NO. 20-35064

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; et al., Plaintiffs-Appellees, v. SECOND AMENDMENT FOUNDATION, INC.; CONN WILLIAMSON, Defendants-Appellants. and US DEPARTMENT OF STATE; et al., Defendants, DEFENSE DISTRIBUTED, Defendant.	PLAINTIFF-APPELLEE STATES' MOTION TO DISMISS APPEAL AS MOOT

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I. INTRODUCTION AND RELIEF REQUESTED

This appeal is moot because the federal agency actions at issue have been rescinded and superseded by a new federal policy, leaving no live controversy over the validity of the old actions. This is an appeal from a successful challenge to the State Department's procedurally defective and unlawful attempt to deregulate computer files designed to automatically manufacture undetectable, untraceable, plastic firearms using a 3D printer or similar device, and to permit the "unlimited distribution" of such files via the internet. However, the appellant is not the State Department, which rescinded its deregulatory actions in 2018; the federal government has since gone on to promulgate new and different export-control regulations that govern the subject files, acknowledging that such files threaten U.S. national security interests and should be regulated.

Rather, appellants are private parties[1]—including Defense Distributed, a company founded by "crypto-anarchist" Cody Wilson, whose objective is "evading and disintermediating" gun-safety laws by making deadly and uniquely dangerous firearms readily available to anyone with access to the internet and a 3D printer (regardless of their criminal background, mental health status, age, or global location). Appellants oppose any regulation of the subject files, and ask this Court to reverse the invalidation of the State Department's deregulatory actions.

[1] Defense Distributed and two other private parties filed separate appeals of the same final judgment. Case Nos. 20-35030, 20-35064. The States submit that these appeals should be consolidated, *see* Fed. R. App. P. 3(b)(2); in the meantime, this motion is being filed on both dockets.

Their appeal is moot because the State Department's actions at issue below were rescinded within a week; the federal government has made no effort to reinstate those rescinded actions, and did not appeal the final judgment vacating those actions as unlawful; and the federal government has since adopted a new, superseding policy of regulating the subject files. The federal government's current policy is inconsistent with the relief appellants seek here. In essence, by appealing the judgment below, appellants seek reinstatement of the State Department's prior deregulatory actions, which would have permitted appellants to post the files on the internet with no restrictions. But the State Department's current position is that the subject files *should* be regulated to protect "the national security and foreign policy interests of the United States." 85 Fed. Reg. 3823 (Jan. 23, 2020). Under these circumstances, this Court cannot grant appellants the relief they seek. Moreover, there is no live controversy between the parties to this appeal because appellants did not assert any claims for relief below, and no claims were asserted against them. This appeal is moot and should be dismissed for lack of subject-matter jurisdiction.

II. FACTUAL BACKGROUND

A. The Proceedings Below

At issue below were two agency actions the State Department took in July 2018 pursuant to a settlement agreement with appellants: (1) a "temporary modification" of the United States Munitions List to remove the subject files[2] from

[2] The temporary modification defined the subject files to include both specific files in Defense Distributed's possession and "similar 3D printing files related to firearms" that "they or others" have already created or will "continue to create" in the future. *Def. Distributed v. U.S. Dep't of State*, C15-0372RP (W.D. Tex.), ECF

the Munitions List (and thereby from federal export controls that prohibited Defense Distributed from posting the files on the internet) and (2) a letter to Defense Distributed and other appellants advising that their files were approved for public release and unlimited distribution. *Washington v. U.S. Dep't of State*, 420 F. Supp. 3d 1130, 1135–38 (W.D. Wash. 2019) (Exhibit 1 hereto).

Since at least 2013, the State Department had maintained the subject files on the Munitions List and regulated their export accordingly. *Id.* at 1135. In ensuing litigation brought by Defense Distributed in 2015 in the U.S. District Court for the Western District of Texas, the State Department successfully defeated Defense Distributed's motion to enjoin regulation of the files, arguing that unregulated export by internet posting would endanger U.S. national security and foreign policy interests. *Id.* at 1137. The State Department also prevailed in the Fifth Circuit on Defense Distributed's appeal of the denial of a preliminary injunction. *Id.* In April 2018, upon remand to the Texas district court, the State Department moved to dismiss Defense Distributed's lawsuit, reiterating that absent export-control regulation, the subject files "could be used to threaten U.S. national security, U.S. foreign policy interests, or international peace and stability." *Id.* (quoting *Def. Distributed v. U.S. Dep't of State*, C15-0372RP, Dkt. #92 (W.D. Tex)).

Nevertheless, later in April 2018, the State Department and Defense Distributed agreed to settle the case, and ultimately signed a formal settlement

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No. 90 (Second Amended Complaint) ¶¶ 23–45; *see Washington v. U.S. Dep't of State*, C18-1115RSL (W.D. Wash.), ECF No. 171-2 (Temporary Modification) at 2 (defining removed files by reference to the Second Amended Complaint in the *Defense Distributed* Texas case).

agreement. *Id.* In the settlement agreement, the State Department agreed "[i] to publish a notice of proposed rulemaking and final rule revising the United States Munitions List ('USML') that would allow the distribution of the [subject] files, [ii] to announce a temporary modification of the USML to allow immediate distribution while the final rule was in development, and [iii] to issue a letter to Defense Distributed and other defendants advising that the [subject] files are approved for public release and unlimited distribution." *Id.* The State Department published the temporary modification and issued the letter on July 27, 2018. *Id.* at 1137.

On July 30, 2018, a coalition of nineteen states and the District of Columbia (the States) filed the instant lawsuit against the State Department, seeking judicial review of the temporary modification and letter under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Appellants were joined as "necessary party" defendants due to the potential impact of the relief requested (i.e., vacatur of the temporary modification and letter) on their settlement agreement with the State Department; however, no claims for relief were asserted against appellants. *See Washington v. U.S. Dep't of State*, No. C18-1115RSL, 2018 WL 5921011 (W.D. Wash. Nov. 13, 2018) (approving joinder as "necessary party" defendants under Fed. R. Civ. P. 19(a)). Nor did appellants assert any counterclaims or cross-claims. *See id.*, ECF No. 81 (Answer of Defendants Defense Distributed, Second Amendment Foundation, and Conn Williamson).

On July 31, 2018, the district court enjoined the State Department from implementing or enforcing the temporary modification and the letter. *Washington v. U.S. Dep't of State*, 315 F. Supp. 3d 1202 (W.D. Wash. 2018) (temporary restraining

order); *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247 (W.D. Wash. 2018) (preliminary injunction). The State Department promptly complied by rescinding the temporary modification and informing the letter's recipients that the letter was "a nullity" on July 31, 2019. Declaration of Kristin Beneski, Ex. A (Aug. 2, 2018 letter from counsel for the State Department). No party appealed the district court's preliminary injunction.

On November 12, 2019, the district court issued a final judgment finding the temporary modification and letter unlawful under the APA because these actions failed to comply with the Arms Export Control Act's congressional notice requirement and were arbitrary and capricious. *Washington*, 420 F. Supp. 3d 1130 (granting summary judgment to plaintiffs–appellees). The district court rejected various jurisdictional and constitutional arguments that were advanced by appellants, but were not advanced by the State Department. *See id.* at 1138, 1140–41, 1147. In particular, the district court rejected appellants' assertion that the First Amendment prohibited the court from setting aside the deregulatory actions, ruling that the State Department "has not relied on the First Amendment as justification for its action, and neither the Court nor the private defendants may supply a basis for the decision that the agency itself did not rely upon." *Id.* at 1147 (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 683–84 (2007)). Further, the district court ruled that appellants' arguments based on the First Amendment are "not relevant to the merits of the APA claims plaintiffs assert in this litigation," and that appellants had failed to show that such concerns were "a talisman that excuses the federal defendants' failures under the APA." *Id.*

The State Department did not appeal the district court's judgment. In fact, as discussed below, the federal government published superseding regulations earlier this year, re-adopting its longstanding previous position that the subject files should be controlled—not deregulated. Appellants, however, filed notices of appeal on January 14, 2020 and January 27, 2020, respectively, in Case Nos. 20-35030 and 20-35064.

B. The Federal Government's New Regulations

On January 23, 2020, the State Department and the Commerce Department published two companion final rules that apply to a host of Munitions List items, including the subject files. *International Traffic In Arms Regulations: U.S. Munitions List Categories I, II, and III*, 85 Fed. Reg. 3819 (Jan. 23, 2020) (State Rule); *Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)*, 85 Fed. Reg. 4136 (Jan. 23, 2020) (Commerce Rule). The combined effect of these companion rules is to remove certain items from the Munitions List (and thus from the State Department's export-control jurisdiction) and to transfer them to the Commerce Department's export-control jurisdiction. *See* State Rule at 3820.

The Commerce Rule's preamble recognizes that "plaintiffs in *Washington v. Dep't of State* raised concerns about risks to public safety" if the subject files were released on the internet, and states that the Department "shares the concerns raised over the possibility of widespread and unchecked availability of the software and technology internationally, the lack of government visibility into production and use, and the potential damage to U.S. counter proliferation efforts." Commerce Rule at

4141. The Commerce Rule further recognizes that "[i]n the absence of controls on the export, reexport, or in-country transfer of such technology and software, such items could be easily used in the proliferation of conventional weapons, the acquisition of destabilizing numbers of such weapons, or for acts of terrorism." *Id.* at 4140. The State Department "agrees with the Department of Commerce that maintaining controls over such exports under the [Commerce Department's Export Administration Regulations] remains in the national security and foreign policy interests of the United States." State Rule at 3823.

A coalition of twenty-two states and the District of Columbia filed a lawsuit challenging these new final rules on the grounds that they were promulgated absent compliance with the APA's notice and comment requirements, are arbitrary and capricious, and are otherwise invalid. That lawsuit is premised on the plaintiff states' concerns that the Commerce Department's regulations are unduly narrow and contain loopholes that would allow for the circumvention of export controls as to the subject files, despite the federal government's goal of ensuring such files are appropriately controlled. On March 6, 2020, the district court in that separate new case preliminarily enjoined the final rules insofar as they apply to the subject files, and ordered that the subject files remain on the Munitions List pending review of the plaintiff states' claims on the merits—thus preserving the longstanding status quo. *Washington v. U.S. Dep't of State*, No. 2:20-cv-00111-RAJ, 2020 WL 1083720 (W.D. Wash. Mar. 6, 2020) (*Washington II*). As a result of the preliminary injunction, the subject files remain on the Munitions List and subject to State

Department export controls, while the remainder of the final rules have gone into effect.

In short, the federal government's current policy is that—contrary to the July 2018 temporary modification and letter permitting "unlimited distribution"—the subject files should be export-controlled under federal regulations. The parties in *Washington II* disagree as to whether the final rules appropriately implement that policy, but they agree that regulation is necessary and appropriate. *See id.* at *8 (noting that the federal defendants now "concur with regulating the 3-D gun files"). Appellants in this case are not parties to the new case concerning the State and Commerce Departments' final rules.

III. ARGUMENT

"A federal court's jurisdiction is limited to cases or controversies." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997), *as amended* (Sept. 16, 1997) (citing U.S. Const. art. III, § 2). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). A case is moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). These requirements ensure that federal courts exercise jurisdiction only over "questions presented in an adversary context and in a form historically viewed as

capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

"If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016-17 (9th Cir. 2012), *as amended* (Sept. 17, 2012). "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) (finding case moot because "no effective relief remains available").

A. This Appeal Is Moot Because the Agency Actions at Issue Have Been Rescinded and Superseded by a New Federal Policy

This appeal is moot because the July 2018 deregulatory agency actions at issue below no longer exist (and have not existed since July 2018), and are inconsistent with the current federal policy of regulating the subject files. Appellees ask this Court to overturn the district court's ruling vacating the 2018 actions and holding them unlawful, but doing so would afford no meaningful relief to appellants. The 2018 actions have been superseded by the State and Commerce Departments' final rules, which represent a new federal policy of regulating the subject files to protect U.S. national security and foreign policy interests. "'There is no question that a case can be mooted by promulgation of new regulations or by amendment or revocation of old regulations.'" *Gulf of Me. Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (quoting *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1432 n.27 (D.C. Cir. 1984)). Where a challenged agency action "no longer exists," courts

"can do nothing to affect [the parties'] rights relative to it," thus making the case "classically moot for lack of a live controversy." *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016).

Courts commonly dismiss appeals as moot where the agency action at issue below was subsequently modified or rescinded. *See, e.g.*, *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1252 (10th Cir. 2009) (Gorsuch, J.) (it was "obvious and inevitable" that the agency's promulgation of a new rule mooted a challenge to the prior rule); *Akiachak*, 827 F.3d at 113 (it is a "well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot"); *Gulf of Me. Fisherman's All.*, 292 F.3d at 88 ("This court has no means of redressing either procedural failures or substantive deficiencies associated with a regulation that is now defunct."); *N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1160 (10th Cir. 2019) (appeal was moot where agency's modifications to challenged rules "cured the defects identified in the district court's order" and the modified rules "supersede the old ones"; thus, any decision by the court of appeals on the superseded rules "would be wholly without effect in the real world"); *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 274 (D.C. Cir. 2001) (challenged regulatory provision rendered moot where agency deleted that provision from its rule pending appeal); *Am. Rivers*, 126 F.3d at 1124 (dismissing challenge to agency's biological opinion as moot where that opinion was superseded by a new biological opinion); *Levine v. Apker*, 455 F.3d 71, 79 (2d Cir. 2006) ("where a new regulation has superceded [sic] an old one, the 'validity of the old regulation is moot,

for this case has lost its character of a present, live controversy'") (quoting *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982)). This case is no different. The temporary modification and letter at issue below have been rescinded and superseded by a new federal policy, which moots this appeal.

The fact that the new final rules are the subject of a pending legal challenge does not make this appeal any less moot. Regardless of the outcome of the new lawsuit, the temporary modification and letter at issue below "no longer exist." *Akiachak*, 827 F.3d at 112 (quoting *Wyoming v. U.S. Dep't of Agr.*, 414 F.3d 1207, 1212 (10th Cir. 2005)). Those actions were in effect for a very brief period, were rescinded two years ago, and have been replaced by the new policy reflected in the final rules published this year. The federal government and the plaintiff states in the new lawsuit are in agreement that the subject files should be regulated; thus, while they disagree as to the method of such regulation, there is no possibility that the new lawsuit would somehow result in reinstatement of the 2018 temporary modification and letter—an outcome that no party to that lawsuit wants. Rather, for the 2018 actions to go back into effect, the State Department would have to reverse its current policy of regulating the files and decide to re-implement the temporary modification and letter. Appellants may wish for that outcome, but they cannot obtain it through this appeal.

Any ruling by this Court on the validity of the defunct temporary modification and letter will not afford appellants any real-world relief; rather, such a ruling "would constitute a textbook example of advising what the law would be upon a hypothetical state of facts rather than an actual case or controversy as required by

Article III of the Constitution." *Wyoming*, 414 F.3d at 1212–13; *see also N.M. Health Connections*, 946 F.3d at 1161 (appeal was moot where agency "already has replaced the original rules with these new ones" and "cannot revert to the original rules without a new [notice and comment] proceeding, *see* 5 U.S.C. § 553"). If appellants disagree with the federal government's decision to regulate computer files for 3D-printed firearms and disallow their "unlimited distribution," that is between appellants and the federal government—which is not a party to this appeal. This Court cannot afford appellants any meaningful relief on an appeal concerning agency actions that have been rescinded and superseded. The appeal is moot and must be dismissed for lack of subject-matter jurisdiction.

B. This Appeal Is Moot Because There Is No Live Controversy Concerning Claims for Relief By or Against Appellants

The fact that the agency actions at issue have been rescinded and superseded is dispositive: this appeal should be dismissed as moot for that reason alone. Moreover, this appeal is doubly moot because appellants did not assert any claims for relief below, and no claims were asserted against them—meaning there is no live controversy between the parties for this Court to adjudicate.

Under Article III of the Constitution, "the scope of a federal court's jurisdiction to resolve a case or controversy is defined by the affirmative claims to relief sought in the complaint or, as may be the case, in any counterclaims or crossclaims." *Akiachak*, 827 F.3d at 106–07 (citing, *inter alia*, *Powell v. McCormack*, 395 U.S. 486, 497 (1969); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414–15 (1972)); *accord Muskrat v. United States*,

219 U.S. 346, 357 (1911) ("By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom . . . . The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.") (citation omitted).

As the D.C. Circuit explained in *Akiachak*:

> In order to remain "live," and thus justiciable, a case or controversy must retain at least one "claim for relief [that] remains viable, whether that claim was the primary or secondary relief originally sought." *Ramer v. Saxbe*, 522 F.2d 695, 704 (D.C. Cir. 1975); *see also Powell*, 395 U.S. at 499, 89 S. Ct. 1944 ("reject[ing] respondents' theory that the mootness of a 'primary' claim requires a conclusion that all 'secondary' claims are moot"). The causes of action identified in the complaint perform the Article III function of restricting the court's review to "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. of Hartford v. Haworth*, 300 U.S. 227, 241, 244 (1937).

Id. at 105.

Appellants here are situated very similarly to the appellant in *Akiachak*, which was the State of Alaska. Alaska had intervened in the district court as a defendant, and had "filed an answer that contained affirmative defenses and a prayer for relief, but nothing identified as a counterclaim or crossclaim." *Id.* at 107. Though Alaska argued that one of its affirmative defenses included a request for declaratory relief, the D.C. Circuit held that under Federal Rule of Civil Procedure 8, affirmative defenses "are not themselves claims for relief." *Id.* Moreover, the D.C. Circuit commented that even if it were to construe Alaska's pleading as asserting an

independent claim,[3] "the only relief Alaska requested was a ruling that the [relevant provision of the agency rule at issue] was valid and compelled by the statute," and because the relevant provision "no longer exists," it "cannot continue to generate a live controversy." *Id.* at 108; *see supra* Part III.A. "Unfortunately for Alaska, which intervened in the district court as a defendant and brought no independent claim for relief," the Court held, "the controversy between the [other parties] is now moot." *Id.* at 102. "We therefore dismiss Alaska's appeal for lack of jurisdiction." *Id.*

Here, similarly to Alaska in the *Akiachak* case, appellants were named as "necessary party" defendants in the district court solely to ensure their interests were adequately represented, given the case's potential impact on their settlement agreement with the State Department. When appellants answered the complaint, they did not assert any counterclaims or cross-claims. *Washington v. U.S. Dep't of State*, C18-1115RSL (W.D. Wash.), ECF No. 81 (Answer of Defendants Defense Distributed, Second Amendment Foundation, and Conn Williamson). While their answer did include a "request for relief," it sought only a denial of plaintiffs' requested relief and the entry of judgment for defendants; it did not seek any form of affirmative relief. *See id.* Absent any claims asserted by or against appellants—and because the controversy between the other parties is now moot—there is no live controversy under Article III for this Court to adjudicate.

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[3] The dissenting judge in *Akiachak* was concerned that the majority was "euthaniz[ing] a live dispute" because, although Alaska did not assert a counterclaim or crossclaim, it did request declaratory relief that was "separate and distinct from merely winning the suit." 827 F.3d at 116 (Brown, J., dissenting). Such concerns do not apply here, because appellants made no such request.

C. If Appellants Seek to Alter Federal Law, Any Recourse Is Against the Federal Government, Not the States

This case is fundamentally about the validity of certain federal agency regulations and the status of federal law. Appellants ultimately seek to turn back the clock to the brief period in July 2018 during which files for the production of 3D-printed firearms were not subject to federal regulation. For all the reasons explained above, they cannot do so through this appeal—but that does not leave them without any potential avenue for relief. For example, if appellants believe the federal government was obligated to deregulate the subject files pursuant to the settlement agreement, they may bring an action for specific enforcement.[4] Or, if they believe *current* federal law pertaining to the subject files runs afoul of the First Amendment or is otherwise unlawful, they may challenge it on those grounds.[5] In any case, when

[4] To be sure, such a claim would have dubious merit, and likely could not be heard by this court. *See, e.g.*, *Munoz v. Mabus*, 630 F.3d 856 (9th Cir. 2010) (claim against federal government for breach of settlement agreement "belongs, if anywhere, in the Court of Federal Claims"); *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1082 (10th Cir. 2006) ("We now join our fellow circuits in holding that the Tucker and Little Tucker Acts 'impliedly forbid' federal courts from ordering . . . specific performance[] for contract claims against the government . . .") (citing, *inter alia*, *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998)).

[5] Again, such a challenge would have dubious merit. For one thing, in promulgating the new final rules this year, the federal government considered and rejected commenters' "First Amendment concerns" with export-control regulation, explaining that the subject files are "functional in nature, having the capability to cause a machine to use physical materials to produce" firearms and firearm parts; as such, restrictions on the files' dissemination "do not violate the right to free expression under the First Amendment." Commerce Rule at 4141.

it comes to altering the status of federal law, appellants' recourse—if any—is not against the States who are parties to this appeal, but against the federal government.

IV. CONCLUSION

For the reasons above, the States respectfully request that this appeal be dismissed as moot.

RESPECTFULLY SUBMITTED this 28th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the page and type-volume limitations of Ninth Circuit Rule 27-1(1)(d) and Federal Rule of Appellate Procedure 27(d)(2)(A) because it does not exceed 20 pages and contains 4,336 words, exclusive of the exempted portions of the motion. The motion has been prepared in a format, typeface, and type style that comply with Federal Rule of Appellate Procedure 32(a)(4)-(6). As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word-count feature of this word-processing system in preparing this certificate.

/s/ Kristin Beneski
KRISTIN BENESKI

April 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kristin Beneski
KRISTIN BENESKI

April 28, 2020

Exhibit 1

420 F.Supp.3d 1130
United States District Court, W.D. Washington, at Seattle.

State of WASHINGTON, et al., Plaintiffs,
v.
UNITED STATES DEPARTMENT OF STATE, et al., Defendants.

NO. C18-1115RSL
|
Signed 11/12/2019

Synopsis

Background: Eight states and the District of Columbia brought action under the Administrative Procedure Act (APA) against the United States Department of State and certain private parties, seeking declaratory and injunctive relief as to Department's temporary modification of the United States Munitions List (USML) to allow the distribution of computer aided design (CAD) files for automated production of 3D printed weapons until implementation of the final rule. The States and the Department filed cross-motions for summary judgment.

Holdings: The District Court, Robert S. Lasnik, Senior District Judge, held that:

[1] States satisfied zone-of-interest test for having standing to bring action seeking injunctive and declaratory relief against Department's action;

[2] issues regarding the Department's process through which it removed items from the USML, its compliance with the standards furnished by AECA, and the adequacy of the agency's analysis of and explanation for its decision were subject to judicial review under the APA;

[3] whether the Department complied with clear procedural requirements when it removed CAD data files from the USML did not constitute a political question that was nonjusticiable;

[4] Department's removal of CAD files from USML was arbitrary and capricious and thus had to be invalidated; and

[5] a permanent injunction was not required.

States' motion granted in part and denied in part; Department's motion denied.

See also 315 F.Supp.3d 1202

West Headnotes (21)

[1] Federal Courts Injury, harm, causation, and redress

To present a justiciable case or controversy under Article III of the United States Constitution, plaintiffs must demonstrate an injury in fact that is fairly traceable to the actions of the defendants and that will likely be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[2] Federal Civil Procedure In general; injury or interest

Prudential limitations in determining standing are founded in concern about the proper, and properly limited, role of the courts in a democratic society. U.S. Const. art. 3, § 2, cl. 1.

[3] Federal Civil Procedure In general; injury or interest

A plaintiff's grievance must arguably fall within the zone of interests protected or regulated by a statutory provision on which the claim is based to meet the prudential requirement for standing. U.S. Const. art. 3, § 2, cl. 1.

[4] Administrative Law and Procedure Interest in general

Federal Civil Procedure In general; injury or interest

Zone-of-interest test is a standing requirement of general applicability, but the zone of interests of

a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the Administrative Procedures Act (APA) is fairly expansive. U.S. Const. art. 3, § 2, cl. 1; 5 U.S.C.A. § 551 et seq.

[5] **Administrative Law and Procedure** Interest in general

Zone-of-interest test for determining whether a party meets the prudential requirement for standing is not meant to be especially demanding in Administrative Procedure Act (APA) context. U.S. Const. art. 3, § 2, cl. 1; 5 U.S.C.A. § 551 et seq.

[6] **Administrative Law and Procedure** Interest in general

To satisfy zone-of-interest test for standing in the Administrative Procedure Act (APA) context, plaintiffs need not establish a congressional purpose to benefit them through passage of the underlying statute; they need simply have interests that relate to and are not inconsistent with the purposes implicit in the statute. U.S. Const. art. 3, § 2, cl. 1; 5 U.S.C.A. § 551 et seq.

[7] **Declaratory Judgment** State or state officers

States' grievances regarding United States Department of State's modification of the United States Munitions List (USML) and issuance of a letter authorizing the publication of certain computer aided design (CAD) data files, which would allow users to create guns and their components with a 3D printer, arguably fell within zone of interests protected or regulated by Arms Export Control Act (AECA), and therefore States satisfied zone-of-interest test for having standing to bring action seeking injunctive and declaratory relief against Department's action; plastic weapons could be transported, undetected, anywhere in the world, and States had interests in curbing violence, assassinations, and terroristic threats, and in protecting against violations of gun control laws within their borders. 5 U.S.C.A. § 551 et seq.; 22 U.S.C.A. § 2778.

[8] **War and National Emergency** Export restrictions

Issues regarding the United States Department of State's process through which it removed items from the United States Munitions List, its compliance with the standards furnished by Arms Export Control Act (AECA), and the adequacy of the agency's analysis of and explanation for its decision were subject to judicial review under the Administrative Procedure Act (APA), although AECA conferred broad jurisdiction to president for determining whether to remove items from USML; procedural and substantive requirements at issue were clearly stated, and evaluation of the requirements could be done without fear of treading on any matter that implicated agency expertise, involved a complicated balancing of factors, or had been traditionally regarded as beyond judicial review. 5 U.S.C.A. § 701(a)(2); 22 U.S.C.A. § 2778.

[9] **Constitutional Law** Political Questions

Whether the United States Department of State complied with clear procedural requirements when it removed computer aided design (CAD) data files, which would allow users to create guns and their components with a 3D printer, from the United States Munitions List (USML) that restricted publication of certain data files for weapons under the Arms Export Control Act (AECA), did not constitute a political question that was nonjusticiable under the separation of powers doctrine, although decision to include an item on USML or to grant or deny an export license for a listed item was statutorily excluded from judicial review and required an exercise of discretion within the agency's expertise. 22 U.S.C.A. § 2778.

[10] **War and National Emergency** Export restrictions

United States Department of State's temporary modification of the United States Munitions List (USML) to allow immediate publication of the previously regulated computer aided design (CAD) files, which would allow users to create guns and their components with a 3D printer, constituted a removal of one or more items from the USML, triggering congressional notice requirement under the Arms Export Control Act (AECA), even though the modification was temporary rather than final; it was the removal of a particular article or service from the list that triggered the review and notice requirement. 22 U.S.C.A. § 2778(f).

[11] **Administrative Law and Procedure** Consistency with statute, statutory scheme, or legislative intent

A federal regulation cannot empower the Government to do what a federal statute prohibits it from doing.

[12] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

In determining whether agency action was arbitrary and capricious, the district court's scope of review is narrow and focused on determining whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made.

[13] **Administrative Law and Procedure** Necessity

Administrative Law and Procedure Report or opinion; reasons for decision

Administrative Law and Procedure In general; necessity

For the district court to be able to determine whether the agency has acted within the bounds imposed by the governing statute, the agency is required to disclose the basis for its action, making the findings necessary to support the decision, and produce an administrative record that substantially supports those findings.

[14] **War and National Emergency** Export restrictions

United States Department of State's failure to consider how proliferation of weaponry and related technical data would impact world peace, national security, and foreign policy before removing certain computer aided design (CAD) data files, which would allow users to create guns and their components with a 3D printer, from United States Munitions List (USML) rendered removal of data from list under Arms Export Control Act (AECA) an arbitrary and capricious action that had to be invalidated under Administrative Procedure Act (APA), although Department did analyze whether weapons provided a critical military or intelligence advantage; those considerations were mandatory and therefore de-listing was not based on consideration of relevant factors and within scope of authority delegated to agency by statute. 5 U.S.C.A. § 706; 22 U.S.C.A. § 2778; 22 C.F.R. § 120.3(b).

1 Cases that cite this headnote

[15] **War and National Emergency** Export restrictions

United States Department of State failed to identify substantial evidence in administrative record explaining change in position regarding need to regulate 3D-printed firearms under Arms Export Control Act (AECA) before removing certain computer aided design (CAD) files for plastic firearms from United States Munitions List (USML), requiring action to be invalidated as arbitrary and capricious under Administrative Procedure Act (APA); federal government previously regulated such weapons out of concerns related to undetectable nature of a plastic gun, as it could slip through conventional security equipment and could easily be manufactured, and Department offered no analysis on impact of removing data, no

response to public comments raising concerns, and no justification for change in stance. 5 U.S.C.A. § 706; 22 U.S.C.A. § 2778.

[16] **Administrative Law and Procedure** Change of policy; reason or explanation

Requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position; the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate, but sometimes it must, when, for example, its new policy rests upon factual findings that contradict those that underlay its prior policy and it would be arbitrary or capricious to ignore such matters.

[17] **Administrative Law and Procedure** Change of policy; reason or explanation

When an agency's new policy rests upon factual findings that contradict those that underlay its prior policy, it is not that further justification is demanded by the mere fact of policy change, but that a reasoned explanation is needed for disregarding facts and circumstances that underlay the prior policy.

[18] **Federal Courts** Waiver, estoppel, and consent

Private company that published online computer aided design (CAD) files for certain plastic guns that the United States Department of State removed from the United States Munition List (USML) waived its personal jurisdiction challenge in action seeking injunctive and declaratory relief regarding validity of the remand, although it asserted a personal jurisdiction defense in its answer, where it omitted the issue from its motion to dismiss. Fed. R. Civ. P. 12(h)(1)(A).

[19] **War and National Emergency** Export restrictions

First Amendment grounds could not be the basis for upholding decision by the United States Department of State to remove certain computer aided design (CAD) data files, which would allow users to create guns and their components with a 3D printer, in States' action against the department challenging to removal under the Administrative Procedure Act (APA); Department did not rely on the First Amendment grounds as a justification for its action. U.S. Const. Amend. 1; 5 U.S.C.A. § 551 et seq.

[20] **Administrative Law and Procedure** Annulment, Vacatur, or Setting Aside of Administrative Decision

Administrative Law and Procedure Remand

The presumptive remedy for unlawful agency action is vacatur and remand.

[21] **Injunction** Armed services and national security

United States Department of State's unlawful agency action in issuing a temporary modification of the United States Munitions List (USML) that removed certain computer aided design (CAD) data files for plastic weapons, in violation of the procedures required by Administrative Procedure Act (APA), did not warrant issuance of an injunction preventing Department and federal officials from again issuing a temporary modification purporting to deregulate the CAD files with no warning; there was no indication that the Department of State was poised to immediately modify the USML as soon as their previous efforts were invalidated or were otherwise inclined to ignore the procedural and substantive requirements of the Arms Export Control Act (AECA). 22 U.S.C.A. § 2778.

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ORDER INVALIDATING JULY 27, 2018, TEMPORARY MODIFICATION AND LETTER

Robert S. Lasnik, United States District Judge

***1135** This matter comes before the Court on the parties' cross-motions for summary judgment. Dkt. #170, #173, and #174. Plaintiffs seek a summary determination that the federal defendants violated the Administrative Procedures Act ("APA") when they modified the United States Munitions List ("USML") and issued a letter authorizing the on-line publication of certain computer aided design ("CAD") data files in July 2018. They request that the Court vacate the agency action and permanently enjoin the federal defendants from removing the CAD files at issue from the USML unless and until they comply with the statutory procedural requirements.

*1136 BACKGROUND AND PROCEDURAL HISTORY

Since at least 2013, the federal government had taken the position that the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778, authorizes restrictions on the internet publication of CAD files that allow users to create guns and their components with a 3D printer. When defendant Defense Distributed posted CAD files for various weapons on its website at the end of 2012, the Directorate of Defense Trade Controls ("DDTC"), which is part of the Department of State, notified Defense Distributed that the publication may have been unauthorized and in violation of the AECA's implementing regulations, the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120-30. The DDTC explained that making the CAD files available on the internet constituted a disclosure or transfer of technical data to foreign persons and was considered an "export" subject to the AECA and ITAR. The government advised Defense Distributed to remove the files from its website and, if it believed the files were not properly subject to export control, to utilize the commodity jurisdiction ("CJ") procedure to obtain an official determination from the DDTC.

Defense Distributed filed a number of determination requests. When the DDTC failed to make timely rulings, Defense Distributed filed a lawsuit in the United States District Court for the Western District of Texas. Defense Distributed v. U.S. Dep't of State, C15-0372RP (W.D. Tex). That litigation pitted Defense Distributed and the Second Amendment Foundation on one side against the Department of State, the DDTC, and various federal employees on the other. Defense Distributed challenged the federal government's power to regulate its publication of the CAD files on the internet, arguing that the regulation subjected its gun-related speech to a system of prior restraints that was applied in an arbitrary manner in violation of Defense Distributed's First, Second, and Fifth Amendment rights. A month after the Texas litigation was filed, the DDTC determined that some, but not all, of the CAD data files Defense Distributed wanted to publish on the internet were technical data subject to the AECA and ITAR.

Defense Distributed filed a motion for preliminary injunction in the Texas litigation to preclude the federal government from imposing prepublication approval requirements on any of its CAD files. The federal government opposed the motion, arguing that:

- "export of Defense Distributed's CAD files could cause serious harm to U.S. national security and foreign policy interests" that "warrant subjecting [the files] to ITAR's export licensing of technical data;"
- Defense Distributed's "CAD files constitute the functional equivalent of defense articles: capable, in the hands of anyone who possesses commercially available 3D printing equipment, of 'automatically' generating a lethal firearm that can be easily modified to be virtually undetectable in metal detectors and other security equipment;"
- "The State Department is particularly concerned that [Defense Distributed's] proposed export of undetectable firearms technology could be used in an assassination,

for the manufacture of spare parts by embargoed nations, terrorist groups, or guerrilla groups, or to compromise aviation security overseas in a manner specifically directed at U.S. persons;" and

• both the government and the public "have a strong interest in curbing violent regional conflicts elsewhere in the world, especially when such conflict implicates the security of the United States and the world as a whole."

***1137** Id., Dkt. #32 at 19-20 (W.D. Tex.) (internal quotation marks and citations omitted). The then-Director of the Office of Defense Trade Controls Management, Lisa V. Aguirre, concluded that the unrestricted export of Defense Distributed's CAD files would result in the production of plastic firearms that are fully operable and virtually undetectable by conventional security measures, that their use to commit terrorism, piracy, assassinations, or other serious crimes would cause serious and long-lasting harm to the foreign policy and national security interests of the United States, that efforts to restrict the availability of these articles to enemies of the United States would fail, that the proliferation of weapons and related technologies would contribute to a more dangerous international environment, and that the export would undercut the domestic laws of nations that have more restrictive firearm controls and the United States' foreign relations with those nations would suffer. Id., Dkt. #32-1 at ¶ 35.

The Honorable Robert L. Pitman denied Defense Distributed's motion for preliminary injunction, noting that Defense Distributed's avowed purpose is to facilitate "*global* access to, and the collaborative production of, information and knowledge related to the three-dimensional ('3D') printing of arms," and that such activities "undoubtedly increase[ ] the possibility of outbreak or escalation of conflict" and are of the type Congress authorized the President to regulate through the AECA. Id., Dkt. #43 at 8-9 (emphasis in original). The Fifth Circuit affirmed, finding that "the State Department's stated interest in preventing foreign nationals - including all manner of enemies of this country - from obtaining technical data on how to produce weapons and weapons parts" constitutes "a very strong public interest in national defense and national security." Defense Distributed v. U.S. Dep't of State, 838 F.3d 451, 458 (5th Cir. 2016).

In April 2018, the federal government moved to dismiss Defense Distributed's claims in the Texas litigation, reiterating that what was at stake was "the United States' ability to control the export of weapons - a system of laws and regulations that seeks to ensure that articles useful for warfare or terrorism are not shipped from the United States to other countries (or otherwise provided to foreigners) without authorization, where, beyond the reach of U.S. law, they could be used to threaten U.S. national security, U.S. foreign policy interests, or international peace and stability." C15-0372RP, Dkt. #92 at 1 (W.D. Tex). Later that month, the parties reached a tentative settlement agreement. Pursuant to the settlement, which was not signed until July 29, 2018, the Department of State changed course, abandoning its prior regulatory and litigation positions and allowing the private defendants, Defense Distributed, the Second Amendment Foundation, and Conn Williamson, to publish on the internet CAD files for the automated production of 3D-printed weapons. The federal government specifically agreed, among other things, to publish a notice of proposed rulemaking and final rule revising the United States Munitions List ("USML") that would allow the distribution of the CAD files, to announce a temporary modification of the USML to allow immediate distribution while the final rule was in development, and to issue a letter to Defense Distributed and other defendants advising that the CAD files are approved for public release and unlimited distribution. The federal defendants also acknowledged and agreed that the temporary modification and letter "permits any United States person ... to access, discuss, use, reproduce, or otherwise benefit from" the CAD files. The announcement of the temporary modification and the issuance of the letter were to occur on or before July 27, 2018. No findings of fact or ***1138** other statements are provided in the settlement agreement that address, much less invalidate, the federal government's prior analysis regarding the likely impacts of publication on national security or world peace or that otherwise explain the federal government's change of position.

On May 24, 2018, the Department of State published a notice of proposed rulemaking ("NPRM") that implicated the technical data at issue in the litigation. The NPRM proposed an amendment to the ITAR to, *inter alia*, remove certain Category I items (primarily small caliber weapons and their related technical data) from the USML, thereby lifting the requirement to obtain a license for their export. 83 Fed. Reg. 24,198 (May 24, 2018). Although the NPRM did not explicitly mention 3D-printed firearms or their related technical data, approximately 12% of the comments received in response to the NPRM did, and all of them opposed lifting the license requirement. The public comment period end on July 9, 2018. The settlement agreement was made public the following day. The temporary modification was

published and the letter to the private defendants was issued on July 27, 2018. The temporary modification contains an assertion that the DDTC "has determined that it is in the interest of the security and foreign policy of the United States" to immediately modify Category I of the USML to exclude the technical data at issue in the Texas litigation. Dkt. #171-2 at 2. The public comments opposing exclusion were not considered by the agency when it issued the temporary modification and letter. Dkt. #179-2 at ¶ 7.

Three days after the temporary modification was published, eight states and the District of Columbia filed this lawsuit, alleging that the federal defendants' conduct was *ultra vires* and in violation of the APA and the Tenth Amendment to the United States Constitution. [1] In response to plaintiffs' motion for preliminary injunctive relief, the federal defendants justified the deregulation of the CAD files (along with the delisting of other items within Category I of the USML) by pointing to a Department of Defense determination that the items "do not provide the United States with a critical military or intelligence advantage" and "are already commonly available and not inherently for military end-use." Dkt. #64-1 at 10. After an expedited hearing, the Court found that plaintiffs had shown a likelihood of success on the merits of their APA claim insofar as the temporary modification resulted in the removal of one or more items from the USML, that plaintiffs had shown a likelihood of irreparable injury if an injunction did not issue because Defense Distributed had announced its intent to make the CAD files downloadable from its website on August 1, 2018, [2] and that the balance of hardships and the public interest tipped sharply in plaintiffs' favor. The federal defendants were enjoined from implementing or enforcing the temporary modification of the USML and/or the July 27th letter and were required to preserve the status quo *ex ante* as if the modification had not occurred and the letter had not been issued. Dkt. #23 and #95.

In the context of the States' challenge to the issuance of the temporary modification and letter, the federal defendants ***1139** produced and supplemented the administrative record on which the decision to issue the temporary modification and letter was based. [3] Plaintiffs now seek an order invalidating the temporary modification and letter under the APA and permanently enjoining the federal defendants from removing the computer files at issue from the USML unless and until they comply with the governing procedural requirements. The federal and private defendants oppose plaintiffs' motion and request judgment in their favor.

DISCUSSION

A. Jurisdiction

Both the federal and private defendants challenge the Court's jurisdiction over this matter. The federal defendants argue that the States cannot meet prudential standing requirements. The private defendants argue that the issuance of the temporary modification and letter are "committed to agency discretion by law" and not subject to judicial review under 5 U.S.C. § 701(a)(2) and 22 U.S.C. § 2278(h), that listing on the USML is a political question over which the Court lacks subject matter jurisdiction, and that the claims are barred by the Tucker Act. [4]

1. Zone of Interests

[1] **[2]** **[3]** The question of standing involves both constitutional limitations imposed by Article III of the U.S. Constitution and prudential limitations imposed by the judiciary to limit the exercise of federal jurisdiction. See Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). To present a justiciable case or controversy under Article III, plaintiffs must demonstrate an "injury in fact" that is "fairly traceable" to the actions of the defendants and that will likely be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The prudential limitations are "founded in concern about the proper - and properly limited - role of the courts in a democratic society." Warth, 422 U.S. at 498, 95 S.Ct. 2197. The prudential requirement at issue here is that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision on which the claim is based. See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

[4] **[5]** **[6]** The zone-of-interests test is a standing requirement of general applicability, but "the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA" is fairly expansive. Bennett v. Spear, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal quotation marks and citations omitted). The test "is not meant to be especially demanding" in the APA context, and the Supreme Court applies "the test in keeping with Congress's evident intent when enacting the APA to make agency

action presumptively reviewable." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012) (internal quotation marks and citations omitted). Plaintiffs need not establish a congressional purpose to benefit them through passage of the underlying statute, ***1140** they need simply have interests that relate to and are not inconsistent with the purposes implicit in the statute. Id. The Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." Id.

[7] The AECA "was intended to authorize the President to control the import and export of defense articles and defense services in 'furtherance of world peace and the security and foreign policy of the United States.' " U.S. v. Chi Mak, 683 F.3d 1126, 1134 (9th Cir. 2012) (quoting 22 U.S.C. § 2778(a)(1)). In keeping with the goals of the statute, the federal government has, in the past, justified subjecting the CAD files at issue to ITAR's export licensing scheme based on their characteristics and functionality, which make them especially dangerous to U.S. national security and foreign policy interests. The agency properly focused its analysis on the factors specified in the AECA and deemed it important to keep plastic, undetectable firearms out of foreign hands where they were not subject to U.S. laws and controls. The agency's focus on exports, national security, and world peace does not, however, mean that the States' domestic interests are unrelated or marginally related to the AECA's purposes. The State Department found that the firearms generated by the subject CAD files "can be easily modified to be virtually undetectable in metal detectors and other security equipment," could be used in assassinations or terrorist activities "specifically directed at U.S. persons," and could lead to violent regional conflicts that implicate the security of the United States. Defense Distributed v. U.S. Dep't of State, C15-0372RP, Dkt. #32 at 19-20 (W.D. Tex). Given that the CAD files and the resulting weapons can be transported, undetected, virtually anywhere in the world, these same impacts would likely arise within the United States even if the plastic weapons are manufactured abroad. The States' interests in curbing violence, assassinations, terrorist threats, aviation and other security breaches, and violations of gun control laws within their borders are at least marginally related to the interests protected or regulated by the AECA. The state and federal interests, while not identical, are aligned and not in any way inconsistent. Because the States' grievance arguably falls within the zone of interests protected or regulated by the AECA, there is no judicially-imposed limit on the Court's exercise of jurisdiction in this matter.

2. Agency Discretion and Judicial Review

[8] The private defendants argue that this Court lacks jurisdiction over plaintiffs' APA claims because the APA does not apply "to the extent that ... agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The AECA expressly commits one type of decision to agency discretion, namely the decision to designate an item as a defense article or defense service. 22 U.S.C. § 2778(h). The decision at issue here, however, is the removal of an item from the USML. Plaintiffs are challenging the federal defendants' failure to comply with statutory procedures and/or to consider certain congressionally-specified factors when making removal decisions under AECA. Congress did not expressly make such removal decisions unreviewable.

Even absent a statutory bar to judicial review, certain agency decisions have traditionally been considered wholly discretionary and beyond review. To be sure, the AECA confers broad discretion on the President when determining whether to add or remove items from the USML, but that discretion is not unbounded: Congress has imposed both procedural and substantive benchmarks to guide the agency's action. ***1141** In order to honor the "basic presumption of judicial review" embodied in the APA and to "give effect to the command that courts set aside agency action that is an abuse of discretion," the Supreme Court has "read the § 701(a)(2) exception for action committed to agency discretion quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" and has "generally limited the exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, ... such as a decision not to institute enforcement proceedings ... or a decision by an intelligence agency to terminate an employee in the interest of national security...." Dep't of Commerce v. N.Y., —— U.S. ——, 139 S. Ct. 2551, 2567-68, 204 L.Ed.2d 978 (2019) (internal quotation marks and citations omitted).

The procedural and substantive requirements at issue in this case are clearly stated, and whether the agency complied with those requirements can be judicially evaluated without fear of treading on any matter that implicates agency expertise, involves a complicated balancing of factors, or has been traditionally regarded as beyond judicial review. The Court

finds that the process through which defendants removed items from the USML in July 2018, defendants' compliance with the standards furnished by the AECA, and the adequacy of the agency's analysis of and explanation for its decision are subject to judicial review under the APA.

3. Political Question

[9] The private defendants also argue that the regulation or deregulation of defense articles or services under the AECA is a political question that is nonjusticiable under the separation of powers doctrine. This argument fails for much the same reasons as the agency discretion and judicial review arguments. While the decision to include an item on the USML or to grant or deny an export license for a listed item is statutorily excluded from judicial review and/or requires an exercise of discretion within the agency's expertise, whether the agency complied with clear procedural requirements and considered factors Congress deemed relevant when removing an item from the USML is neither a political question nor one committed to the agency's discretion as a matter of statute or case law.

4. Tucker Act

Finally, the private defendants assert that the Court of Federal Claims has exclusive jurisdiction "to render judgment upon any claim against the United States founded ... upon any express or implied contract with the United States...." 28 U.S.C. § 1491(a)(1). Plaintiffs seek to invalidate agency action under the APA because it violates the procedural requirements of the AECA and/or is arbitrary and capricious. These claims are statutory and, as plaintiffs point out, the Tucker Act has no application in this context. Dkt. #186 at 22. The private defendants abandoned this argument in reply.

B. Administrative Procedures Act Claims

The APA authorizes judicial review of final agency action and provides that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... in excess of statutory jurisdiction, authority, or limitations; ... [or] without observance of procedure required by law." 5 U.S.C. § 706. Plaintiffs argue that the federal government's efforts to immediately remove items from the USML through issuance ***1142** of a temporary modification and letter were not in accordance with law and were without observance of procedure required by law insofar as the State Department failed to give thirty days' notice to the Congressional foreign relations committees specified in 22 U.S.C. § 2778(f)(1). Plaintiffs also seek to invalidate the decision to allow the CAD files to be published on the internet on the ground that the temporary modification violates the limitations on federal power imposed by the Tenth Amendment. Finally, plaintiffs argue that the agency action was arbitrary and capricious because the agency failed to consider the factors identified by Congress and because the delisting is not supported by substantial evidence in the administrative record.

1. Congressional Notice

[10] The AECA requires that the President or his designee periodically review the items on the USML to ensure that export controls are warranted. 22 U.S.C. § 2778(f)(1). The results of the review must be reported to Congress, and the Department "may not remove any item from the Munitions List until 30 days after the date on which [it] 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...." Id. The federal defendants argue that the Congressional notice requirement does not apply because the CAD files at issue here are not specifically enumerated on the USML and are therefore not "items" for purposes of § 2778(f)(1). This argument was rejected at the preliminary injunction stage, and the Court sees no reason to reconsider its decision.

The President has the power to designate "defense articles and defense services" and to control their import and export "[i]n furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1). The articles and services (*i.e.*, items) so designated constitute the USML. Id. See also 22 C.F.R. § 121.1(a) (describing the organization of the USML and noting each USML category is composed of related defense articles). Category I of the USML includes all firearms up to .50 caliber (22 C.F.R. § 121.1(I)(a) and (b)) and all technical data "required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of" such firearms (22 C.F.R. § 120.10(a)). Through the CJ process, the Department of State specifically determined that the subject CAD files are subject to the export controls of ITAR.

The Department of State argues that its decision to immediately allow the unlicensed export of previously-regulated items does not trigger the Congressional notice requirement because the temporary modification did not deregulate a whole group or category of defense articles

described in the USML, such as "nonautomatic and semi-automatic firearms to caliber .50 inclusive (12.7 mm)," 22 C.F.R. § 121.1(I)(a). This argument conflates "category" with "item." As described in the statute, the USML is a list of items designated by the President as "defense articles and defense services." 22 U.S.C. § 2778(a)(1). Rather than generate an exhaustive list of every individual article or service that is subject to export control under the AECA, the Department of State opted to populate the USML with generally descriptive categories. Those categories describe actual items, however, and it is those items that are the "defense articles and defense services" subject to export control under the AECA. 22 C.F.R. § 121.1.

The congressional review and notice requirements specifically apply to items, not categories of items. 22 U.S.C. § 2778(f). The Department's CJ regulation further ***1143** confirms that it is the removal of a particular article or service - an item rather than a category - that triggers the review and notice requirements. The Department describes the CJ procedure as a means of resolving doubts "as to whether an article or service is covered by the U.S. Munitions List" and to seek "redesignation of an article or service currently covered by the U.S. Munitions List." 22 C.F.R. § 120.4(a). Immediately after the reference to redesignation, the regulations reiterate that the "Department must provide notice to Congress at least 30 days before any item is removed from the U.S. Munitions List." Id. Given the language, structure, and purpose of the statute and implementing regulations, the Court finds that the attempt to revoke the listing of an item previously covered by the USML through the issuance of a "temporary modification," thereby lifting all export controls under the AECA and ITAR, triggers the congressional notice requirement of the statute.

[11] It is undisputed that Congress was not notified prior to the removal of the subject CAD files from the USML. This procedural failure cannot be rectified by providing Congressional notice thirty days in advance of making the "temporary" removal "final:" the temporary modification implemented the removal immediately, without waiting for the proposed rule to become final and without giving Congress notice and an opportunity to exercise its oversight role. Because the removal to which the States object occurred as of July 27, 2018, a subsequent notice is obviously not timely under the statute. [5]

The Court finds that the temporary modification of the USML to allow immediate publication of the previously-regulated CAD files constitutes the removal of one or more items from the USML without the required Congressional notice. Because the agency action was "without observance of procedure required by law," it must be held unlawful and set aside under § 706 of the APA.

2. Tenth Amendment Claim

As part of the settlement agreement in the Texas litigation, the federal defendants agreed that the temporary modification that would be issued on or before July 27, 2018, would permit "any United States person" including the private defendants' customers and members, "to access, discuss, use, reproduce, or otherwise benefit from the technical data" contained in the CAD files at issue. Dkt. #171-2 at 6. Plaintiffs argue that this provision exceeds the limits imposed on the federal government by the Tenth Amendment in that it conflicts with, and presumably abrogates, state laws restricting certain persons from possessing, manufacturing, owning, and/or using firearms in general or 3D-printed firearms in particular. Plaintiffs therefore argue that the temporary modification must be invalidated as "otherwise not in accordance with law" under the APA.

Both the federal and private defendants have, at various times during this litigation, disavowed any intent to alter or in any way impact existing prohibitions or limitations on the possession of firearms, and the federal defendants recognize the continuing viability of state law gun control measures. Plaintiffs find no comfort in these statements "given the plain language ***1144** of the operative Temporary Modification and Letter." Dkt. #186 at 14. A review of the notice of temporary modification and letter shows, however, that neither communication expressly permits "any United States person" to "use" the CAD files or 3D-printed firearms. Nor do they contain a reference incorporating the settlement agreement or the promises set forth therein. Without assistance from the parties, the Court declines to determine whether a contractual provision regarding the intended meaning of a promised, future statement would have any effect on state law or be otherwise enforceable when the statement, when finally issued, contains no language regarding the subject matter.

3. Arbitrary and Capricious

[12] **[13]** Plaintiffs allege that the federal defendants' decision to allow Defense Distributed to upload to the internet CAD files containing 3D printing instructions for the manufacture of undetectable weapons was arbitrary and

capricious because the State Department failed to consider the factors set forth in the AECA, failed to offer an explanation supported by substantial evidence in the administrative record, and/or has asserted justifications that are pretextual. In determining whether agency action was arbitrary and capricious, the Court's scope of review is "narrow" and focused on determining whether the agency "examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." Dep't of Commerce, 139 S. Ct. at 2569 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)) (internal quotation marks omitted). In order for the Court to be able to determine whether the agency has acted within the bounds imposed by the governing statute, the agency is required to disclose the basis for its action, making the findings necessary to support the decision, and produce an administrative record that substantially supports those findings. Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962).

[14] The federal defendants, citing 22 C.F.R. § 120.3(b), argue that only items that "provide[ ] a critical military or intelligence advantage" belong on the USML and that a multi-year, inter-agency review process led to the determination that firearms up to .50 caliber do not satisfy that standard. There are a number of problems with this argument. First, the regulation cited states that articles or services that provide "a critical military or intelligence advantage" "shall be" included on the USML. Items that fit that description must be on the USML, but they are not the only items that can be included. Thus, an agency determination that small-caliber firearms do not provide critical military or intelligence advantages does not explain why those previously-controlled items were removed from the list.

Second, Congress granted the President and his designees the discretion to remove an item from the USML in light of certain considerations and factors. Congress directed the agency to consider how the proliferation of weaponry and related technical data would impact world peace, national security, and foreign policy. The State Department essentially concedes that, despite the specified statutory considerations, it evaluated the export controls on small caliber firearms only through the prism of whether restricting foreign access would provide the United States with a military or intelligence advantage. Because the delisting was not "based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute," it must be invalidated under the APA. Motor Vehicle Mfrs., 463 U.S. at 42, 103 S.Ct. 2856.

***1145** **[15]** **[16]** **[17]** Third, given the agency's prior position regarding the need to regulate 3D-printed firearms and the CAD files used to manufacture them, it must do more than simply announce a contrary position.

> [T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.... [T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate ... [But s]ometimes it must - when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy.... It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay ... the prior policy.

F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515-16, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (emphasis in original). Until April 2018, the federal government regulated technical data related to the design and production of weapons using a 3D printer because the data and weapons posed a threat to world peace and the security and foreign policy of the United States. Some of its concerns related specifically to the undetectable nature of a gun made from plastic: because they could slip through conventional security equipment, the State Department feared that they could be used in assassination attempts, hijackings, piracy, and terrorist activities. Other concerns related to the portability and ease of a manufacturing process that would allow terrorist groups and embargoed nations to evade sanctions, repair weapons, restock arms supplies, and fuel violent regional conflicts. Both aspects of the technical data at issue would, the State Department feared, subvert the domestic laws of nations with restrictive firearm

controls, impairing the United States' foreign relations with those nations. Overall, the Department of State concluded that the worldwide publication of computerized instructions for the manufacture of undetectable firearms was a threat to world peace and the national security interests of the United States and would cause serious and long-lasting harm to its foreign policy. Against these findings, the federal defendants offer nothing: no analysis of the potential impacts of removing the CAD files for 3D-printed firearms from the USML, no response to the public comments raising concerns about such a removal, no acknowledgment in the NPRMs of its change in position with regards to the CAD files, and no justification in the temporary modification, the letter, or the administrative record for the change. [6]

***1146** The federal defendants argue that the agency appropriately evaluated whether import and export restrictions on small caliber firearms were warranted and that the results of the multi-year inter-agency review apply to 3D-printed guns and the technical data related to them. The only parts of the administrative record cited in support of this argument are the NPRMs issued by the Departments of State and Commerce regarding the delisting of certain items in Category I of the USML. A review of those documents shows that:

- the goal of the proposed revisions is to limit Category I to only those items "that provide the United States with a critical military or intelligence advantage or, in the case of weapons, are inherently for military end use" (83 Fed. Reg. 24,198); [7]
- the revised Category I will no longer cover small-caliber non-automatic and semi-automatic firearms (Id.);
- the revised Category I will no longer cover "commercial items widely available in retail outlets and less sensitive military items" (83 Fed. Reg. 24,166);
- the proposed changes are based on an inter-agency review (Id.).

These statements are merely descriptions of the changes proposed and the process used, not an analysis of or justification for the changes. The Department of Commerce goes on to say that it believes that, unless an item provides a critical military or intelligence advantage to the United States or is generally unavailable at retail outlets for civil and recreational activities, the burdens of subjecting U.S. manufacturers to the obligations of the ITAR are not warranted by any proportionate benefits to national security or foreign policy objectives. 83 Fed. Reg. 24,167.

Whatever the merits of this analysis with regards to the rim fire rifles, pistols, and other popular shooting implements specifically mentioned in the NPRMs, it does not provide a "reasoned explanation" for the action with regards to the CAD files and 3D-printed weapons at issue here. Less than two months before the NPRMs were published, the State Department had taken the position that 3D-printed weapons posed unique threats to world peace, national security, and the foreign policy of the United States: the agency's specific concerns regarding the proliferation of these weapons are well-documented in the administrative record. The NPRMs neither display an awareness that the agency is changing its position with regards to the data files, nor provide a reasoned explanation for a new policy that necessarily "rests upon factual findings that contradict those which underlay its prior policy." Fox Television Stations, 556 U.S. at 515-16, 129 S.Ct. 1800. The agency has simply abandoned, without acknowledgment or analysis, its previous position and has sub silentio found that the delisting is consistent with world peace, national security, and U.S. foreign policy despite explicit, recent findings to the contrary. See ***1147** Motor Vehicle Mfrs. Ass'n, 463 U.S. at 46-51, 103 S.Ct. 2856 (acknowledging that an agency need not consider and reject all policy alternatives when reaching a decision, but noting that where an alternative is within the ambit of the existing standard or policy, "it may not be abandoned without any consideration whatsoever"). [8] Because it is arbitrary and capricious to ignore the contradiction in these circumstances, the agency action must be invalidated.

The Court finds that the agency action is arbitrary and capricious in two, independent respects. First, the agency failed to consider aspects of the problem which Congress deemed important before issuing the temporary modification and letter on July 27, 2018. Second, the agency failed to identify substantial evidence in the administrative record explaining a change of position that necessarily contradicts its prior determinations and findings regarding the threats posed by the subject CAD files and the need to regulate the same under the AECA. Because the agency action was arbitrary and capricious, it is unlawful and must be set aside under § 706 of the APA. [9]

C. The Private Defendants' Other Arguments

1. Motion to Dismiss

The private defendants incorporate by reference a motion to dismiss that was denied almost a year ago. Having offered no reason to reconsider the prior ruling and no explanation for the delay in seeking reconsideration, the motion is denied.

2. Personal Jurisdiction

[18] Defense Distributed argues that the Court lacks jurisdiction over its person. Such a defense can be, and has been, waived. Although Defense Distributed asserted a personal jurisdiction defense in its answer, it omitted it from the motion to dismiss it filed on October 11, 2018, and has therefore waived the defense under Fed. R. Civ. P. 12(h)(1)(A).

3. First Amendment Justification for Agency Action

[19] The private defendants argue that the CAD files are protected speech under the First Amendment and assert that the files were removed from the USML in order to avoid constitutional problems. The agency, however, has not relied on the First Amendment as justification for its action, and neither the Court nor the private defendants may supply a basis for the decision that the agency itself did not rely upon. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 683-84, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007).

4. First Amendment Violation

The private defendants again assert that restrictions on their ability to publish the files constitute a prior restraint that is presumed to be unconstitutional and that the regulations should be subjected to strict scrutiny. Whether or not the First Amendment precludes the federal government from regulating the publication of technical data under the authority granted by the AECA is not relevant to the merits of the APA claims plaintiffs assert in this litigation. Plaintiffs allege that the federal defendants failed to follow prescribed procedures and acted in an arbitrary and capricious manner when they issued the temporary modification and letter authorizing the immediate publication of the CAD ***1148** files. The State Department has not attempted to justify its action as compelled by the First Amendment, nor have the private defendants shown that their First Amendment interests are a defense to plaintiffs' claims or a talisman that excuses the federal defendants' failures under the APA.

D. Remedy

[20] **[21]** The presumptive remedy for unlawful agency action is vacatur and remand. All. for the Wild Rockies v. United States Forest Serv., 907 F.3d 1105, 1121 (9th Cir. 2018). Plaintiffs also seek an injunction preventing the federal defendants from again issuing a temporary modification purporting to deregulate the subject CAD files with no warning. Plaintiffs have not shown that the harm they fear is likely to occur, however. There is no indication that the federal defendants are poised to immediately modify the USML as soon as their previous efforts are invalidated or are otherwise inclined to ignore the procedural and substantive requirements of the AECA discussed in this order. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction.").

CONCLUSION

For all of the foregoing reasons, plaintiffs' motion for summary judgment (Dkt. #170) is GRANTED in part and DENIED in part. The July 27, 2018, "Temporary Modification of Category I of the United States Munitions List" and letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation were unlawful and are hereby VACATED. Defendants' motions for summary judgment (Dkt. #173 and #174) are DENIED.

All Citations

420 F.Supp.3d 1130

Footnotes

1 An amended complaint, adding eleven more States/Commonwealths as plaintiffs, was filed on August 2, 2018. Dkt. # 29.

2 The private defendants now assert that they published the subject CAD files to the internet immediately upon receipt of the letter and the issuance of the temporary modification. Dkt. #174-1 at 5-6. The publication does not change the following analysis.

3 Plaintiffs do not concede that the record, as supplemented, is complete or that defendants' various claims of privilege are proper.

4 Defendants also incorporate by reference arguments made in the preliminary injunction context regarding Article III standing and this lawsuit being an impermissible collateral attack on the outcome of the litigation in the Western District of Texas. Those arguments are again rejected. See Dkt. #95 at 9-12.

5 To the extent the federal defendants are relying on 22 C.F.R. § 126.2 as authority for the temporary modification (see Dkt. #173 at 6), its use of that procedure to immediately redesignate an item that was previously covered by the USML without Congressional notice violates the governing statute. "It is beyond dispute that a federal regulation cannot empower the Government to do what a federal statute prohibits it from doing." Tuan Thai v. Ashcroft, 366 F.3d 790, 798 (9th Cir. 2004).

6 The private defendants point to a PowerPoint presentation made at an Additive Manufacturing Symposium in February 2014 and a law review article written by their former counsel that same year as support for the agency's 2018 decision to remove the subject CAD files from the USML. The law review article merely raises constitutional arguments against the regulation of 3D-printed guns and is seemingly unrelated to any justification the agency has offered for its action. The symposium presentation includes two slides related to 3D-printed guns, one displaying a picture of a 3D-printed gun (courtesy of Cody Wilson) and another including text stating that export controls offer no benefit to U.S. manufacturing or national security. Dkt. #116-1 at 32. There is no indication that the agency actually relied on this document when issuing the temporary modification in 2018: in fact, it tacitly concedes that it did not because the multi-year review upon which the decision was apparently based focused on small caliber firearms generally, not 3D-printed guns specifically. Just as importantly, the slides do not reflect consideration of the factors Congress intended the agency to consider or constitute a "reasoned explanation" for disregarding the agency's prior findings regarding the impact of 3D-printed weapons on world peace, national security, and foreign policy. Fox Television Stations, 556 U.S. at 516, 129 S.Ct. 1800.

7 The descriptions of what will be covered by the revised Category I vary in the NPRMs. The Department of State asserts that the revised Category I will cover "only defense articles that are inherently military or that are not otherwise widely available for commercial sale." 83 Fed. Reg. 24, 198. The Department of Commerce describes Category I items under the amended USML as those which are "inherently military and otherwise warrant control on the USML" or "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." 83 Fed. Reg. 24,166.

8 In addition, there are no findings (and no evidence in the administrative record) that the CAD files at issue here were widely available before the agency abruptly deregulated them on July 27, 2018.

9 Because the agency action must be invalidated on other grounds, the Court has not considered whether the agency's justifications were pretextual or whether such a finding would warrant invalidation under the APA.