

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON, et al.,	)	No. 2:18-cv-1115-RSL
Plaintiffs,	)	
v.	)	<b>FEDERAL DEFENDANTS’</b>
UNITED STATES DEPARTMENT OF	)	<b>BRIEF IN OPPOSITION TO</b>
STATE, et al.,	)	<b>PLAINTIFFS’ MOTION FOR</b>
Defendants.	)	<b>PRELIMINARY INJUNCTION</b>
	)	<b>NOTED FOR: August 21, 2018</b>

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## INTRODUCTION

The manufacture or possession of plastic guns that are undetectable is a serious federal crime, punishable by up to five years in prison. Among other statutes, the Undetectable Firearms Act prohibits the manufacture, possession, sale, import, or transfer of undetectable firearms. *See* 18 U.S.C. § 922(p). The Department of Justice, among other agencies, enforces that prohibition, and will continue to do so vigorously. Neither those enforcement efforts nor the prohibition itself is affected in any way by the actions challenged in this case.

This case is not about the regulation of U.S. persons who wish to utilize a 3D printer to manufacture their own small-caliber firearms. Rather, this case concerns the Department of State's delegated authority to control the export of defense articles and services, or technical data related thereto, that raise military or intelligence concerns. The Department is tasked with determining what technology and weaponry provides a critical military or intelligence advantage such that it should not be shipped without restriction from the United States to other countries (or otherwise provided to foreigners), where, beyond the reach of U.S. law, it could be used to threaten U.S. national security, foreign policy, or international peace and stability. Domestic activities that do not involve providing access to foreign persons, by contrast, are left to other federal agencies—and the states—to regulate.

In bringing their motion for a preliminary injunction, Plaintiffs misunderstand the fundamental limit on the State Department's authority. According to Plaintiffs, the Government's export-related determinations—specifically with respect to the export of technical data developed by Defense Distributed—have jeopardized their ability to protect the safety and health of their residents. But the domestic harms about which Plaintiffs are allegedly concerned are not properly regulated by the Department under current law. Plaintiffs' allegations of harm are not reasonably attributable to the Department's regulation of exports, but rather focus on the possibility that third parties will commit violations of the Undetectable Firearms Act or other relevant laws that are not at issue in this case. Likewise, Plaintiffs have failed to demonstrate that the facts and law clearly favor their position with respect to the

merits of their claims, or that it is in the public interest for the Court to second-guess the national security determinations of the Executive Branch.

Accordingly, Plaintiffs' motion should be denied.

## BACKGROUND

### I. Statutory And Regulatory Background

The Arms Export Control Act ("AECA"), 22 U.S.C. § 2751 *et seq.*, authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States" to "control the *import* and the *export* of defense articles and defense services" and to promulgate regulations accordingly. 22 U.S.C. § 2778(a)(1) (emphasis added). The President has delegated this authority to the Department in relevant part, and the Department has accordingly promulgated the International Traffic in Arms Regulations ("ITAR"), which are administered by the Department's Directorate of Defense Trade Controls ("DDTC"). *See* Exec. Order No. 13637(n)(i), 78 Fed. Reg. 16,129 (Mar. 8, 2013); 22 C.F.R. §§ 120-130. At the heart of the AECA is the United States Munitions List ("USML"), an extensive listing of materials that constitute "defense articles and defense services" under the ITAR. *See* 22 C.F.R. Part 121. As relevant here, Category I of the USML includes all firearms up to .50 caliber, and all technical data directly related to such firearms. *Id.* § 121.1(I)(a), (i). Technical data is information that "is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles." *Id.* § 120.10(a)(1). Section 2778 of the AECA authorizes the President (1) to designate those defense articles and services to be included on the USML; (2) to require licenses for the export of items on the USML; and (3) to promulgate regulations for the import and export of such items on the USML. 22 U.S.C. § 2778.

The ITAR does not regulate any transfers of defense articles except those that constitute "exports," *i.e.*, the transfer of defense articles abroad or to foreign persons, and "temporary imports." The ITAR's definition of exports includes, in part (1) "[s]ending or taking of a defense article out of the United States in any manner," 22 C.F.R. § 120.17(a)(1); (2)

1 “[r]eleasing or otherwise transferring a defense article to an embassy or to any of its agencies or  
2 subdivisions, such as a diplomatic mission or consulate, in the United States,” *id.*

3 § 120.17(a)(4); and (3) “[r]eleasing or otherwise transferring technical data to a foreign person  
4 in the United States (a ‘deemed export’),” *id.* § 120.17(a)(2).

5 In certain cases where it is unclear whether a particular item is a defense article or  
6 defense service, the Department makes a “commodity jurisdiction” (“CJ”) determination using  
7 a procedure set forth in the ITAR. *See id.* § 120.4. Upon written request, DDTC will provide  
8 applicants with a determination as to whether the item, service, or data is within the scope of  
9 the ITAR. These assessments are made on a case-by-case basis through an inter-agency  
10 process, evaluating whether the item, service, or data is covered by the USML, provides the  
11 equivalent performance capabilities of a defense article on the USML, or has a critical military  
12 or intelligence advantage. *See id.* § 120.4(d).

13 While the AECA and ITAR do not provide the State Department with authority to  
14 prohibit the domestic manufacture or possession of 3D-printed guns, there are other federal  
15 statutes that deal with this topic. Most significantly, the Undetectable Firearms Act bars the  
16 manufacture, possession, sale, import, or transfer of undetectable firearms. *See* 18 U.S.C.  
17 § 922(p); An Act to Extend the Undetectable Firearms Act of 1988 for 10 Years, Pub. L. No.  
18 113-57, 127 Stat. 656 (2013). Under that statute, firearms manufactured or sold in the United  
19 States must generally be capable of being detected by metal detectors and by x-ray machines.  
20 *See* 18 U.S.C. § 922(p)(1). Those requirements are not in any way affected by the actions  
21 challenged in this case, nor are the separate federal prohibitions on the possession of firearms  
22 by felons, persons subject to restraining orders, or the mentally ill. *See* 18 U.S.C. § 922(g)(1)  
23 (felons and certain state-law misdemeanants); *id.* § 922(g)(8) (court-issued restraining orders);  
24 *id.* § 922(g)(4) (persons adjudicated as mentally ill). The Government continues to enforce  
25 these laws in order to address domestic safety issues related to undetectable firearms. The  
26 Department’s determination under the ITAR at issue here will not affect those enforcement  
27 efforts.

## II. The Government's Settlement With Defense Distributed

In 2012, Defense Distributed published on the Internet “privately generated technical data regarding a number of gun-related items.” *Def. Distributed v. Dep’t of State*, 121 F. Supp. 3d 680, 687 (W.D. Tex. 2015). In May 2013, DDTC sent Defense Distributed a letter stating that Defense Distributed may have released ITAR-controlled technical data without the required authorization. *See id.* Defense Distributed removed the technical data and submitted a CJ request. *Id.* The company, however, and in conjunction with another non-profit, the Second Amendment Foundation, ultimately brought a lawsuit against, *inter alia*, the Department and DDTC, claiming that the requirement to obtain authorization prior to publishing the subject files on its website violated plaintiffs’ rights under the First, Second, and Fifth Amendments and exceeded the Department’s statutory authority. *Id.* at 688.

In August 2015, the U.S. District Court for the Western District of Texas denied Defense Distributed’s motion for a preliminary injunction. *Id.* at 701. For purposes of the preliminary injunction analysis, the district court considered the files to be subject to the protection of the First Amendment. *Id.* at 691-92. Applying intermediate scrutiny, the court concluded that “because the AECA and ITAR do not prohibit domestic communications” and plaintiffs remained “free to disseminate the computer files at issue domestically,” they had not shown a substantial likelihood of success on the merits. *Id.* at 695.

The Fifth Circuit affirmed in a split decision. *See* 838 F.3d 451 (5th Cir. 2016). Focusing narrowly on the question of the non-merits requirements for preliminary relief, the panel majority concluded that the “Department’s stated interest in preventing foreign nationals . . . from obtaining technical data on how to produce weapons and weapon parts” outweighed plaintiffs’ interest in their constitutional rights. *Id.* at 458-59. The panel majority “decline[d] to address the merits” because plaintiffs’ failure to meet any single requirement for a preliminary injunction would require affirmance of the district court. *See id.* at 456-58. A dissent from the panel opinion did address the merits. *See id.* at 461 (Jones, J. dissenting). “[F]or the benefit of the district court on remand,” the dissent set forth an analysis concluding

1 that “the State Department’s application of its ‘export’ control regulations to this domestic  
 2 Internet posting appears to violate the governing statute, represents an irrational interpretation  
 3 of the regulations, and violates the First Amendment as a content-based regulation and a prior  
 4 restraint.” *Id.* at 463-64.

5 After plaintiffs’ petitions for rehearing *en banc* and for certiorari were denied, *see* 138  
 6 S. Ct. 638 (2018); 865 F.3d 211 (5th Cir. 2017) (5 dissenting judges), proceedings resumed in  
 7 district court. In April 2018, the Government moved to dismiss plaintiffs’ second amended  
 8 complaint. *See Def. Distributed*, No. 1:15-cv-372-RP, Dkt. No. 92. Meanwhile, the district  
 9 court ordered the parties to exchange written settlement demands, *see id.*, Dkt. No. 88, thereby  
 10 initiating a process under which the parties were able to reach a settlement before briefing on  
 11 the motion to dismiss was complete, *see id.*, Dkt. Nos. 93, 95.

12 Pursuant to the settlement and as relevant here, the Government agreed to the following:

- 13 (a) Defendants’ commitment to draft and to fully pursue, to the extent  
 14 authorized by law (including the Administrative Procedure Act), the  
 15 publication in the Federal Register of a notice of proposed rulemaking and  
 16 final rule, revising USML Category I to exclude the technical data that is  
 the subject of the Action.<sup>[1]</sup>
- 17 (b) Defendants’ announcement, while the above-referenced final rule is in  
 18 development, of a temporary modification, consistent with the . . . (ITAR),  
 19 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that  
 20 is the subject of the Action. The announcement will appear on the DDTC  
 21 website, [www.pmdtc.state.gov](http://www.pmdtc.state.gov), on or before July 27, 2018.<sup>[2]</sup>

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22 <sup>1</sup> *See* Section III, *infra*. At the time settlement negotiations began, the parties had long expected such a Notice  
 23 of Proposed Rulemaking (“NPRM”) to be issued. *See* 78 Fed. Reg. 22,740, 22,741 (April 16, 2013) (announcing  
 24 that “[t]he Department intends to publish final rules implementing the revised USML categories and related ITAR  
 25 amendments periodically”). Reflecting nearly a decade of efforts to carry out a reform of export regulations and  
 26 pursuant to a “comprehensive review” of the U.S. export control system, the Government has undertaken an  
 Export Control Reform Initiative (“ECRI”) that was proposed in April 2010, *see* Fact Sheet on the President’s  
 Export Control Reform Initiative (Apr. 20, 2010), [https://obamawhitehouse.archives.gov/the-press-office/fact-](https://obamawhitehouse.archives.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative)  
[sheet-presidents-export-control-reform-initiative](https://obamawhitehouse.archives.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative), and facilitated by Executive Order No. 13637, 78 Fed. Reg.  
 16,129 (Mar. 8, 2013). By January 20, 2017, this export reform process had been completed for USML categories  
 IV through XX.

27 <sup>2</sup> Pursuant to 22 C.F.R. § 126.2, “[t]he Deputy Assistant Secretary for Defense Trade Controls may order the  
 temporary suspension or modification of any or all of the regulations of this subchapter in the interest of the  
 security and foreign policy of the United States.”

(c) Defendants’ issuance of a letter to Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). . . .

(d) Defendants’ acknowledgment and agreement that the temporary modification . . . permits any United States person, to include DD’s customers and SAF’s members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the letter to Plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files.

The parties executed the agreement on June 29, 2018, and the Government complied with (b) and (c) on July 27, 2018. *See* Ex. A, Declaration of Sarah Heidema (“Heidema Decl.”) ¶¶ 27, 29. The Settlement Agreement provides that Defendants deny that they violated Plaintiffs’ constitutional rights. *See id.* ¶ 28.

### **III. The Government’s Proposed Rulemaking**

On May 24, 2018—after the initial exchange of settlement offers but more than one month prior to the settlement with Defense Distributed—the Departments of State and Commerce each issued a notice of proposed rulemaking (“NPRM”) that implicated the technical data at issue in *Defense Distributed*. *See* 83 Fed. Reg. 24,198 (May 24, 2018); 83 Fed. Reg. 24,166 (May 24, 2018). In those NPRMs, the Government proposed amending the ITAR “to revise Categories I (firearms, close assault weapons and combat shotguns), II (guns and armament) and III (ammunition and ordnance) of the [USML] to describe more precisely the articles warranting export and temporary import control on the USML.” 83 Fed. Reg. at 24,198. If the NPRM is finalized as contemplated, the items removed from the USML would no longer be subject to the ITAR’s authorization requirements, *see id.*, i.e., no license from the Department of State would be required for their export.

The Commerce NPRM explains both the rationale for the proposed transfer as well as the review process undertaken by the Government. As it explained, the process included a “review of those categories by the Department of Defense, which worked with the Departments



of State and Commerce in preparing the amendments.” 83 Fed. Reg. at 24,166. The review was intended to ensure that items remaining on the USML are either “inherently military or otherwise warrant[ing] control on the USML” or “of a type common to nonmilitary firearms applications, possess parameters or characteristics that provide a critical military or intelligence advantage to the United States, and are almost exclusively available from the United States.” *Id.* Put simply, the goal was to ensure that items remaining on the USML in the categories in question, and therefore subject to export controls under the ITAR, are military weapons and related items that could present a critical military or intelligence advantage.

#### IV. Procedural History

On July 30, 2018, Plaintiffs filed the instant action against, *inter alia*, the Department, the Secretary of State, DDTC, and Defense Distributed. Compl., ECF No. 1. Plaintiffs alleged that the Government’s settlement with Defense Distributed adversely affected their public safety laws, in violation of the Administrative Procedure Act (“APA”) and the Tenth Amendment to the U.S. Constitution. *Id.* at 21-41. Also on July 30, 2018, Plaintiffs moved for a temporary restraining order against Defendants, Mot. for TRO, Dkt. No. 2, which the Court granted on July 31, 2018, Dkt. No. 23 (“Order”).

In its Order, the Court held that Plaintiffs had demonstrated irreparable injury because “[i]f an injunction is not issued and the status quo alters . . . , the proliferation of these firearms will have many of the negative impacts on a state level that the federal government once feared on the international stage.” Order at 7. Further, the Court determined that Plaintiffs were likely to succeed on the merits of their APA claim because “[t]here is no indication” that, prior to entering into the settlement agreement, the Government either provided 30-day notice to Congress pursuant to 22 U.S.C. § 2278(f)(1) or obtained the concurrence of the Secretary of Defense pursuant to Executive Order 13637. *Id.* at 6.

The Court also found that Plaintiffs have standing “[f]or purposes of this temporary order.” *Id.* at 6 n.2. The Court based this determination on the “clear and reasonable fear” expressed by Plaintiffs, as well as the Court’s finding that “there is no separation of the internet



1 between domestic and international audiences.” *Id.* Finally, the Court found that “the balance  
 2 of hardships and the public interest tip sharply in plaintiffs’ favor.” *Id.* at 7. Consequently, the  
 3 Court enjoined the Government “from implementing or enforcing the ‘Temporary Modification  
 4 of Category I of the United States Munitions List’ and the letter to Cody R. Wilson, Defense  
 5 Distributed, and Second Amendment Foundation issued by the U.S. Department of State on  
 6 July 27, 2018,” and required that the Government “preserve the status quo *ex ante* as if the  
 7 modification had not occurred and the letter had not been issued.” *Id.* The Court did not enjoin  
 8 Defense Distributed in any manner. *Id.*

9 Plaintiffs amended their complaint on August 2, 2018, Am. Compl., Dkt. No. 29, and  
 10 moved for a preliminary injunction on August 9, 2018, Dkt. No. 43 (“Pls.’ Mot.”). As agreed  
 11 to by the parties, the TRO remains in effect until August 28, 2018. *See* Order, Dkt. No. 30.

### 12 ARGUMENT

13 “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not  
 14 be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek*  
 15 *v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). A plaintiff “must  
 16 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in  
 17 the absence of preliminary relief, that the balance of equities tips in his favor, and that an  
 18 injunction is in the public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d  
 19 1046, 1052 (9th Cir. 2009) (citation omitted). Alternatively, “‘serious questions going to the  
 20 merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of  
 21 a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of  
 22 irreparable injury and that the injunction is in the public interest.” *All. for the Wild Rockies v.*  
 23 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *see also Leiva-Perez v. Holder*, 640 F.3d 962,  
 24 967-68 (9th Cir. 2011). Plaintiffs bear the burden of demonstrating that each of these four  
 25 factors is met. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776-77 (9th Cir. 2011).

26 Plaintiffs here ask the Court to suspend and enjoin enforcement of actions already taken  
 27 by the Government pursuant to its obligations under the settlement agreement. *See* Pls.’ Mot.

at 1; *see also* Pls.’ Proposed Order, Dkt. No. 43-3. Through this requested relief, Plaintiffs seek not to “maintain the status quo” pending litigation, but to place themselves in a better position than they were in before the onset of the current controversy through an award of “the exact same ultimate relief” they seek. *Taiebat v. Scialabba*, No. 17-0805, 2017 WL 747460, at \*2-3 (N.D. Cal. Feb. 27, 2017). “In general, that kind of judgment on the merits in the guise of preliminary relief is a highly inappropriate result.” *Senate of Cal. v. Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992).<sup>3</sup>

**I. Plaintiffs Have Not Shown That The Department’s Action Will Cause Irreparable Harm.**

A preliminary injunction serves the “limited purpose” of “preserv[ing] the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, “[a]n essential prerequisite” before granting preliminary relief is a showing that irreparable injury is likely in the absence of an injunction. *See Dollar Rent A Car of Wash., Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1375 (9th Cir. 1985); *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 19 (2008).

Plaintiffs argue that the “threat to public safety” allegedly caused by the Department’s settlement agreement constitutes irreparable harm. Pls.’ Mot. at 19-24. Specifically, they claim that the settlement agreement “will make it significantly easier to produce undetectable, untraceable weapons, pos[e] unique threats to the health and safety of the States’ residents and employees, and compromis[e] the States’ ability to enforce their laws and keep their residents and visitors safe.” *Id.* at 19. These harms alleged by Plaintiffs with respect to the specific items at issue in this motion fall well short of irreparable harm.

First, Plaintiffs contend that removal of Defense Distributed’s files from the USML will lead to the “proliferation of downloadable guns.” Pls.’ Mot. at 19. They refer further to “the unique threats of irreparable harm to the States posed by permitting 3D-printed weapons files to

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<sup>3</sup> The Government leaves to the private party Defendants the question of whether and how their individual rights should be considered in this analysis.

1 be posted on the internet.” Pls.’ Mot. at 20. But the core inadequacy of Plaintiffs’ claims of  
 2 irreparable harm is that they are not caused by, and cannot be traced to, the Department’s  
 3 regulatory actions or the challenged settlement agreement. Rather, if these harms occur at all, it  
 4 will be because individuals violate the separate prohibitions of the Undetectable Firearms Act  
 5 and other relevant domestic laws. Indeed, Plaintiffs’ claim of irreparable harm is based on a  
 6 fundamental misconception of the relevant law and the authority of the Department as the  
 7 federal agency that administers it. The AECA and ITAR have not conferred upon the  
 8 Department the authority to regulate or otherwise prohibit the domestic acquisition of defense  
 9 articles and services by U.S. persons or domestic communications to U.S. persons. *See*  
 10 *generally* 22 U.S.C. § 2778. Rather, as noted above, the agency’s only relevant authority  
 11 pursuant to the AECA and ITAR is limited to *exports* of defense articles and related technical  
 12 data. *Id.* § 2778(a)(1). Critically, neither the AECA nor ITAR prohibits the transmission of  
 13 defense articles among U.S. persons within the United States. Therefore, the Department has  
 14 never prohibited Defense Distributed, or any other company or individual, from providing their  
 15 files to U.S. persons on U.S. soil, including by, *e.g.*, providing such technical data through the  
 16 mail, distributing DVDs containing such data, or other means. *See Def. Distributed*, 121 F.  
 17 Supp. 3d at 695 (“Plaintiffs are free to disseminate the computer files at issue domestically in  
 18 public or private forums, including via the mail or any other medium that does not provide the  
 19 ability to disseminate the information internationally.”); *see also* Heidema Decl. ¶ 12. To the  
 20 extent Defense Distributed and others have not previously disseminated the computer files at  
 21 issue within Plaintiffs’ boundaries, such inaction is attributable to their own decisions and not  
 22 to the Department’s regulatory authority. Plaintiffs therefore cannot plausibly suggest that the  
 23 Government’s settlement regarding Defense Distributed’s foreign export of its files has harmed  
 24 or imminently harm Plaintiffs’ ability to enforce their statutory schemes, prevent or solve  
 25 crimes, or protect public health.<sup>4</sup> Should any of the harms about which Plaintiffs are concerned  
 26

27 <sup>4</sup> The declarations submitted by Plaintiffs do not address these deficiencies. *See generally* Dkt. No. 43-2. Not only are the harms described equally speculative as those presented in Plaintiffs’ motion, but these declarations  
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1 occur, it will be because individuals have violated separate domestic prohibitions, such as the  
 2 Undetectable Firearms Act. *See* 18 U.S.C. § 922(p)(1).

3 For this reason, the types of harms that Plaintiffs identify do not support the granting of  
 4 injunctive relief in the circumstances of this case. All of the concerns identified are harms that  
 5 might result from the domestic availability of 3D-printed guns in the United States, but such  
 6 concerns have little to do with whether particular files should be regulated for foreign export on  
 7 national security grounds. Their relation to the State Department's exercise of authority and  
 8 the settlement agreement is speculative. For example, Plaintiffs contend that someone of  
 9 questionable "age, mental health, or criminal history" may procure the necessary equipment,  
 10 download files made specifically available as a result of the Department's settlement, assemble  
 11 an operable firearm, and commit a crime, *see* Pls.' Mot. at 19-20. But such actions would  
 12 violate domestic prohibitions on the use of firearms. The Department does not regulate the  
 13 files at issue for their availability to U.S. persons in the United States, and it is speculative to  
 14 claim that these domestic consequences would follow from the Department of State's actions  
 15 under the ITAR.

16 Plaintiffs' claims regarding the "unique threats" posed by firearms made by a 3D-  
 17 printing process fail for the same reasons. *See id.* at 20-24. For instance, they assert  
 18 shortcomings in the ability of metal detectors to discern the presence of firearms made from a  
 19 3D printer, *see id.* at 20-21, but nothing in the State Department actions challenged in this case  
 20 purports to permit the domestic production of undetectable firearms. Such production is illegal  
 21 due to separate authority that regulates domestic conduct. *See* 18 U.S.C. § 922(p)(1).

22 Plaintiffs also argue that 3D-printed firearms "present unique challenges to law  
 23 enforcement," particularly with respect to tracing weapons and conducting forensic testing on  
 24 bullets. Pls' Mot. at 21-22. Again, Plaintiffs can only speculate as to whether such a harm  
 25 would result from a decision by the Department of State not to regulate the export of the

26 \_\_\_\_\_  
 27 confirm the domestic availability of the subject files notwithstanding the Department's regulatory efforts. Camper  
 Decl. ¶ 10, Dkt. No. 43-2; Patel Decl. ¶ 14, Dkt. No. 43-2.

1 Defense Distributed's files for national security reasons.

2 Similarly conjectural are Plaintiffs' assertions about a "[h]eightedened risk of terrorist  
3 attacks." *Id.* at 23. As reflected in the State and Commerce NPRMs, the Government proposed  
4 transferring certain items in USML Category I, which encompass Defense Distributed's files,  
5 only because it has determined that such a transfer would not injure the national security  
6 interests of the United States. *See* 83 Fed. Reg. at 24,198; 83 Fed. Reg. at 24,166; *see also*  
7 Heidema Decl. ¶ 19. So Plaintiffs here seek to base injunctive relief on speculative harms to  
8 national security that exist quite apart from the challenged actions and even that the  
9 Government has considered and rejected. Moreover, concerns that children "may mistake  
10 [these weapons] for toys" exist apart from export control requirements, and it is at best  
11 conjecture that the modification of export control requirements would have any effect on the  
12 alleged harm.<sup>5</sup>

13 At best, Plaintiffs have only identified harms that may result from 3D-printed guns  
14 *generally*, not from the challenged actions regulating foreign exports. But there are already  
15 laws aimed at domestic conduct that seek to prevent such harms. As the Ninth Circuit has  
16 made clear, it is the likelihood of harm from the actions that are sought to be enjoined that is  
17 relevant for the preliminary injunction analysis. *See Park Vill. Apartment Tenants Ass'n v.*  
18 *Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011). Plaintiffs simply cannot tie their  
19 fear of *domestic* irreparable injury to a statutory regime dealing with *foreign* export, especially  
20 when there are separate statutes governing domestic manufacture, possession, and sale that

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21  
22 <sup>5</sup> The two cases Plaintiffs cite—*Maryland v. King*, 567 U.S. 1301 (2012), and *United States v. Ressam*, 679  
23 F.3d 1069 (9th Cir. 2012)—are inapposite. *See* Pls.' Mot. at 19, 24. In *Maryland*, Chief Justice Roberts, sitting as  
24 Circuit Justice, granted a stay of judgment overturning a criminal conviction pending disposition of the State's  
25 petition for a writ of certiorari. *Maryland*, 567 U.S. at 1301. Chief Justice Roberts wrote that a stay was  
26 appropriate because "there is . . . an ongoing and concrete harm to Maryland's law enforcement and public safety  
27 interests." *Id.* As is made clear in the subsequent sentences omitted by Plaintiffs, however, such irreparable harm  
arose from the fact that, as a result of the judgment, "Maryland may not employ a duly enacted statute [its DNA  
Collection Act] to help prevent [serious] injuries." *Id.* Here, by contrast, the Department's settlement has not  
prevented any of Plaintiffs from employing their public safety statutes. *Ressam* is also readily distinguishable.  
There a terrorist brought explosives into the United States in the trunk of a rental car. *Ressam*, 679 F.3d at 1073.  
After a U.S. customs inspector detected Ressam's nervousness, she sent the car for a secondary inspection, where  
the contraband was located. *Id.* Thus not only does *Ressam* involve a weapon wholly distinct from a 3D-printed  
gun, but it only demonstrates that existing law enforcement measures are able to thwart such attempted attacks.

1 remain unaffected by the challenged actions.

2 Finally, Plaintiffs have overlooked “[t]he possibility that . . . other corrective relief will  
3 be available,” in which case temporary relief is unavailable. *Sampson v. Murray*, 415 U.S. 61,  
4 90 (1974). Plaintiffs retain the full authority to enforce their public safety laws, including  
5 lawful restrictions on firearms possession and transfer, against any and all violators of the law.  
6 And as discussed above other federal public safety laws regulating, *inter alia*, the possession of  
7 firearms by felons and the mentally ill, and federal laws requiring that firearms contain  
8 sufficient metal to be detectable, remain in force. These laws—which, unlike the AECA and  
9 ITAR, address domestic, criminal conduct—provide “other corrective relief” on an ongoing  
10 basis.

## 11 **II. Plaintiffs Have Not Shown A Likelihood Of Success On The Merits**

12 Although their Amended Complaint asserts claims under both the APA and the Tenth  
13 Amendment, Am. Compl. ¶¶ 218-47, Plaintiffs’ motion for a preliminary injunction discusses  
14 only their APA claims, Pls.’ Mot. at 10-19. As to either category of claims, Plaintiffs have  
15 failed to establish that “the law and the facts clearly favor” their position, as required under the  
16 heightened mandatory injunction standard. *See Stanley*, 13 F.3d at 1320.

### 17 **A. Plaintiffs Lack Article III Standing To Assert Their Claims.**

18 “Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and  
19 ‘Controversies,’” and “[t]he doctrine of standing gives meaning to these constitutional limits by  
20 ‘identify[ing] those disputes which are appropriately resolved through the judicial process.’”  
21 *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted). Standing,  
22 “which is built on separation-of-powers principles, serves to prevent the judicial process from  
23 being used to usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 568  
24 U.S. 398, 408 (2013). The “irreducible constitutional minimum of standing” has three  
25 elements: that a plaintiff suffer a concrete injury-in-fact, that the injury be fairly traceable to the  
26 challenged action of the defendant, and that it be likely (as opposed to speculative) that the  
27



injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Plaintiffs claim they satisfy the requirements of Article III standing because the Department's settlement has injured their sovereign, proprietary, and quasi-sovereign interests. Pls.' Mot. at 7-9. Plaintiffs fail to carry their burden with respect to each of these theories. First, Plaintiffs assert that the settlement agreement has injured their sovereign interests in their "abilities to enforce their statutory codes," their "border integrity," and their "ability to protect their residents from injury and death." *Id.* at 8. But neither U.S. export controls generally, nor the challenged settlement agreement, prevents states from acting to enforce their own laws or protect state residents.<sup>6</sup> Thus, Plaintiffs cannot demonstrate that the injuries they allege are "fairly traceable" to the Department's settlement with Defense Distributed. *See Lujan*, 504 U.S. at 560.<sup>7</sup> Plaintiffs repeatedly assert that the Government's "deregulation" has jeopardized safety and security. *See* Pls.' Mot. at 8; *see also id.* at 10 (claiming "threats to . . . the safety of the States' own employees and residents [] are caused by the Government's sudden decision to deregulate the posting of 3D-printed gun files on the internet"). Again, Plaintiffs' arguments are premised on a misconception of the AECA and ITAR, and the state of affairs prior to the settlement of Defense Distributed's claims. As the Government has previously explained, it regulates the transfer of items constituting exports and temporary imports pursuant to the AECA and ITAR, and it has no authority to regulate the transmission of technical data exclusively from U.S. persons to U.S. persons within the United States under those authorities.

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<sup>6</sup> Plaintiffs find no support in *California v. Sessions*, 284 F. Supp. 3d 1015, 1029 (N.D. Cal. 2018), *see* Pls.' Mot. at 8 n.25, where the court found injury-in-fact based on allegations that the Government "seeks to compel [the State] to change its policies" and threatened loss of funds that were promised under federal law. Here, the Department does not seek a change in Plaintiffs' laws or policies, nor has it threatened to withhold any funds.

<sup>7</sup> Although Plaintiffs claim the requirement to establish this second standing factor is "relaxed" because they are "vested with a procedural right," Pls.' Mot. at 7, they have failed to explain the nexus between their alleged procedural rights and the interests they assert. *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) ("[A] plaintiff asserting a procedural injury does not have standing absent a showing that the 'procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing' . . . . A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact." (citation omitted)).



Thus, during the entire pendency of Defense Distributed’s lawsuit against the Government, the ITAR did not limit Defense Distributed—or any other entity—from “free[ly] . . . disseminat[ing] the computer files at issue domestically in public or private forums,” including within Plaintiffs’ borders. *Def. Distributed*, 121 F. Supp. 3d at 695. Plaintiffs therefore cannot plausibly assert that the Government’s “deregulation” has affected—let alone seriously jeopardized—their ability to protect their interests. *See* Pls.’ Mot. at 8; Am. Compl. ¶ 17.

Moreover, separate laws aimed at domestic conduct continue to address domestic public safety concerns. It remains the case that any person who might obtain the necessary equipment and materials, download the files from Defense Distributed’s website, properly construct an operable firearm, and render the firearm undetectable would be engaging in an action forbidden by federal law. *See* 18 U.S.C. § 922(p)(1). Thus, Plaintiffs cannot establish that the challenged actions, which concern whether an item must be regulated for export from the United States, restrict their ability or authority to protect public safety in their states. *See Clapper*, 568 U.S. at 409.

Plaintiffs fare no better in invoking their alleged proprietary or quasi-sovereign interests. Pls.’ Mot. at 8-9; Am. Compl. ¶¶ 15-18. According to Plaintiffs, they have suffered proprietary injury insofar as “[t]he deregulation . . . make[s] state, county, and municipal jails and prisons more dangerous for guards and inmates.” Pls’ Mot. at 8. As an initial matter, they offer no support that such an injury is properly asserted under the doctrine of proprietary interests rather than as *parens patriae*. *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976) (“The alleged injuries to the state’s economy and the health, safety, and welfare of its people clearly implicate the *parens patriae* rather than the proprietary interest of the state.”).<sup>8</sup> But even if such interests were “proprietary,” Plaintiffs have failed to demonstrate that any harm based on the possibility of 3D-printed guns infiltrating prisons and injuring persons is

---

<sup>8</sup> The cases cited by Plaintiffs, *see* Pls.’ Mot. at 8 n.29, do not involve jails or prisons but instead discuss a state as land owner or “participa[nt] in a business venture,” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); as operator of a public university, *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017); and licensing activities, *Texas v. United States*, 787 F.3d 733, 748 (5th Cir. 2015).

1 imminent and concrete and would not be prevented by domestic laws regulating undetectable  
 2 firearms. *See Aziz v. Trump*, 231 F. Supp. 3d 23, 33 (E.D. Va. 2017) (state seeking to assert  
 3 injury to its proprietary interest is “subject to the same law of standing as any other party in  
 4 federal court”). *Compare Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017)  
 5 (supporting allegations of proprietary injury by identifying individuals prevented from  
 6 attending, teaching at, or participating in the educational mission of state schools), *cert. denied*  
 7 *sub. nom, Golden v. Washington*, 138 S. Ct. 448 (2017).

8 Plaintiffs’ assertions about their quasi-sovereign interests unquestionably sound in the  
 9 doctrine of *parens patriae*. *See* Pls.’ Mot. at 8-9; *see also Washington v. Chimei Innolux Corp.*,  
 10 659 F.3d 842, 847 (9th Cir. 2011) (explaining that the “doctrine of *parens patriae* allows a  
 11 sovereign to bring suit on behalf of its citizens when the sovereign alleges injury to a  
 12 sufficiently substantial segment of its population, articulates an interest apart from the interests  
 13 of particular private parties, and expresses a quasisovereign interest”). But to the extent  
 14 Plaintiffs seek to vindicate the interests of private citizens, *see* Pls.’ Mot. at 8-9; Am. Compl.  
 15 ¶ 16 (referring to need to “[e]nsur[e] the safety of their residents”), they fail to create any  
 16 “actual controversy between the State[s] and the defendant[s],” *Alfred L. Snapp & Son, Inc. v.*  
 17 *Puerto Rico*, 458 U.S. 592, 602 (1982), and so lack standing as *parens patriae*. *See also*  
 18 *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 974 (9th Cir. 2009) (allowing a state to “bring suit  
 19 on behalf of its citizens solely by virtue of its interest that its citizens benefit from voluntary  
 20 federal grants” would “make the *parens patriae* doctrine ‘too vague to survive the standing  
 21 requirements of Art. III.’” (citation omitted)). It is also well established that a state “does not  
 22 have standing as *parens patriae* to bring an action against the Federal government.” *Sierra*  
 23 *Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (citation omitted); *see also*  
 24 *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Citizens Against Ruining the Env’t v.*  
 25 *EPA*, 535 F.3d 670, 676 (7th Cir. 2008).

#### 26 **B. Plaintiffs Lack Prudential Standing.**

27 Plaintiffs fail to satisfy prudential requirements of standing as well. “The APA imposes  
 Opposition to Motion for Preliminary Injunction  
 (No. 2:18-cv-1115-RSL) – 16

1 ‘a prudential standing requirement in addition to the requirement, imposed by Article III of the  
 2 Constitution, that the plaintiff have suffered an injury in fact.’” *Havasupai Tribe v. Provencio*,  
 3 876 F.3d 1242, 1253 (9th Cir. 2017) (citation omitted). Prudential standing requires that an  
 4 interest asserted by a plaintiff be “arguably within the zone of interests to be protected or  
 5 regulated by the statute that he says was violated.” *Id.* (citation omitted); *see also Ashley Creek*  
 6 *Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005) (“The prudential standing analysis  
 7 examines whether ‘a particular plaintiff has been granted a right to sue by the statute under  
 8 which he or she brings suit.’” (citation omitted)). While the zone of interests test is not  
 9 “demanding,” it nevertheless forecloses suit “when a plaintiff’s ‘interests are so marginally  
 10 related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be  
 11 assumed that Congress intended to permit the suit.’” *Match–E–Be–Nash–She–Wish Band of*  
 12 *Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

13 Here, Plaintiffs do not fall within the zone of interests protected by the AECA,  
 14 particularly with respect to the provision on which they rely. *See Bennett v. Spear*, 520 U.S.  
 15 154, 175-76 (1997) (emphasizing that zone of interests test is applied in the context of “the  
 16 particular provision of law upon which the plaintiff relies”). The AECA “is designed to protect  
 17 against the national security threat created by the unrestricted flow of military information  
 18 abroad.” *United States v. Posey*, 864 F.2d 1487, 1495 (9th Cir. 1989); *accord United States v.*  
 19 *Chi Mak*, 683 F.3d 1126, 1134 (9th Cir. 2012) (AECA “was intended to authorize the President  
 20 to control the import and export of defense articles and defense services in ‘furtherance of  
 21 world peace and the security and foreign policy of the United States.’” (quoting 22 U.S.C.  
 22 § 2778(a)(1))); *see also* Am. Compl. ¶ 27 (acknowledging that “[t]he purpose of the AECA is  
 23 to reduce the international trade in arms and avoid destabilizing effects abroad through arms  
 24 exports”).<sup>9</sup> In this context Congress enacted 22 U.S.C. § 2778(f)(1), which provides that “[t]he

25  
 26 <sup>9</sup> Plaintiffs’ attempt to characterize the AECA as designed to protect “domestic security” rather than “national  
 27 security” is unavailing. *See* Pls.’ Mot. at 9. By Plaintiffs’ reasoning, any national security determination made by  
 the Government would be subject to second-guessing by Plaintiffs because it affects their residents. Yet they offer  
 no authority to support such a position. *See id.*; *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J.,  
 dissenting) (“The national security . . . is the primary responsibility and purpose of the Federal Government.”).

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” certain congressional committees. As the legislative history makes clear, Congress enacted this provision in response to “legitimate industry concerns” and cautioned the Executive Branch to “avoid unnecessary export regulation.” H.R. Rep. No. 97-58, at 21-22 (1981). Thus Plaintiffs—who neither exercise congressional oversight of the Department nor function as would-be exporters, and whose alleged harms concern purely domestic, non-military matters, fail to meet the zone of interests test. *Cf. People ex rel. Hartigan v. Cheney*, 726 F. Supp. 219, 227 (C.D. Ill. 1989) (Illinois not within zone of interest of the Base Closure and Realignment Act, because, as here, the state “is not the subject of the Secretary’s action” and “states have no constitutional or statutory role in federal military policy”).

**C. Plaintiffs’ APA Claims Are Meritless.**

**1. The Department’s Actions Accord With Its Delegated Authority.**

Plaintiffs cannot establish likely success on the merits of any of their claims. First, Plaintiffs claim that the Government has failed to comply with the AECA’s 30-day notice requirement to Congress. *See* Pls.’ Mot. at 11-12; *see also id.* at 13-14 (challenging Department’s reliance on 22 C.F.R. § 126.2); Am. Compl. ¶¶ 220-22, 231. But Plaintiffs again betray their misunderstanding of the governing law. The statutory provision they invoke provides that “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 appropriate congressional committees. 22 U.S.C. § 2778(f)(1) (emphases added). Pursuant to the plain text of the AECA, an “item” refers to the USML’s categories or subcategories—*e.g.*, “Fully automatic firearms to .50 caliber inclusive (12.7 mm),” 22 C.F.R. § 121.1—and not specific articles or commodities related thereto. 22 U.S.C. § 2778(a)(1) (“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

1 Munitions List.”); *see Def. Distributed*, 121 F. Supp. 3d at 687 (“The Munitions List ‘is not a  
 2 compendium of specific controlled items,’ rather it is a ‘series of categories describing the  
 3 kinds of items’ qualifying as ‘defense articles.’” (quoting *United States v. Zhen Zhou Wu*, 711  
 4 F.3d 1, 12 (1st Cir. 2013))). Thus, the Department’s settlement agreement did not affect any  
 5 “item” of the USML. The Department’s settlement regarding the files at issue in *Defense*  
 6 *Distributed* does not implicate the 30-day notice requirement of 22 U.S.C. § 2778(f)(1).

7 To the extent the Court finds the AECA’s reference to “item” or “remove” to be  
 8 ambiguous, the Department’s interpretation of these terms is entitled to at least *Skidmore*  
 9 deference. Under *Skidmore*, a court must defer to an agency’s interpretation provided it is  
 10 “persuasive and reasonable,” considering “‘the thoroughness evident in its consideration, the  
 11 validity of its reasoning, [and] its consistency with earlier and later pronouncements.’” *Fox*  
 12 *Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1013 (9th Cir. 2017) (quoting  
 13 *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001))). The Department has consistently  
 14 held the view since at least 2011 that only the permanent removal of items, *i.e.*, the categories  
 15 or subcategories of the USML, implicate the 30-day notice requirement. *See* Heidema Decl.  
 16 ¶¶ 9, 30, 32. Further, the Department’s position accords with both the AECA’s text and the  
 17 original purpose of 22 U.S.C. § 2778(f)(1), which was to encourage the Executive Branch to  
 18 remove items from the USML. *See* H.R. Rep. No. 97-58, at 22 (“[T]he committee expects the  
 19 executive branch will avoid unnecessary export regulation . . .”). Additionally, Congress has  
 20 been aware of the Department’s interpretation and yet has not addressed it in amendments to  
 21 the AECA. *See* Pub. L. No. 113-296, 128 Stat. 4075 (2014); Heidema Decl. ¶ 9. “These  
 22 circumstances provide further evidence—if more is needed—that Congress intended the  
 23 Agency’s interpretation, or at least understood the interpretation as statutorily permissible.”  
 24 *Fox Television Stations*, 851 F.3d at 1014 (quoting *Barnhart v. Walton*, 535 U.S. 212, 220  
 25 (2002)).

26 To the extent the Court concludes that notice to Congress was required under 22 U.S.C.  
 27 § 2778(f)(1), Defendants request that the Court simply extend the TRO for an additional 45

1 days so that the State Department can consider providing the notice to Congress—rather than  
 2 entering the more sweeping preliminary injunction that Plaintiffs seek.

3 Similarly, Plaintiffs’ misreading of 22 C.F.R. § 126.2 is fatal to their argument that the  
 4 Department has “[m]isuse[d]” the temporary modification regulation. *See* Pls.’ Mot. at 13-14.  
 5 That regulation, by definition, effectuates only a “temporary” modification, and thus does not  
 6 constitute a “removal” such that a 30-day notice is required. *See* 22 C.F.R. § 126.2. Nor can  
 7 Plaintiffs cast doubt on the reasonableness of the Department’s interpretation of § 126.2 by  
 8 claiming that its national security determination “is not the sort of emergency stopgap measure  
 9 contemplated by 22 C.F.R. § 126.2.” Pls.’ Mot. at 14. It is well established that an agency is  
 10 entitled to “substantial deference” in interpreting its regulations. *E.g., Lezama-Garcia v.*  
 11 *Holder*, 666 F.3d 518, 525 (9th Cir. 2011). And Plaintiffs’ purported national security  
 12 pronouncements, *see* Pls.’ Mot. at 14; *see also id.* at 18, offer no basis to challenge the  
 13 Department’s findings in this regard. *E.g., United States v. Hawkins*, 249 F.3d 867, 873 n.2  
 14 (9th Cir. 2001) (“[C]ourts have long recognized that the Judicial Branch should defer to  
 15 decisions of the Executive Branch that relate to national security.”).

16 Plaintiffs also cannot state a claim related to Executive Order 13637, pursuant to which  
 17 designations or changes in designations “of items or categories of items that shall be considered  
 18 as defense articles and defense services subject to export control under section 38 (22 U.S.C.  
 19 § 2778) shall have the concurrence of the Secretary of Defense.” Exec. Order No. 13637  
 20 § 1(n)(i). *See* Pls.’ Mot. at 13; Am. Compl. ¶¶ 221-22, 231, 246. Again, the Department has  
 21 not changed the designations “of items or categories of items.” Further, Plaintiffs’ argument  
 22 fails because the Executive Order creates no rights for Plaintiffs to enforce. Exec. Order No.  
 23 13637 § 6(c); *cf. Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 120 (D.D.C. 2011)  
 24 (Exec. Order No. 13186). Most importantly, as stated in the Commerce NPRM, “[t]he changes  
 25 described in this proposed rule and in the State Department’s companion proposed rule on  
 26 Categories I, II, and III of the USML are based on a review of those categories by the  
 27 Department of Defense, which worked with the Departments of State and Commerce in



preparing the amendments.” 83 Fed. Reg. at 24,166; *see also* Heidema Decl. ¶ 31 (discussing concurrence specific as to subject files).

The Court should also reject Plaintiffs’ argument that the Department, in settling *Defense Distributed*, engaged in an “unlawful attempt to abrogate state and federal law.” Pls.’ Mot. at 14-15; Am. Compl. ¶¶ 227, 233, 239. Specifically, Plaintiffs claim that the temporary modification, which “permits any United States person” to use the subject files, “conflicts with many of the States’ respective laws regulating firearms,” as well as provisions of the Gun Control Act, 18 U.S.C. § 922(g), (x). Pls.’ Mot. at 14. Yet the Government does not suggest, and has never suggested, that the settlement agreement conflicts with or otherwise preempts such laws. To the contrary, the Department has consistently emphasized that its actions are taken only pursuant to its authority to regulate the United States’ system of export controls, not domestic activity. *See Def. Distributed*, 121 F. Supp. 3d at 695. The provisions of the Gun Control Act cited by Plaintiffs remain in force, as do the protections for state law legislated by Congress in the Gun Control Act. *See* 18 U.S.C. § 927. Thus, the laws invoked by Plaintiffs remain unaffected by the settlement agreement, and there is no basis to substitute Plaintiffs’ understanding of the agreement for the far more reasonable interpretation of the Government.<sup>10</sup>

## 2. The Department’s Actions Were Not Arbitrary And Capricious.

Finally, Plaintiffs claim that the Department’s actions were arbitrary and capricious because they constitute an unexplained reversal of the agency’s prior position concerning whether the subject files are ITAR controlled. *See* Pls.’ Mot. at 15-17; Am. Compl. ¶¶ 238-39. Insofar as Plaintiffs challenge the Government’s litigation strategy in *Defense Distributed* or its decision to enter into a settlement to resolve that litigation, such decisions are committed to agency discretion by law and thus not subject to judicial review, 5 U.S.C. § 701(a)(2). *See Heckler v. Chaney*, 470 U.S. 821 (1985); *Exec. Bus. Media, Inc. v. U.S. Dep’t of Def.*, 3 F.3d

<sup>10</sup> Similarly, the Court should not accept Plaintiffs’ accusations of deliberate efforts by the Government to circumvent the law, Pls.’ Mot. at 14; *see also id.* at 4 (suggesting the Government settled “covert[ly]”). *United States v. Boyce*, 38 F. Supp. 3d 1135, 1151 (C.D. Cal. 2014), *aff’d*, 683 F. App’x 654 (9th Cir. 2017) (“Government officials are presumed to carry out their duties in good faith.”).



1 759, 761 (4th Cir. 1993) (“[T]he Attorney General has broad discretion and even plenary  
 2 authority to control litigation under 28 U.S.C. 516 and 519, and [] such decisions are not  
 3 judicially reviewable.”); *accord United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir.  
 4 2008) (recognizing Attorney General’s plenary discretion to settle litigation, but noting that in  
 5 cases—unlike this one—where plaintiffs allege that Attorney General has “exceeded [his] legal  
 6 authority,” such claims are reviewable).<sup>11</sup>

7 Moreover, as the relevant NPRMs indicate, the Department has concluded that ITAR  
 8 control of such technical data is not warranted. *See generally* 83 Fed. Reg. 24,198; 83 Fed.  
 9 Reg. at 24,166. These NPRMs have not been withdrawn and remain the official position of the  
 10 Government.<sup>12</sup> *Cf. Pennzoil Co. v. Dep’t of Energy*, 680 F.2d 156, 171 (Temp. Emer. Ct. App.  
 11 1982). Further, the rationale for this determination is provided in the Commerce NPRM, which  
 12 explains that the “review was focused on identifying the types of articles that are now  
 13 controlled on the USML that are either (i) inherently military and otherwise warrant control on  
 14 the USML or (ii) if of a type common to non-military firearms applications, possess parameters  
 15 or characteristics that provide a critical military or intelligence advantage to the United States,  
 16 and are almost exclusively available from the United States.” 83 Fed. Reg. at 24,166 (“Thus,  
 17 the scope of the items described in this proposed rule is essentially commercial items widely  
 18 available in retail outlets and less sensitive military items.”). This case is only about the  
 19 determination of the Government that the technical data at issue would not give a military or  
 20 intelligence advantage and is therefore not properly subject to export controls. Only those  
 21 weapons of a type that is inherently military or that is not otherwise widely available for  
 22 commercial sale are properly subject to such controls. The Government has not made any  
 23 determination that 3D-printed guns should not be regulated domestically, and indeed the  
 24 Government intends to apply those authorities that regulate such firearms and supports

25 <sup>11</sup> Plaintiffs contend that in accepting the settlement agreement, Defendants agreed to exceed their legal  
 26 authority. As explained in the balance of this memorandum, that is not accurate.

27 <sup>12</sup> Further, Plaintiffs cite no authority for the proposition that the APA requires the Department to release  
 “reports, studies, or analyses” in support of its decision regarding a temporary modification pending a larger  
 rulemaking effort. *See* Pls.’ Mot. at 16.

1 Plaintiffs' efforts to do so as well.

2  
3 **III. The Balance of Equities And The Public Interest Weigh Against Entry Of A Preliminary Injunction**

4 Finally, Plaintiffs cannot show the balance of equities and public interest factors—  
5 which are merged when the Government is a party, *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d  
6 1073, 1092 (9th Cir. 2014)—tips sharply in their favor, particularly given the mandatory  
7 injunction they seek. First, because the Department has no authority to restrict U.S. persons  
8 from sharing these files with other U.S. persons within the United States, the harms identified  
9 by Plaintiffs cannot be prevented by an injunction in this case. *See Def. Distributed*, 121 F.  
10 Supp. 3d at 687 (files previously available on Defense Distributed's website). Moreover, the  
11 public interest is not served by restraining the ability of the Executive Branch to exercise its  
12 discretion to determine whether harm to national security requires export controls on particular  
13 items. *Cf. Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937) (statutory scheme  
14 of Congress "is in itself a declaration of public interest and policy which should be persuasive"  
15 to courts).

16 Further, the Government notes that the possibility of manufacturing small-caliber  
17 firearms from a 3D-printing process has been publicly discussed since 2013. Heidema Decl.  
18 ¶ 26 n.5. Yet Plaintiffs allege no efforts on their part to enact additional legislation regarding  
19 the manufacture of such firearms, *see* Am. Compl. ¶¶ 68-217, and not a single Plaintiff  
20 submitted comments in response to the NPRMs, Heidema Decl. ¶ 23. This further  
21 demonstrates that the balance of equities weighs in Defendants' favor.

22 **CONCLUSION**

23 For the foregoing reasons, the motion for a preliminary injunction should be denied.

24 Dated: August 15, 2018

Respectfully submitted,

25 CHAD A. READLER  
26 Acting Assistant Attorney General

27 ANNETTE L. HAYES

Opposition to Motion for Preliminary Injunction  
(No. 2:18-cv-1115-RSL) – 23

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2018, I electronically filed the foregoing brief using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: August 15, 2018

/s/ Steven A. Myers

Steven A. Myers

## EXHIBIT 1

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON, et al.,  
Plaintiff,

v.

U.S. DEPARTMENT OF STATE, et al.,  
Defendants.

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No. 2:18-cv-1115-RSL

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**DECLARATION OF SARAH J. HEIDEMA**

I, Sarah J. Heidema, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Director of the Office of Defense Trade Controls Policy, within the Directorate of Defense Trade Controls (DDTC), in Bureau of Political-Military Affairs at the Department of State (the “Department”). I have held this position since April 2018, and my responsibilities include maintaining the International Traffic in Arms Regulations and providing policy guidance on the export of defense articles. I previously served as the Division Chief for Regulatory and Multilateral Affairs within the Office of Defense Trade Controls Policy and prior to that I held a variety positions covering export control issues within the Directorate of Defense Trade Controls and at the Department of Commerce, Bureau of Industry and Security. My varied positions afford me extensive knowledge of the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR) as it relates to DDTC activities.

2. I submit this declaration in support of the Federal Defendants’ opposition to the motion for a preliminary injunction filed by Plaintiffs in the above-captioned case. The information contained herein is based on my personal knowledge and on information provided to me in my official capacity.

**Relevant Statutory and Regulatory Framework: AECA and ITAR**

3. The AECA authorizes the President “in furtherance of world peace and the security and



foreign policy of the United States . . . 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.” 22 U.S.C. § 2778(a)(1). The AECA also authorizes the President “to designate those items which shall be considered as defense articles and defense services . . . 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” (USML). *Id.* The President delegated this authority to the Department with respect to exports, temporary imports, and brokering, and the Department has promulgated the ITAR to implement those portions of the statute. *See* Executive Order 13637(n)(i); 22 C.F.R. parts 120-130.

4. Within the Department, DDTC administers the ITAR, including part 121, which contains the USML. The items enumerated on the USML are those that “provide a critical military or intelligence advantage.” 22 C.F.R. § 120.3(b). The AECA prohibits the export or import of defense articles and defense services without a license, except as specifically provided in regulations. *See* 22 U.S.C. § 2778(b)(2).

5. The USML comprises twenty-one categories that enumerate items including, for example: certain “[r]ockets, space launch vehicles (SLVs), missiles, bombs, torpedoes, depth charges, mines, and grenades,” *see* 22 C.F.R. § 121.1 Category IV(a); “[a]ttack helicopters,” *see* 22 C.F.R. § 121.1 Category VIII(a)(4); spacecraft meeting described characteristics, *see* 22 C.F.R. § 121.1 Category XV(a); and “[b]iological agents and biologically derived substances specifically developed, configured, adapted, or modified for the purpose of increasing their capability to produce casualties in humans . . . .” 22 C.F.R. § 121.1 Category XIV(b).

6. The USML also includes “technical data” “required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of



defense articles,” such as “blueprints, drawings, photographs, plans, instructions or documentation.” 22 C.F.R. § 120.10(a)(1); *see e.g.*, 22 C.F.R. § 121.1 Category XI(d).

“Technical data” does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information that is in the public domain. *See* 22 C.F.R. § 120.10. ITAR § 120.11 defines “public domain,” in relevant part, as information which is published and generally accessible or available to the public, and provides a list of information that has been made available to the public, including “[t]hrough sales at . . . bookstores” and “[t]hrough 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 . . . .”

7. As required by the AECA, the Department periodically reviews the items—classes of hardware, technical data, and services described on the USML—to determine what items, if any, no longer warrant control under the ITAR and conveys the results of such reviews to Congress. *See* 22 U.S.C. § 2778(f). The review process begins with Department engagement with the Departments of Defense and Commerce to determine the categories most appropriate for review, and this consultation is informed by inquiries received from the general public, internal feedback from licensing officers and Commodity Jurisdiction analysts, and the period of time since the categories under consideration were reviewed previously. At the onset of the review process the Department publishes a Notice of Inquiry in the *Federal Register* to announce the categories under consideration for review and to solicit comment on potential improvements to those categories. If warranted, based on the feedback received, the Department will then initiate an ordinary rulemaking process, beginning with the publication of a Notice of Proposed Rulemaking (NPRM).

8. The Department continuously engages with its interagency partners and industry to evaluate the USML. For example, in 2015 the Department published a Notice of Inquiry requesting comments to inform its review, in part, of USML Categories VIII and XIX, Aircraft and Related Articles and Gas Turbine Engines and Associated Equipment, respectively. *See* 80 Fed. Reg. 11,313 (Mar. 2, 2015). In 2016, the Department published an NPRM proposing to revise the categories, *see* 81 Fed. Reg. 6,797 (Feb. 9, 2016), and a final rule implementing revisions later that year, *see* 81 Fed. Reg. 83,126 (Nov. 21, 2016). The Department also recently published a Notice of Inquiry requesting comments from the public to inform, in part, its review of the controls on Categories V, X, and XI implemented in 2014. *See* 83 Fed. Reg. 5,970 (Feb. 12, 2018); 79 Fed. Reg. 34 (Jan. 2, 2014) (final rule revising, in part, Categories V and X); 79 FR 37,535 (Jul. 1, 2014) (final rule revising, in part, Category XI). The Department and its interagency partners are reviewing the public comments submitted in response to the 2018 Notice of Inquiry, and the Department intends to publish an NPRM for public comment implementing any revisions to the categories that are warranted.

9. The AECA states that the Department “may not remove any item from the [USML] 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.” 22 U.S.C. § 2778(f). Since at least 2011, the Department has interpreted “item” within the meaning of this provision to refer to the specifically enumerated text of the USML. For example, the “item” controlled in Category VII(a)(1) is “(a) Armored combat ground vehicles as follows: (1) Tanks.” 22 C.F.R. 121.1, in Category VII(a)(1). The Department would notify as required under 22 U.S.C. § 2778(f) prior to removing armored combat tanks from the USML, or otherwise circumscribing the text of this entry in a way that

would remove a class of tanks from the USML, *e.g.*, by revising the control only to cover those tanks that meet defined performance criteria. The Department formalized its adoption of this interpretation in 2011 after considering the statutory context, AECA legislative history, agency past practice, and the impracticality of notifying removal of every individual model, part, or component that might be impacted by a regulatory change. The Department informed Congress in 2011 that the Department would provide a formal 30-day notification, pursuant to 22 U.S.C. § 2778(f), for the removal of “items” from the USML related to category revisions. At that time the Department also volunteered to provide an informal review of removals of items from the USML beginning 30 days prior to the formal notification.

10. The Department also makes commodity jurisdiction (CJ) determinations, following a procedure described in the ITAR, to identify the export control jurisdiction of specific goods, services, and information. *See* 22 C.F.R. § 120.4. The purpose of the process is to determine whether—for purposes of export controls—specific goods, services, or information are subject to the ITAR and therefore under the jurisdiction of the Department or are subject to the Export Administration Regulations (EAR) and therefore under the jurisdiction of the Department of Commerce. The vast majority of all jurisdictional determinations are self-determined either by the original equipment manufacturer (OEM) or via a third party. The Department makes CJ determinations upon request by persons, most often the OEM, unable to self-determine the jurisdiction of a specific good, service, or information. The CJ process typically takes 45-55 business days. If after 45 days the Department has not provided a final CJ, the applicant may request in writing that the determination be given expedited processing. *See* 22 C.F.R. § 120.4(e).

11. The ITAR authorizes the Deputy Assistant Secretary for Defense Trade Controls to



“order a temporary suspension or modification of any or all of the [ITAR] in the interest of the security and foreign policy of the United States.” 22 C.F.R. § 126.2.

### **Relevant Statutory and Regulatory Framework: Licenses and Authorizations**

12. The ITAR requires a license, in relevant part, for the *export* of “technical data.” *See* 22 C.F.R. § 123.1(a). Although revealing “technical data” to a foreign person, including through oral or visual disclosures, is an export under the ITAR, disclosing or transferring “technical data” to U.S. persons in the United States is not an export and is not governed by the ITAR. *See* 22 C.F.R. § 120.17. Consequently, forums in the United States where “technical data” is discussed normally limit participants to U.S. persons.<sup>1</sup> Because there are no unauthorized foreign persons in attendance, presenting “technical data” at such a conference would not result in an “export” within the meaning of the ITAR, and would not require a license from the Department. Similarly, while releasing “technical data” electronically to foreign persons is an ITAR-controlled export, posting “technical data” on a website that prevents access by foreign persons or sharing “technical data” between U.S. persons in the United States using a USB drive would not be ITAR-controlled exports.

13. ITAR § 125.4(b)(13) reinforces the public domain provision by exempting from the ITAR licensing requirements “[t]echnical data approved for public release (i.e., unlimited distribution) by the cognizant U.S. Government department or agency or Office of Freedom of Information and Security Review.” Thus, when the U.S. government authorizes the public

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<sup>1</sup> For example, the admittance policy for the American Institute of Aeronautics and Astronautics 2013 Propulsion and Energy Event provided: “If you plan to attend any presentations restricted by ITAR, you must bring proof of citizenship . . . . Please note that only U.S. Citizens and U.S. Resident Aliens can be considered for attendance at these restricted presentations. Admittance to restricted sessions and access to restricted technical papers is implemented and controlled by the rules of ITAR.” <https://www.aiaa.org/Secondary.aspx?id=14287> (last visited Jul. 11, 2018).

release of “technical data,” that information does not require a license from DDTC for export.

14. The AECA provides for criminal and civil penalties for violations involving controls imposed on the export of defense articles and defense services, including for unauthorized exports. *See* 22 U.S.C. § 2778(c), (e); 22 C.F.R. § 127.1. ITAR enforcement decisions are made on a case-by-case basis depending on the particular facts of a case. Civil penalties may include a monetary penalty or debarment from participating in activities subject to the ITAR. *See* 22 CFR §§ 127.3, 127.10, 127.7.

### **Interagency Review of the USML**

15. Since 2010, the Department of State has been engaged in an interagency effort to revise the USML so that its scope is limited to those defense articles that provide the United States with a critical military or intelligence advantage. In the specific case of the Department’s proposed revisions to USML Categories I-III, the Department interpreted this standard to focus on whether the defense articles at issue are inherently for military end-use. *See* 83 Fed. Reg. 24,198, 24,198 (Jul. 9, 2018). This ongoing effort is intended to create a simpler, more robust export control system that simplifies industry compliance, supports interoperability with allies and partners, and focuses the Department’s resources on those technologies most critical to U.S. national security. In connection with this effort, the Department has published 26 final, or interim final, rules revising eighteen of the twenty-one USML categories,<sup>2</sup> removing less sensitive items from the USML, that are concurrently added by the Department of Commerce (DOC) to the Commerce

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<sup>2</sup> *See e.g.*, 79 Fed. Reg. 27,180 (May 13, 2014) (“Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV”); 79 Fed. Reg. 37,535 (Jul. 1, 2014) (“Amendment to the International Traffic in Arms Regulations: United States Munitions List Category XI (Military Electronics), and Other Changes”); 81 Fed. Reg. 49,531 (Jul. 28, 2016) (“Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories XIV and XVIII”); 81 Fed. Reg. 70,340 (Oct. 12, 2016) (“Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII”); 81 Fed. Reg. 83,126 (Nov. 21, 2016) (“Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories VIII and XIX”); 82 Fed. Reg. 2,889 (Jan. 10, 2017) (“International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV”).



Control List (CCL).

16. To implement these changes, the Department works collaboratively with its interagency partners to evaluate and revise categories of items on the USML. While a wide range of interagency stakeholders review and clear the *Federal Register* notices that revise the USML, the Department works particularly closely with the Departments of Defense and Commerce to solicit their views on the appropriate composition of the USML. The engagement with the DOC is further intended to ensure that the jurisdictional posture of a given item is clear, and the application of ITAR or EAR controls to that item can be discerned and understood by the public. Additionally, the Department coordinates with the DOC to publish rules in parallel where updates to the USML require conforming changes to the CCL to ensure the appropriate level of control.

17. With respect to the Department of Defense (DoD), as required by Executive Order 13637, the Department obtains concurrence of the Secretary of Defense for designations, including changes in designations, of items or categories of items that are defense articles and defense services enumerated on the USML. *See* Executive Order 13637(n)(i). Throughout this effort to revise the USML, which began in 2010,<sup>3</sup> the Department has followed a consistent process for revising the USML categories and obtaining DoD concurrence. This process begins with an internal national security review conducted by the DoD<sup>4</sup> to assess which items in the category continue to warrant control on the USML. The DoD presents the results of this review

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<sup>3</sup> The interagency effort to revise the USML began in 2010. *See* 75 Fed. Reg. 76,935 (Dec. 10, 2010) (publishing advanced notice of proposed rulemaking, “Revisions to the United States Munitions List,” seeking public comment on “revisions to the United States Munitions List (USML) that would make it a ‘positive list’ of controlled defense articles”). The Department published its first final rule revising the USML as part of this effort in 2013. *See* 78 Fed. Reg. 22,740 (Apr. 16, 2013) (“Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform”).

<sup>4</sup> Within the DoD, the Defense Technology Security Administration (DTSA) has the lead in engaging with the Department and the interagency on this effort.

in an interagency meeting, and, if warranted by interagency discussion, will conduct and report on further internal national security assessments. The iterative process generates rules for publication in the *Federal Register*.

18. The Department has long taken the position that controlling the temporary import and export of defense articles and services is a foreign affairs function of the U.S. government, and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). *See* 22 C.F.R § 128.1. The Department, nevertheless, accepted public comment through a notice of proposed rulemaking prior to adding, removing, or amending the description of any item on the USML.

19. As part of the most recent review of the USML, the Department has not published final rules revising Categories I, II, or III, which enumerate respectively: firearms, close assault weapons and combat shotguns; guns and armament; and ammunition/ordnance. Through the interagency review process described above, in which the Department coordinated principally with the Departments of Defense and Commerce to develop revisions to the USML and CCL, the Department determined that certain items now controlled by USML Categories I-III do not provide the United States with a critical military or intelligence advantage, and therefore do not warrant control on the USML. This decision was informed by DoD's assessment that the items proposed for transfer are already commonly available and not inherently for military end-use, such as semi-automatic firearms under .50 caliber currently described in Category I(a). As an example, a specific make and model meeting the description of this subparagraph is the Beretta M9 pistol, which is available for sale at sporting goods stores and other retailers throughout the United States, and has been licensed by the Department for export to commercial retailers and militaries around the world. The assessment that the items proposed for removal pose little



national security concern is highlighted by the fact that DoD does not generally review export license applications for the physical items described in Category I, as DoD does for license applications in other categories.

20. The Department briefed the outcome of this review to the staff of the Senate Foreign Relations Committee, Senate Committee on Banking, Housing, and Urban Affairs, and House Foreign Affairs Committee on May 14, 2018. Subsequently, on May 24, 2018, the Department published in the *Federal Register* a NPRM (May 2018 NPRM), 83 Fed. Reg. 24,198, proposing to transfer oversight from the Department of State to the DOC certain articles in these categories, including firearms widely available for commercial sale.

21. As part of the May 2018 NPRM, the Department proposed to revise USML Category I, covering firearms and related articles, to control only defense articles that are inherently military or that are not otherwise widely available for commercial sale. In particular, if the rule is finalized as contemplated in the NPRM, the revised Category I will not include non-automatic and semi-automatic firearms to caliber .50 (12.7mm) inclusive, currently controlled under paragraph (a), and all of the components, parts, accessories, and attachments for those articles. If finalized as contemplated in the NPRM, technical data related to the firearms that are removed from the USML will no longer be subject to the ITAR.

22. The May 2018 NPRM proposed that the Department would retain jurisdiction of certain firearms considered to provide a critical military or intelligence advantage, such as: firearms that fire caseless ammunition; fully automatic firearms to caliber .50 (12.7mm) inclusive; and firearms specially designed to integrate fire control, automatic tracking, or automatic firing systems.

23. The comment period on the May 2018 NPRM closed on July 9, 2018. The Department

received more than 3,500 comments in response to the NPRM, including comments related to 3D-printed firearms. The Department is reviewing these public comments and will respond if it publishes a final rule. None of the Plaintiff States submitted comments in response to the NPRM.

24. The Department has not withdrawn the May 2018 NPRM and is actively preparing a final rule for publication. The national security determination that informed the NPRM—that certain items now controlled by USML Categories I-III do not provide the United States with a critical military or intelligence advantage, and therefore do not warrant continued control on the USML—remains the Department’s position with respect to the items proposed for transfer. The Department intends to notify Congress, in accordance with 22 U.S.C. § 2778(f), at least 30 days in advance of any final rule removing items from USML Categories I-III.

#### **Defense Distributed Settlement Agreement**

25. In early May 2013, the Department became aware that Defense Distributed had placed on an unrestricted website executable Computer-Aided Design (CAD) files enabling the manufacture of plastic firearm components, accessories, and attachments with a 3D printer. The Department informed Defense Distributed that, as a result of this unrestricted posting, Defense Distributed may have released ITAR-controlled technical data to foreign persons without the required authorization. Defense Distributed removed the published files and, with the Second Amendment Foundation, eventually brought a lawsuit against, *inter alia*, the Department claiming that the requirement to obtain authorization prior to publishing the files on the website violated the plaintiffs’ rights under the First, Second, and Fifth Amendments.

26. I understand that the various files, including those that were the subject of the *Defense Distributed* litigation, were downloaded repeatedly while available on the Defense Distributed



website.<sup>5</sup> I also understand that internationally hosted websites continued to make those files available for download during the pendency of the *Defense Distributed* litigation. Any restrictions imposed by the Department on the technical data that was the subject of the action were limited to the export of that technical data; the Department has no jurisdiction over sharing technical data between U.S. persons in the United States, unless such sharing also provides access to foreign persons.

27. The parties entered into a settlement agreement on June 29, 2018, a true and correct copy of which is attached hereto as Exhibit A, in which the Government agreed, in relevant part, to:

(a) [D]raft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising USML Category I to exclude the technical data that is the subject of the Action.

(b) [Announce], while the above-referenced final rule is in development, of a temporary modification, consistent with the . . . (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that is the subject of the Action. The announcement will appear on the DDTC website, [www.pmddtc.state.gov](http://www.pmddtc.state.gov), on or before July 27, 2018.

(c) [Issue] a letter to Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). For the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue this approval.

28. The settlement agreement was not an admission by the Department of any fault, or of any

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<sup>5</sup> For example, Forbes reported in 2013 that “[i]f gun control advocates hoped to prevent blueprints for the world’s first fully 3D-printable gun from spreading online, that horse has now left the barn about a hundred thousand times. That’s the number of downloads of the 3D-printable file for the so-called ‘Liberator’ gun that the high-tech gunsmithing group Defense Distributed has seen in just the last two days . . . .” *Forbes, 3D-Printed Gun’s Blueprints Downloaded 100,000 Times in Two Days (With Some Help from Kim Dotcom)*, available at <https://www.forbes.com/sites/andygreenberg/2013/05/08/3d-printed-guns-blueprints-downloaded-100000-times-in-two-days-with-some-help-from-kim-dotcom/> (last visited Aug. 3, 2018).

omission in any act or failure to act, and the Department denied, and continues to deny, any *ultra vires* actions, as well as any violation of the First, Second, or Fifth Amendments of the United States Constitution.

29. The Department complied with the actions required by the settlement agreement, and the case was dismissed on July 30, 2018.

30. In accordance with longstanding Department policy in effect since at least 2011, the temporary modification of the ITAR pursuant to ITAR § 126.2, described in paragraph 1(b) of the settlement agreement, was not notified to Congress under 22 U.S.C. § 2778(f). During the effort to revise the USML, described in paragraph 15 above, the Department has provided 30-day notice to Congress prior to modifying the USML text to remove classes of hardware, technical data, and services described on the USML. These revisions of USML text announced the transfer to the CCL of groups or categories of articles meeting broad descriptions, rather than specific models, types or specific parts and components that may be captured within the groups or categories. Here, the temporary modification did not propose to remove, even temporarily, classes of hardware or technical data from the USML within the Department's interpretation of "item" for 22 U.S.C § 2778(f) purposes. Consequently, if the Department removes classes of hardware, technical data, or services described on the USML, such as in connection with the May 2018 NPRM, Congress will receive the necessary notifications. The Department's interpretation of "item" makes practical sense because it would be difficult, if not impossible, to comprehensively identify and enumerate each article or commodity captured by the regulatory text.

31. Similarly, the Department obtains concurrence from the Secretary of Defense when the Department makes changes in designations of items—classes of hardware, technical data, and



services described on the USML—such as for the proposed removal of certain non-automatic and semi-automatic firearms to caliber .50 inclusive, described in USML Category I(a), and the associated technical data, as described in USML Category I(h). The Department requested and received concurrence from DoD in the policy decision to remove all non-automatic and semi-automatic firearms, and associated technical data, from the United States Munitions List, as described in detail in the May 2018 NPRM. Furthermore, the Department requested and received concurrence from DoD, through the Defense Technology Security Administration, before sending the letter, described in paragraph 1(c) of the settlement agreement, advising Defense Distributed that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR.

32. The ITAR contemplates release of technical data into the public domain and provides an exemption from the licensing requirements for technical data that cognizant U.S. government agencies or departments have approved for public release. *See* 22 C.F.R §§ 120.11, 125.4(b)(13). In accordance with the Department’s interpretation of 22 U.S.C. § 2778(f) described in paragraphs 9 and 30, the Department does not consider the release of information into the public domain to be the removal of an “item” from the USML requiring notification. As such, the Department does not notify Congress when such release is authorized, such as occurred with the letter that the Department sent to Defense Distributed pursuant to paragraph 1(c) of the settlement agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 2018.

  
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Sarah J. Heidema

# Exhibit A

### SETTLEMENT AGREEMENT

Defense Distributed (“DD”), Second Amendment Foundation, Inc. (“SAF”), and Conn Williamson (collectively, “Plaintiffs,”) and the United States Department of State (“State”), the Secretary of State, the Directorate of Defense Trade Controls (“DDTC”), the Deputy Assistant Secretary, Defense Trade Controls, and the Director, Office of Defense Trade Controls Policy (collectively, “Defendants”), out of a mutual desire to resolve all of the claims in the case captioned *Defense Distributed, et al. v. Dep’t of State, et al.*, Case No. 15-cv-372-RP (W.D. Tex.) (the “Action”) without the need for further litigation and without any admission of liability, hereby stipulate and agree as follows:

Plaintiffs and Defendants do hereby settle all claims, issues, complaints, or actions described in the case captioned, and any and all other claims, complaints, or issues that have been or could have been asserted by Plaintiffs against Defendants in accordance with the following terms and conditions:

1. *Consideration:* In consideration of Plaintiffs’ agreement to dismiss the claims in the Action with prejudice as described in paragraph 2, below, Defendants agree to the following, in accordance with the definitions set forth in paragraph 12, below:

- (a) Defendants’ commitment to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising USML Category I to exclude the technical data that is the subject of the Action.
- (b) Defendants’ announcement, while the above-referenced final rule is in development, of a temporary modification, consistent with the International



Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that is the subject of the Action. The announcement will appear on the DDTC website, [www.pmddtc.state.gov](http://www.pmddtc.state.gov), on or before July 27, 2018.

- (c) Defendants' issuance of a letter to Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). For the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue this approval.
- (d) Defendants' acknowledgment and agreement that the temporary modification of USML Category I permits any United States person, to include DD's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the letter to Plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files.
- (e) Payment in the amount of \$39,581.00. This figure is inclusive of any interest and is the only payment that will be made to Plaintiffs or their counsel by Defendants under this Settlement Agreement. Plaintiffs' counsel will provide Defendants'

counsel with all information necessary to effectuate this payment.

The items set forth in subparagraphs (a) through (e) above constitute all relief to be provided in settlement of the Action, including all damages or other monetary relief, equitable relief, declaratory relief, or relief of any form, including but not limited to, attorneys' fees, costs, and/or relief recoverable pursuant to 2 U.S.C. § 1302, 2 U.S.C. § 1311, 2 U.S.C. § 1317, 22 U.S.C. § 6432b(g), 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and the Local Rules.

2. *Dismissal with Prejudice:* At the time of the execution of this Settlement Agreement, Plaintiffs agree to have their counsel execute and provide to Defendants' counsel an original Stipulation for Dismissal with Prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and 41(a)(1)(B). Counsel for Defendants agree to execute the stipulation and file it with the Court in the Action, no sooner than 5 business days after the publication of the announcement described in Paragraph 1(b) of this Settlement Agreement and issuance of the letter described in Paragraph 1(c) of this Settlement Agreement. A copy of the Stipulation for Dismissal with Prejudice is attached hereto.
3. *Release:* Plaintiffs, for themselves and their administrators, heirs, representatives, successors, or assigns, hereby waive, release and forever discharge Defendants, and all of their components, offices or establishments, and any officers, employees, agents, or successors of any such components, offices or establishments, either in their official or

individual capacities, from any and all claims, demands and causes of action of every kind, nature or description, whether currently known or unknown, which Plaintiffs may have had, may now have, or may hereafter discover that were or could have been raised in the Action.

4. *No Admission of Liability:* This Settlement Agreement is not and shall not be construed as an admission by Defendants of the truth of any allegation or the validity of any claim asserted in the Action, or of Defendants' liability therein. Nor is it a concession or an admission of any fault or omission in any act or failure to act. Nor is it a concession or admission as to whether the monetary or equitable relief, attorneys' fees, costs, and expenses sought by Plaintiffs in the Action, are reasonable or appropriate. None of the terms of the Settlement Agreement may be offered or received in evidence or in any way referred to in any civil, criminal, or administrative action other than proceedings permitted by law, if any, that may be necessary to consummate or enforce this Settlement Agreement. The terms of this Settlement Agreement shall not be construed as an admission by Defendants that the consideration to be given hereunder represents the relief that could be recovered after trial. Defendants deny that they engaged in *ultra vires* actions, deny that they violated the First Amendment, Second Amendment, or Fifth Amendment of the United States Constitution, and maintain that all of the actions taken by Defendants with respect to Plaintiffs comply fully with the law, including the United States Constitution.



5. *Merger Clause:* The terms of this Settlement Agreement constitute the entire agreement of Plaintiffs and Defendants entered into in good faith, and no statement, remark, agreement or understanding, oral or written, which is not contained therein, shall be recognized or enforced. Plaintiffs acknowledge and agree that no promise or representation not contained in this Settlement Agreement has been made to them and they acknowledge and represent that this Settlement Agreement contains the entire understanding between Plaintiffs and Defendants and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein. Nor does the Parties' agreement to this Settlement Agreement reflect any agreed-upon purpose other than the desire of the Parties to reach a full and final conclusion of the Action, and to resolve the Action without the time and expense of further litigation.
6. *Amendments:* This Settlement Agreement cannot be modified or amended except by an instrument in writing, agreed to and signed by the Parties, nor shall any provision hereof be waived other than by a written waiver, signed by the Parties.
7. *Binding Successors:* This Settlement Agreement shall be binding upon and inure to the benefit of Plaintiffs and Defendants, and their respective heirs, executors, successors, assigns and personal representatives, including any persons, entities, departments or agencies succeeding to the interests or obligations of the Parties.

8. *Consultation with Counsel:* Plaintiffs acknowledges that they have discussed this Settlement Agreement with their counsel, who has explained these documents to them and that they understand all of the terms and conditions of this Settlement Agreement. Plaintiffs further acknowledge that they have read this Settlement Agreement, understand the contents thereof, and execute this Settlement Agreement of their own free act and deed. The undersigned represent that they are fully authorized to enter into this Settlement Agreement.
9. *Execution:* This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together constitute one and the same instrument, and photographic copies of such signed counterparts may be used in lieu of the original.
10. *Jointly Drafted Agreement:* This Settlement Agreement shall be considered a jointly drafted agreement and shall not be construed against any party as the drafter.
11. *Tax and Other Consequences:* Compliance with all applicable federal, state, and local tax requirements shall be the sole responsibility of Plaintiffs and their counsel. Plaintiffs and Defendants agree that nothing in this Settlement Agreement waives or modifies federal, state, or local law pertaining to taxes, offsets, levies, and liens that may apply to this

Settlement Agreement or the settlement proceeds, and that Plaintiffs are executing this Settlement Agreement without reliance on any representation by Defendants as to the application of any such law.

12. *Definitions:* As used in this Settlement Agreement, certain terms are defined as follows:

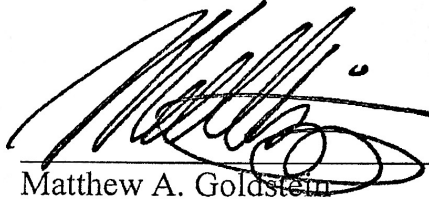
- The phrase “*Published Files*” means the files described in paragraph 25 of Plaintiffs’ Second Amended Complaint.
- The phrase “*Ghost Gunner Files*” means the files described in paragraph 36 of Plaintiffs’ Second Amended Complaint.
- The phrase “*CAD Files*” means the files described in paragraph 40 of Plaintiffs’ Second Amended Complaint.
- The phrase “*Other Files*” means the files described in paragraphs 44-45 of Plaintiffs’ Second Amended Complaint.
- The phrase “*Military Equipment*” means (1) Drum and other magazines for firearms to .50 caliber (12.7 mm) inclusive with a capacity greater than 50 rounds, regardless of jurisdiction of the firearm, and specially designed parts and components therefor; (2) Parts and components specially designed for conversion of a semi-automatic firearm to a fully automatic firearm; (3) Accessories or attachments specially designed to automatically stabilize aim (other than gun rests) or for automatic targeting, and specially designed parts and components therefor.
- The phrase “*technical data that is the subject of the Action*” means: (1) the Published Files; (2) the Ghost Gunner Files; (3) the CAD Files; and (4) the Other Files insofar as those files regard items exclusively: (a) in Category I(a) of the United States Munitions List (USML), as well as barrels and receivers covered by Category I(g) of the USML that are components of such items; or (b) items.



covered by Category I(h) of the USML solely by reference to Category I(a),  
excluding Military Equipment.

Dated: June 29, 2018

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