

1 question whether the provision would be unconstitutional in some
2 applications is moot, because none of those provisions applies to what Stagg
3 alleges it intends to do. We agree that Plaintiff's intended conduct is not
4 subject to the ITAR's licensing requirement and further conclude that that
5 finding renders Stagg's constitutional challenges moot. We therefore
6 VACATE the judgment of the district court and direct that the action be
7 DISMISSED.

8
9 LAWRENCE D. ROSENBERG (Christopher
10 B. Stagg, Stagg, P.C., New York, NY, *on*
11 *the brief*), Jones Day, Washington, DC,
12 *for Plaintiff-Appellant*.

13
14 DOMINIKA TARCZYNSKA, Assistant
15 United States Attorney (Benjamin H.
16 Torrance, Assistant United States
17 Attorney, *on the brief*), *for* Audrey
18 Strauss, Acting United States Attorney
19 for the Southern District of New York,
20 New York, NY, *for Defendant-Appellees*.

21
22 LEVAL, *Circuit Judge*:

23 Plaintiff Stagg, P.C. ("Stagg") appeals from the judgment of the United
24 States District Court for the Southern District of New York (Katherine Polk
25 Failla, *J.*) granting summary judgment to Defendants, the United States
26 Department of State ("DOS"), the Secretary of State, and the Directorate of
27 Defense Trade Controls, ("DDTC").¹ The complaint seeks, *inter alia*,

¹ A glossary of acronyms employed in this opinion is as follows: Arms Export Control Act ("AECA"), Directorate of Defense Trade Controls ("DDTC"),

1 declaratory judgment that DOS's International Traffic in Arms Regulations
2 ("ITAR"), 22 C.F.R. §§ 120.1–130.17, impose an unconstitutional prior restraint
3 on Plaintiff's intended speech and are unconstitutionally vague.

4 Under the ITAR and their governing statute, the Arms Export Control
5 Act ("AECA"), 22 U.S.C. § 2751 *et seq.*, a party seeking to export items
6 designated as "defense articles and defense services" must first register with
7 the DDTC, a subdivision of DOS, and obtain a license for each export. The
8 ITAR's licensing requirement covers, *inter alia*, "technical data" that is
9 required for the design, manufacture, maintenance, or modification of a
10 defense article, unless the data is "in the public domain," as defined in the
11 ITAR. 22 C.F.R. §§ 120.10, 120.11. Transferring such data to a foreign person
12 within the United States is considered an "export" under the ITAR, thus
13 triggering the registration and licensing requirements. Violation of the ITAR
14 may result in severe criminal or civil penalties.

15 Stagg is a law firm, which specializes in export control matters. The
16 complaint asserts that Stagg intends to speak on the ITAR's technical data

Department of State ("DOS"), International Traffic in Arms Regulations
("ITAR"), United States Munitions List ("USML").

1 provisions at public conferences, and to publish free educational materials on
2 that topic on its website. To provide useful examples in its materials, it
3 intends to republish information pertaining to defense articles that is
4 excluded from the ITAR's licensing requirement by the exception for
5 materials "in the public domain." 22 C.F.R. § 120.11. Some of these examples
6 will involve Stagg's "aggregation" or "modification" of public domain
7 information.

8 The complaint alleges that Stagg has been deterred from engaging in its
9 intended speech by two public statements of DOS: one which expresses the
10 view that technical data does not qualify for the public domain exclusion if it
11 "has been made available to the public without authorization," 80 Fed. Reg.
12 31,525, 31,535 (June 3, 2015), and another, which states, "[I]t is seldom the case
13 that a party can aggregate public domain data for purposes of application to a
14 defense article without . . . creating a data set that itself is not in the public
15 domain," 78 Fed. Reg. 31,444, 31,445 (May 24, 2013). Stagg asserts that the
16 publicly available information it intends to use has never been authorized by
17 the Government for release into the public domain, and also that it fears its
18 aggregation and modification of public domain data will create a data set that

1 Defendants will consider to be ITAR-controlled. It asserts a concern, in light
2 of DOS's statements, that its intended speech will subject it to prosecution for
3 unlicensed export of ITAR-controlled technical data to foreign persons who
4 may attend its presentations or access the materials on its website. It seeks a
5 declaratory judgment that the ITAR's licensing requirement violates the First
6 and Fifth Amendments, primarily because it gives vague, excessive, and
7 standardless discretion to the licensing authority.

8 The district court granted summary judgment to Defendants,
9 concluding, *inter alia*, that the text of the ITAR unambiguously does not
10 require a license for Stagg's intended republication of information in the
11 "public domain" that has not been previously authorized for release into the
12 public domain. In a later ruling on Stagg's motion for reconsideration, the
13 district court characterized its previous ruling as finding "that the purported
14 prior restraint alleged in [Stagg's complaint] did not exist" because the ITAR
15 did not apply to Stagg's intended speech, and rejected on standing grounds
16 Stagg's request for a declaratory judgment that the licensing scheme is
17 unconstitutional. App'x at 83. While it was clear that the district court ruled
18 against Stagg and dismissed its complaint, it was not entirely clear whether

1 and to what extent the district court regarded this ruling as a judgment on the
2 merits or as a dismissal for lack of Article III jurisdiction.

3 This appeal followed. For the reasons below, we agree substantially
4 with the district court’s reasoning that the licensing regulations did not cover
5 Stagg’s pleaded intended speech and conclude that the complaint should be
6 dismissed under Article III because Stagg is no longer at risk of injury from
7 the licensing provisions it claims are unconstitutional.

8 I. BACKGROUND

9 A. The Statutory and Regulatory Scheme

10 Section 38 of the AECA authorizes the President to control the export of
11 “defense articles and defense services.” 22 U.S.C. § 2778(a)(1). It further
12 authorizes the President to “designate those items which shall be considered
13 as defense articles and defense services,” and to “promulgate regulations for
14 the . . . export of such articles and services.” *Id.* The President has delegated
15 this authority to the Secretary of State, Exec. Order 13,637, who has
16 promulgated the ITAR to implement Section 38 of the AECA. *See* 22 C.F.R.
17 §§ 120.1–130.17. The ITAR are primarily administered by the DDTC. *See id.*
18 § 120.1(a). The list of items designated as “defense articles and defense

1 services” is identified as the United States Munitions List (“USML”). It
2 appears within the ITAR. 22 C.F.R. § 121.1. Currently, the USML lists 21
3 categories of items that are designated as “defense articles or defense
4 services,” such as “Firearms and Related Articles” and “Spacecraft and
5 Related Articles.” *Id.*

6 Under the AECA, any person “who engages in the business of
7 manufacturing, exporting, or importing any” of the items on the USML must
8 register with the DDTC and pay a registration fee prescribed by regulation. 22
9 U.S.C. § 2778(b)(1)(a)(i). The ITAR specify that “engaging in such a business
10 requires only one occasion of manufacturing or exporting or temporarily
11 importing a defense article or furnishing a defense service.” 22 C.F.R.
12 § 122.1(a).

13 The AECA further provides that no defense articles or defense services
14 included in the USML “may be exported or imported without a license for
15 such export or import,” except as otherwise provided by the ITAR. 22 U.S.C.
16 § 2778(b)(2). The ITAR provide that, with some limited exemptions not
17 relevant here, a registrant who wishes to export unclassified “technical data”
18 must acquire what is known as a DSP-5 license beforehand. 22 C.F.R. § 125.2.

1 As relevant here, the term “technical data” is defined to include
2 “[i]nformation . . . which is required for the design, development, production,
3 manufacture, assembly, operation, repair, testing, maintenance or
4 modification of defense articles. This includes information in the form of
5 blueprints, drawings, photographs, plans, instructions or documentation.” 22
6 C.F.R. § 120.10(a)(1). Each of the 21 categories designated as “defense articles
7 or defense services” in the USML is defined to include “technical data” either
8 “relating” or “directly related” to the listed articles. *See id.* § 121.1.

9 The ITAR define “export” to include “releasing or otherwise
10 transferring technical data to a foreign person in the United States,” which is
11 classified as a “deemed export.” 22 C.F.R. § 120.17(a)(2). Additionally, the
12 ITAR define “defense service” to include the “furnishing to foreign persons of
13 any technical data controlled under this subchapter . . . whether in the United
14 States or abroad.” 22 C.F.R. § 120.9(a)(2). Thus, the ITAR require registration
15 and a license before one may “releas[e] or otherwise transfer[.]” technical data
16 to any foreign person in the United States.²

² “Foreign person” is defined, with some exceptions not relevant here, as any natural person who is not a U.S. citizen, lawful permanent resident, or holder of one of an enumerated group of other immigration statuses. 22 C.F.R. § 120.16.

1 Crucially for this case, “technical data” does *not* include “information in
2 the public domain.” 22 C.F.R. § 120.10(b). “Public domain” means
3 information which is published and which is generally accessible or
4 available to the public:

5 (1) Through sales at newsstands and bookstores;

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

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

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

13 (5) Through patents available at any patent office;

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

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

21 (8) Through fundamental research in science and engineering at
22 accredited institutions of higher learning in the U.S. where the
23 resulting information is ordinarily published and shared broadly
24 in the scientific community. Fundamental research is defined to
25 mean basic and applied research in science and engineering
26 where the resulting information is ordinarily published and
27 shared broadly within the scientific community, as distinguished
28 from research the results of which are restricted for proprietary
29 reasons or specific U.S. Government access and dissemination
30 controls. University research will not be considered fundamental
31 research if:

- 1 (i) The University or its researchers accept other
2 restrictions on publication of scientific and technical
3 information resulting from the project or activity, or
4 (ii) The research is funded by the U.S. Government and
5 specific access and dissemination controls protecting
6 information resulting from the research are applicable.

7 22 C.F.R. § 120.11(a). “Information which is in the public domain [as defined
8 in § 120.11] is not subject to the controls of” the ITAR. *Id.* § 125.1(a).

9 A willful violation of Section 38 of the AECA or of the ITAR is
10 punishable by a fine of up to \$1,000,000 or imprisonment of up to 20 years, or
11 both. 22 U.S.C. § 2778(c). Additionally, a civil penalty of up to \$1,183,736 may
12 be imposed for a violation of Section 38 of the AECA. 22 C.F.R.
13 § 127.10(a)(1)(i).³

14 The ITAR establish several circumstances in which a license can be
15 denied or revoked, including whenever “the Department of State deems such
16 action to be in furtherance of world peace, the national security or the foreign
17 policy of the United States, or is otherwise advisable.” 22 C.F.R. § 126.7(a)(1).

18 The ITAR further provide that the administration of the AECA, including

³ The text of the ITAR’s civil penalty provision says nothing with respect to whether the exporter must have acted with any particular mental state, 22 C.F.R. § 127.10, and we express no view on that question.

1 licensing decisions and revocations, is not subject to judicial review under the
2 Administrative Procedure Act. 22 C.F.R. § 128.1.

3 Focusing largely on the unlimited discretion afforded by the standard
4 “or is otherwise advisable,” as well as the lack of procedural safeguards (such
5 as judicial review) to reduce the danger of abuse of that discretion, Stagg
6 seeks a declaratory judgment that the ITAR license scheme operates as an
7 unconstitutional prior restraint on speech.⁴

8 **B. Defendants’ Public Statements Interpreting the ITAR**

9 Stagg asserts that its fears of prosecution result largely from two public
10 statements of DOS interpreting the ITAR. First, on May 24, 2013, DOS posted
11 a notice in the Federal Register (the “2013 Notice”) responding to requests for
12 clarification whether the aggregation of public domain data could be
13 considered a “defense service” or render the data “other than public domain.”
14 The 2013 Notice stated:

15 The Department confirms that a defense service involves technical data
16 and therefore the use of publicly available information would not
17 constitute a defense service. . . . The Department notes, however, that it

⁴ Stagg further argues that the ITAR licensing requirement fails strict scrutiny and is unconstitutionally overbroad because it regulates domestic publication of certain scientific and technical information merely because foreign persons *might* obtain the published information, regardless of the speaker’s intent, and that the scope of the ITAR’s licensing requirement is impermissibly vague.

1 is seldom the case that a party can aggregate public domain data for
2 purposes of application to a defense article without using proprietary
3 information or creating a data set that itself is not in the public domain.

4 78 Fed. Reg. at 31,445.

5 Second, on June 3, 2015, DOS issued a notice of proposed rulemaking
6 (the “2015 Notice”) that would have amended the definition of “public
7 domain” to state that “technical data . . . is not in the public domain if it has
8 been made available to the public without authorization.” 80 Fed. Reg. at
9 31,535. The 2015 Notice contained the following explanatory preamble:

10 Paragraph (b) of the revised definition explicitly sets forth the
11 Department’s requirement of authorization to release information into
12 the ‘public domain.’ Prior to making available ‘technical data’ or
13 software subject to the ITAR, the U.S. government must approve the
14 release

15 The requirements of paragraph (b) are not new. Rather, they are a more
16 explicit statement of the ITAR’s requirement that one must seek and
17 receive a license or other authorization from the Department . . . to
18 release ITAR controlled ‘technical data,’ as defined in § 120.10. . . . This
19 proposed provision will enhance compliance with the ITAR by
20 clarifying that ‘technical data’ may not be made available to the public
21 without authorization. Persons who intend to discuss ‘technical data’ at
22 a conference or trade show, or to publish it, must ensure that they
23 obtain the appropriate authorization.

24 80 Fed. Reg. at 31,528. This proposed amendment was never adopted.

1 **C. Procedural History**

2 **1. Stagg’s Complaint**

3 Stagg’s operative complaint alleges that it “seeks to immediately speak
4 publicly and to immediately publish free educational materials on the ITAR’s
5 technical data provisions, including at upcoming public conferences,” and
6 that it “intends to speak and publish such materials on a continual basis.”
7 App’x at 114–15. The purpose of these materials is to “provide educational
8 awareness to the public on how to comply with the ITAR’s technical data
9 controls.” *Id.* at 115. “This speech would also contain some comments critical
10 of the government and . . . propose future regulatory revisions in this area.”
11 *Id.* The complaint also alleges Stagg’s intention to publish these presentation
12 materials to its website. *Id.* at 116.

13 As examples in these materials, Stagg seeks to use “published and
14 generally accessible public information that is available from bookstores and
15 libraries . . . [that] would have otherwise constituted technical data but is
16 excluded from the technical data provisions because it is in the public
17 domain.” *Id.* at 115. Stagg alleges that the information it intends to use was
18 “not authorized by the Defendants into the public domain.” *Id.* at 116.

1 Additionally, Stagg intends to “aggregate and modify public domain
2 information to provide more interactive examples” in its conference
3 presentations and published materials. *Id.* The complaint does not contain
4 any allegations that Stagg possesses, or intends to disseminate or include in
5 its materials, any technical data that is not “published,” “generally
6 accessible,” and “available from bookstores and libraries.” Stagg alleges that
7 it is “stopped from speaking and publishing” because the 2013 Notice and
8 2015 Notice render its intended uses of publicly available information subject
9 to the ITAR’s registration and licensing requirements. *Id.* at 115–16. As
10 relevant here, it seeks declarations “that Defendants’ prior restraint is facially
11 invalid under the First Amendment” and “that Defendant’s prior restraint is
12 invalid under the Fifth Amendment” as an impermissibly vague law. *Id.* at
13 118.

14 **2. Stagg’s Motion for Preliminary Injunction**

15 Stagg filed a motion for preliminary injunction,⁵ seeking to enjoin “any
16 licensing or other approval requirements for putting privately generated

⁵ The complaint seeks an injunction, as well as declaratory judgment. Plaintiff, however, subsequently abandoned the claim for an injunction.

1 unclassified information into the public domain.” *Stagg P.C. v. U.S. Dep’t of*
2 *State*, 158 F. Supp. 3d 203, 210 (S.D.N.Y. 2016).

3 Against the background described above of government statements
4 asserting that materials appearing to fall within the public domain exclusion
5 might not be excluded from ITAR’s license requirement, either because they
6 came into the public domain without authorization or because the materials
7 in the public domain had been aggregated, the district court held that Stagg
8 had standing to challenge the ITAR based on its allegations that it possessed
9 technical data “available in — but unauthorized for release into — the public
10 domain, that it wants to aggregate into a set of materials for presentation to
11 an audience.” *Id.* at 209.

12 The district court⁶ then concluded that the balance of the equities and
13 the public interest required denial of Stagg’s motion for a preliminary
14 injunction. *Id.* at 210. Noting that Stagg’s requested injunction would extend
15 not just to situations involving the republication of publicly available
16 technical data but to “all situations where individuals wished to disclose
17 technical data generate[d] privately but covered by the ITAR,” the court

⁶ The case at that time was assigned to Judge Shira A. Scheindlin and was later transferred to Judge Failla.

1 concluded that the injunction would have “very serious adverse impacts on
2 the national security of the United States.” *Id.*

3 The court also rejected the possibility of entering an injunction limited
4 to republication of previously published technical data. Because Stagg
5 declined to provide any detail as to the nature of the information it intended
6 to use in its presentations, the district court had “no choice but to assume the
7 worst case scenario — e.g. technical data regarding highly sensitive defense
8 systems published by an unauthorized source, repackaged by Stagg P.C. for
9 purposes of its speeches.” *Id.* at 210 n.47.

10 This court affirmed by summary order. Regarding the question
11 whether Stagg had standing, we reasoned that “[i]n stating that (1) it
12 presently seeks to disseminate information already in its possession subject to
13 ITAR’s challenged licensing requirement and (2) it has already refrained from
14 doing so for fear of being sanctioned, Stagg has alleged the real or immediate
15 threat of future injury necessary for standing.” *Stagg P.C. v. U.S. Dep’t of State*,
16 673 F. App’x 93, 94–95 (2d Cir. 2016) (summary order) (internal quotation
17 marks omitted). We further noted:

18 [M]any of Stagg’s arguments on appeal could be read as attacking not
19 the existing regulatory scheme, but either a proposed regulation that

1 was never adopted [*i.e.*, the June 3, 2015 proposed rule], or a prior
2 regulation that Stagg claims was once in force but has since been
3 repealed. Constitutional questions about regulations that no longer
4 exist or that have been under consideration do not present cases or
5 controversies within a court’s Article III jurisdiction. Here, however,
6 the government unambiguously confirmed at oral argument that Stagg
7 correctly characterizes the government’s interpretation of the existing
8 regulatory scheme Thus, we agree that Stagg has standing to
9 challenge that scheme as the government construes it.

10 *Id.* at 95 n.1 (internal citation omitted). As to the merits, we found no
11 abuse of discretion in the district court’s decision to deny preliminary
12 injunctive relief. *Id.* at 96.

13 3. The Parties’ Cross-Motions for Summary Judgment

14 The parties cross-moved for summary judgment. In support of Stagg’s
15 motion for summary judgment, Christopher Stagg, Stagg’s principal and lead
16 attorney, submitted two declarations in which he reiterated that Stagg wished
17 to use “examples of published and generally accessible information that
18 would otherwise constitute technical data but for the public domain
19 exclusion” in its presentations and published materials, App’x at 136–37, and
20 that it wished to “aggregate and modify that information with application to
21 defense articles to show different and new ways that technical data relating to
22 defense articles can take form,” *id.* at 138. The declarations also added that

1 some of the technical data Stagg wished to use would be taken from the
2 Internet. *Id.* at 139, 152.

3 The district court denied Stagg’s motion for summary judgment and
4 granted Defendants’ motion for summary judgment, concluding that “after
5 evaluating the unambiguous text of the ITAR . . . it [could not] discern the
6 constitutional infirmities identified by [Stagg].” App’x at 21. The court
7 reaffirmed that Stagg had standing because, “under the Government’s own
8 stated interpretation of the regulatory scheme, Plaintiff may be subject to
9 prosecution for republishing technical data that was obtained from otherwise
10 public domain sources, but that was not authorized by Defendants to be
11 placed into the public domain.” *Id.* at 36.⁷ On the other hand, analyzing the
12 text of the ITAR, the court found that “[n]othing in the current [ITAR] can
13 reasonably be interpreted to suggest that data that would otherwise qualify as
14 public domain does not [so qualify] solely because it became publicly
15 available without government authorization.” *Id.* at 42–43. Similarly, it
16 concluded that the text could not reasonably be interpreted to mean that

⁷ The court also rejected a mootness challenge to Stagg’s claim based on a statement, which had been posted to the DDTC’s website during this litigation, purporting to clarify the meaning of DOS’s 2015 Notice.

1 “non-aggregation and/or non-modification [were] prerequisites for public
2 domain status.” *Id.* at 44. On the basis of its construction of the ITAR, the
3 court rejected each of Stagg’s First Amendment challenges, noting in
4 particular that “Plaintiff has failed to identify any aspect of the [ITAR] that
5 operates as a prior restraint [on Stagg], and its arguments that the public
6 domain exclusion fails the procedural requirements for constitutional prior
7 restraints are irrelevant.” *Id.* at 55–56. It also rejected Stagg’s Fifth
8 Amendment challenge. *Id.* at 58–60.

9 Stagg moved for reconsideration of the district court’s opinion, which
10 the court denied. Of particular relevance here, the court rejected several of
11 Stagg’s arguments for reconsideration on standing grounds. First, Stagg
12 argued that the district court’s summary judgment ruling failed to properly
13 apply the unbridled discretion doctrine of *City of Lakewood v. Plain Dealer Pub.*
14 *Co.*, 486 U.S. 750 (1988), and the requirement of certain procedural safeguards
15 for prior restraints on speech under *Freedman v. Maryland*, 380 U.S. 51 (1965).
16 The district court rejected this argument, explaining that its earlier decision
17 concluded that the “purported prior restraints that were the subject of
18 [Stagg’s complaint] do not exist.” App’x at 81. Thus, the court concluded, the

1 requirements of *Lakewood* and *Freedman* did not apply to any portion of the
2 ITAR that Stagg had standing to challenge. *Id.* at 80–81. Similarly, the court
3 rejected Stagg’s contention that, regardless of whether Stagg’s intended
4 speech was subject to the ITAR under the district court’s construction, the
5 court should have entertained a broader challenge to the ITAR, examining
6 whether the licensing scheme satisfied constitutional requirements in
7 situations where a license is, in fact, required. The court stated:

8 Plaintiff has not established standing to mount a facial challenge to
9 portions of the ITAR regulating speech that does trigger the licensing
10 requirement, because the characteristics that Plaintiff has disclosed
11 about the speech it seeks to engage in — disseminating, aggregating,
12 and modifying information already in the public domain, including
13 republication of that information to the Internet — do not [trigger the
14 licensing requirement].

15
16 *Id.* at 83.

17 II. DISCUSSION

18 A. Article III’s Requirement of a “Case” or “Controversy”

19 We must first determine whether Stagg asserts a “case” or
20 “controversy” within the jurisdiction of the federal courts. If not, then federal
21 courts lack the power to adjudicate his claim for declaratory relief. *See Genesis*
22 *Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (noting that the authority of

1 federal courts is limited to resolving “the legal rights of litigants in actual
2 controversies” (internal quotation marks omitted)). We have an ongoing duty
3 to “satisfy [ourselves] not only of [our] own jurisdiction, but also that of the
4 lower courts in a cause under review,’ even though the parties are prepared
5 to concede it.” *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)
6 (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); see also *FW/PBS, Inc. v.*
7 *City of Dallas*, 493 U.S. 215, 230–31 (1990) (“The federal courts are under an
8 independent obligation to examine their own jurisdiction . . .”). Because the
9 unambiguous terms of the ITAR exempt from its registration and licensing
10 requirements the materials that Stagg’s complaint asserts an intention to
11 republish, we conclude that Stagg alleges no injury it might suffer resulting
12 from application of the ITAR to its intended actions. Although Stagg’s suit
13 may have presented a “case” or “controversy” at the outset of this litigation,
14 because of the Defendants’ statements that threatened imposition of the
15 licensing requirement for Stagg’s intended speech, the district court’s (and
16 our) rulings on the meaning of the ITAR eliminate the threat. Accordingly,
17 Stagg no longer has a personal stake in its plea for a declaration that those
18 provisions are unconstitutional.

1 Article III of the United States Constitution provides that the judicial
2 power of the United States extends to certain “cases” and “controversies.”
3 U.S. CONST. art. III, § 2. The case-or-controversy requirement of Article III
4 encompasses both the requirement that the plaintiff establish standing to sue
5 and the related doctrine of mootness.

6 The requirement of standing is an “essential and unchanging part of
7 the case-or-controversy requirement of Article III.” *Lujan v. Defenders of*
8 *Wildlife*, 504 U.S. 555, 560 (1992). The “irreducible constitutional minimum” of
9 standing is that “the plaintiff must have suffered an ‘injury in fact’ — an
10 invasion of a legally protected interest which is (a) concrete and
11 particularized, and (b) actual or imminent, not conjectural or hypothetical” —
12 which is fairly traceable to the defendant’s actions and redressable by a
13 favorable decision. *Id.* at 560–61 (internal quotation marks and citations
14 omitted). The injury-in-fact requirement “helps to ensure that the plaintiff has
15 a ‘personal stake in the outcome of the controversy.’” *Susan B. Anthony List v.*
16 *Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498
17 (1975)).

1 Under the doctrine of mootness, the plaintiff’s “personal stake” in the
2 outcome of the litigation “must be extant at all stages of review, not merely at
3 the time the complaint is filed.” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532,
4 1537 (2018) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). When the
5 plaintiff no longer has a legally cognizable interest in the outcome of the
6 action, the case becomes moot and is no longer a “case” or “controversy” for
7 the purposes of Article III. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

8 “In determining whether a litigant has standing to challenge
9 governmental action as a violation of the First Amendment, . . . the litigant
10 [must] demonstrate a claim of specific present objective harm or a threat of
11 specific future harm.” *Meese v. Keene*, 481 U.S. 465, 472 (1987) (internal
12 quotation marks omitted). A plaintiff who seeks to bring a pre-enforcement
13 challenge to a law asserts an Article III injury when he alleges “an intention to
14 engage in a course of conduct arguably affected with a constitutional interest,
15 but proscribed by a statute, and there exists a credible threat of prosecution
16 thereunder.” *Susan B. Anthony List*, 573 U.S. at 159. Where the plaintiff alleges
17 that a statute “delegates overly broad licensing discretion to an administrative
18 office,” he may challenge the statute “whether or not his conduct could be

1 proscribed by a properly drawn statute, and whether or not he applied for a
2 license." *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

3 **1. Stagg's "Personal Stake" in the Litigation**

4 Stagg's complaint alleges that it intends to disseminate, through its
5 published materials and public presentations, "published and generally
6 accessible public information that is available from bookstores and
7 libraries . . . [that] would have otherwise constituted technical data but is
8 excluded from the technical data provisions because it is in the public
9 domain." App'x at 115. This includes information, Stagg alleges, that was
10 "not authorized by the Defendants into the public domain." *Id.* at 116.
11 Additionally, the complaint asserts Stagg's intention to "aggregate and
12 modify public domain information to provide more interactive examples." *Id.*
13 The complaint does not allege an intention to disseminate anything that is not
14 "published," "generally accessible," and "available from bookstores and
15 libraries." Stagg asserts a fear of prosecution for two reasons: (1) because
16 DOS's 2015 Notice interprets the ITAR to require a license for republication of
17 materials that are publicly available through one of the means enumerated in
18 the public domain provision, if these materials were never authorized for

1 release to the public; and (2) because DOS's 2013 Notice expresses DOS's view
2 that aggregation of public domain materials can create a new set of "technical
3 data," so that republication would require a license.

4 Notwithstanding these allegations, the district court concluded that
5 Stagg "never truly faced a prior restraint." App'x at 65. We agree, and we
6 therefore conclude that Stagg can no longer establish the requisite "personal
7 stake" to sustain federal court jurisdiction, because its intended republication
8 of these materials does not subject it to a credible threat of enforcement of the
9 license requirement. *See Susan B. Anthony List*, 573 U.S. at 159.

10 *First*, under the ITAR licensing requirement, "technical data" that is
11 subject to licensing does not include "information in the public domain." 22
12 C.F.R. § 120.10. "Public domain," in turn, "means information which is
13 published and which is generally accessible or available to the public"
14 through any of the means listed in § 120.11, including through bookstores, *id.*
15 § 120.11(a)(1), and at libraries, *id.* § 120.11(a)(4). Nowhere do the ITAR state or
16 imply that prior government authorization is required for information to
17 qualify as "in the public domain." To the contrary, § 120.11 states
18 unambiguously that any information which is "published" and "generally

1 accessible or available” through one of the listed means is in the public
2 domain, and therefore is not subject to the ITAR’s licensing requirement.
3 Because the ITAR provisions are unambiguous on this point, DOS’s 2015
4 Notice, proclaiming an interpretation contrary to the unambiguous terms of
5 the regulations, has no effect. While a government agency’s views are entitled
6 to great deference as to the meaning of ambiguous provisions of that agency’s
7 regulations, when the regulations lay down an unambiguous rule, the
8 agency’s expression of views interpreting its regulations in a manner
9 inconsistent with their plain meaning receives no deference. *See Christensen v.*
10 *Harris Cnty.*, 529 U.S. 576, 588 (2000) (courts do not give deference to agency
11 interpretation of its own regulation when regulation is unambiguous).
12 Because the ITAR provisions make this plain, we conclude Stagg is not subject
13 to a licensing requirement under the ITAR for use of “information that is
14 available from bookstores and libraries” but was never “authorized by the
15 Defendants into the public domain,” App’x at 115–16, regardless of DOS’s
16 2015 Notice to the contrary. That information is in the “public domain,” and
17 therefore is not subject to the ITAR. 22 C.F.R. § 125.1(a).

1 *Second*, nothing in the ITAR states, implies, or supports the
2 interpretation that the bare aggregation of public domain data, without more,
3 removes that data from the coverage of the public domain provision. Rather,
4 the unambiguous text of the ITAR excludes *all* “information in the public
5 domain” from the definition of “technical data.” Information that otherwise
6 satisfies the definition of “public domain” does not lose that status simply
7 because it is presented together with other information that also satisfies that
8 definition. Such information would still be “published” and “generally
9 accessible or available to the public” through one of the eight means listed in
10 § 120.11. Accordingly, Stagg’s intent to release aggregations of public domain
11 data does not establish a credible threat of enforcement of the ITAR against
12 it.⁸

⁸ While it is true that Defendants have taken the position in this litigation that there are “limited circumstances in which aggregation can create new technical data,” App’x at 44, we need not consider those special circumstances because Stagg has not alleged that it will aggregate public domain data in a manner that would give rise to new technical data. Consistent with the 2013 Notice, Defendants’ position is that aggregation of public domain data “would not create ITAR-controlled technical data . . . [unless the] aggregation is for purposes of application to a defense article, [and the aggregator] possesses the expertise necessary to make such an application.” *Id.* at 43 (internal quotation marks removed); *see also* 78 Fed. Reg. at 31,445 (2013 Notice) (“[I]t is seldom the case that a party can aggregate public domain data

1 *Third*, with respect to Stagg’s pleaded intention to “modify” public
2 domain information in its publications and presentations, our analysis is
3 somewhat different. “Modify” could mean anything from, at one extreme,
4 republishing together (aggregating) in one republication public domain
5 materials that previously had been published separately, changing a typeface,
6 or substituting ellipses for text that is superfluous to Stagg’s illustrative
7 purpose, to, at the other extreme, changing the technical content of the data as
8 it pertains to the manufacture or implementation of a defense article.

9 As for the first category of innocuous changes that do not alter the
10 significance of the data, the above discussion of Stagg’s intent to aggregate
11 demonstrates why such changes would not create new technical data. The

*for purposes of application to a defense article without using proprietary information or creating a data set that itself is not in the public domain.” (emphasis added)). Here, Stagg does not allege it intends to apply its aggregated data to a defense article. Rather, its alleged purposes are purely educational and illustrative: it intends to aggregate public domain information “to provide more interactive examples” during its public presentations and in its published materials. App’x at 116. Thus, notwithstanding the Government’s acknowledgment that aggregation *might* subject public domain data to licensing when done “for purposes of application to a defense article, [and the aggregator] possesses the expertise necessary to make such an application,” Stagg’s pleaded intentions do not fall within those parameters. Stagg therefore raises no credible threat of prosecution based on its “aggregation” of public domain data.*

1 clear terms of the ITAR cannot reasonably be understood to mean that the
2 exemption for republication of public domain materials applies only when
3 the prior publication is exactly reproduced in its entirety, in the same font and
4 size, without any sort of innocuous alteration of appearance. The ITAR make
5 clear that republication of public domain materials is exempt,
6 notwithstanding superficial “modifications” that do not alter the content of
7 the data.

8 On the other hand, as for “modifications” at the other extreme, which
9 change the content — as opposed to the form — of technical data pertaining
10 to defense articles from what was set forth in the public domain version, data
11 that had been so modified would no longer be public domain materials. They
12 clearly would be subject to the licensing requirement of ITAR.

13 Stagg’s complaint does not specify how it intends to “modify public
14 domain information” to create its “interactive examples.” App’x at 116. Nor
15 do Christopher Stagg’s declarations provide any additional clarity. In his June
16 2018 declaration, for instance, Christopher Stagg states that Stagg wishes to
17 “modify [public domain information] with application to defense articles to
18 show different and new ways that technical data relating to defense articles

1 can take form and be presented.” *Id.* at 138. Similarly, his August 2018
2 declaration states that Stagg intends to “provide real-world examples of what
3 technical data looks like in various forms (which requires aggregating and
4 modifying it) and at different phases (which also requires aggregating and
5 modifying it).” *Id.* at 155. On their face, these statements of Stagg’s intention
6 to “modify” public domain data appear to mean nothing more than
7 “modification” as to the *form* in which the data is presented, which, as
8 discussed above, would not place such a modification under the ITAR’s
9 licensing requirement. Notwithstanding that substantive modifications would
10 fall under the licensing requirement, the allegations in Stagg’s complaint and
11 in Christopher Stagg’s declarations are too vague and imprecise to effectively
12 plead a credible threat of subjugation of Stagg’s “modifications” to the ITAR’s
13 licensing scheme.

14 Stagg further contends that it remains subject to a prior restraint,
15 notwithstanding the district court’s construction of the ITAR, because it
16 remains unclear which Internet sources qualify for the public domain
17 exception. The issue of Stagg’s publication of Internet materials was
18 introduced into this litigation by the declarations of Christopher Stagg,

1 submitted in relation to the competing motions for summary judgment. These
2 declarations assert that Stagg intends to republish examples of technical data
3 taken from the Internet in its presentations and publications. The problem
4 with Stagg's argument is that its complaint includes no mention of an
5 intention to republish materials from the Internet. The complaint speaks only
6 of republishing materials "available in bookstores and libraries," all of which
7 fall within the ITAR's exemption from the licensing requirement. An
8 intention to publish material from the Internet that is not otherwise part of the
9 "public domain" is not properly part of this suit. Christopher Stagg's
10 declaration of such intention did not have the effect of expanding the
11 allegations of the complaint. Having failed to plead an intention to republish
12 materials derived from the Internet, Stagg may not now rely on the risk of
13 prosecution for so doing as establishing its personal stake necessary to show a
14 live Article III "case" or "controversy."

15 We conclude that Stagg has failed to allege an intention to engage in
16 any activity that is subject to the ITAR's licensing requirement. The ITAR
17 leave Stagg free to do all of the things it pleaded an intention to do, without
18 being subject to the requirements of registration and licensing. Although

1 Stagg may have asserted a cognizable Article III injury at the outset of the
2 litigation, by reason of the credible threat of enforcement raised by DOS’s
3 public statements interpreting the ITAR as covering Stagg’s intended speech,
4 the district court’s (and our) rulings eliminate that threat.⁹ It follows that the
5 action must be dismissed for want of Article III jurisdiction. As for Stagg’s
6 contentions that the ITAR licensing scheme violates constitutional norms —
7 because, *inter alia*, it lacks standards constraining the discretion of the

⁹ Our determination that none of Stagg’s intended activities alleged in its complaint is subject to the ITAR’s licensing and registration requirements has preclusive effect, even though our ultimate conclusion is that we lack Article III jurisdiction. *See Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (holding that defendant tugboat operator was estopped from denying that it was plaintiff’s employer when that fact “constituted the sole basis for the New Jersey Compensation Court’s dismissal of [plaintiff’s] suit . . . on the ground that it lacked jurisdiction,” and rejecting defendant’s argument that collateral estoppel should not apply because the New Jersey court “found itself without jurisdiction, [and] consequently lacked jurisdiction to make any determination whatsoever”). As we explained in *Roth*, a court “always possesses jurisdiction to determine its jurisdiction, and any fact upon which that decision is grounded may serve as the basis for an estoppel by judgment in any later action.” *Id.*; *see also Goldsmith v. Mayor & City Council of Baltimore*, 987 F.2d 1064, 1069 (4th Cir. 1993) (“[A] jurisdictional dismissal that does not constitute judgment on the merits so as to completely bar further transactionally-related claims still operates to bar relitigation of issues actually decided by that former judgment.”); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4436 (3d ed. 2020) (“Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question . . .”).

1 licensing authority, lacks procedural safeguards, and fails to provide fair
2 notice of its requirements — even if true, they do not assert a case or
3 controversy within the meaning of Article III because, under the
4 unambiguous provisions of the ITAR, none of Stagg’s intended activities
5 alleged in its complaint is subject to a licensing requirement, or indeed any
6 other restriction on its speech, imposed by the ITAR. Stagg is thus in no way
7 injured by the ITAR’s licensing requirement, and its claims are moot.

8 **2. Stagg’s Further Arguments for Article III Jurisdiction**

9 Stagg further argues that, notwithstanding the district court’s (and our)
10 ultimate conclusion that the ITAR licensing requirement does not apply to the
11 intended conduct it pleaded, it nonetheless may challenge the
12 constitutionality of that licensing requirement. It advances three reasons: (1)
13 standing must be determined, as established in *Klein v. Qlik Techs., Inc.*, “as of
14 the outset of litigation,” 906 F.3d 215, 221 (2d Cir. 2018); (2) the district court’s
15 ultimate finding of lack of standing impermissibly contravened this court’s
16 earlier conclusion that “Stagg has standing to challenge [the ITAR] as the
17 government construes it,” *Stagg*, 673 F. App’x at 95 n.1; and (3) a facial
18 challenge persists regardless of “whether . . . constructions of the ITAR would

1 eliminate the prior restraint . . . as it applies to Stagg” under Supreme Court
2 precedent, Appellant’s Br. 22–23. None of these arguments is persuasive.

3 *First*, Stagg contends that the district court’s ultimate finding of lack of
4 standing to seek declaratory relief as to the constitutionality of the ITAR, after
5 having first concluding that Stagg had standing, violated the principle
6 established in *Qlik* that standing is determined “as of the outset of the
7 litigation.” Appellant’s Br. 22 (quoting *Qlik*, 906 F.3d at 221). Whatever merit
8 Stagg’s argument may have with respect to refinements of terminology for
9 describing different forms of absence of adversity necessary to establish a
10 “case” or “controversy” subject to federal court jurisdiction under Article III,
11 its argument does not negate the conclusion that its suit fails to meet the
12 “case” or “controversy” requirement.

13 In *Qlik*, a shareholder brought a derivative suit in the name of a
14 corporation alleging that the corporation’s fiduciaries committed violations of
15 the Securities Exchange Act, causing loss to the corporation. *Qlik*, 906 F.3d at
16 218. During the pendency of the litigation, the corporation’s shares were
17 “bought out in an all-cash merger, causing [the shareholder-plaintiff] to lose
18 any financial interest in the litigation.” *Id.* The district court then dismissed

1 the case, describing the reason as the plaintiff's lack of standing. *Id.* We
2 vacated the decision, explaining that standing "evaluates a litigant's personal
3 stake as of the outset of litigation," at which time the plaintiff had standing.
4 We explained that the applicable jurisdictional doctrine when a party loses its
5 stake during the course of the litigation is not standing but mootness. *Id.* at
6 220–21, 228. We vacated the district court's dismissal for lack of standing and
7 remanded for substitution of the corporation as the real party in interest so as
8 to avoid being obliged to dismiss the action by reason of the mootness of the
9 shareholder's claim. *Id.* at 228.

10 Whatever the merits of Stagg's observations on the *Qlik* precedent, they
11 do not show that Stagg's suit satisfies Article III's requirement of a "case" or
12 "controversy." The *Qlik* case, while noting an error in attributing the
13 dismissal of the shareholder's derivative suit to the plaintiff's lack of
14 standing, did not rule that the shareholder's suit should survive. To the
15 contrary, it merely explained that the infirmity of the shareholder's suit was
16 attributable to mootness, rather than lack of standing. The suit could satisfy
17 Article III only by converting it from a shareholder's derivative suit in the
18 name of the corporation into a suit brought by the corporation itself, so that

1 the shareholder's eventual loss of a personal stake in the suit after ceasing to
2 be a shareholder became irrelevant to the satisfaction of Article III. The
3 answer to Stagg's argument is that, as in *Qlik*, the proper explanation for the
4 defect in Article III jurisdiction is "mootness," rather than "lack of standing."
5 When the district court rejected DOS's arguments that Stagg's intended
6 actions were subject to licensing, and ruled that they were not, Stagg's claim
7 became moot. Notwithstanding that Stagg previously had standing to
8 challenge the constitutionality of the licensing scheme because of its credible
9 fear of prosecution based on DOS's assertions that it was so subject, the issue
10 was mooted by the district court's (and our) ruling that the ITAR did not
11 apply to such speech. The Government is precluded from further efforts to
12 enforce the licensing requirement against Stagg for those categories of
13 speech.¹⁰ Therefore, at the most, Stagg's argument predicated on *Qlik* shows
14 not that it has a personal stake in the suit that satisfies Article III, but only that
15 its lack of a personal stake is attributable to mootness that arose from the
16 district court's interpretive ruling, rather than to lack of standing as of the
17 start of the litigation.

¹⁰ See *supra* note 9.

1 *Second*, Stagg argues that the district court’s ultimate conclusion
2 impermissibly contravened this court’s earlier conclusion, in ruling on Stagg’s
3 motion for a preliminary injunction, that “Stagg has standing to challenge
4 [the ITAR] as the government construes it.” Appellant’s Br. 22 (quoting *Stagg*,
5 673 F. App’x at 95 n.1). But Stagg misconstrues the import of this court’s
6 ruling affirming Stagg’s standing.

7 In ruling on the motion for a preliminary injunction, the district court
8 concluded that Stagg had standing because the Government’s assertions that
9 Stagg’s intended actions were subject to licensing gave rise to a credible fear
10 of prosecution. That was the basis on which we affirmed the district court’s
11 conclusion that Stagg had standing. *See Stagg*, 673 F. App’x at 94–95. Our
12 subsequent conclusion that Stagg has no personal stake depends on an
13 altogether different basis. The district court ruled (and we agree) that the
14 Government could not lawfully enforce the license requirement against Stagg
15 for its intended speech alleged in the complaint because the unambiguous
16 terms of the licensing scheme do not cover such speech. We conclude that
17 Stagg no longer faces a credible threat of prosecution by virtue of the
18 preclusive effect of our ruling.

1 Although on a superficial assessment, the district court’s ultimate
2 ruling (and our ruling in this decision) may appear inconsistent with this
3 court’s earlier ruling, in fact they are not. As of the start of the litigation, Stagg
4 was ruled to have standing based on a credible threat of prosecution.
5 Subsequently, Stagg’s personal stake was vitiated by the ruling that the
6 licensing scheme did not apply to Stagg’s conduct. There is no inconsistency
7 between the earlier and the ultimate rulings.

8 *Third*, Stagg argues that, under the Supreme Court’s and our court’s
9 prior restraint case law, a facial challenge to the “deemed export” provision as
10 a whole persists regardless of how we construe the ITAR. Stagg’s cited
11 precedents do not support its argument.

12 Stagg relies heavily on the Supreme Court’s statement in *Freedman v.*
13 *State of Maryland* that “it is well established that one has standing to challenge
14 a statute on the ground that it delegates overly broad licensing discretion to
15 an administrative office, whether or not his conduct could be proscribed by a
16 properly drawn statute, and whether or not he applied for a license.” 380 U.S.
17 at 56.

1 Read in its proper context, the quotation from *Freedman* does not
2 support the proposition that a plaintiff need not allege a specific injury
3 traceable to a licensing scheme in order to mount a facial challenge. The
4 crucial point for our purposes is that *Freedman* had been convicted under a
5 Maryland statute for showing a film without first seeking or obtaining a
6 license from the State Board of Censors. *Freedman*, 380 U.S. at 52. In his effort
7 to overturn the conviction, he argued to the Supreme Court that the statute’s
8 license requirement constituted an invalid prior restraint in light of the
9 inadequacy of procedural safeguards for confining the licensors’ decisions
10 within constitutional limits. *Id.* at 54–56. The Supreme Court rejected the
11 Maryland court’s conclusion that, because he had violated only the provision
12 of the statute outlawing the showing without a license, he could not attack
13 alleged shortcomings of other provisions of the statute, including the
14 procedural deficiencies in the licensing scheme. It was in this context that the
15 Court said that *Freedman* could bring a facial challenge against the statute
16 “whether or not . . . he applied for a license.” *Id.* at 56. The availability of a
17 facial challenge obviated *Freedman*’s need to show that the application of the
18 licensing scheme to his case would have been unconstitutional or that his

1 request for a license would have been denied, not his need to show that his
2 activity was subject to the licensing requirement, as this was unquestionably
3 shown by his conviction.

4 *City of Lakewood v. Plain Dealer Publishing Co.*, on which Stagg also relies,
5 similarly does not establish that Stagg has standing to raise a broad facial
6 challenge to provisions that do not apply to it. There, the City of Lakewood,
7 Ohio adopted an ordinance giving the mayor broad authority to grant or
8 deny applications for permits to place news racks on public property, and to
9 place terms and conditions on any such permit. *City of Lakewood v. Plain Dealer*
10 *Pub. Co.*, 486 U.S. 750, 753 (1988). The plaintiff newspaper elected not to seek a
11 permit, instead raising a facial challenge to the ordinance. *Id.* at 754. The
12 majority held that the newspaper could bring its facial challenge. The dissent
13 disagreed, arguing that it should have been required to apply for a permit
14 first. *See id.* at 775–76 (White, J., dissenting) (describing the “usual rule” that,
15 in cases involving administrative discretion over granting permits, the Court
16 need not assume that the discretion will be illegally exercised, and that the
17 plaintiff should “apply and see what happens” (internal quotation marks

1 omitted)); *id.* at 786 (opining that the “usual rules” concerning discretionary
2 licensing laws should apply).

3 Thus, the key issue in *City of Lakewood*, as in *Freedman*, was whether a
4 plaintiff could challenge a licensing scheme without applying for, and being
5 denied, a license. There was no question whether the plaintiff’s intended
6 activities would subject it to the licensing requirement it sought to challenge.¹¹
7 *See id.* at 755–56 (“[W]hen a licensing statute allegedly vests unbridled
8 discretion in a government official over whether to permit or deny expressive
9 activity, *one who is subject to the law* may challenge it facially without the
10 necessity of first applying for, and being denied, a license.” (emphasis
11 added)). *City of Lakewood* therefore does not stand for the proposition that a
12 facial challenge lies as to licensing requirements not applicable to the
13 plaintiff’s intended activities. To read *City of Lakewood* otherwise would mean
14 allowing any number of plaintiffs to raise a facial challenge to a licensing

¹¹ Although the Supreme Court’s opinion does not discuss the plaintiff newspaper’s complaint in any detail, there is every reason to assume that the complaint included an allegation that the newspaper intended to place a news rack on public property in Lakewood. This intention was the entire impetus for its suit, and it had already sought and been denied permission to place a news rack on a sidewalk in Lakewood under an earlier ordinance. *See City of Lakewood*, 486 U.S. at 753.

1 scheme without alleging a specific harm arising therefrom, effectively
2 eliminating the baseline requirement of Article III that a plaintiff demonstrate
3 a “personal stake” in the outcome of the litigation that is “extant at all stages
4 of review.” *Sanchez-Gomez*, 138 S. Ct. at 1537.

5 Finally, Stagg cites *Lusk v. Village of Cold Spring*, 475 F.3d 480 (2d Cir.
6 2007), for the proposition that a prior restraint challenge does not consider
7 “the application of the statute to a particular set of facts.” *Id.* at 493 n.15. *Lusk*
8 does not support Stagg’s argument that we must adjudicate its facial
9 challenge to aspects the ITAR’s licensing scheme even if we hold that that
10 scheme unambiguously does not apply to its intended speech. In *Lusk*, the
11 plaintiff challenged a local law, which prohibited making alterations to
12 certain buildings without prior permission from a review board. 475 F.3d at
13 482. The plaintiff challenged the law after having received a “Violation
14 Notice” from the defendant, charging him with violation of the law. *Id.* at 481.
15 The court did not hold that *Lusk* was not subject to the law. Thus, *Lusk* says

1 nothing about whether a plaintiff who is not injured (or no longer injured) by
2 a licensing scheme may maintain a facial challenge to that scheme.¹²

3 * * *

4 In sum, we conclude that Stagg’s constitutional challenges to the ITAR
5 do not assert a case or controversy within the jurisdiction of the federal courts
6 because the unambiguous provisions of the ITAR do not subject Stagg (to the
7 extent of its intended activities as alleged in its complaint) to any licensing
8 requirement or credible threat of enforcement.

9 We agree with the district court that the ITAR licensing scheme does
10 not apply to Stagg’s intended conduct alleged in the complaint, and so rule.
11 We disagree with the district court, however, as to the consequences of that
12 ruling. As a result of the district court’s (and our) rulings on the unambiguous
13 inapplicability of the ITAR license requirement to Stagg’s intended actions,
14 Stagg has no personal stake in its suit for a declaration that the ITAR licensing
15 scheme is unconstitutional. Stagg’s suit therefore fails the test of Article III
16 jurisdiction, and the appropriate disposition is dismissal of the suit, rather

¹² Stagg also relies on several out-of-circuit cases to support its proposition that it may bring a facial challenge to the “deemed export” provision regardless of our construction of the ITAR. To the extent that these cases are inconsistent with the analysis here, we find them unpersuasive.

1 than the grant of summary judgment to the Defendants. To the extent that
2 portions of the district court's opinions below can be interpreted as ruling on
3 the merits of Stagg's constitutional challenges, we vacate those rulings.

4 **CONCLUSION**

5 For the foregoing reasons, the plaintiff is not at risk of prosecution
6 under the ITAR licensing scheme. The district court's judgment is VACATED,
7 and Stagg's suit to declare that scheme unconstitutional is DISMISSED for
8 lack of Article III jurisdiction.