137 S. Ct. 2080; *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (Due Process Clause). In those cases, too, whether the court analyzes the merits of the plaintiff's constitutional challenge plays a crucial role in whether preliminary relief is granted—even in matters implicating national security. *Compare, e.g.*, *Int'l Refugee Assistance Project*, 857 F.3d at 572, 588-601 (affirming nationwide preliminary injunction), *Hawaii*, 2017 WL 1011673, at *11-17 (granting temporary restraining order after beginning analysis by finding plaintiffs had a likelihood of success on the merits of their First Amendment challenge, and finding that the unconstitutionality of the statute outweighed national security concerns), *with* App. 7a-9a (denying preliminary injunction after beginning analysis with national security concerns and never addressing plaintiff's likelihood of success on the merits).

C. A Court Must Analyze A Plaintiff's Likelihood Of Success On The Merits To Adequately Ascertain Whether An Injunction Is Warranted.

Review is also warranted because the Second Circuit's decision is wrong. In the context of a plaintiff seeking a preliminary injunction, a court

must begin by analyzing the plaintiff's likelihood of success on the merits of the First Amendment challenge. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("In deciding whether to grant a preliminary injunction, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits."); *see also Sindicato*, 699 F.3d at 11 ("It was . . . incumbent upon the district court to engage with the merits before moving on to the remaining prongs of its analysis.").

That is because the likelihood of a plaintiff's success in proving that the challenged law is unconstitutional in turn affects the other three preliminary injunction factors. "[T]he determination of where the public interest lies," for example, "is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge." *Connection Distrib. Co.*, 154 F.3d at 288; *Alvarez*, 679 F.3d at 589-90 (same). "[S]hould the [challenged] statute be unconstitutional, the public interest would be adversely affected by denial of . . . an injunction," *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988), because the public does not have "an interest in the enforcement of an unconstitutional law," *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003), *aff'd* 542 U.S. 656. *See also, e.g.*, *Gordon*, 721 F.3d at 653 ("[E]nforcement of an unconstitutional law is always contrary to the public interest."); *Scott*, 612 F.3d at 1297 ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law.").

Because it significantly affects the other three preliminary injunction factors, the plaintiff's likelihood of success on the merits of the

constitutional challenge is essential to a court's ability to assess accurately whether a preliminary injunction is warranted. That is especially so when the plaintiff is challenging a prior restraint's constitutionality under the First Amendment. "Any system of prior restraints of expression [bears] a heavy presumption against its constitutional validity," and a party who seeks to have such a restraint upheld "carries a heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co.*, 403 U.S. at 714 (citations omitted). That burden is lifted, however, if a court is allowed to conduct its preliminary injunction analysis without considering the plaintiff's likelihood of success on the merits. The Second and Fifth Circuit's decisions to the contrary should be rejected.

II. WHETHER THE PUBLIC'S INTEREST IN NATIONAL SECURITY CAN JUSTIFY AN UNCONSTITUTIONAL LAW IS A RECURRING AND EXCEPTIONALLY IMPORTANT QUESTION.

Both the district court and the Second Circuit held that the Government's interest in national security can, standing alone, warrant denial of a preliminary injunction—even if the ITAR's prior restraint is unconstitutional and Stagg is being irreparably harmed. *See, e.g.*, App 20a-21a. In doing so, the Second Circuit departed from this Court's guidance in *New York Times Co. v. United States* and *Holder v. Humanitarian Law Project*, and created a conflict with numerous other Circuits and lower courts. The Second Circuit's decision has far-reaching implications, and is exceptionally wrong. Review is warranted.

A. The Decision Below Conflicts With Numerous Rulings From This And Other Courts.

The Second Circuit held that the Government's assertion of national security could alone warrant denying a preliminary injunction against the ITAR's unconstitutional prior restraint. That conflicts with rulings from this Court and lower courts across the country.

1. This Court has repeatedly recognized that national security does not trump First Amendment speech rights, including in the preliminary injunction analysis. *See Humanitarian Law Project*, 561 U.S. at 39 ("[W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."); *N.Y. Times Co.*, 403 U.S. at 719 (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.").

In *New York Times Co.*, for example, this Court rejected the Government's efforts to impose a prior restraint on publication of the Pentagon Papers, which involved classified national security information. 403 U.S. at 718 (Black, J., concurring). Similar to this case, the Government argued that it had the authority "to protect the nation against publication of information whose disclosure would endanger the national security," and claimed that

this interest in national security warranted a prior restraint[6] on the publication of the Pentagon Papers. *Id.* In support of its national security claim, the Government put on substantial evidence of the harms that would occur if the papers were allowed to publish. *See, e.g.*, *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 326-27, 330 (S.D.N.Y. 1971).

Nevertheless, a majority of this Court rejected the Government's assertion that its substantial evidence of the harms that would befall national security was sufficient to warrant a prior restraint. *See* 403 U.S. at 714, 718-19, 731 (opinions of Justices White, Black, and Brennan, joined by Justices Stewart and Douglas). As Justice Black put it, national security harms could not trump the newspapers' First Amendment rights:

> [W]e are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." . . . . The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.

403 U.S. at 718-19. That is particularly so, the Court noted, in the context of *re*publication of information. *See id.* at 733 (White, J., concurring) (where

[6] There, the prior restraint took the form of a preliminary injunction against the newspapers. *See id.* at 714.

"publication has already begun," then "the efficacy of" banning further speech about the matter "to avert anticipated damage is doubtful at best"). *See also Bartnicki*, 532 U.S. at 525, 534-35 (prohibiting criminal punishment of republication of publicly-available information).

Because the First Amendment would not "tolerate" the Government invoking national security to justify a prior restraint "predicated upon surmise or conjecture that untoward consequences may result" from the speech, 403 U.S. at 725-26 (Brennan, J., concurring), this Court denied the government's prior restraint as unconstitutional under the First Amendment.

2. Similarly, numerous lower courts have recently rejected the Government's efforts to justify unconstitutional Executive Orders on the grounds of national security. For example, the Fourth Circuit sitting en banc in *Int'l Refugee Assistance Project v. Trump* recently affirmed a nationwide preliminary injunction blocking implementation of an unconstitutional Executive Order that the Government asserted was necessary for national security. *See* 857 F.3d at 588-601. The district court in *Hawaii v. Trump* did the same, 2017 WL 1011673, at *11-17, and its decision was affirmed by the Ninth Circuit, 859 F.3d 741, 789 (9th Cir. 2017). And the district court in *Klayman v. Obama*, 957 F. Supp. 2d 1, 43-44 (D.D.C. 2013) granted a preliminary injunction against the NSA's bulk data collection

program, despite the Government's purported national security interest.[7]

These decisions are in conflict with the decisions of the Second Circuit below and the Fifth Circuit in *Defense Distributed*.

B. The Impact Of The Decision Below Is Exceptionally Far Reaching.

Whether the Government's interest in national security, alone, is sufficient to overcome a certainty of success on the merits of a constitutional challenge to a statute is a recurring and important issue.

The Government regularly raises national security as a defense to challenges to the ITAR. *See Def. Distributed*, 838 F.3d at 458-60 (noting that the State Department's primary argument for denying a preliminary injunction against the ITAR was "national defense and national security"); *Bernstein*, 945 F. Supp. at 1288. The number of challenges are likely to increase as the public becomes aware of the Government's recent assertion that the ITAR imposes a prior restraint, including on the republication of publicly-available information that was originally published as far back as the 1950s. Thus, even in the narrow context of First Amendment challenges to the ITAR, this issue is likely to recur.

But the impact of the decision below extends far beyond just the ITAR's prior restraint. In a number

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[7] That ruling was ultimately reversed on appeal on the grounds that the plaintiff had failed to demonstrate likelihood of success on the merits, not because national security interests predominated. *See* 800 F.3d 559, 565-69 (D.C. Cir. 2015).

of contexts, the Government asserts that constitutionally-infirm statutes are justified by national security. *See, e.g.*, *Int'l Refugee Assistance Project*, 857 F.3d at 572; *Hawaii*, 2017 WL 1011673, at *16; *Washington*, 847 F.3d at 1169; *Klayman*, 957 F. Supp. 2d at 43-44. The decision below thus has the potential to affect the preliminary injunction analysis for a wide swath of statutes and regulations facing constitutional challenges.

C. The Decision Below Is Exceptionally Wrong.

The exceptional reach of the decision below is made all the more troubling because it is exceptionally wrong.

The Government contends that it can impose a broad restraint on pure speech based on the possibility that a foreigner could access it in a public library, take the information contained therein abroad, and use it to help build defense articles. If that were sufficient for the Government to prevail, *N.Y. Times Co.* and the numerous lower courts decisions rejecting the Government's efforts to justify unconstitutional Executive Orders on the grounds of national security would have come out the other way. But those cases show that fundamental rights are not subject to restrictions based solely on the Government's assertion of national security.

In *New York Times Co.* this Court made clear that national security is not a trump card in the preliminary injunction analysis. 403 U.S. at 718 (Black, J., concurring). Indeed, in the First Amendment context, it is just the opposite: a plaintiff's likelihood of success on the merits of the

First Amendment challenge to a statute is the most crucial consideration, because neither the Government nor the public has an interest in enforcing an unconstitutional law, and First Amendment violations that silence speech always cause irreparable harm. *See, e.g.*, *Gordon*, 721 F.3d at 653 ("[T]he Constitution is the ultimate expression of the public interest.") (citation omitted). Claims of national security alone cannot overcome a certainty of success on the merits of a First Amendment challenge to a statute. Otherwise, our limited federal Government would be able to abrogate its own constitutional limitations and protections by claiming that anything it does implicates national security. That is not the law.

In any event, the Government's claim that it must control domestic pure speech as an "export" for national security purposes is dubious. Although the Government has long represented that the ITAR does not impose a prior restraint on publication, the Government now takes the opposite position, *see* App. 4a-5a, 8a, without ever amending the law to justify this new position. If the Government was concerned that public speech could harm national security, it would ensure that the law clearly stated that the ITAR applied to domestic publications to give notice to the public of what the law requires, which the Second Circuit noted the ITAR does not provide. *See* App. 9a. And the Government should ensure that this prior restraint is constitutional, lest it be struck down; but here, the Government knows it is not. *See* DOJ 1978 Memo; *Bernstein*, 945 F. Supp. at 1289.

Moreover, unlike the *classified* information in *N.Y. Times Co.*, the information here is *unclassified*. "The

government has no legitimate interest in censoring unclassified materials." *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983). The First Amendment "precludes [prior] restraints with respect to information which is unclassified." *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972); *see also Posey*, 864 F.2d at 1497 (noting that it would violate the First Amendment if the ITAR prohibited domestic publication purportedly because of "export" and "security" reasons). And the Government cannot seriously contend that republication of publicly available unclassified information implicates national security, because it is already available to anyone who wishes to find it. *See N.Y. Times Co.*, 403 U.S. at 733 (White, J., concurring).

At best, the Government is imposing a broad prior restraint on the conjecture that foreigners will access public libraries, take materials published therein abroad, and use that information to help build defense articles, thus subjecting that unclassified information to the ITAR. If the Government can prevail solely on such attenuated grounds, then national security can justify any prior restraint. But that is not the law.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

This case presents an excellent opportunity for this Court to resolve both questions presented.

1. This case does not present any obstacles to review. It involves a facial challenge—a purely legal issue that requires no factual development, *see Sindicato*, 699 F.3d at 10-11—and Stagg preserved

each question throughout the district and appellate court proceedings.

That this case involves a motion for a preliminary injunction is no reason to delay consideration of the circuit split. For one, the elements for a preliminary injunction are the same as a permanent injunction, and thus the Second Circuit's permanent injunction analysis would be the same as its preliminary analysis. That is why this Court routinely grants petitions arising from appeals of preliminary injunctions involving constitutional challenges to statutes and other issues of national importance. *See Ashcroft*, 542 U.S. 656 (preliminary injunction); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (same); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (same); *Saenz v. Roe*, 526 U.S. 489 (1999) (same); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam) (same).

2. This case is a better vehicle than *Defense Distributed* for resolving these important issues.

Defense Distributed presents additional obstacles to addressing the ITAR's public domain exclusion. *Defense Distributed* involves only the original publication of newly generated technical data to the Internet, which is not one of the channels listed in the ITAR's public domain exclusion. Thus, this Court would first have to decide whether the Internet qualifies for the public domain exclusion—an issue over which there is no developed circuit split—before it could reach the issue presented here.

Moreover, *Defense Distributed* may also become moot because the State Department is taking steps to remove the civilian firearms in that case from the

U.S. Munitions List. *See* Letter from 145 Representatives to Secretaries Tillerson and Ross (May 3, 2017), https://www.majoritywhip.gov/wp-content/uploads/2017/05/5-3-17-Scalise-final-ECR-letter.pdf (stating Congress's understanding that draft regulations to remove firearms from U.S. Munitions list are complete).

Furthermore, this case presents the stronger First Amendment challenge to the ITAR. It involves pure speech: presentations and lectures concerning the ITAR's scope and criticizing the Government's implementation and application of the ITAR. *See supra*. It also challenges the application of the ITAR to republication of information already found in the public domain, which clearly violates *Bartnicki*.

Therefore, this case presents a superior vehicle for reviewing the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted. At the least, this case should be consolidated with *Defense Distributed*, and certiorari granted in each, or held for the Court's consideration of *Defense Distributed*.

Respectfully submitted,

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand sixteen.

PRESENT: GUIDO CALABRESI,
REENA RAGGI,
GERARD E. LYNCH,
Circuit Judges.

STAGG P.C.,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, JOHN KERRY, in his official capacity only as Secretary of State,

No: 16-315-cv

Defendants-Appellees.

APPEARING FOR APPELLANT:	LAWRENCE D. ROSENBERG (Christopher B. Stagg, Stagg P.C., New York, New York, *on the brief*), Jones Day, Washington D.C.
APPEARING FOR APPELLEE:	DOMINIKA TARCZYNSKA, Assistant United States Attorney (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, New York.

Appeal from an order of the United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*) denying a preliminary injunction.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order entered on January 26, 2016, is AFFIRMED.

Plaintiff Stagg P.C. appeals from the denial of its motion for a preliminary injunction against the government's imposition of the registration and

licensing mandates of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778, and the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120–130, which regulate the dissemination of information related to items enumerated on the United States Munitions List, *see* 22 C.F.R. § 121. Specifically, the requested injunction would have broadly enjoined the government from "enforcing *any* licensing or other approval requirements for putting privately generated unclassified information *into* the public domain." J.A. 8 (emphases added). Our jurisdiction to review the denial order is established by 28 U.S.C. § 1292(a)(1).

Stagg alleges that the challenged licensing system is (1) an unconstitutional prior restraint under the First Amendment and (2) impermissibly vague under the Fifth Amendment. While defending the district court's injunction denial, the government challenges its ruling that Stagg has standing to maintain this action. We review (1) a determination as to standing *de novo*; and (2) the denial of a preliminary injunction for abuse of discretion, which we will identify only where a decision rests on an error of law or clearly erroneous finding of fact. *See Nicosia v. Amazon, Inc.*, 834 F.3d 220, 238 (2d Cir. 2016). In so doing, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm substantially for the reasons stated by the district court. *See Stagg P.C. v. U.S. Dep't of State*, 158 F. Supp. 3d 203 (S.D.N.Y. 2016).

1. Standing

The district court determined that, "under the lenient standing requirements in prior restraint

cases," Stagg has standing to pursue this action because it "alleges that it possesses certain technical data . . . that it wants to aggregate into a set of materials for presentation to an audience," which "requires prior approval from the DDTC under the AECA and the ITAR." *Id.* at 209. We agree.

In stating that (1) it presently seeks to disseminate information already in its possession subject to ITAR's challenged licensing requirement and (2) it has already refrained from doing so for fear of being sanctioned, Stagg has alleged the "real or immediate threat" of future injury necessary for standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *see Meese v. Keene*, 481 U.S. 465, 473 (1987) (determining that affidavit stating that challenged law had deterred plaintiff from exhibiting films established standing). Moreover, a licensing regime is subject to facial challenge as a prior restraint when it "allegedly vests unbridled discretion in a government official over whether to permit or deny" publication of speech, even "without the necessity of [plaintiff's] first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988). Accordingly, the district court correctly rejected the government's standing challenge to this action.[1]

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[1] We note that many of Stagg's arguments on appeal could be read as attacking not the existing regulatory scheme, but either a proposed regulation that was never adopted, or a prior regulation that Stagg claims was once in force but has since been repealed. Constitutional questions about regulations that no longer exist or that have been under consideration do not present cases or controversies within a court's Article III jurisdiction. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) ("A claim is not ripe if it depends upon

2. Preliminary Injunction

A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The district court determined that the third and fourth factors required denial of the preliminary injunction here to avoid "very serious adverse impacts" to national security. *Stagg P.C. v. U.S. Dep't of State*, 158 F. Supp. 3d at 210. We agree.

The content of the speech in question is "technical data," which ITAR defines as "[i]nformation . . . required for [*inter alia*] the design, development, [and] production . . . of defense articles." 22 C.F.R. § 120.10(a). Because Stagg (1) has elected not to identify, even to the district court, the specific content of the material it seeks to publish, *see Stagg P.C. v. U.S. Dep't of State*, 158 F. Supp. 3d at 208; and (2) has requested a broad injunction against "*any* licensing or other approval requirements for putting privately generated unclassified information *into* the public domain," J.A. 8 (emphases added) (an injunction which we note would apply also to material that is not presently publicly available), the

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contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks omitted)). Here, however, the government unambiguously confirmed at oral argument that Stagg correctly characterizes the government's interpretation of the existing regulatory scheme (as noted below). Thus, we agree that Stagg has standing to challenge that scheme as the government construes it.

district court appropriately "assume[d] the worst case scenario," *i.e.*, that the material at issue might communicate, for example, "technical data for delivery systems for weapons of mass destruction," or for "chemical and biological agents," or "plans for 3D-printable plastic firearms," *Stagg P.C. v. U.S. Dep't of State*, 158 F. Supp. 3d at 210 n.47 & 210–11.

The national security concerns raised by a preliminary injunction that barred the government from licensing, and thereby controlling, the dissemination of such sensitive information are obvious and significant. We note that the government does not merely invoke national security as "a broad, vague generality" of the sort that cannot "abrogate the fundamental law embodied in the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring). Rather, it has set forth specific concerns relating to the export of "technical data" as defined in ITAR. As a State Department official explained in a sworn affidavit, a preliminary injunction would "cause significant harm to the national security and foreign policy interest of the United States," due to the potential for "[u]ncontrolled disclosure of technical data on the development, production, or deployment of weapons of mass destruction" or "the potential release of technical data for delivery systems of" such weapons to "someone set on creating mass, indiscriminate, civilian casualties" or a "foreign adversary." J.A. 95. Indeed, "[a]bsent the inclusion of 'technical data[]'" within ITAR's licensing structure, the statutory "limits on arms transfers would be of negligible practical effect because [they] would leave unregulated the exportation of the technology, know-how, blueprints, and other design information

sufficient for foreign powers to construct, produce, manufacture, maintain, and operate the very same equipment regulated in its physical form by the ITAR." *Id*. at 90. In matters of national security, which present the most compelling national interest, *see Haig v. Agee*, 453 U.S. 280, 307 (1981); *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015), we accord considerable "deference" to such an "evaluation of the facts by the Executive," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. at 27. Thus, the government presents a valid case—unrefuted by Stagg—for balancing the equities in their favor and finding that the public interest weighs against this injunction.

Stagg contends that the district court's reliance solely on national security to deny the preliminary injunction is foreclosed by *New York Times Co. v. United States*, 403 U.S. 713. We are not persuaded. While it could not be said that disclosure of the materials there at issue would "result in direct, immediate, and irreparable damage to our Nation or its people," *id*. at 730 (Stewart, J., concurring), that is just the conclusion that the district court was entitled to draw here so long as Stagg refuses to disclose to a court the information it wants to shield from ITAR. Further, here we deal with a statutorily authorized regulatory scheme, which implicates legislative as well as executive judgment about the national security interest in controlling information for the production of defense articles on the U.S. Munitions List. *See id*. at 718 (Black, J., concurring).

Having carefully scrutinized the specific national security interests presented by the government, we conclude that its stated interests outweigh Stagg's

claimed harm. The government has articulated specific, concrete damage to national security that could result if the district court entered Stagg's broad proposed injunction. The specificity of the government's contentions contrasts sharply with the vagueness of Stagg's allegations and its refusal to provide the district court with sufficient information to assess the plausibility of the government's national security arguments. Thus, the district court did not abuse its discretion when it found that the public interest in maintaining national security weighed against granting a preliminary injunction in this case.

In these circumstances, where the balance-of-equities and public interest factors weigh so heavily against a preliminary injunction, we need not decide whether Stagg is likely to succeed on the merits or to suffer irreparable harm. *See American Civil Liberties Union v. Clapper*, 785 F.3d at 826 (declining to order preliminary injunction in light of national security interests even where success on merits was certain); *see also Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 458 (5th Cir. 2016) (affirming denial of preliminary injunction against ITAR on balance-of-equities and public interest factors alone). Accordingly, we identify no abuse of discretion in the district court's denial decision.

But just as Stagg's refusal to disclose—even to the district court—the information it seeks to publish, and whether that information is already publicly available, makes it appropriate to deny the broad preliminary injunction sought, we note concern with the government's representations at oral argument. Specifically, government counsel argued that ITAR applies to *republication* of information already in the public domain. While a June 3, 2015 proposed rule

would add a subsection to the definition of "public domain" making clear that "[t]echnical data . . . is not in the public domain if it has been made available to the public [initially] without authorization," 80 Fed. Reg. 31,525, 31,535, and would proscribe the "mak[ing] available to the public [of] technical data . . . if [a party] has knowledge that the technical data . . . was [first] made publicly available without an authorization in § 120.11(b)," *id.* at 31,538, it is unclear where in the *current* ITAR such a prohibition can be located. Indeed, government counsel was unable to direct us to a provision that qualifies 22 C.F.R. § 120.10(b), which presently exempts from the definition of technical data, subject to ITAR, *inter alia*, "information in the public domain as defined in § 120.11." We do not pursue the point further here or predict how it might be decided on full briefing. We state only that, while we affirm the order denying the broad injunction sought by Stagg, we do so without prejudice to the pursuit of narrower relief in the district court.[2]

3. Conclusion

We have considered Stagg's remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM without prejudice the order denying preliminary injunctive relief.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

s/ Catherine O'Hagan Wolfe

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[2] Insofar as comments in the district court's opinion are skeptical of a narrower injunction, we do not understand them to reflect any ruling, particularly as no narrower relief or supportive briefing was then before the court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STAGG P.C.,

Plaintiff,

- against -

U.S. DEPARTMENT OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, and JOHN F. KERRY, in his official capacity as Secretary of State,

Defendants.

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OPINION AND ORDER

15-cv-8468 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

Stagg P.C., a law firm located in Washington D.C., brings this motion against the U.S. Department of State, its Secretary, and its subordinate agency, the Directorate of Defense Trade Controls (the "DDTC") seeking a preliminary injunction enjoining the application of certain provisions of the Arms Export Control Act ("AECA") and the International Traffic in Arms Regulations ("ITAR") that plaintiff asserts

violate the First and Fifth Amendments to the United States Constitution and the Administrative Procedure Act ("APA"). For the following reasons, plaintiff's motion is DENIED.

I. BACKGROUND

A. The AECA and Its Regulatory Framework

The AECA authorizes the President of the United States to control the export of defense articles and defense services.[1] The ITAR are the implementing regulations of the AECA.[2] The AECA includes the U.S. Munitions List ("USML"), the list of items designated as defense articles and services,[3] and authorizes the President to designate items for inclusion on the USML, require licenses for the export of USML items, and promulgate regulations for the import and export of such items.[4] The President delegates his authority under the AECA to the Secretary of State, and this authority is further delegated to the DDTC.[5]

The USML lists "defense articles and defense services" ranging from firearms to nuclear weapons, and also includes related "technical data" "required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles," including "blueprints, drawings, photographs, plans,

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1 *See* 22 U.S.C. § 2778(a)(1).

2 *See* 22 C.F.R. §§ 120-130.

3 *See* 22 U.S.C. § 2278(a)(1).

4 *See id*. § 2278(h).

5 *See* 22 C.F.R. § 120.1(a).

instructions or documentation."[6] The ITAR exclude from the definition of "technical data" (1) "information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges, and universities," (2) "basic marketing information on function or purpose or general system descriptions of defense articles," and (3) "information in the public domain."[7] "Public domain" is defined, *inter alia*, to include "information which is published and which is generally accessible or available to the public."[8]

Where there is doubt as to whether an item or service is covered by the USML, the ITAR provide a "commodity jurisdiction" procedure, pursuant to which the DDTC will determine whether an article or service is within the ITAR's scope.[9] The DDTC also provides informal guidance and advisory opinions on the ITAR and their application.[10] While the DDTC is considering a commodity jurisdiction request, the DDTC advises individuals to abstain from exporting or transmitting the item in question without proper registration and approval. The regulations include a ten day deadline for providing a preliminary response, as well as a provision for requesting expedited processing.[11] The DDTC is required to "complete the review and adjudication of license applications within 60 days of receipt, except in cases where national

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6 *Id.* § 120.10(a)(1).

7 *Id.* § 120.10(a)(5).

8 *Id.* § 120.11(a).

9 *See id.* § 120.4.

10 *See id.* § 126.9(a).

11 *See id.* § 120.4(e).

security exceptions apply."[12] These exceptions are relatively narrow: When Congressional notification is required (generally for sales of major defense equipment), when required assurances from other governmental entities, such as those overseeing missile technology and cluster munitions, have not been received, and when other certain administrative procedures are in-process but have not been completed.[13]

Any person who discloses or transfers technical data protected by the ITAR must be licensed or otherwise obtain approval from the DDTC prior to any disclosure or transfer.[14] The ITAR prohibit judicial review of licensing and other approval determinations.[15] A willful export of defense articles (including related technical data) without a license is a criminal violation.[16] Civil penalties can be imposed for both willful and non-willful unlicensed exports.[17]

B. Previous Prior Restraint Under the ITAR

Before January 1, 1985, the ITAR contained a prior restraint on releasing technical data into the public domain. The prior restraint read:

> The burden for obtaining appropriate U.S. Government approval for the publication of technical data falling within the definition in § 125.01, including such data as may be

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[12] 74 Fed. Reg. 63,497 (Dec. 3, 2009).

[13] *See id*.

[14] *See* 22 U.S.C. § 2778(b)(2).

[15] *See* 22 C.F.R. § 128.1.

[16] *See* 22 U.S.C. § 2778(c); 22 C.F.R. § 127.1(a).

[17] *See* 22 U.S.C. § 2778(e); 22 C.F.R. § 127.10.

> developed under other than U.S. Government contracts, is on the person or company seeking publication.[18]

The DDTC published a final rule on December 6, 1984 that repealed this prior restraint effective January 1, 1985, noting that "[c]oncerns were expressed . . . on licensing requirements as they relate to the First Amendment of the Constitution. The revision seeks to reflect these concerns, and certain new exemptions are provided."[19] These concerns had been expressed by the Department of Justice and U.S. House of Representatives, both of which considered the prior restraint to be unconstitutional.[20] This was the last revision to the ITAR concerning a prior restraint on releasing technical data into the public domain until June 3, 2015.

C. Recent Developments Leading to This Action

On June 3, 2015, defendants published a proposed rule for notice and comment that sought, in relevant part, to revise the definition of "public domain" to provide a "more explicit statement of the ITAR's requirement that one must seek and receive a license or other authorization from the Department . . . to release ITAR controlled 'technical data.'"[21] Also

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[18] 22 C.F.R. § 125.11 n.3 (1984).

[19] 49 Fed. Reg. 47,682 (Dec. 6, 1984).

[20] *See* Office of Legal Counsel, U.S. Department of Justice, *Constitutionality Under the First Amendment of ITAR Restrictions on Public Cryptography* (May 11, 1978); H.R. Rep. No. 96-1540, at 188-19 (1980).

[21] 80 Fed. Reg. 31,528.

proposed is a new provision stating that re-dissemination of "technical data" made available to the public without authorization "is a violation of the ITAR if, and only if, it is done with knowledge that the 'technical data' . . . was made publicly available without an authorization . . . ."[22] The DDTC accepted comments on these proposed revisions to the ITAR from June 3, 2015 to August 3, 2015.[23] It received approximately 12,787 comments, including a comment from Stagg P.C., and is in the process of reviewing and incorporating them into the next iteration of the revised regulations and preamble.[24]

Stagg P.C. is a law firm headquartered in Washington, D.C. It, by and through its representatives, wishes to give a presentation at a public event hosted by the New York City Bar Association ("NYCBA") on February 9, 2016.[25] This presentation will include slides that, according to Stagg P.C., include information available in the public domain but not approved for release into the public domain under the proposed rule disseminated

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[22] *Id.*

[23] *See* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Def. Mem.") at 6.

[24] *See* 12/7/15 Declaration of Brian H. Nilsson, Deputy Assistant Secretary of State for Defense Trade Controls, Ex. A to Def. Mem. ("Nilsson Dec.") ¶ 15.

[25] *See* 12/3/15 Declaration of Christopher Stagg in Support of Plaintiff's Motion for a Preliminary Injunction ("Stagg Dec.") ¶ 13. No such event currently appears on the NYCBA's calendar of events. *See* Event Calendar, New York City Bar Association, http://services.nycbar.org/Members/Event_Calendar/Members/Event_Calendar.aspx?.

by the DDTC.[26] Stagg P.C. describes this aggregation as the "private generation of unclassified information."[27]

Because the preamble to the DDTC's proposed rule declares that the proposed redefinition of "public domain" "[is] a more explicit statement of the ITAR's requirement that one must seek and receive a license or other authorization"[28] before releasing ITAR-controlled technical data into the public domain, Stagg P.C. argues it is currently subject to a prior restraint on its speech.[29] Stagg P.C. does not identify the materials in question despite both this Court's and the Government's request (depriving the DDTC of the opportunity to end this controversy by confirming its suspicion[30] that the materials Stagg P.C. wishes to present are not covered by the AECA and ITAR). Rather, Stagg P.C. has chosen to move for a preliminary injunction enjoining the enforcement of *any* licensing or approval requirement for releasing privately generated unclassified information into the public domain.[31]

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[26] *See* Stagg Dec. ¶ 13.

[27] *See* Proposed Order, Ex. 1 to Plaintiff's Memorandum of Law in Support of Motion for a Preliminary Injunction ("Pl. Mem.") at 1.

[28] 80 Fed. Reg. 31,528 (June 3, 2015).

[29] *See* Pl. Mem. at 7-8.

[30] *See* Nilsson Dec. ¶¶ 17-19.

[31] Stagg P.C. has not, to the DDTC's knowledge, availed itself of the administrative process for obtaining permission to release technical data described above, and has chosen instead to proceed directly to federal court. *See* Nilsson Dec. ¶ 16.

II. LEGAL STANDARD

"'A preliminary injunction is an extraordinary remedy never awarded as of right.'"[32] "A party seeking a preliminary injunction must generally show a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in the party's favor, and that an injunction is in the public interest."[33]

In the case of a prohibitory injunction, the Second Circuit allows a party seeking a preliminary injunction to show "'either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'"[34] However, "'when . . . the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets [a] more rigorous likelihood-of-success

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[32] *UBS Fin. Servs., Inc. v. West Virginia Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

[33] *American Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015) (citing Winter, 555 U.S. at 20); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 311-12 (1982)). *See also* Fed. R. Civ. P. 65(a) (preliminary injunctions).

[34] *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)).

standard.'"[35] That is, plaintiff "'must establish a clear or substantial likelihood of success on the merits.'"[36]

III. DISCUSSION

A. Standing

Plaintiff has declined to provide much of the detail that would assist both its adversary and this Court in weighing the merits of its claim. It has not provided the technical data it alleges violate the AECA and ITAR. Nor has it provided the materials aggregating this technical data. It has not even provided detail on the conference it allegedly intends to speak at in February. This Court is left with little more than a hypothetical problem in search of a solution.[37] That said, the vagueness in Stagg P.C.'s pleading—however frustrating—is insufficient to deprive it of standing under the lenient standing requirements in prior restraint cases. "When a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive

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[35] *Sussman v. Crawford*, 488 F.3d 136, 140 (2d Cir. 2007) (quoting *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000)).

[36] *Id.* (quoting *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000)).

[37] The proposed amendment to the ITAR giving rise to this claim is also just that—*proposed*—and the DDTC is in the midst of responding to and incorporating the 12,000 comments it received in its previous round of notice and comment into a revised preamble and set of regulations. The DDTC may well reword or even withdraw the preamble and amended regulation in response to the public comments it has received, and obviate the need for this lawsuit. The issue of the incomplete nature of the DDTC's administrative action will be addressed in deciding defendants' partial motion to dismiss.

activity, one who is subject to the law may challenge it facially without first applying for, or being denied, a license."[38]

Here, the facts articulated in Stagg P.C.'s complaint and the supporting affidavit of Christopher Stagg, while somewhat opaque, are sufficiently particular to establish standing under this standard. Stagg P.C. alleges that it possesses certain technical data, available in—but unauthorized for release into—the public domain, that it wants to aggregate into a set of materials for presentation to an audience on February 9, 2016. Stagg P.C. alleges that this activity requires prior approval from the DDTC under the AECA and ITAR. Stagg P.C. alleges that the DDTC's licensing requirement, which covers such technical data, grants the DDTC unbridled (and unreviewable) discretion to approve or deny the release of said technical data to the public. Stagg P.C. therefore has standing to bring this facial challenge to the statute and regulations in question.

B. Qualification for Injunctive Relief

Plaintiff has the burden of demonstrating each of the four prerequisites for the granting of a preliminary injunction: irreparable harm, a likelihood of success on the merits, that the balance of equities tips in its favor, and that an injunction is in the public interest.[39] Plaintiff seeks to enjoin government action taken in the public interest pursuant to the statutory and regulatory scheme set

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[38] *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014).

[39] *See Winter*, 555 U.S. at 20 (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)).

out in the AECA and ITAR, and therefore must meet a higher burden—a substantial likelihood of success on the merits—as to the second prong.

Plaintiff has demonstrated irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[40] Plaintiff also raises several arguments regarding its likelihood of success on the merits that the Government would be wise to note. I also recognize the Second Circuit's recent determination, in the context of campaign finance restrictions, that "[c]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not dispositive factor."[41] In this case, however, that determination must be considered together with the Second Circuit's (and the Supreme Court's) designation of national security as a "public interest of the highest order,"[42] and the Supreme Court's admonition to district courts to consider carefully an injunction's adverse impact on the public interest in national defense.[43] Indeed, even in a case where "appellants [showed] a likelihood—*indeed, a certainty*—of success on the merits" of certain claims, the Second Circuit found

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[40] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

[41] *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

[42] *Clapper*, 785 F.3d at 826. *Accord Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.").

[43] *See Winter*, 555 U.S. at 24-25.

that "[i]n light of the asserted national security interests at stake, we deem it prudent" to deny a preliminary injunction suspending a metadata collection program intruding on citizens' rights to privacy.[44] Even assuming for the purposes of this motion that Stagg P.C. has shown a substantial likelihood of success on the merits of its First and Fifth Amendment and APA claims, the balance of the equities and the public interest both require the denial of this preliminary injunction.[45]

Stagg P.C. does not seek an injunction cabined to its contemplated republication of protected technical data at a bar association event in February; rather, it seeks an expansive injunction barring the enforcement of "any licensing or other approval requirements for putting privately generated unclassified [technical] information into the public domain" under the relevant sections of the ITAR.[46] This would enjoin the application of the ITAR's approval mechanism not only to situations where an individual or organization wishes to republish previously disclosed technical data, but to all situations where individuals wished to disclose

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[44] *Clapper*, 733 F.3d at 825-26 (emphasis added). The program in question was being reviewed for renewal by Congress at the time the motion for a preliminary injunction was brought—just as the ITAR's definition of "public domain" is currently being reviewed by the DDTC.

[45] By this decision, I express no opinion on the final disposition of Stagg P.C.'s case. It may be that, after the development of a full factual record, permanent injunctive relief will be warranted.

[46] *See* Proposed Order, Ex. 1 to Pl. Mem., at 1.

technical data generately privately but covered by the ITAR.[47]

Granting this injunction would have very serious adverse impacts on the national security of the United States. The "privately generated unclassified information" described by Stagg P.C. in this case is a slideshow containing examples of technical data covered by ITAR, not approved for public release, but still available in the public domain. This Court is left to speculate as to the specific technical data that may be in Stagg P.C.'s possession, but can in fact identify other technical data that might be freely republished if Stagg P.C.'s injunction was granted. Examples include: digital plans for 3D-printable plastic firearms, undetectable by metal detectors and untraceable without registration and serial number,[48] privately generated technical data for delivery systems for weapons of mass destruction, such as rockets and missiles, created by defense contractors,[49] and technical data related to chemical and biological agents that could be adapted for use as

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[47] A more limited injunction applicable only to Stagg P.C.'s aggregation of previously published technical data would also fail. Without any details as to the nature or content of the technical data Stagg P.C. wishes to disclose, I have no choice but to assume the worst case scenario—e.g. technical data regarding highly sensitive defense systems published by an unauthorized source, repackaged by Stagg P.C. for purposes of its speeches. For the same reasons described below, such an injunction would be contrary to the public interest. Moreover, the balance of the equities weighs heavily in favor of the Government, and its interest in maintaining national security.

[48] *See* Nilsson Decl. ¶ 24.

[49] *See id.* ¶¶ 21-23.

weapons.[50] This parade of horribles is not an idle fancy. Indeed, without the licensing and approval mechanisms set forth in the AECA and ITAR, *any* unclassified technical data leaked to the Internet would be fair game to republish in any forum without regard to consequences—and in an era where national security information has been successfully leaked,[51] this is not a specious threat. The balance of the equities and the public interest both firmly weigh in favor of the Government, and against the plaintiff. Because Stagg P.C. has not met its burden of showing either that the balance of equities tips in its favor or that an injunction is in the public interest, its request for a preliminary injunction is DENIED.

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[50] *See id.* ¶ 21.

[51] *See*, *e.g.*, Barton Gellman et al., *Edward Snowden Comes Forward As Source of NSA Leaks*, Washington Post, June 9, 2013, available at https://www.washingtonpost.com/politics /intelligence-leaders-push-back-on-leakers-media/2013/06/09/fff8 0160-d122-11e2-a73e-826d299ff459_story.html; Charlie Savage & Emmarie Huetteman, *Manning Sentenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. Times, Aug. 21, 2013, at A1.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction is DENIED. The Clerk of the Court is directed to close this motion (Dkt. No. 15). A conference is scheduled for February 10, 2016 at 4:00 p.m.

SO ORDERED:

s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
January 26, 2016

-Appearances-

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of February, two thousand seventeen.

Stagg P.C.,

Plaintiff - Appellant,

v.

United States Department of State, Directorate of Defense Trade Controls, John Kerry, in his official capacity only as Secretary of State,

Defendants - Appellees.

ORDER

Docket No: 16-315

Appellant, Stagg P.C., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
s/ Catherine O'Hagan Wolfe

APPENDIX D

U.S.C.A. Const. Amend. I provides:

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

22 U.S.C.A. § 2778 provides in relevant part:

§ 2778. Control of arms exports and imports

(a) Presidential control of exports and imports of defense articles and services, guidance of policy, etc.; designation of United States Munitions List; issuance of export licenses; negotiations information

(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

(2) Decisions on issuing export licenses under this section shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.

(3) In exercising the authorities conferred by this section, the President may require that any defense article or defense service be sold under this chapter as a condition of its eligibility for export, and may

require that persons engaged in the negotiation for the export of defense articles and services keep the President fully and currently informed of the progress and future prospects of such negotiations.

(b) Registration and licensing requirements for manufacturers, exporters, or importers of designated defense articles and defense services

(1)(A)(i) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations. Such regulations shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this chapter or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.

(ii)(I) As prescribed in regulations issued under this section, every person (other than an officer or

employee of the United States Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service designated by the President under subsection (a)(1) of this section, or in the business of brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service (as defined in subclause (IV)), shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

(II) Such brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.

(III) No person may engage in the business of brokering activities described in subclause (I) without a license, issued in accordance with this chapter, except that no license shall be required for such activities undertaken by or for an agency of the United States Government—

(aa) for use by an agency of the United States Government; or

(bb) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(IV) For purposes of this clause, the term "foreign defense article or defense service" includes any non-United States defense article or defense service of a nature described on the United States Munitions List

regardless of whether such article or service is of United States origin or whether such article or service contains United States origin components.

(B) The prohibition under such regulations required by the second sentence of subparagraph (A) shall not extend to any military firearms (or ammunition, components, parts, accessories, and attachments for such firearms) of United States manufacture furnished to any foreign government by the United States under this chapter or any other foreign assistance or sales program of the United States if—

(i) such firearms are among those firearms that the Secretary of the Treasury is, or was at any time, required to authorize the importation of by reason of the provisions of section 925(e) of Title 18 (including the requirement for the listing of such firearms as curios or relics under section 921(a)(13) of that title); and

(ii) such foreign government certifies to the United States Government that such firearms are owned by such foreign government.

(C) A copy of each registration made under this paragraph shall be transmitted to the Secretary of the Treasury for review regarding law enforcement concerns. The Secretary shall report to the President regarding such concerns as necessary.

(2) Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in

accordance with this chapter and regulations issued under this chapter, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(3)(A) For each of the fiscal years 1988 and 1989, $250,000 of registration fees collected pursuant to paragraph (1) shall be credited to a Department of State account, to be available without fiscal year limitation. Fees credited to that account shall be available only for the payment of expenses incurred for—

(i) contract personnel to assist in the evaluation of munitions control license applications, reduce processing time for license applications, and improve monitoring of compliance with the terms of licenses; and

(ii) the automation of munitions control functions and the processing of munitions control license applications, including the development, procurement, and utilization of computer equipment and related software.

(B) The authority of this paragraph may be exercised only to such extent or in such amounts as are provided in advance in appropriation Acts.

(c) Criminal violations; punishment

Any person who willfully violates any provision of this section, section 2779 of this title, a treaty referred to in subsection (j)(1)(C)(i), or any rule or

regulation issued under this section or section 2779 of this title, including any rule or regulation issued to implement or enforce a treaty referred to in subsection (j)(1)(C)(i) or an implementing arrangement pursuant to such treaty, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than 20 years, or both.

(d) Repealed. Pub. L. 96-70, Title III, § 3303(a)(4), Sept. 27, 1979, 93 Stat. 499

(e) Enforcement powers of President

In carrying out functions under this section with respect to the export of defense articles and defense services, including defense articles and defense services exported or imported pursuant to a treaty referred to in subsection (j)(1)(C)(i), the President is authorized to exercise the same powers concerning violations and enforcement which are conferred upon departments, agencies and officials by subsections (c), (d), (e), and (g) of section 11 of the Export Administration Act of 1979[1], and by subsections (a) and (c) of section 12 of such Act[2], subject to the same terms and conditions as are applicable to such powers under such Act[3], except that section 11(c)(2)(B) of

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[1] 50 U.S.C.A. § 4610(c), (d), (e), and (g).

[2] 50 U.S.C.A. § 4614(a) and (c).

[3] 50 U.S.C.A. § 4601 et seq.

such Act shall not apply, and instead, as prescribed in regulations issued under this section, the Secretary of State may assess civil penalties for violations of this chapter and regulations prescribed thereunder and further may commence a civil action to recover such civil penalties, and except further that the names of the countries and the types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that the release of such information would be contrary to the national interest. Nothing in this subsection shall be construed as authorizing the withholding of information from the Congress. Notwithstanding section 11(c) of the Export Administration Act of 1979, the civil penalty for each violation involving controls imposed on the export of defense articles and defense services under this section may not exceed $500,000.

(f) Periodic review of items on Munitions List; exemptions

(1) The President shall periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant export controls under this section. The results of such reviews shall be reported to the Speaker of the House of Representatives, the Committee on Foreign Affairs of the House of Representatives, and to the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate. The President may not remove any item from the Munitions List until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International

Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate in accordance with the procedures applicable to reprogramming notifications under section 2394-1(a) of this title. Such notice shall describe the nature of any controls to be imposed on that item under any other provision of law.

(2) The President may not authorize an exemption for a foreign country from the licensing requirements of this chapter for the export of defense items under subsection (j) of this section or any other provision of this chapter until 30 days after the date on which the President has transmitted to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate a notification that includes—

(A) a description of the scope of the exemption, including a detailed summary of the defense articles, defense services, and related technical data covered by the exemption; and

(B) a determination by the Attorney General that the bilateral agreement concluded under subsection (j) of this section requires the compilation and maintenance of sufficient documentation relating to the export of United States defense articles, defense services, and related technical data to facilitate law enforcement efforts to detect, prevent, and prosecute criminal violations of any provision of this chapter, including the efforts on the part of countries and factions engaged in international terrorism to illicitly acquire sophisticated United States defense items.

(3) Paragraph (2) shall not apply with respect to an exemption for Canada from the licensing

requirements of this chapter for the export of defense items.

(4) Paragraph (2) shall not apply with respect to an exemption under subsection (j)(1) to give effect to a treaty referred to in subsection (j)(1)(C)(i) (and any implementing arrangements to such treaty), provided that the President promulgates regulations to implement and enforce such treaty under this section and section 2779 of this title.

(5)(A) Except as provided in subparagraph (B), the President shall take such actions as may be necessary to require that, at the time of export or reexport of any major defense equipment listed on the 600 series of the Commerce Control List contained in Supplement No. 1 to part 774 of subtitle B of title 15, Code of Federal Regulations, the major defense equipment will not be subsequently modified so as to transform such major defense equipment into a defense article.

(B) The President may authorize the transformation of any major defense equipment described in subparagraph (A) into a defense article if the President—

(i) determines that such transformation is appropriate and in the national interests of the United States; and

(ii) provides notice of such transformation to the chairman of the Committee on Foreign Affairs of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate consistent with the notification requirements of section 2776(b)(5)(A) of this title.

(C) In this paragraph, the term "defense article" means an item designated by the President pursuant to subsection (a)(1).

(6) The President shall ensure that any major defense equipment that is listed on the 600 series of the Commerce Control List contained in Supplement No. 1 to part 774 of subtitle B of title 15, Code of Federal Regulations, shall continue to be subject to the notification and reporting requirements of the following provisions of law:

(A) Section 2321j(f) of this title.

(B) Section 2415 of this title.

(C) Section 2753(d)(3)(A) of this title.

(D) Section 2765 of this title.

(E) Section 2776(b), (c), and (d) of this title.

(g) Identification of persons convicted or subject to indictment for violations of certain provisions

(1) The President shall develop appropriate mechanisms to identify, in connection with the export licensing process under this section—

(A) persons who are the subject of an indictment for, or have been convicted of, a violation under—

(i) this section,

(ii) section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410)[4],

(iii) section 793, 794, or 798 of Title 18 (relating to espionage involving defense or classified information)

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[4] Now 50 U.S.C.A. § 4610.

or section 2339A of such title (relating to providing material support to terrorists),

(iv) section 16 of the Trading with the Enemy Act (50 U.S.C. App. 16)[5],

(v) section 206 of the International Emergency Economic Powers Act (relating to foreign assets controls; 50 U.S.C. App. 1705),

(vi) section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) or section 104 of the Foreign Corrupt Practices Act (15 U.S.C. 78dd-2),

(vii) chapter 105 of Title 18 (relating to sabotage),

(viii) section 4(b) of the Internal Security Act of 1950 (relating to communication of classified information; 50 U.S.C. 783(b)),

(ix) section 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276),

(x) section 601 of the National Security Act of 1947 (relating to intelligence identities protection;)[6],

(xi) section 603(b) or (c) of the Comprehensive Anti-Apartheid Act of 1986 (22 U.S.C. 5113(b) and (c)), or

(xii) sections 3, 4, 5, and 6 of the Prevention of Terrorist Access to Destructive Weapons Act of 2004, relating to missile systems designed to destroy aircraft (18 U.S.C. 2332g), prohibitions governing atomic weapons (42 U.S.C. 2122), radiological dispersal devices (18 U.S.C. 2332h), and variola virus (18 U.S.C. 175c);

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[5] Now 50 U.S.C.A. § 4315.

[6] 50 U.S.C.A. § 3121.

(B) persons who are the subject of an indictment or have been convicted under section 371 of Title 18 for conspiracy to violate any of the statutes cited in subparagraph (A); and

(C) persons who are ineligible—

(i) to contract with,

(ii) to receive a license or other form of authorization to export from, or

(iii) to receive a license or other form of authorization to import defense articles or defense services from, any agency of the United States Government.

(2) The President shall require that each applicant for a license to export an item on the United States Munitions List identify in the application all consignees and freight forwarders involved in the proposed export.

(3) If the President determines—

(A) that an applicant for a license to export under this section is the subject of an indictment for a violation of any of the statutes cited in paragraph (1),

(B) that there is reasonable cause to believe that an applicant for a license to export under this section has violated any of the statutes cited in paragraph (1), or

(C) that an applicant for a license to export under this section is ineligible to contract with, or to receive a license or other form of authorization to import defense articles or defense services from, any agency of the United States Government,

the President may disapprove the application. The President shall consider requests by the Secretary of

the Treasury to disapprove any export license application based on these criteria.

(4) A license to export an item on the United States Munitions List may not be issued to a person—

(A) if that person, or any party to the export, has been convicted of violating a statute cited in paragraph (1), or

(B) if that person, or any party to the export, is at the time of the license review ineligible to receive export licenses (or other forms of authorization to export) from any agency of the United States Government,

except as may be determined on a case-by-case basis by the President, after consultation with the Secretary of the Treasury, after a thorough review of the circumstances surrounding the conviction or ineligibility to export and a finding by the President that appropriate steps have been taken to mitigate any law enforcement concerns.

(5) A license to export an item on the United States Munitions List may not be issued to a foreign person (other than a foreign government).

(6) The President may require a license (or other form of authorization) before any item on the United States Munitions List is sold or otherwise transferred to the control or possession of a foreign person or a person acting on behalf of a foreign person.

(7) The President shall, in coordination with law enforcement and national security agencies, develop standards for identifying high-risk exports for regular end-use verification. These standards shall be published in the Federal Register and the initial

standards shall be published not later than October 1, 1988.

(8) Upon request of the Secretary of State, the Secretary of Defense and the Secretary of the Treasury shall detail to the office primarily responsible for export licensing functions under this section, on a nonreimbursable basis, personnel with appropriate expertise to assist in the initial screening of applications for export licenses under this section in order to determine the need for further review of those applications for foreign policy, national security, and law enforcement concerns.

(9) For purposes of this subsection—

(A) the term "foreign corporation" means a corporation that is not incorporated in the United States;

(B) the term "foreign government" includes any agency or subdivision of a foreign government, including an official mission of a foreign government;

(C) the term "foreign person" means any person who is not a citizen or national of the United States or lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act, and includes foreign corporations, international organizations, and foreign governments;

(D) the term "party to the export" means—

(i) the president, the chief executive officer, and other senior officers of the license applicant;

(ii) the freight forwarders or designated exporting agent of the license application; and

(iii) any consignee or end user of any item to be exported; and

(E) the term "person" means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization, or group, including governmental entities.

(h) Judicial review of designation of items as defense articles or services

The designation by the President (or by an official to whom the President's functions under subsection (a) of this section have been duly delegated), in regulations issued under this section, of items as defense articles or defense services for purposes of this section shall not be subject to judicial review.

(i) Report to Department of State

As prescribed in regulations issued under this section, a United States person to whom a license has been granted to export an item on the United States Munitions List shall, not later than 15 days after the item is exported, submit to the Department of State a report containing all shipment information, including a description of the item and the quantity, value, port of exit, and end-user and country of destination of the item.

(j) Requirements relating to country exemptions for licensing of defense items for export to foreign countries

(1) Requirement for bilateral agreement

(A) In general

The President may utilize the regulatory or other authority pursuant to this chapter to exempt a foreign country from the licensing requirements of this chapter with respect to exports of defense items

only if the United States Government has concluded a binding bilateral agreement with the foreign country. Such agreement shall—

(i) meet the requirements set forth in paragraph (2); and

(ii) be implemented by the United States and the foreign country in a manner that is legally-binding under their domestic laws.

(B) Exception for Canada

The requirement to conclude a bilateral agreement in accordance with subparagraph (A) shall not apply with respect to an exemption for Canada from the licensing requirements of this chapter for the export of defense items.

(C) Exception for defense trade cooperation treaties

(i) In general

The requirement to conclude a bilateral agreement in accordance with subparagraph (A) shall not apply with respect to an exemption from the licensing requirements of this chapter for the export of defense items to give effect to any of the following defense trade cooperation treaties, provided that the treaty has entered into force pursuant to article II, section 2, clause 2 of the Constitution of the United States:

(I) The Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London on June 21 and 26, 2007 (and any implementing arrangement thereto).

(II) The Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney September 5, 2007 (and any implementing arrangement thereto).

(ii) Limitation of scope

The United States shall exempt from the scope of a treaty referred to in clause (i)—

(I) complete rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets) or complete unmanned aerial vehicle systems (including cruise missile systems, target drones, and reconnaissance drones) capable of delivering at least a 500 kilogram payload to a range of 300 kilometers, and associated production facilities, software, or technology for these systems, as defined in the Missile Technology Control Regime Annex Category I, Item 1;

(II) individual rocket stages, re-entry vehicles and equipment, solid or liquid propellant motors or engines, guidance sets, thrust vector control systems, and associated production facilities, software, and technology, as defined in the Missile Technology Control Regime Annex Category I, Item 2;

(III) defense articles and defense services listed in the Missile Technology Control Regime Annex Category II that are for use in rocket systems, as that term is used in such Annex, including associated production facilities, software, or technology;

(IV) toxicological agents, biological agents, and associated equipment, as listed in the United States Munitions List (part 121.1 of chapter I of title 22, Code of Federal Regulations), Category XIV,

subcategories (a), (b), (f)(1), (i), (j) as it pertains to (f)(1), (l) as it pertains to (f)(1), and (m) as it pertains to all of the subcategories cited in this paragraph;

(V) defense articles and defense services specific to the design and testing of nuclear weapons which are controlled under United States Munitions List Category XVI(a) and (b), along with associated defense articles in Category XVI(d) and technology in Category XVI(e);

(VI) with regard to the treaty cited in clause (i)(I), defense articles and defense services that the United States controls under the United States Munitions List that are not controlled by the United Kingdom, as defined in the United Kingdom Military List or Annex 4 to the United Kingdom Dual Use List, or any successor lists thereto; and

(VII) with regard to the treaty cited in clause (i)(II), defense articles for which Australian laws, regulations, or other commitments would prevent Australia from enforcing the control measures specified in such treaty.

(2) Requirements of bilateral agreement

A bilateral agreement referred to in paragraph (1)—

(A) shall, at a minimum, require the foreign country, as necessary, to revise its policies and practices, and promulgate or enact necessary modifications to its laws and regulations to establish an export control regime that is at least comparable to United States law, regulation, and policy requiring—

(i) conditions on the handling of all United States-origin defense items exported to the foreign country,

including prior written United States Government approval for any reexports to third countries;

(ii) end-use and retransfer control commitments, including securing binding end-use and retransfer control commitments from all end-users, including such documentation as is needed in order to ensure compliance and enforcement, with respect to such United States-origin defense items;

(iii) establishment of a procedure comparable to a "watchlist" (if such a watchlist does not exist) and full cooperation with United States Government law enforcement agencies to allow for sharing of export and import documentation and background information on foreign businesses and individuals employed by or otherwise connected to those businesses; and

(iv) establishment of a list of controlled defense items to ensure coverage of those items to be exported under the exemption; and

(B) should, at a minimum, require the foreign country, as necessary, to revise its policies and practices, and promulgate or enact necessary modifications to its laws and regulations to establish an export control regime that is at least comparable to United States law, regulation, and policy regarding—

(i) controls on the export of tangible or intangible technology, including via fax, phone, and electronic media;

(ii) appropriate controls on unclassified information relating to defense items exported to foreign nationals;

(iii) controls on international arms trafficking and brokering;

(iv) cooperation with United States Government agencies, including intelligence agencies, to combat efforts by third countries to acquire defense items, the export of which to such countries would not be authorized pursuant to the export control regimes of the foreign country and the United States; and

(v) violations of export control laws, and penalties for such violations.

(3) Advance certification

Not less than 30 days before authorizing an exemption for a foreign country from the licensing requirements of this chapter for the export of defense items, the President shall transmit to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate a certification that—

(A) the United States has entered into a bilateral agreement with that foreign country satisfying all requirements set forth in paragraph (2);

(B) the foreign country has promulgated or enacted all necessary modifications to its laws and regulations to comply with its obligations under the bilateral agreement with the United States; and

(C) the appropriate congressional committees will continue to receive notifications pursuant to the authorities, procedures, and practices of section 2776 of this title for defense exports to a foreign country to which that section would apply and without regard to any form of defense export licensing exemption otherwise available for that country.

(4) Definitions

In this section:

(A) Defense items

The term "defense items" means defense articles, defense services, and related technical data.

(B) Appropriate congressional committees

The term "appropriate congressional committees" means—

(i) the Committee on Foreign Affairs and the Committee on Appropriations of the House of Representatives; and

(ii) the Committee on Foreign Relations and the Committee on Appropriations of the Senate.

(k) Licensing of certain commerce-controlled items

(1) In general

A license or other approval from the Department of State granted in accordance with this section may also authorize the export of items subject to the Export Administration Regulations if such items are to be used in or with defense articles controlled on the United States Munitions List.

(2) Other requirements

The following requirements shall apply with respect to a license or other approval to authorize the export of items subject to the Export Administration Regulations under paragraph (1):

(A) Separate approval from the Department of Commerce shall not be required for such items if such items are approved for export under a Department of State license or other approval.

(B) Such items subject to the Export Administration Regulations that are exported pursuant to a Department of State license or other approval would remain under the jurisdiction of the Department of Commerce with respect to any subsequent transactions.

(C) The inclusion of the term 'subject to the EAR' or any similar term on a Department of State license or approval shall not affect the jurisdiction with respect to such items.

(3) Definition

In this subsection, the term "Export Administration Regulations" means—

(A) the Export Administration Regulations as maintained and amended under the authority of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); or

(B) any successor regulations.

22 C.F.R. § 120.10 provides in relevant part:

§ 120.10 Technical data.

(a) Technical data means, for purposes of this subchapter:

(1) Information, other than software as defined in § 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600–series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software (see § 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this section does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in § 120.11 of this subchapter or telemetry data as defined in note 3 to Category XV(f) of part 121 of this subchapter. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

22 C.F.R. § 120.11 provides in relevant part:

§ 120.11 Public domain.

(a) Public domain means information which is published and which is generally accessible or available to the public:

(1) Through sales at newsstands and bookstores;

(2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;

(3) Through second class mailing privileges granted by the U.S. Government;

(4) At libraries open to the public or from which the public can obtain documents;

(5) Through patents available at any patent office;

(6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;

(7) Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency (see also § 125.4(b)(13) of this subchapter);

(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary

reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:

(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

* * *

22 C.F.R. § 120.17 provides in relevant part:

§ 120.17 Export.

(a) Export means:

(1) Sending or taking a defense article out of the United States in any manner, except by mere travel outside of the United States by a person whose personal knowledge includes technical data; or

(2) Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the U.S. Munitions List, whether in the United States or abroad; or

(3) Disclosing (including oral or visual disclosure) or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government (e.g., diplomatic missions); or

(4) Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad; or

(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

(6) A launch vehicle or payload shall not, by reason of the launching of such vehicle, be considered an export for purposes of this subchapter. However, for certain limited purposes (see § 126.1 of this subchapter), the controls of this subchapter may apply to any sale, transfer or proposal to sell or transfer defense articles or defense services.

* * *

22 C.F.R. § 125.1 provides in relevant part:

§ 125.1 Exports subject to this part.

(a) The controls of this part apply to the export of technical data and the export of classified defense articles. Information which is in the public domain (see § 120.11 of this subchapter and § 125.4(b)(13)) is not subject to the controls of this subchapter.

(b) A license for the export of technical data and the exemptions in § 125.4 may not be used for foreign production purposes or for technical assistance unless the approval of the Directorate of Defense Trade Controls has been obtained. Such approval is generally provided only pursuant to the procedures specified in part 124 of this subchapter.

(c) Technical data authorized for export may not be reexported, transferred or diverted from the country of ultimate end-use or from the authorized foreign end-user (as designated in the license or approval for export) or disclosed to a national of another country without the prior written approval of the Directorate of Defense Trade Controls.

(d) The controls of this part apply to the exports referred to in paragraph (a) of this section regardless of whether the person who intends to export the technical data produces or manufactures defense articles if the technical data is determined by the Directorate of Defense Trade Controls to be subject to the controls of this subchapter.

(e) For the export of technical data related to articles in Category VI(e), Category XVI, and Category XX(b)(1) of § 121.1 of this subchapter, please see § 123.20 of this subchapter.

22 C.F.R. § 125 (1984) provides in relevant part:

§ 125.10 Shipments by U.S. Government agencies.

Exports of technical data by U.S. Government agencies are exempt in accordance with Part 126 of this subchapter. This exemption, however, shall not apply when a U.S. Government agency, on behalf of a private individual or firm, acts as a transmittal agent either as a convenience or in satisfaction of security requirements.

§ 125.11 General exemptions.

(a) Except as provided in § 126.01, district directors of customs and postal authorities are authorized to permit the export without a license of unclassified technical data as follows:

(1) If it is in published[3] form and subject to public dissemination by being:

(i) Sold at newstands and bookstores;

(ii) Available by subscription or purchase without restrictions to any person or available without cost to any person;

(iii) Granted second class mailing privileges by the U.S. Government; or,

(iv) Freely available at public libraries.

* * *

[3] The burden for obtaining appropriate U.S. Government approval for the publication of technical data falling within the definition in § 125.01, including such data as may be developed under other than U.S. Government contract, is on the person or company seeking publication.

22 CFR 2728 provides in relevant part:

§ 120.1 Purpose.

Section 38 of the Arms Export Control Act (22 U.S.C. 2728) authorizes the President to control the export and import of defense articles and defense services. It is the purpose of this subchapter to implement this authority. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended (42 FR 4311). By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Director of the Office of Munitions Control, Bureau of Politico-Military Affairs, Department of State (35 FR 5422).

§ 120.2 Designation of defense articles and defense services.

The Arms Export Control Act also provides (22 U.S.C. 2778(a) and 2794(7)) that the President shall designate which articles shall be deemed to be defense articles and defense services for purposes of this subchapter. The items so designated constitute the United States Munitions List, and are specified in Part 121 of this subchapter. Such designations are made by the Department of State with the concurrence of the Department of Defense.

§ 120.3 Policy on designating defense articles and services.

Designations of defense articles and defense services are based primarily on whether an article or services is deemed to be inherently military in character. Whether it has a predominantly military

application is taken into account. The fact that an article or service may be used for both military and civilian purposes does not in and of itself determine whether it is subject to the export controls of this subchapter. (Narrow exceptions to this general policy exist with respect to exports of certain spare parts and components in Categories V(d); VII(e) and (g); XI(e); XII(c); and XVI(b).) The intended use of the article or service after its export (i.e., for a military or civilian purpose) is also not relevant in determining whether the export is subject to the controls of this subchapter.

§ 120.4 Relation to Department of Commerce regulations.

If an article or service is placed on the United States Munitions List, its export is regulated exclusively by the Department of State. Exports which are not subject to the controls of this subchapter are generally under the regulatory jurisdiction of the Department of Commerce pursuant to the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401-2420) and the implementing Export Administration Regulations (15 CFR Parts 368-399).

§ 120.5 Commodity jurisdiction procedure.

The Office of Munitions Control will provide, upon written request, a determination on whether a particular article is included on the United States Munitions List. Such requests should be accompanied by five copies of the letter requesting a determination and any brochures or other documentation or specifications relating to the article. A "commodity jurisdiction" procedure is used if a

doubt exist within the U.S. Government on whether an article is on the Munitions List. The procedure entails consultations among the Departments of State, Commerce and Defense.

Definitions

§ 120.6 General.

The definitions contained in this part (listed alphabetically) apply to the use of the defined terms throughout this subchapter unless a different meaning is specified. See also §§ 130.2–130.8 for definitions applicable to Part 130.

§ 120.7 Defense articles.

"Defense article" means any item designated in § 121.1. This term includes models, mockups, and other such items which reveal technical data directly relating to items designated in § 121.1.

§ 120.8 Defense services

Defense services means:

(a) the furnishing of assistance, including training, to foreign persons in the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles, whether in the United States or abroad; or

(b) the furnishing to foreign persons of any technical data, whether in the United States or abroad.

§ 120.9 District director of customs.

"District director of customs" means the district directors of customs at customs headquarters ports (other than the port of New York City, New York);

the regional commissioners of customs, the deputy and assistant regional commissioners of customs for customs region II at the port of New York, New York; and port directors at customs ports not designated as headquarters ports.

§ 120.10 Export.

"Export" means, for purposes of this subchapter:

(a) Sending or taking defense articles out of the United States in any manner; or

(b) Transferring registration or control to a foreign person of any aircraft, vessel, or satellite on the United States Munitions List, whether in the United States or abroad; or

(c) Sending or taking technical data outside of the United States in any manner except by mere travel outside of the United States by a person whose personal knowledge includes technical data; or

(d) Disclosing or transferring technical data to a foreign person, whether in the United States or abroad; or

(e) The performance of a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

As of the effective date of the Commercial Space Launch Act, a launch vehicle or payland shall not, by reason of the launching of such vehicle, be considered an export for purposes of this subchapter.

§ 120.11 Foreign person.

"Foreign person" means any person (§ 120.16) who is not a citizen or national of the United States unless that person has been lawfully admitted for permanent residence in the United States under the

Immigration and Naturalization Act (8 U.S.C. 1101, section 101(a)20, 60 Stat. 163) (i.e., individuals referred to as "immigrant aliens" under previous laws and regulations). It includes foreign corporations (i.e., corporations that are not incorporated in the United States), international organizations, foreign governments, and any agency or subdivision of foreign governments (e.g., diplomatic missions).

§ 120.12 Intransit shipment.

"Intransit shipment" means a temporary import into the United States of a defense article.

§ 120.13 License.

"License" means a document bearing the word "license" which when issued by the Director, Office of Munitions Control, or his authorized designee, permits the export or intransit shipment of a specific defense article, defense service, or technical data.

§ 120.14 Manufacturing license agreement.

An agreement (e.g., contract) whereby a U.S. person grants a foreign person an authorization or a license to manufacture defense articles abroad and which involves or contemplates (a) the export of technical data (as defined in § 120.21) or defense articles or the performance of defense services, or (b) the use by the foreign person of technical data or defense articles previously exported by the U.S. person.

§ 120.15 Office of Munitions Control.

"Office of Munitions Control" means the Office of Munitions Control, Bureau of Politico-Military Affairs, Department of State, Washington, D.C. 20520.

§ 120.16 Person.

"Person" means a natural persona as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities. If a provision in this subchapter does not refer exclusively to a foreign person (§ 120.11) or U.S. person (§ 120.23), then it refers to both.

§ 120.17 Presiding official.

"Presiding official" means a person authorized to conduct hearings in administrative proceedings.

§ 120.18 Public domain.

"Public domain" means information which is published and which is generally accessible or available to the public:

(a) Through sales at newsstands and bookstores;

(b) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;

(c) through second class mailing privileges granted by the U.S. Government; or,

(d) at libraries open to the public.

§ 120.19 Significant military equipment

(a) "Significant military equipment" means articles, as identified in paragraph (b) of this section, for which special export controls are warranted because of their capacity for substantial military utility or capability.

(b) Articles designated as significant military equipment under the criterion specified in paragraph (a) of this section include all classified articles and

the articles enumerated in § 121.1 in Categories I (a) and (c) (in quantity); II (a) and (b); III(a) (excluding ammunition for firearms in Category (I)) and (d); IV (a), (b), (d), (e), (f) and (g); V (a) (in quantity) and (b); VI (a), (b) (inclusive only of turrets and gun mounts, missile systems, and special weapons systems) and (e); VII (a), (b), (c), (e) (f) and (g); VIII (a), (b)(1), (c) and (d), GEMS as defined in (i), and inertial systems as defined in (j); XI (a)(1), (b)(1), (c); XII (a) and (b); XIV (a), (b), (c) and (d); XVI; XVII; and XX (a) and (b).

(c) Items in § 121.1 which are preceded by an asterisk are "significant military equipment."

(d) Section 47(6) of the Arms Export Control Act (22 U.S.C. 2794(6) note) provides a definition of "major defense equipment" and refers to certain significant combat equipment on the U.S. Munitions List. The terms "significant military equipment" and "significant combat equipment" are considered to be equivalent for purposes of that section of the Arms Export Control Act and this subchapter.

§ 120.20 Technical assistance agreement.

An agreement (e.g., contract) for the performance of defense services or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles.

§ 120.21 Technical data.

"Technical data" means, for purposes of this subchapter:

(a) Classified information relating to defense articles and defense services;

* * *

22 CFR § 125 provides in relevant part:

§ 125.1 Exports subject to this Part.

(a) The export controls of this Part apply to the export of technical data and the export of classified defense articles. Information which is in the "public domain" (see § 120.18) is not subject to the controls of this subchapter.

(b) A license for the export of technical data and the exemptions in § 125.4 may not be used for foreign production purposes or for technical assistance unless the approval of the Department of State has been obtained. Such approval is generally provided only pursuant to the procedures specified in Part 124 of this subchapter.

(c) Technical data authorized for export may not be diverted or transferred from the country of ultimate end-use (as designated in the license or approval for export) or disclosed to a national of another country without the prior written approval of the Department of State.

(d) The export controls of this Part apply to the exports referred to in paragraph (a) of this section regardless of whether the person who intends to export the technical data produces or manufactures defense articles if the technical data is determined by the Office of Munitions Control to be subject to the controls of this subchapter.

(e) The provisions of this subchapter do not apply to technical data related to articles in Category VI(e) and Category XVI. The export of such data is controlled by the department of Energy and the Nuclear Regulatory Commission pursuant to the

Atomic Energy act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978.

§ 125.2 Exports of unclassified technical data.

(a) *General.* A license issued by the Department of State is required for the export of unclassified technical data unless the export is exempt from the licensing requirements of this subchapter.

(b) *Patents.* A license issued by the Department of State is required for the export of technical data whenever the data exceeds that which is used to support a domestic filing of a patent application or to support a foreign filing of a patent application whenever no domestic application has been filed. The export of technical data to support the filing and processing of patent applications in foreign countries is subject to regulations issued by the U.S. Patent and Trademark Office pursuant to 35 U.S.C. 184.

(c) *Disclosures.* Unless otherwise expressly exempted in this subchapter, a license is required for the oral, visual or documentary disclosure of technical data to foreign nationals in connection with visits by U.S. persons to foreign countries, visits by foreign persons to the United States, or otherwise. A license is required regardless of the manner in which the technical data is transmitted (e.g., in person, by telephone, correspondence, electronic means, telex, etc.) A license is required for such disclosures in connection with visits by U.S. persons to foreign diplomatic missions and consular offices.

§ 125.3 Exports of classified technical data and classified defense articles.

(a) A request for authority to export defense articles or technical data classified pursuant to

Executive Order 12356 or other legal authority must be submitted to the Office of Munitions Control for approval. The application must contain full details of the proposed transaction. A nontransfer and use certificate (Form DSP-83) executed by the foreign consignee, end-user and an authorized representative of the foreign government involved will be required. This requirement may be waived by the Office of Munitions Control if the end-user is a foreign government with which the United States has a General Security of Information Agreement or other foreign government security assurance (e.g., diplomatic note).

(b) Classified technical data which is approved by the Department of State either for export or reexport after a temporary import will be transferred or disclosed only in accordance with the requirements relating to the transmission of classified information in the Department of Defense Industrial Security Manual. Any other requirements imposed by cognizant U.S. departments and agencies must also be satisfied.

(c) The approval of the Department of State must be obtained for the export of technical data by a U.S. person to a foreign person in the U.S. or in a foreign country unless the proposed export is exempt under the provisions of this subchapter.

(d) All communications relating to a patent application covered by an invention secrecy order are to be addressed to the U.S. Patent and Trademark Office (See 37 CFR 5.11).

Exemptions

§ 125.4 Exemptions of general applicability.

(a) The following exemptions apply to exports of technical data for which no license or other approval is needed from the Office of Munitions Control. These exemptions do not apply to exports to proscribed destinations under § 126.1. Unless specifically indicated, these exemptions do not apply to classified information. Transmission of classified information must comply with the requirements of the Department of Defense Industrial Security Manual and the exporter must certify to the transmittal authority that the technical data does not exceed the technical limitation of the authorized export.

(b) The following exports are exempt from the licensing requirements of this subchapter;

(1) Technical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense;

(2) Technical data, including classified information, in furtherance of a manufacturing license or technical assistance agreement approved by the Department of State under Part 124 of this subchapter and which meet the requirements of § 124.3;

(3) Technical data, including classified information, in furtherance of a contract between the exporter and an agency of the U.S. Government, if the contract provides for the export of the relevant technical data and such data does not disclose the details of design, development, production, or manufacture of any defense article;

(4) Additional copies of technical data, including classified information, previously exported or authorized for export to the same recipient. Revised copies of such technical data are also exempt if they pertain to the identical defense article, and if the revisions are solely editorial and do not add to the content of technology previously exported or authorized for export to the same recipient;

(5) Technical data in the form of operations, maintenance, and training information relating to a defense article lawfully exported or authorized for export to the same recipient. This exemption applies only to exports by the original exporter;

(6) Technical data related to firearms not in excess of caliber .50 and ammunition for such weapons, except detailed design, development, production or manufacturing information;

(7) Technical data being returned to the original source of import;

(8) Technical data directly related to classified information which has been previously exported in accordance with this Part to the same recipient, and which does not disclose the details of the design, development, production, or manufacture of any defense article;

(9) Technical data, including classified information, sent by a U.S. corporation to a U.S. person employed by that corporation overseas or to a U.S. Government agency. This exemption is subject to the limitations of § 125.1(b) and may be used only if (i) the technical data is to be used overseas solely by U.S. persons and (ii) if the U.S. person overseas is an employee of the

U.S. Government or is directly employed by the U.S. corporation and not by a foreign subsidiary;

(10) Disclosures of technical data in the U.S. by U.S. institution of higher learning to foreign persons who are their bona fide and full time regular employees. This exemption is available only if (i) the employee's permanent abode throughout the period of employment is in the United States; (ii) the employee is not a national of a country to which exports are prohibited pursuant to § 126.1; and (iii) the institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Office of Munitions Control;

(11) Technical data, including classified information, for which the exporter, pursuant to an arrangement with the Department of Defense or NASA which requires such exports, has been granted an exemption in writing from the licensing provisions of this Part by the Office of Munitions Control. Such an exemption will normally be granted only if the arrangement directly implements an international agreement to which the United States is a party and if multiple exports are contemplated. The Office of Munitions Control, in consultation with the relevant U.S. Government agencies, will determine whether the interests of the United States Government are best served by expediting exports under an arrangement through an exemption. (See also paragraph (b)(3) of this section for a related exemption);

(12) Technical data which is specifically exempt under Part 126 of this subchapter; or

(13) Technical data approved for public release (i.e., unlimited distribution) by the U.S. Government department or agency which originated or developed the information. This exemption is applicable to information approved by the cognizant U.S. Government department or agency for public release in any from (e.g., publications, speeches, conference papers, movies, etc.). It does not require that the information be published in order to qualify for the exemption.

§ 125.5 Exemptions for plant visits.

(a) A license is not required for the oral and visual disclosure of unclassified technical data during the course of a classified plant visit by a foreign person, provided (1) the classified visit has itself been authorized pursuant to a license issued by the Office of Munitions Control; or (2) the classified visit was approved in connection with an actual or potential government-to-government program or project by a U.S. Government agency having classification jurisdiction over the classified defense article or classified technical data involved under Executive Order 12356 or other applicable Executive Order; and (3) the unclassified information to be released is directly related to the classified defense article or technical data for which approval was obtained and does not disclose the details of the design, development, production or manufacture of any other defense articles. In the case of U.S. Government approved visits, the requirements of the Defense Industrial Security Manual [Department of Defense Manual 5220.22M] must be met.

(b) The approval of the Office of Munitions Control is not required for the disclosure of oral and visual

classified information to a foreign person during the course of a plant visit approved by the appropriate U.S. Government agency if (1) the requirements of the Defense Industrial Security Manual have been met, (2) the classified information is directly related to that which was approved by the U.S. Government agency, (3) it does not exceed that for which approval was obtained, and (4) it does not disclose the details of the design, development, production or manufacture of any other defense articles.

(c) A license is not required for the documentary disclosure to a foreign person of unclassified technical data during the course of a plant visit (either classified or unclassified) approved by the Office of Munitions Control or a U.S. Government agency provided the documents do not contain technical data in excess of that approved for oral and visual disclosure. The documents must not contain technical data which could be used for design, development, production or manufacture of a defense article.

§ 125.6 Certification requirements.

To claim an exemption for the export of technical data under the provisions of § 125.4 and § 125.5, an exporter must certify that the proposed export is covered by a relevant paragraph of that section. This certification is not required if the technical data is only disclosed orally or visually. The certification referred to in this section consists of marking the package or letter containing the technical date: "22 CFR 125. *(identify subsection)* applicable" and identifying the specific paragraph under which the exemption is claimed. In the case of unclassified technical data, district directors of customs may

require that the certification be made on a shipper's export declaration.

Procedures

§ 125.7 Exports of unclassified technical data.

(a) *General.* Unless an export is exempt from the licensing requirements of this subchapter, an application for the permanent export of unclassified technical data must be made to the Office of Munitions Control on Form DSP-5. If the technical data is to be returned to the United States, Form DSP-73 should be used instead. In the case of a visit, sufficient details of the proposed discussions must be transmitted for an adequate appraisal of the data. Seven copies of the data or the details of the discussions must be provided. Only one copy must be provided if a renewal of the license is requested.

(b) *Patents.* Requests for the filing of patent applications in a foreign country and requests for the filing of amendments, modifications or supplements to such patents must be directed to the U.S. Patent and Trademark Office in accordance with 37 CFR Part 5. If an applicant complies with the regulations of that office, the approval of the Office of Munitions Control is required only in the circumstances described in § 125.2(b). In such cases, an application must be submitted in accordance with the provisions of paragraph (a) of this section.

§ 125.8 Exports of classified technical data and classified defense articles.

All applications for the export or temporary import of classified technical data or classified defense articles must be submitted to the Office of Munitions Control on Form DSP-85. Applications will be

accepted from U.S. nationals only. An application for the export of classified technical data must be accompanied by seven copies of the data and a completed Form DSP-83 (see § 123.10). An application for the export of classified defense articles must be accompanied by seven copies of descriptive information and a completed Form DSP-83. Only one copy of the data or descriptive literature must be provided if a renewal of the license is requested. All classified materials accompanying an application must be transmitted to the Office of Munitions Control in accordance with the requirements of section II of the Defense Industrial Security Manual (Department of Defense Manual Number 5220.22-M).

§ 125.9 Filing of licenses for exports of unclassified technical data.

Licenses for the export of unclassified technical data must be deposited with the appropriate district director of customs or postmaster at the time of shipment or mailing. The district director of customer or postmaster will endorse and transmit the licenses to the Office of Munitions Control in accordance with the instructions contained on the reverse side of the license. If a license for the export of unclassified technical data is used but not endorsed by U.S. Customs or a postmaster for whatever reason, the person exporting the data must self-endorse the license and return it promptly to the Office of Munitions Control.

§ 125.10 Filing of Licenses for exports of classified technical data and classified defense articles.

Licenses for the export of classified technical data or classified defense articles will be forwarded by the Office of Munitions Control to the Defense Investigative Service of the Department of Defense in accordance with the provisions of the Department of Defense Industrial Security Manual. The Office of Munitions Control will forward a copy of the license to the applicant for the applicant's information. The Defense Investigative Service will return the endorsed license to the Office of Munitions Control upon completion of the authorized export or expiration of the license, whichever occurs first.

* * *

80 Fed. Reg. 31525 provides in relevant part:

DEPARTMENT OF STATE

22 CFR Parts 120, 123, 125, and 127

[Public Notice 9149]

RIN 1400-AD7O

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

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform (ECR) initiative, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to update the definitions of "defense article," "defense services," "technical data," "public domain," "export," and "reexport or retransfer" in order to clarify the scope of activities and information that are covered within these definitions and harmonize the definitions with the Export Administration Regulations (EAR), to the extent appropriate. Additionally, the Department proposes to create definitions of "required," "technical data that arises during, or results from, fundamental research," "release," "retransfer," and "activities that are not exports, reexports, or retransfers" in order to clarify and support the interpretation of the revised definitions that are proposed in this rulemaking. The Department proposes to create new sections detailing

the scope of licenses, unauthorized releases of information, and the "release" of secured information, and revises the sections on "exports" of "technical data" to U.S. persons abroad. Finally, the Department proposes to address the electronic transmission and storage of unclassified "technical data" via foreign communications infrastructure. This rulemaking proposes that the electronic transmission of unclassified "technical data" abroad is not an "export," provided that the data is sufficiently secured to prevent access by foreign persons. Additionally, this proposed rule would allow for the electronic storage of unclassified "technical data" abroad, provided that the data is secured to prevent access by parties unauthorized to access such data. The revisions contained in this proposed rule are part of the Department of State's retrospective plan under Executive Order 13563 first submitted on August 17, 2011.

DATES: The Department of State will accept comments on this proposed rule until August 3, 2015.

ADDRESSES: Interested parties may submit comments within 60 days of the date of publication by one of the following methods:

- *Email: DDTCPublicComments@state.gov* with the subject line, "ITAR Amendment—Revisions to Definitions; Data Transmission and Storage."

- *Internet:* At *www.regulations.gov*, search for this notice by using this rule's RIN (1400-AD70).

Comments received after that date may be considered, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire

to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Mr. C. Edward Peartree, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663–1282; email *DDTCResponseTeam@state.gov*. ATTN: ITAR Amendment—Revisions to Definitions; Data Transmission and Storage. The Department of State's full retrospective plan can be accessed at *http://www.state.gov/documents/organization/181028.pdf*.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130). The items subject to the jurisdiction of the ITAR, *i.e.*, "defense articles" and "defense services," are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations ("EAR," 15

CFR parts 730 through 774, which includes the Commerce Control List (CCL) in Supplement No. 1 to part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

BIS is concurrently publishing comparable proposed amendments (BIS companion rule) to the definitions of "technology," "required," "peculiarly responsible," "published," results of "fundamental research," "export," "reexport," "release," and "transfer (in-country)" in the EAR. A side-by-side comparison on the regulatory text proposed by both Departments is available on both agencies' Web sites: *www.pmddtc.state.gov* and *www.bis.doc.gov*.

1. Revised Definition of Defense Article

The Department proposes to revise the definition of "defense article" to clarify the scope of the definition. The current text of § 120.6 is made into a new paragraph (a), into which software is added to the list of things that are a "defense article" because software is being removed from the definition of "technical data." This is not a substantive change.

A new § 120.6(b) is added to list those items that the Department has determined should not be a "defense article," even though they would otherwise meet the definition of "defense article." All the items described were formerly excluded from the definition of "technical data" in § 120.10. These items are declared to be not subject to the ITAR to parallel the

EAR concept of "not subject to the EAR" as part of the effort to harmonize the ITAR and the EAR. This does not constitute a change in policy regarding these items or the scope of items that are defense articles.

2. Revised Definition of Technical Data

The Department proposes to revise the definition of "technical data" in ITAR § 120.10 in order to update and clarify the scope of information that may be captured within the definition. Paragraph (a)(1) of the revised definition defines "technical data" as information "required" for the "development," "production," operation, installation, maintenance, repair, overhaul, or refurbishing of a "defense article," which harmonizes with the definition "technology" in the EAR and the Wassenaar Arrangement. This is not a change in the scope of the definition, and additional words describing activities that were in the prior definition are included in parentheticals to assist exporters.

Paragraph (a)(1) also sets forth a broader range of examples of formats that "technical data" may take, such as diagrams, models, formulae, tables, engineering designs and specifications, computer-aided design files, manuals or documentation, or electronic media, that may constitute "technical data." Additionally, the revised definition includes certain conforming changes intended to reflect the revised and newly added defined terms proposed elsewhere in this rule.

The proposed revised definition also includes a note clarifying that the modification of the design of an existing item creates a new item and that the

"technical data" for the modification is "technical data" for the new item.

Paragraph (a)(2) of the revised definition defines "technical data" as also including information that is enumerated on the USML. This will be "technical data" that is positively described, as opposed to "technical data" described in the standard catch-all "technical data" control for all "technical data" directly related to a "defense article" described in the relevant category. The Department intends to enumerate certain controlled "technical data" as it continues to move the USML toward a more positive control list.

Paragraph (a)(3) of the revised definition defines "technical data" as also including classified information that is for the "development," "production," operation, installation, maintenance, repair, overhaul, or refurbishing of a "defense article" or a 600 series item subject to the EAR. Paragraph (a)(5) of the revised definition defines "technical data" as also including information to access secured "technical data" in clear text, such as decryption keys, passwords, or network access codes. In support of the latter change, the Department also proposes to add a new provision to the list of violations in § 127.1(b)(4) to state that any disclosure of these decryption keys or passwords that results in the unauthorized disclosure of the "technical data" or software secured by the encryption key or password is a violation and will constitute a violation to the same extent as the "export" of the secured information. For example, the "release" of a decryption key may result in the unauthorized disclosure of multiple files containing "technical data" hosted abroad and could therefore

constitute a violation of the ITAR for each piece of "technical data" on that server.

Paragraph (b) of the revised definition of "technical data" excludes non-proprietary general system descriptions, information on basic function or purpose of an item, and telemetry data as defined in Note 3 to USML Category XV(f) (§ 121.1). Items formerly identified in this paragraph, principles taught in schools and "public domain" information, have been moved to the new ITAR § 120.6(b).

The proposed definition removes software from the definition of "technical data." Specific and catch-all controls on software will be added elsewhere throughout the ITAR as warranted, as it will now be defined as a separate type of "defense article."

3. Proposed Definition of Required

The Department proposes a definition of "required" in a new § 120.46. "Required" is used in the definition of "technical data" and has, to this point, been an undefined term in the ITAR. The word is also used in the controls on technology in both the EAR and the Wassenaar Arrangement, as a defined term, which the Department is now proposing to adopt:

. . . [O]nly that portion of [technical data] that is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions. Such required [technical data] may be shared by different products.

The proposed definition of "required" contains three notes. These notes explain how the definition is to be applied.

Note 1 provides that the definition explicitly includes information for meeting not only controlled performance levels, but also characteristics and functions. All items described on the USML are identified by a characteristic or function. Additionally, some descriptions include a performance level. As an example, USML Category VIII(a)(1) controls aircraft that are "bombers" and contains no performance level. The characteristic of the aircraft that is controlled is that it is a bomber, and therefore, any "technical data" peculiar to making an aircraft a bomber is "required."

Note 2 states that, with the exception of "technical data" specifically enumerated on the USML, the jurisdictional status of unclassified "technical data" is the same as that of the commodity to which it is directly related. Specifically, it explains that "technical data" for a part or component of a "defense article" is directly related to that part or component, and if the part or component is subject to the EAR, so is the "technical data."

Note 3 establishes a test for determining if information is peculiarly responsible for meeting or achieving the controlled performance levels, characteristics or functions of a "defense article." It uses the same catch-and-release concept that the Department implemented in the definition of "specially designed." It has a similarly broad catch of all information used in or for use in the "development," "production," operation, installation, maintenance, repair, overhaul, or refurbishing of a "defense article." It has four releases that mirror the "specially designed" releases, and one reserved paragraph for information that the Department

determines is generally insignificant. The first release is for information identified in a commodity jurisdiction determination. The second release is reserved. The third release is for information that is identical to information used in a non-defense article that is in "production," and not otherwise enumerated on the ITAR. The fourth release is for information that was developed with knowledge that it is for both a "defense article" and a non-defense article. The fifth release is information that was developed for general purpose commodities.

In the companion rule, BIS proposes to make Note 3 into a stand-alone definition for "peculiarly responsible" as it has application outside of the definition of "required." The substance of Note 3 and the BIS definition of "peculiarly responsible" are identical. DDTC asks for comments on the placement of this concept.

4. Proposed Definitions of Development and Production

The Department proposes to add § 120.47 for the definition of "development" and § 120.48 for the definition of "production." These definitions are currently in Notes 1 and 2 to paragraph (b)(3) in § 120.41, the definition of "specially designed." Because "technical data" is now defined, in part, as information "required" for the "development" or "production" of a "defense article," and these words are now used in the definition of a "defense service," it is appropriate to define these terms. The adoption of these definitions is also done for the purpose of harmonization because these definitions are also used in the EAR and by the Wassenaar Arrangement.

5. Revised Definition of Public Domain

The Department proposes to revise the definition of "public domain" in ITAR § 120.11 in order to simplify, update, and introduce greater versatility into the definition. The existing version of ITAR § 120.11 relies on an enumerated list of circumstances through which "public domain" information might be published. The Department believes that this definition is unnecessarily limiting in scope and insufficiently flexible with respect to the continually evolving array of media, whether physical or electronic, through which information may be disseminated.

The proposed definition is intended to identify the characteristics that are common to all of the enumerated forms of publication identified in the current rule—with the exception of ITAR § 120.11(a)(8), which is addressed in a new definition for "technical data that arises during, or results from, fundamental research"—and to present those common characteristics in a streamlined definition that does not require enumerated identification within the ITAR of every current or future qualifying publication scenario. Additionally, the proposed definition incorporates phrases such as "generally accessible" and "without restriction upon its further dissemination" in order to better align the definition found in the EAR and more closely aligned with the definition in the Wassenaar Arrangement control lists.

The proposed definition requires that information be made available to the public without restrictions on its further dissemination. Any information that meets this definition is "public domain." The

definition also retains an exemplary list of information that has been made available to the public without restriction and would be considered "public domain." These include magazines, periodicals and other publications available as subscriptions, publications contained in libraries, information made available at a public conference, meeting, seminar, trade show, or exhibition, and information posted on public Web sites. The final example deems information that is submitted to co-authors, editors, or reviewers or conference organizers for review for publication to be "public domain," even prior to actual publication. The relevant restrictions do not include copyright protections or generic property rights in the underlying physical medium.

Paragraph (b) of the revised definition explicitly sets forth the Department's requirement of authorization to release information into the "public domain." Prior to making available "technical data" or software subject to the ITAR, the U.S. government must approve the release through one of the following: (1) The Department; (2) the Department of Defense's Office of Security Review; (3) a relevant U.S. government contracting authority with authority to allow the "technical data" or software to be made available to the public, if one exists; or (4) another U.S. government official with authority to allow the "technical data" or software to be made available to the public.

The requirements of paragraph (b) are not new. Rather, they are a more explicit statement of the ITAR's requirement that one must seek and receive a license or other authorization from the Department

or other cognizant U.S. government authority to release ITAR controlled "technical data," as defined in § 120.10. A release of "technical data" may occur by disseminating "technical data" at a public conference or trade show, publishing "technical data" in a book or journal article, or posting "technical data" to the Internet. This proposed provision will enhance compliance with the ITAR by clarifying that "technical data" may not be made available to the public without authorization. Persons who intend to discuss "technical data" at a conference or trade show, or to publish it, must ensure that they obtain the appropriate authorization.

Information that is excluded from the definition of "defense article" in the new § 120.6(b) is not "technical data" and therefore does not require authorization prior to release into the "public domain." This includes information that arises during or results from "fundamental research," as described in the new § 120.49; general scientific, mathematical, or engineering principles commonly taught in schools, and information that is contained in patents.

The Department also proposes to add a new provision to § 127.1 in paragraph (a)(6) to state explicitly that the further dissemination of "technical data" or software that was made available to the public without authorization is a violation of the ITAR, if, and only if, it is done with knowledge that the "technical data" or software was made publicly available without an authorization described in ITAR § 120.11(b)(2). Dissemination of publicly available "technical data" or software is not an export-controlled event, and does not require authorization

from the Department, in the absence of knowledge that it was made publicly available without authorization.

"Technical data" and software that is made publicly available without proper authorization remains "technical data" or software and therefore remains subject to the ITAR. As such, the U.S. government may advise a person that the original release of the "technical data" or software was unauthorized and put that person on notice that further dissemination would violate the ITAR.

* * *

22 C.F.R. § 126.7 provides in relevant part:

§ 126.7 Denial, revocation, suspension, or amendment of licenses and other approvals.

(a) Policy. Licenses or approvals shall be denied or revoked whenever required by any statute of the United States (see §§ 127.7 and 127.11 of this subchapter). Any application for an export license or other approval under this subchapter may be disapproved, and any license or other approval or exemption granted under this subchapter may be revoked, suspended, or amended without prior notice whenever:

(1) The Department of State deems such action to be in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable; or

(2) The Department of State believes that 22 U.S.C. 2778, any regulation contained in this subchapter, or the terms of any U.S. Government export authorization (including the terms of a manufacturing license or technical assistance agreement, or export authorization granted pursuant to the Export Administration Act, as amended) has been violated by any party to the export or other person having significant interest in the transaction; or

(3) An applicant is the subject of a criminal complaint, other criminal charge (e.g., an information), or indictment for a violation of any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(4) An applicant or any party to the export or the agreement has been convicted of violating any of the

U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(5) An applicant is ineligible to contract with, or to receive a license or other authorization to import defense articles or defense services from, any agency of the U.S. Government; or

(6) An applicant, any party to the export or agreement, any source or manufacturer of the defense article or defense service or any person who has a significant interest in the transaction has been debarred, suspended, or otherwise is ineligible to receive an export license or other authorization from any agency of the U.S. government (e.g., pursuant to debarment by the Department of Commerce under 15 CFR part 760 or by the Department of State under part 127 or 128 of this subchapter); or

(7) An applicant has failed to include any of the information or documentation expressly required to support a license application, exemption, or other request for approval under this subchapter, or as required in the instructions in the applicable Department of State form or has failed to provide notice or information as required under this subchapter; or

(8) An applicant is subject to sanctions under other relevant U.S. laws (e.g., the Missile Technology Controls title of the National Defense Authorization Act for FY 1991 (Pub.L. 101–510); the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (Pub.L. 102–182); or the Iran–Iraq Arms Non–Proliferation Act of 1992 (Pub.L. 102–484)).

(b) Notification. The Directorate of Defense Trade Controls will notify applicants or licensees or other

appropriate United States persons of actions taken pursuant to paragraph (a) of this section. The reasons for the action will be stated as specifically as security and foreign policy considerations permit.

(c) Reconsideration. If a written request for reconsideration of an adverse decision is made within 30 days after a person has been informed of the decision, the U.S. person will be accorded an opportunity to present additional information. The case will then be reviewed by the Directorate of Defense Trade Controls.

(d) Reconsideration of certain applications. Applications for licenses or other requests for approval denied for repeated failure to provide information or documentation expressly required will normally not be reconsidered during the thirty day period following denial. They will be reconsidered after this period only after a final decision is made on whether the applicant will be subject to an administrative penalty imposed pursuant to this subchapter. Any request for reconsideration shall be accompanied by a letter explaining the steps that have been taken to correct the failure and to ensure compliance with the requirements of this subchapter.

(e) Special definition. For purposes of this subchapter, the term "party to the export" means:

(1) The chief executive officer, president, vice-presidents, other senior officers and officials (e.g., comptroller, treasurer, general counsel) and any member of the board of directors of the applicant;

(2) The freight forwarders or designated exporting agent of the applicant; and

(3) Any consignee or end-user of any item to be exported.

22 C.F.R. § 128.1 provides in relevant part:

§ 128.1 Exclusion of functions from the Administrative Procedure Act.

The Arms Export Control Act authorizes the President to control the import and export of defense articles and services in furtherance of world peace and the security and foreign policy of the United States. It authorizes the Secretary of State to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. It also authorizes the Secretary of State to revoke, suspend or amend licenses or other written approvals whenever the Secretary deems such action to be advisable. The administration of the Arms Export Control Act is a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act and is thereby expressly exempt from various provisions of that Act. Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

DANIEL J. BERNSTEIN, Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Defendants	C 95-0582 MHP **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Hearing: September 20, 1996
Time: 12:00 Noon
Judge Marilyn Hall Patel

* * *

in connection therewith (defense services). While such controls may be cross-referenced in the regulations, there are distinct regulatory provisions for each including, of most pertinence, a separate definition of technical data with its various exceptions.

3. The Exemptions To The Definition Of Technical Data Are Not Vague.

Plaintiff challenges as vague the very exceptions that exclude a host of information from export controls. These exemptions are far from vague. Plaintiff claims first that the exception for "scientific, mathematical, and engineering principles commonly taught in schools, colleges and universities" is vague, based solely on the notion that one school might not teach what another does. Pl. Mem. at 35. This argument can be quickly passed over. The ITAR does not purport to require uniformity in what schools teach. The obvious purpose of the exception is to indicate that technical data does not include information exchanged in the common, everyday occurrence of a university lecture. The ITAR does not indicate that the government must pass judgment on what can or cannot be deemed a "common" academic principle, nor is it so applied. Lowell Decl. ¶ 23.

Plaintiffs attack on the "public domain" exemption is also meritless. That provision contains several specific exceptions as to what is controlled as technical that any ordinary person can understand—information in bookstores, newsstands, or disclosed at conferences. Plaintiff sees a "Catch-22" "lurking"

in the provision that, unless something is already published, it is subject to export controls. He would construe the definition to mean, in other words, that nothing can be published without the government's approval. Not only is this wrong as a factual matter, *see* Lowell Decl. ¶ 22, it is by far the most *un*-reasonable interpretation of the provision, one that people of ordinary intelligence are *least* likely to assume is the case.[32]

The origin of plaintiffs "Catch-22" theory was apparently his phone conversation with Charles Ray, formerly of the Office of Defense Trade Controls.[33]

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[32] Plaintiffs discussion of the public domain provision is also highly confusing. He claims that "software" should be treated as in the public domain because that exception refers to "information," not "technical data." Pl Mem. at 35-36. The public domain provision is a clear and express exception to the definition of "technical data." 22 C.F.R. § 120.10(a)(4) (technical data does "*not include . . . information in the public domain as defined by § 120.11*") (emphasis added). Thus, "information" in the public domain is quite obviously an exclusion from technical data controls. Meanwhile, cryptographic software is expressly excluded from technical data licensing procedures. *See* 22 C.F.R. § 121.8(f).

[33] This transcript was initially disclosed by plaintiff in June 1995, and defendants requested, but were never provided, a copy of the tape recording of this conversation, which plaintiff apparently still has since he claims to have edited the transcript in the interim. The Federal Rules of Evidence require the use of the original record, unless lost or destroyed or not obtainable by judicial process. F.R.E. 1002, 1004. The transcript also constitutes hearsay. For these reasons, it is inadmissible evidence. Pursuant to the Court's direction, the parties will confer on factual issues and file a joint statement of facts not in dispute on September 11, 1996. At the completion of this conferral process, should evidentiary disputes remain, defendants will submit a separate list of evidentiary objections,

See Bernstein Decl. ¶¶ 23-31. This exemplifies, perhaps more than anything, the deficient manner in which plaintiff has presented his claims. Assuming, *arguendo*, that the transcript plaintiff submits of his conversation with Mr. Ray is authentic, it greatly undermines plaintiff's claims.

First, the conversation did not address whether Dr. Bernstein could or could not publish or export either Snuffle or his related paper, but concerned hypothetical applications of the public domain exception that plaintiff posed to Mr. Ray. Declaration of Charles Ray ¶ 6. Mr. Ray repeatedly made clear that he was not offering legal interpretations, but merely trying to assist the plaintiff in better understanding the ITAR. *Id*. ¶ 8. Mr. Ray also said he was not providing any determinations on behalf of the State Department that applied to plaintiff, and the conversation had nothing to do with plaintiff's CJ requests at issue in this case. *Id*. ¶ 6.[34] Indeed, according to his own transcript, plaintiff agreed that the discussion was

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including as to any additional exhibits or declarations plaintiffs submit with their opposition brief on August 30, 1996.

[34] It is well-established that the government cannot be bound by the representations of any employee who does not have actual authority to make a binding determination or decision. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

For this reason, the frequent references in several of plaintiff's declarations to telephone conversations with government employees is highly suspect evidence. Aside from being hearsay, evidence of phone conversations with an employee lacks weight and relevance, since such conversations do not reflect the actual discharge of legal authority by responsible agency officials.

hypothetical, and that he would not take Mr. Ray's views as "gospel."[35] *Id.*

Despite all of this, Mr. Ray's ultimate advice was sound and supported by case law: if the motive behind the publication of technical data related to a munition was to knowingly circumvent the ITAR, then this would have to be considered in assessing whether a violation occurred. *Id.* ¶ 7; *see Edler*, 570 F.2d at 522: *Posey*, 864 F.2d at 1496-97 (conduct of exporting technical data, even if publicly available, can be controlled if plaintiff intends to assist a foreign entity in developing or maintaining an item on the USML). This episode illustrates well that the basis of plaintiff's claims are his own misunderstanding, misreading, and misstatement of both the ITAR and of what he was advised by the government.

4. The Definition of Export Is Not Vague.

Plaintiff next challenges as vague the definition of an "export" of technical data as including disclosures to foreign persons in the United States. As defendants have explained, this definition cannot be viewed in isolation, but in connection with the exemptions to what is—and is not—regulated as technical data. *See* Def. Mem. at 29-30. Indeed, defendants agree with plaintiff that no reasonable person would view the regulations as controlling

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[35] Not only did he take them as "gospel," plaintiff avers in his Complaint that Mr. Ray told him "in essence that his Scientific Paper could never be placed in the public domain since it is not already in the public domain." Compl. ¶ 156. By plaintiff's own account, this greatly mischaracterizes the statements of Charles Ray. Plaintiff then sued Mr. Ray in his *individual* capacity.

purely domestic publication on cryptography, Pl. Mem. at 36, which is why this aspect of the vagueness claim fails.

a. Transmission Over The Internet Presents Export Concerns.

Plaintiff also raises the issue as to whether Internet distribution of cryptographic software would constitute an export. Pl. Mem. at 36-37. As a threshold matter, the question

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