

The Honorable Robert S. Lasnik

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants.

NO. 2:18-cv-01115-RSL

**PLAINTIFF STATES' MOTION FOR SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:  
APRIL 19, 2019<sup>1</sup>**

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<sup>1</sup> The briefing schedule for this motion is set by the Case Management Order (Dkt. # 115).

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

- I. INTRODUCTION AND RELIEF REQUESTED ..... 1
- II. STATEMENT OF UNDISPUTED FACTS ..... 2
  - A. AECA and ITAR Govern Export Control of Weapons and Related Technical Data..... 2
  - B. The Subject Files Can Produce Functional Weapons Using a 3D Printer..... 2
  - C. The State Department Defends Its Regulation of the Subject Files, Defeating Defense Distributed at Every Stage of the Litigation ..... 3
  - D. Reversing Its Position, the State Department Settles with Defense Distributed by Agreeing to Remove the Subject Files from the U.S. Munitions List..... 5
  - E. This Court Preliminarily Enjoins the Temporary Modification and Letter ..... 7
  - F. The State Department Offers Shifting, Unsupported Rationales for Its Actions..... 7
  - G. Final Rules Are Forthcoming, According to the Federal Defendants ..... 8
- III. ARGUMENT ..... 9
  - A. Legal Standard ..... 9
  - B. The State Department Failed to Provide the Required 30 Days’ Notice to Congress and Exceeded Its Regulatory Authority ..... 10
  - C. The State Department’s Actions Were Arbitrary and Capricious ..... 12
    - 1. The administrative record fails to explain or support the agency’s asserted rationales for abruptly reversing its position. .... 12
    - 2. The agency failed to consider the specific properties of 3D-printed guns and disregarded the unique threats they pose. .... 15
    - 3. The agency’s stated rationales are pretextual as applied to 3D-printable firearm files. .... 18
  - D. The Court Should Vacate the State Department’s Actions and Enjoin It from Further Attempts to Unlawfully Deregulate the Files ..... 20
- IV. CONCLUSION ..... 24

**I. INTRODUCTION AND RELIEF REQUESTED**

This lawsuit challenges the State Department’s “temporary” deregulation of 3D-printable computer files for the automatic production of undetectable, untraceable plastic firearms. The subject files include specific files that Defense Distributed plans to release on the internet if they are exempted from federal export control, as well as files that may be created in the future and other unknown, unreviewed files. If the files are allowed to be published online, they will be permanently available to virtually anyone inside or outside the United States—including terrorists, assassins, violent criminals, mentally ill persons, and unsupervised children.

The State Department, which has regulated the subject files for years by including them on the U.S. Munitions List pursuant to the Arms Export Control Act (AECA), abruptly attempted to deregulate the files via a “Temporary Modification of Category I” of the Munitions List (“Temporary Modification”) and a letter to Defense Distributed (“Letter”). It did so pursuant to a private settlement agreement, without following statutorily mandated procedures or providing any public notice, as a *fait accompli* before promulgating any final rule (or even considering public comments on a proposed rule). It also did so without considering the unique properties of 3D-printable firearms or the national and domestic security implications of permitting their “unlimited” release. The State Department’s actions were unlawful, *ultra vires*, arbitrary and capricious, and unconstitutional, as established by the administrative record and other undisputed evidence. Its reckless and covert deregulation evaded Congress’s “particularly rigorous oversight of the Munitions List” and public scrutiny as to an issue of national significance.

The Plaintiff States ask the Court to enter summary judgment in their favor, vacate the Temporary Modification and Letter, and permanently enjoin the Federal Defendants from removing the subject files from the Munitions List without following AECA’s procedural requirements. The only potentially lawful way to remove the files is to comply with all mandatory procedures. In fact, the Federal Defendants say a compliant final rule is forthcoming, implicitly conceding the point even as they continue to defend the indefensible.

**II. STATEMENT OF UNDISPUTED FACTS**

The filed administrative record is consistent with the undisputed facts alleged and established by the States at earlier stages of this litigation, as set forth below.

**A. AECA and ITAR Govern Export Control of Weapons and Related Technical Data**

The Arms Export Control Act (AECA) authorizes the President of the United States “to control the import and the export of defense articles and defense services” “[i]n furtherance of world peace and the security and foreign policy of the United States.” 22 U.S.C. § 2778(a)(1). Items he designates as “defense articles and defense services” constitute the U.S. Munitions List. *Id.* The President delegated his authority to designate Munitions List items to the State Department, *see* Executive Order 13637 § 1(n)(i), and the Department promulgated the International Traffic in Arms Regulations (ITAR), which are administered by its Directorate of Defense Trade Controls.<sup>2</sup> 22 C.F.R. §§ 120–130; *see* Dkt. # 64 (Fed. Defs’ Opp. to PI) at 2.

Category I of the Munitions List includes all firearms up to .50 caliber and related “technical data,” 22 C.F.R. § 121.1(I)(a), i.e., data “required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of” such firearms, *id.* § 120.10(a). In cases where it is unclear whether a particular item is a defense article subject to ITAR, the Department makes an individualized “commodity jurisdiction” (CJ) determination using a procedure set forth in the ITAR. *See id.* § 120.4; Dkt. # 64 at 3.<sup>3</sup>

**B. The Subject Files Can Produce Functional Weapons Using a 3D Printer**

The files at issue in this case are Defense Distributed’s 3D-printable Computer Aided Design (CAD) files that can be used to produce the “Liberator” pistol and other defense articles, plus other unidentified files that Defense Distributed “has and will continue to create and

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<sup>2</sup> The Department, the Directorate, Michael R. Pompeo, Mike Miller, and Sarah Heidema are collectively referred to as the “State Department” or the “Federal Defendants.”

<sup>3</sup> *See also* Declaration of Kristin Beneski, Ex. A (Aguirre Declaration), ¶¶ 19–20 (describing the CJ determination procedure).

1 possess” in the future and any “similar files generated by its members and others.”<sup>4</sup> A functional  
 2 Liberator pistol can be made almost entirely of plastic using the CAD files and a commonly  
 3 available 3D printer, with “considerably less know-how” than is needed to manufacture a firearm  
 4 using “conventional technical data.”<sup>5</sup> As then-Director of the Office of Defense Trade Controls  
 5 Management Lisa V. Aguirre stated in a 2015 declaration, the “‘Liberator’ firearm included in  
 6 DD’s CAD designs presents a specific and unique risk to the national security and foreign policy  
 7 interests of the United States” because it “is a plastic firearm which can be produced in a way as  
 8 to be both fully operable and virtually undetectable by conventional security measures such as  
 9 metal detectors.”<sup>6</sup> In addition to being undetectable, privately manufactured 3D-printed weapons  
 10 can be untraceable by law enforcement because they lack serial numbers.<sup>7</sup>

11 From 2013 to April 2018, the Department considered the Liberator files and other 3D-  
 12 printable firearm files to be “ITAR-controlled technical data” that cannot be exported (including  
 13 by posting on the borderless internet) without prior authorization.<sup>8</sup> In 2015, the Directorate  
 14 conducted an individualized CJ review of Defense Distributed’s files and confirmed that they  
 15 are “technical data under Category I(i) of the [Munitions List]” and subject to ITAR regulation.<sup>9</sup>

16 **C. The State Department Defends Its Regulation of the Subject Files, Defeating**  
 17 **Defense Distributed at Every Stage of the Litigation**

18 In May 2015, Defense Distributed sued the State Department in a Texas federal district  
 19 court, seeking to enjoin it from regulating the files. *Def. Distributed v. U.S. Dep’t of State*, Case

20 \_\_\_\_\_  
 21 <sup>4</sup> Ex. L (*Def. Distributed*: Second Amended Complaint), ¶¶ 25, 36, 40, 44–45 (referenced in Ex. B  
 (Temporary Modification) and Ex. C (Settlement Agreement), ¶ 12).

22 <sup>5</sup> Ex. A (Aguirre Declaration), ¶ 29(b).

23 <sup>6</sup> *Id.* ¶ 35; *see also id.* n.9 (the Liberator’s detectable metal component “can be removed without rendering  
 it inoperable”); Ex. D (*Def. Distributed*: Opp. to Mot. for PI) at 10 n.6 (“the Liberator remains operable without the  
 inserted metal”); Ex. E (*Def. Distributed*: Mot. to Dismiss) at 1 (Defense Distributed’s CAD files “unquestionably  
 direct the functioning of a 3-D printer, cause it to manufacture firearms, or otherwise enable the creation of such  
 firearms . . .”); Dkt. # 112 (Answer), ¶ 39 (admitting that “the Liberator is a plastic firearm” that is undetectable by  
 walk-through metal detectors when it does not contain a removable piece of steel); *infra* at 22–23 & n.57.

24 <sup>7</sup> *See* Dkt. # 43-2 at 29–39 (McCord Decl.), ¶¶ 29–30, 33; *id.* at 40–44 (Kyes Decl.), ¶ 8; *id.* at 4–18  
 25 (Graham Decl.), ¶ 35.

26 <sup>8</sup> Ex. A, Ex. 2 (CJ letter dated 5/8/13); *see* Ex. E (filed 4/6/18).

<sup>9</sup> Exs. F, G (CJ determinations).

No. 15-cv-372-RP (W.D. Tex.). In opposing Defense Distributed’s motion for a preliminary injunction, the State Department argued that its regulation of the files was proper (and furthermore, vital) because, *inter alia*:

- “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.”<sup>10</sup>

In a supporting declaration, then-Director Aguirre explained that the unrestricted export of Defense Distributed’s CAD files would result in the production of fully operable and undetectable plastic firearms, that their use to commit terrorism, piracy, assassinations, or other 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 defense 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 their 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.<sup>11</sup>

The district court denied Defense Distributed’s motion for a preliminary injunction, noting that the company’s avowed purpose is to facilitate “*global* access to, and the collaborative

<sup>10</sup> Ex. D at 10–11.

<sup>11</sup> Ex. A, ¶ 35.

1 production of, information and knowledge related to the three-dimensional (‘3D’) printing of  
 2 arms,” and that such activities “undoubtedly increase[] the possibility of outbreak or escalation  
 3 of conflict” and are of the type Congress authorized the President to regulate through AECA.<sup>12</sup>  
 4 The Fifth Circuit affirmed, citing both the national security implications of the CAD files and  
 5 the permanent nature of the internet, and found the State Department had “asserted a very strong  
 6 public interest in national defense and national security.”<sup>13</sup>

7 On April 6, 2018, the State Department moved to dismiss Defense Distributed’s lawsuit,  
 8 reiterating that what was at stake was “the United States’ ability to control the export of  
 9 weapons—a system of laws and regulations that seeks to ensure that articles useful for warfare  
 10 or terrorism are not shipped from the United States to other countries (or otherwise provided to  
 11 foreigners) without authorization, where, beyond the reach of U.S. law, they could be used to  
 12 threaten U.S. national security, U.S. foreign policy interests, or international peace and  
 13 stability.”<sup>14</sup> According to the State Department, the CAD files “unquestionably direct the  
 14 functioning of a 3-D printer, cause it to manufacture firearms, or otherwise enable the creation  
 15 of such firearms by those abroad” and the Department “has consistently and reasonably  
 16 concluded that it is not possible to meaningfully curtail the overseas dissemination of arms if  
 17 unfettered access to technical data essential to the production of those arms is permitted.”<sup>15</sup>

18 **D. Reversing Its Position, the State Department Settles with Defense Distributed by**  
 19 **Agreeing to Remove the Subject Files from the U.S. Munitions List**

20 By April 30, 2018, the State Department had “reached a tentative settlement agreement”  
 21 with Defense Distributed,<sup>16</sup> which was ultimately approved by Department officials.<sup>17</sup> Pursuant  
 22 to the Settlement Agreement, the State Department changed course, abandoning its prior  
 23 regulatory and litigation positions and permitting Defense Distributed to post the subject files on

24 <sup>12</sup> Ex. H (*Def. Distributed*: Order denying PI) at 8–9.

25 <sup>13</sup> Ex. I (*Def. Distributed*: 5th Cir Opinion) at 10, 12–13.

26 <sup>14</sup> Ex. E at 1.

<sup>15</sup> *Id.* at 1, 3, 7.

<sup>16</sup> Ex. M (*Def. Distributed*: Mot. to Stay) (filed 4/30/18).

<sup>17</sup> Ex. N (*Def. Distributed*: Joint Settlement Status Rpt.) (filed 6/28/18).



1 the internet and distribute them to “any United States person.” Specifically, the Department  
 2 agreed to: (a) “draft and . . . fully pursue” a notice of proposed rulemaking (NPRM) and final  
 3 rule revising Munitions List Category I to exclude the “technical data that is the subject of the  
 4 Action”; (b) announce a “temporary modification” of Category I to exclude the data while the  
 5 final rule is “in development”; (c) issue a letter to Defense Distributed advising that its files are  
 6 “approved for public release (i.e., unlimited distribution)” and exempt from ITAR; and (d)  
 7 acknowledge and agree that the Temporary Modification “permits any United States person” to  
 8 “access, discuss, use, reproduce, or otherwise benefit from” the data, and that the Letter “permits  
 9 any such person to access, discuss, use, reproduce or otherwise benefit from” Defense  
 10 Distributed’s files.<sup>18</sup> The Settlement Agreement contains no findings of fact or other information  
 11 that could explain the Department’s change of position or invalidate its prior analysis as to the  
 12 security implications of “unlimited distribution” of the files.<sup>19</sup>

13 The State Department fulfilled each of these terms. On May 24, 2018, it published the  
 14 promised NPRM in the Federal Register, with a public comment period ending on July 9. 83 Fed.  
 15 Reg. 24,198. The NPRM does not specifically mention 3D-printed guns. *See id.* The Settlement  
 16 Agreement was signed on June 29, in the midst of the comment period, but was not made public  
 17 until July, when the comment period ended.<sup>20</sup> On July 27, the Department issued the Temporary  
 18 Modification and the Letter. The Temporary Modification states that the Department “has  
 19 determined that it is in the interest of the security and foreign policy of the United States to  
 20 temporarily modify United States Munitions List (USML) Category I to exclude” the subject  
 21 files. The “temporary” removal of these files was to “remain in effect while the final rule  
 22 referenced in paragraph 1(a) of the Settlement Agreement is in development.”<sup>21</sup> The Letter states

23 \_\_\_\_\_  
 24 <sup>18</sup> Ex. C, ¶ 1(a)–(d).

25 <sup>19</sup> *See generally* Ex. C. The Settlement Agreement expressly states that it does not “reflect any agreed-  
 upon purpose other than the desire of the Parties to reach a full and fair conclusion of the Action, and to resolve the  
 Action without the time and expense of further litigation.” *Id.* ¶ 5.

26 <sup>20</sup> Dkt. # 95 (Preliminary Injunction) at 7; Dkt. # 112 (Answer), ¶ 53 (admitting the Settlement Agreement  
 was “made public in July 2018”).

<sup>21</sup> Ex. B.



1 that the Department “approve[s]” Defense Distributed’s files “for public release (i.e., unlimited  
2 distribution),” but offers no rationale for this.<sup>22</sup> Those actions prompted this lawsuit.

3 **E. This Court Preliminarily Enjoins the Temporary Modification and Letter**

4 The Court granted the States’ motion for a temporary restraining order, then converted  
5 the order to a preliminary injunction.<sup>23</sup> The Court ruled that the States had standing to challenge  
6 the Temporary Modification and Letter, were likely to succeed on the merits of their APA claim  
7 that the Department removed items from the Munitions List “without the required Congressional  
8 notice,” “raised serious questions regarding the merits” of their claim that the Department’s  
9 actions were arbitrary and capricious, and established that the public interest “strongly supports”  
10 an injunction to prevent irreparable harm caused by the files’ public release on the internet.<sup>24</sup>

11 **F. The State Department Offers Shifting, Unsupported Rationales for Its Actions**

12 In this litigation, the Federal Defendants offered a new and different reason for the State  
13 Department’s deregulation of the subject files. Contrary to the Temporary Modification’s  
14 assertion that the deregulation was “in the interest of the security and foreign policy of the United  
15 States,”<sup>25</sup> the Federal Defendants conceded at oral argument that “undetectable plastic firearms  
16 are a serious security threat.”<sup>26</sup> Their new rationale is that “the Department determined” that non-  
17 automatic and semi-automatic firearms under .50 caliber and related technical data “do not  
18 provide the United States with a critical military or intelligence advantage” because these items  
19 are “already commonly available,” as stated in the August 15, 2018 Declaration of Sarah J.  
20 Heidema.<sup>27</sup> But at oral argument, the Federal Defendants conceded as follows:

21 THE COURT: Of course you cannot buy a 3D-printed gun in any firearms

22 <sup>22</sup> Ex. J (Letter) at 2.

23 <sup>23</sup> Dkt. # 23 (TRO); Dkt. # 95.

24 <sup>24</sup> Dkt. # 95 at 9–11, 12–15, 16–18, 20–24, 25.

25 <sup>25</sup> Ex. B.

26 <sup>26</sup> Ex. K (Verbatim Report of Proceedings on Aug. 21, 2018) at 35:4–8; *see also id.* at 24:12–14 (“The federal government agrees that undetectable plastic firearms pose a significant risk to domestic public safety.”).

<sup>27</sup> Dkt. # 64-1 (Heidema Decl.) ¶¶ 19, 21; Dkt. # 64 (Fed. Defs’ Opp. to PI) at 22. The “critical military or intelligence advantage” rationale also appears in the preamble to the 2018 NPRM, which is part of the Supplemental Record, but the NPRM does not specifically mention 3D-printed guns or the subject files.

1 store in the United States that's undetectable and untraceable, can you?

2 MR. MYERS: No, Your Honor, if it were undetectable and untraceable, that  
3 would be a violation of the Undetectable Firearms Act.<sup>28</sup>

4 On October 19, 2018, the Federal Defendants submitted their designated "Administrative  
5 Record."<sup>29</sup> The States challenged the sufficiency of that record and moved to supplement it.<sup>30</sup> In  
6 response, the Federal Defendants agreed to partially supplement the record as requested,<sup>31</sup> and  
7 they filed supplemental materials (the "Supplemental Record") on December 20, 2018.<sup>32</sup>

8 Neither the Administrative Record nor the Supplemental Record contains any evidence  
9 to support either of the State Department's purported "determin[ations]" regarding the subject  
10 files.<sup>33</sup> The Supplemental Record contains over 3,000 public comments on the May 24, 2018  
11 NPRM.<sup>34</sup> Although the NPRM does not specifically mention 3D-printed firearms, approximately  
12 386 of the public comments do; of those, all are opposed to the NPRM.<sup>35</sup> The Federal Defendants  
13 represented in this litigation that they did not consider the 2018 NPRM comments in enacting  
14 the Temporary Modification and Letter.<sup>36</sup>

15 **G. Final Rules Are Forthcoming, According to the Federal Defendants**

16 The State Department's May 24, 2018 NPRM proposes to remove all non-automatic and  
17 semi-automatic firearms under .50 caliber and related technical data from the Munitions List,  
18 which would instead be governed by the Commerce Department's Export Administration  
19 Regulations (EAR). 83 Fed. Reg. 24,198. Unlike the ITAR, the EAR do not allow for regulation  
20 of items that have been posted on the internet—even for national security reasons. *See* 15 C.F.R.  
21 §§ 734.3(b)(3), 734.7(a)(4) (excluding from EAR regulatory jurisdiction any "published"

22 <sup>28</sup> Ex. K at 32:5–21.

23 <sup>29</sup> Dkt. # 116.

<sup>30</sup> Dkt. # 132. The Motion to Supplement is pending as of the filing of this motion.

<sup>31</sup> *See* Dkt. # 152 at 3.

24 <sup>32</sup> Dkt. # 158.

<sup>33</sup> *See generally id.*

25 <sup>34</sup> *See* Declaration of Jennifer D. Williams ¶ 4(25); Dkt. ## 158-5, 158-6, 158-7.

<sup>35</sup> Williams Decl. ¶ 4(25).

26 <sup>36</sup> *See* Dkt. # 152 at 6–7 (arguing that the original Administrative Record was "complete" and there was  
"no reason" for the Department to have considered the 2018 NPRM comments).

1 information and software, including that made available for “[p]ublic dissemination (i.e.,  
 2 unlimited distribution) in any form . . . including posting on the Internet on sites available to the  
 3 public . . .”). The Commerce Department’s May 24, 2018 companion NPRM explains that, for  
 4 example, “if a gun manufacturer posts a firearm’s operation and maintenance manual on the  
 5 internet,” the “manual would no longer be ‘subject to the EAR.’” 83 Fed. Reg. 24,166, 24,167  
 6 (May 24, 2018) (citing 15 C.F.R. §§ 734.3(b), 734.7(a)).

7 As of the filing of this brief, neither State nor Commerce has issued a final rule. The  
 8 Federal Defendants have represented in this litigation that final rules are forthcoming, Dkt.  
 9 # 131, but offered “no details regarding the substance” of these rules, Dkt. # 169 (Order) at 2,  
 10 including whether they will be consistent with the NPRMs as applied to the subject files.

### 11 III. ARGUMENT

#### 12 A. Legal Standard

13 Under the APA, courts “shall . . . hold unlawful and set aside agency action” that is  
 14 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.  
 15 § 706. Where the material facts are not genuinely disputed and the questions before the Court  
 16 are purely legal, the Court can resolve an APA challenge on a motion for summary judgment.  
 17 Fed. R. Civ. P. 56; *King County v. Azar*, 320 F. Supp. 3d 1167, 1171 (W.D. Wash. 2018), *appeal*  
 18 *dismissed*, 2018 WL 5310765 (9th Cir. Sept. 20, 2018) (citing *Fence Creek Cattle Co. v. U.S.*  
 19 *Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010)).

20 “[I]n APA cases, the Court’s role is to determine whether, as a matter of law, evidence  
 21 in the administrative record supports the agency’s decision.” *King County*, 320 F. Supp. 3d at  
 22 1171 (citing *Occidental Engineering Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985)). Review  
 23 is based on “the whole record,” 5 U.S.C. § 706, which “consists of all documents and material  
 24 directly or *indirectly* considered by the agency decision-makers and includes evidence contrary  
 25 to the agency’s position.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).  
 26 Courts may also consider extra-record evidence when necessary to determine whether the agency

1 has considered all relevant factors and explained its decision, has relied on documents not in the  
 2 filed record, or has acted in bad faith. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d  
 3 971, 992 (9th Cir. 2014); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

4 **B. The State Department Failed to Provide the Required 30 Days’ Notice to Congress  
 5 and Exceeded Its Regulatory Authority**

6 AECA prohibits the State Department from removing any item from the Munitions List  
 7 “until 30 days after the date on which [it] has provided notice of the proposed removal to the  
 8 Committee on International Relations of the House of Representatives and the Committee on  
 9 Foreign Relations of the Senate” in accordance with established notification procedures. 22  
 10 U.S.C. § 2778(f)(1). The notice requirement furthers Congress’s “particularly rigorous oversight  
 11 of the Munitions List,” *United States v. Zheng*, 590 F. Supp. 274, 278–79 (D.N.J. 1984), *vacated*  
 12 *on other grounds*, 768 F.2d 518 (3d Cir. 1985), and was strengthened in 2002 in response to  
 13 perceived attempts to evade that oversight, *see* H.R. Rep. No. 107-57, at 86–87 (2001).

14 The Federal Defendants concededly failed to provide this 30-day notice before issuing  
 15 the Temporary Modification and Letter.<sup>37</sup> This failure is confirmed by the Administrative Record  
 16 and the Supplemental Record, which contain no evidence that such notice was given.<sup>38</sup> Based on  
 17 this statutory violation alone, the Court should invalidate the Temporary Modification and  
 18 Letter. *See* 5 U.S.C. § 706(2)(A), (C), (D) (a reviewing court “shall . . . hold unlawful and set  
 19 aside” agency action that is “not in accordance with law,” “in excess of statutory jurisdiction,  
 20 authority, or limitations,” or “without observance of procedure required by law”).

21 The Federal Defendants previously sought to justify their failure to provide notice by  
 22 claiming that the Temporary Modification did not remove an “item” from the Munitions List,  
 23 but the Court has already correctly ruled as a matter of law that the subject files at issue here are

24 <sup>37</sup> *See* Dkt. # 95 (Preliminary Injunction) at 12–13 & n.7 (noting that Federal Defendants “acknowledge”  
 25 the notice requirement and that the Heidema Declaration “confirms” the notice was not given); Dkt. # 64-1 ¶ 30  
 (stating that “Congress will receive the necessary notifications” only in connection with a final rule).

26 <sup>38</sup> *See generally* Dkt. # 116 (Admin. Record); Dkt. # 133 (Williams Decl.) ¶ 4 (summarizing contents of  
 Administrative Record); Dkt. # 158 (Supp. Record); Second Williams Decl.) ¶ 4 (summarizing contents of  
 Supplemental Record).

1 “items” or “articles” to which the notice requirement applies. Dkt. # 95 at 14–15; *see* 22 U.S.C.  
2 § 2778(a)(1) (designated “defense articles” are “items” that “constitute the United States  
3 Munitions List”); 22 C.F.R. § 121.1 (Munitions List does not enumerate every controlled  
4 “article” or “item,” but describes “categories” of items); *United States v. Zhen Zhou Wu*, 711  
5 F.3d 1, 12 (1st Cir. 2013) (the Munitions List is “a series of categories describing the kinds of  
6 items that qualify as ‘defense articles’”). AECA’s 30-day notice requirement therefore applies,  
7 and was not followed in this case. The Temporary Modification and Letter are procedurally  
8 defective and must be set aside for this reason alone.

9 In addition to violating AECA’s procedural requirements, the Temporary Modification  
10 and Letter exceeded the State Department’s delegated authority under AECA and violated the  
11 limits on federal power established by the Tenth Amendment by purporting to authorize “any  
12 United States person” to “use” the files to print their own undetectable and untraceable weapons,  
13 and to permit “unlimited distribution” of the files.<sup>39</sup> The States have numerous laws restricting  
14 the possession and use of firearms by “United States persons” and others, including laws  
15 prohibiting ineligible persons from possessing firearms, requiring background checks as a  
16 condition of acquiring firearms, and regulating the manufacture of firearms. *See* Dkt. # 29  
17 (FAC), ¶¶ 68–217 (citing state gun-safety laws). Several of the Plaintiff States have also enacted  
18 or proposed laws that specifically regulate 3D-printed guns. *See* N.J. SB 2465; Wash. SB 5061;  
19 D.C. B23-0018; R.I. S0084; Md. SB 8. The Department’s overly broad authorization well  
20 exceeds the scope of its authority under AECA to regulate exports, and on its face purports to  
21 abrogate the states’ police powers to enforce their gun-safety laws in violation of the Tenth  
22 Amendment. *See* U.S. Const. amend. X (“The powers not delegated to the United States by the  
23 Constitution . . . are reserved to the States respectively, or the people.”); *Bond v. United States*,  
24 572 U.S. 844, 854 (2014) (“The States have broad authority to enact legislation for the public  
25 good—what we have often called a ‘police power.’”); *cf. District of Columbia v. Heller*, 554

26 <sup>39</sup> Ex. C, ¶ 1(d) (emphasis added); Ex. J at 2.

1 U.S. 570, 626–27 (2008) (acknowledging validity of “longstanding prohibitions on the  
2 possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms  
3 in sensitive places such as schools and government buildings, or laws imposing conditions and  
4 qualifications on the commercial sale of arms”). The States’ ability and authority to enforce their  
5 gun-safety laws is undermined by the State Department’s purported authorization of “any United  
6 States person” to “use” the files to print their own undetectable and untraceable weapons.

7 **C. The State Department’s Actions Were Arbitrary and Capricious**

8 In addition to violating both AECA and the U.S. Constitution, the Temporary  
9 Modification and Letter are arbitrary and capricious, and should be invalidated for that  
10 independent reason. Agency action is “arbitrary and capricious,” and must be set aside, if the  
11 agency “entirely failed to consider an important aspect of the problem, offered an explanation  
12 for its decision that runs counter to the evidence before the agency, or is so implausible that it  
13 could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle*  
14 *Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency  
15 action is also arbitrary and capricious if it is not based on a “reasoned analysis” that indicates  
16 the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action  
17 including a rational connection between the facts found and the choice made.” *Id.* at 42–43  
18 (citation and internal quotation marks omitted). When an agency reverses position, it must  
19 provide a “reasoned explanation” for “disregarding facts and circumstances that underlay or  
20 were engendered by the prior policy,” *F.C.C. v. Fox Television Studios, Inc.*, 556 U.S. 502, 516  
21 (2009), and “must show that there are good reasons for the new policy,” *id.* at 515. In short, to  
22 survive arbitrary-and-capricious review, agency action must be demonstrably “logical and  
23 rational.” *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

24 **1. The administrative record fails to explain or support the agency’s asserted**  
25 **rationales for abruptly reversing its position.**

26 Judicial review of agency action “is based on the administrative record and the basis for

1 the agency’s decision must come from the record.” *Ass’n of Irrigated Residents v. E.P.A.*, 790  
 2 F.3d 934, 942 (9th Cir. 2015); *see also, e.g., Choice Care Health Plan, Inc. v. Azar*, 315 F. Supp.  
 3 3d 440, 443 (D.D.C. 2018) (to survive APA review, “the facts on which the agency purports to  
 4 have relied” must “have some basis in the record”) (internal quotation marks omitted). Absent  
 5 compliance with this basic requirement, a reviewing court would be unable to measure agency  
 6 action against the relevant governing standard. *See, e.g., U.S. Lines, Inc. v. Fed. Mar. Comm’n*,  
 7 584 F.2d 519, 533 (D.C. Cir. 1978) (observing that the court could not “determine whether the  
 8 final agency decision reflect[ed] the rational outcome of the agency’s consideration of all  
 9 relevant factors,” as required by the APA, because it “ha[d] no idea what factors . . . were in fact  
 10 considered by the agency”).

11 Here, the Temporary Modification itself is the *only* document in the filed administrative  
 12 record that reflects any reason for the State Department’s reversal of its position on 3D-printable  
 13 firearm files.<sup>40</sup> Neither the Letter nor the Settlement Agreement, nor any other part of the filed  
 14 record, memorializes the Department’s “determin[ation]” or offers any reasoning to support it.<sup>41</sup>  
 15 The Temporary Modification asserts, with no explanation or elaboration, that the State  
 16 Department “has determined that it is in the interest of the security and foreign policy of the  
 17 United States to temporarily modify the United States Munitions List to exclude” the subject  
 18 files. Simply stating that the Department “has determined” that permitting dissemination via the  
 19 internet is somehow “in the interest” of U.S. national security and foreign policy is insufficient  
 20 to survive judicial review. The Department must explain *why* it made this determination,  
 21 demonstrating a “rational connection between the facts found and the choice made.” *State Farm*,  
 22 463 U.S. at 43. But the filed record is completely devoid of any relevant “facts found,” much  
 23 less a “rational connection” to the decision to deregulate the subject files.

24 <sup>40</sup> *See* Ex. B; *see generally* Dkt. ## 116 (Admin. Record), 158 (Supp. Record).

25 <sup>41</sup> *See* Ex. J; Ex. C; Dkt. # 95 at 6 (“No findings of fact or other statements are provided in the agreement  
 26 that could explain the federal government’s dramatic change of position or that address, much less invalidate, its  
 prior analysis regarding the likely impacts of publication on the United States’ national security interests.”); *see generally* Dkt. ## 116, 158.



1           The absence of evidence or explanation is unsurprising, since the Federal Defendants  
 2 conceded in this litigation that 3D-printable firearms *do* pose a “serious security threat,” and  
 3 offered a *different* explanation for the deregulation: that the subject files do not provide a “critical  
 4 military or intelligence advantage” because they are “already commonly available[.]”<sup>42</sup> This new  
 5 explanation, which is supported only by the *post hoc* Heidema Declaration, merits no  
 6 consideration because “[t]he focal point for judicial review should be the administrative record  
 7 already in existence, not some new record made initially in the reviewing court.” *Fla. Power &*  
 8 *Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *San Luis & Delta-Mendota Water Auth. v. Jewell*,  
 9 747 F.3d 581, 602 (9th Cir. 2014) (same). In any case, neither the Heidema Declaration itself  
 10 nor any part of the administrative record provides a reasoned explanation for the new rationale  
 11 as applied to the subject files. In fact, the Federal Defendants conceded in these proceedings that  
 12 undetectable and untraceable 3D-printable firearms are *not* commonly available.<sup>43</sup>

13           Furthermore, far from acknowledging that the Temporary Modification and Letter  
 14 represent a reversal of its regulatory position or offering a rational explanation for this (as is  
 15 required), the State Department concealed the reversal until it was a *fait accompli*. See *Fox*  
 16 *Television Stations*, 556 U.S. at 515 (“the requirement that an agency provide reasoned  
 17 explanation for its action would ordinarily demand that it display awareness that it *is* changing  
 18 position”); *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1029 (D.C. Cir. 2017) (“To  
 19 provide a satisfactory explanation, an agency must acknowledge and explain any departure from  
 20 its precedents.”). The State Department privately reached the tentative settlement in the *Defense*  
 21 *Distributed* case in April 2018, which became final on June 29. Meanwhile, the comment period  
 22 for the NPRM (which does not even mention 3D-printed firearms) was still open through July  
 23 9. The Settlement Agreement was not publicly disclosed until July. The Department issued the  
 24 Temporary Modification and Letter on July 27 without the required notice to Congress or any

25 \_\_\_\_\_  
 26 <sup>42</sup> Dkt. # 64 at 22; Dkt. # 64-1 ¶¶ 19, 21.

<sup>43</sup> See Ex. K at 32:5–21.

1 other advance warning or opportunity for public input on the reversal.

2 In sum, neither the original rationale asserted in the Temporary Modification, nor the  
3 new rationale asserted in this case, finds any factual support or rational explanation in the record.  
4 Instead of acknowledging or explaining its reversal, the Department concealed it, and would  
5 have entirely evaded oversight and review if not for this lawsuit. These basic failures render the  
6 Temporary Modification and Letter arbitrary and capricious.

7 **2. The agency failed to consider the specific properties of 3D-printed guns and**  
8 **disregarded the unique threats they pose.**

9 Not only are the State Department's shifting rationales entirely unsupported, but the  
10 administrative record also demonstrates that the Department failed to consider the specific  
11 properties of 3D-printed guns and their unique threats to world peace, national security, and  
12 foreign policy. In ignoring these issues, the Department disregarded the factors Congress deemed  
13 relevant to export control, as well as the evidence supporting the Department's previous  
14 regulation of the subject files to further AECA's stated purposes.

15 An agency's action is arbitrary and capricious where it "entirely failed to consider an  
16 important aspect of the problem" or "offered an explanation for its decision that runs counter to  
17 the evidence before the agency[.]" *State Farm*, 463 U.S. at 43. The agency must consider all  
18 "relevant factors," *id.* at 42—in particular, the factors "Congress intended" the agency to  
19 consider, *id.* at 55. And the agency cannot pick and choose what evidence to rely on and disregard  
20 the rest; judicial review is based on the "whole" record, i.e., "all documents and material directly  
21 or *indirectly* considered by the agency decision-makers," including "evidence contrary to the  
22 agency's position." *Thompson*, 885 F.2d at 555.

23 Congress directed that export regulation under AECA must be "[i]n furtherance of world  
24 peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1). The  
25 State Department based its previous regulation of the subject files squarely on fulfilling these  
26 purposes, invoking threats to "U.S. national security, U.S. foreign policy interests, or

1 international peace and stability” in its April 6, 2018 motion to dismiss in the *Defense*  
 2 *Distributed* case.<sup>44</sup> Elsewhere in its briefing, the Department emphasized the unique dangers  
 3 posed by the subject files, which “constitute the functional equivalent of defense articles” and  
 4 can be used to “automatically” generate a “lethal firearm” that is “virtually undetectable in metal  
 5 detectors and other security equipment.”<sup>45</sup> The Department expressed its particular concern that  
 6 such “undetectable firearms technology could be used in an assassination, for the manufacture  
 7 of spare parts by embargoed nations, terrorist groups, or guerilla groups, or to compromise  
 8 aviation security overseas in a manner specifically directed at U.S. persons.”<sup>46</sup> The Supplemental  
 9 Record amply supports the conclusion that the subject files pose unique threats to U.S. national  
 10 security and foreign policy, as reflected in the Department’s own CJ determinations, the Aguirre  
 11 Declaration, and the Department’s briefing in the *Defense Distributed* case.<sup>47</sup> Moreover,  
 12 hundreds of the public comments on the 2018 NPRM, which the Department received before  
 13 issuing the Temporary Modification and letter on July 27, 2018 (but admittedly did not consider),  
 14 oppose the rule on the grounds that it would deregulate 3D-printable firearms.<sup>48</sup>

15 Despite this evidence, the Department decided to deregulate the subject files sometime  
 16 during a three-week period in April 2018, providing no “reasoned explanation” for disregarding  
 17 the facts and circumstances supporting its previous position. *Fox Television Studios*, 556 U.S. at  
 18 516; *see also SNR Wireless*, 868 F.3d at 1029 (D.C. Cir. 2017); *City of Kansas City, Mo. v. Dep’t*  
 19 *of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) (“Agency action based on a factual  
 20 premise that is flatly contradicted by the agency’s own record does not constitute reasoned  
 21 administrative decisionmaking, and cannot survive review under the arbitrary and capricious  
 22 standard.”). As of April 6, 2018, the Department’s position was that distributing the subject files  
 23 on the internet would “threaten U.S. national security, U.S. foreign policy interests, or

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24 <sup>44</sup> Ex. E at 1.

25 <sup>45</sup> Ex. D at 10.

26 <sup>46</sup> *Id.*

<sup>47</sup> *See* Exs. A, D, E, F, G.

<sup>48</sup> *See* Williams Decl., ¶ 4(25).

1 international peace and stability.” By April 30, 2018, the Department had reached the settlement  
2 agreement that resulted in the Temporary Modification and Letter, which deregulated the subject  
3 files and approved them for “unlimited distribution.”

4 Even though the Department was well aware of the characteristics and qualities of  
5 undetectable firearms that render them uniquely dangerous, as reflected in its own CJ  
6 determinations and its position in the *Defense Distributed* proceedings, there is no indication in  
7 the record that it considered them in connection with the deregulation. This is consistent with  
8 the Federal Defendants’ statements at oral argument indicating that they did not consider these  
9 unique factors until they took a “further look” at the issue in light of this Court’s TRO:

10 MR. MYERS: Your Honor, since Your Honor entered the TRO, the  
11 government has been further studying and further looking into this issue, as the  
12 press secretary I think indicated she was -- or the President was welcoming that  
13 opportunity. That further look has concluded. And the government's position on  
14 this issue has not changed.<sup>49</sup>

15 Further, the Department admitted it did not consider the public comments on the 2018 NPRM—  
16 even the hundreds of comments that oppose the rule due to its implications for 3D-printed guns,  
17 which merit a meaningful response. *See Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35–36  
18 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to  
19 significant points raised by the public.”).

20 As noted above, the Federal Defendants’ *post hoc* rationale for deregulating the subject  
21 files—that they do not provide a “critical military or intelligence advantage”—need not be  
22 considered because it is not reflected or supported anywhere in the filed record. But even taking  
23 it at face value, this explanation fails to account for all of the factors Congress directed the  
24 Department to consider. A defense article can threaten “world peace and the security and foreign  
25 policy of the United States”—as the subject files do—regardless of whether it provides a “critical  
26 military or intelligence advantage.” Yet as the Court previously noted, the Department “appears  
to have evaluated the export controls on small caliber firearms only through the prism of whether

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<sup>49</sup> Ex. K at 34:3–8.

1 restricting foreign access would provide the United States with a military or intelligence  
 2 advantage.” Dkt. # 95 at 18. This is borne out by the filed record, which contains no evidence  
 3 whatsoever that any other factors were considered. The Department’s asserted rationale fails to  
 4 account for the national security and foreign policy factors Congress directed it to consider.  
 5 “Such a failure to address ‘an important aspect of the problem’ that is factually substantiated in  
 6 the record is unreasoned, arbitrary, and capricious decisionmaking.” *Humane Soc’y of U.S. v.*  
 7 *Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017) (quoting *State Farm*, 463 U.S. at 43)).

8 **3. The agency’s stated rationales are pretextual as applied to 3D-printable**  
 9 **firearm files.**

10 The available evidence strongly suggests that the State Department’s asserted rationales  
 11 for deregulating the subject files are pretextual. “[C]ourts have not hesitated to find that reliance  
 12 on a pretextual justification violates the APA.” *New York v. U.S. Dep’t of Commerce*, --- F. Supp.  
 13 3d ----, 2019 WL 190285, at \*112 (S.D.N.Y. Jan. 15, 2019) (citing, *inter alia*, *Woods Petroleum*  
 14 *Corp. v. U.S. Dep’t of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (setting aside agency action  
 15 because the “sole reason” for the action was “to provide a pretext” for the agency’s “ulterior  
 16 motive”)). Because the basis for the agency’s action must be disclosed in the record, “[i]t follows  
 17 that a court cannot sustain agency action founded on a pretextual or sham justification that  
 18 conceals the true ‘basis’ for the decision.” *Id.* The *New York* court concluded, based on a number  
 19 of factors, that the Commerce Department’s rationale for adding a citizenship question to the  
 20 U.S. Census was pretextual. *See id.* at \*112–115. Many similar factors are also present here.

21 First, the Temporary Modification and Letter were highly procedurally irregular. As  
 22 discussed above, they were issued without the required notice to Congress, or any other advance  
 23 notice that would have afforded an opportunity for public scrutiny, and they partially effectuated  
 24 a non-final proposed rulemaking. This concealed the deregulation from public view until it was  
 25 complete, and deprived Congress of its right to exercise its “particularly rigorous oversight” of  
 26 the Munitions List. *See New York*, 2019 WL 190285, at \*112 (“conspicuous procedural

1 irregularities” supported finding of pretext, as did a “failure to disclose” that prevented subject  
2 matter experts from “conducting rigorous testing”).

3 Second, the evidence shows that the State Department decided to deregulate the subject  
4 files abruptly, sometime during the three-week period from April 6 to April 30, 2018, in  
5 connection with the *Defense Distributed* settlement. Even if the global state of affairs had  
6 somehow changed drastically during the three-week period in which the reversal occurred—an  
7 improbable scenario for which there is no evidence—this short period would not have afforded  
8 enough time to reach a reasoned “determin[ation]” that permanent deregulation no longer  
9 presented a national security or foreign policy threat. The Federal Defendants have sought to  
10 justify the Temporary Modification and Letter by asserting they are of a piece with the May 24,  
11 2018 NPRM, but this only underscores their irregularity, since the NPRM was not (and as of this  
12 filing, still is not) final, and the deregulation decision was made months before the NPRM  
13 comment period closed. *See New York*, 2019 WL 190285, at \*112 (finding pretext where  
14 decision was made before the alleged basis for the decision occurred).

15 Third, evidence outside the filed record indicates that the Department’s decision was  
16 based on a reason not disclosed in the record. Heather Nauert, then the State Department  
17 spokesperson, stated at a July 31, 2018 press briefing that the “Department of Justice suggested  
18 that the State Department and the U.S. Government settle this [*Defense Distributed*] case, and  
19 so that is what was done. . . . We took the advice of the Department of Justice, and here we are  
20 right now.”<sup>50</sup> This “following DOJ’s advice” rationale does not appear anywhere in the filed  
21 record. At the same time, Ms. Nauert acknowledged that the State Department still had “equity”  
22 in the matter of 3D-printed guns because it “wants to prevent the wrong people from acquiring  
23 weapons overseas.”<sup>51</sup> This is inconsistent with deregulation being “in the interest of” U.S.  
24 national security and foreign policy and is further evidence of pretext. *See New York*, 2019 WL

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26 <sup>50</sup> Dkt. # 35-1 at 5 of 46.

<sup>51</sup> *Id.*

1 190285, at \*112 (extra-record statements by Commerce Department official contradicted  
 2 agency’s stated rationale for its decision, supporting finding that this rationale was pretextual);  
 3 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (consideration of extra-  
 4 record evidence is appropriate where the record “does not disclose the factors that were  
 5 considered” or the agency’s “construction of the evidence”).

6 Fourth, the original Administrative Record filed by the State Department failed to include  
 7 evidence that was before it when it made its decision, including the Department’s own CJ  
 8 determinations related to the subject files, the Aguirre Declaration, and complete records from  
 9 the *Defense Distributed* litigation in which the Department’s regulation of the files was directly  
 10 at issue. *See New York*, 2019 WL 190285, at \*113, \*48 (“curated and highly sanitized nature”  
 11 of initial administrative record suggested intent to conceal true basis for decision).

12 In sum, the stated bases for the State Department’s deregulation of the subject files—that  
 13 deregulation is “in the interest of” U.S. national security and foreign policy, or that the subject  
 14 files “do not provide a critical military or intelligence advantage”—are pretextual. “Because [the  
 15 State Department’s] stated rationale was not [its] actual rationale, [it] did not comply with the  
 16 APA’s requirement that [it] ‘disclose the basis of [its] decision.’” *New York*, 2019 WL 190285,  
 17 at \*115 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–168 (1962)).

18 **D. The Court Should Vacate the State Department’s Actions and Enjoin It from**  
 19 **Further Attempts to Unlawfully Deregulate the Files**

20 The Temporary Modification and Letter should be vacated. When agency action is found  
 21 to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” the  
 22 APA provides that the reviewing court “shall . . . hold unlawful and set aside” the agency action.  
 23 5 U.S.C. § 706(2). Vacatur is the “normal remedy” for unlawful agency action. *Allina Health*  
 24 *Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). Failure to provide required notice of  
 25 the agency action is a “fundamental flaw,” *id.*, and failure to address important aspects of the  
 26 problem and ignoring relevant evidence are “major shortcomings,” *Humane Soc’y*, 865 F.3d at



1 614, that make vacatur the appropriate remedy. Here, the Temporary Modification and Letter  
 2 suffer from all of these fatal deficiencies and more. Further, this is not a case in which “the egg  
 3 has been scrambled,” *Allina*, 746 F.3d at 1110–1111; vacatur would simply restore the status  
 4 quo and “allow the [pending final rule] to take effect,” *Nat’l Venture Capital Ass’n v. Duke*, 291  
 5 F. Supp. 3d 5, 21 (D.D.C. 2017)—assuming a final rule is lawfully promulgated.<sup>52</sup>

6 The States additionally ask the Court to enjoin the Federal Defendants from issuing any  
 7 subsequent “temporary modification” or otherwise removing the subject files from the Munitions  
 8 List or permitting their export without providing congressional notice as required by AECA.<sup>53</sup>  
 9 Where vacatur of a deregulation decision is not “sufficient to redress [plaintiffs’] injury,” a court  
 10 may issue an injunction that has a “meaningful practical effect independent of its vacatur.”  
 11 *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). Here, absent a permanent  
 12 injunction prohibiting further procedurally defective agency actions, the State Department may  
 13 attempt another end-run around AECA’s requirements before any final rule goes into effect. *See*  
 14 *New York*, 2019 WL 190285, at \*122 (permanent injunction was “necessary to make . . . vacatur  
 15 effective, as it prevents [the agency] from arriving at the same decision *without* curing the  
 16 problems” with its initial action). The States could once again face an abrupt final deregulation  
 17 that threatens immediate, serious, and irreparable harm, and leaves them with no remedy aside  
 18 from seeking another emergency TRO. Notably, the Department’s position is that congressional  
 19 notice was not required, *see* Dkt. # 64 at 18–20, and it has continued to defend this lawsuit  
 20 without ever acknowledging the impropriety of its use of ITAR’s “temporary modification”  
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22 <sup>52</sup> The States anticipate that any final rule that removes the subject files from the Munitions List would be  
 23 arbitrary and capricious for many of the same reasons discussed herein. Of course, the issue is not ripe at this time,  
 since no final rule has been published.

24 <sup>53</sup> The Private Defendants have previously opposed the entry of injunctive relief. *See* Dkt. ## 8, 11, 63.  
 25 Their theories regarding the constitutionality of regulating the subject files are at best tangential to this case, in  
 26 which the States merely ask the Court to invalidate procedurally defective and unlawful agency actions and require  
 the State Department to follow the law in making regulatory changes that affect the subject files. Federal regulation  
 of Munitions List items has repeatedly survived constitutional challenge, *see United States v. Chi Mak*, 683 F.3d  
 1126, 1136 (9th Cir. 2012), but to the extent there are any constitutional implications with respect to the subject  
 files, they are not squarely presented here and the Court need not consider them.

1 procedure to bypass the notice requirement and prematurely effectuate a non-final rule. *See*  
 2 *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995) (“defendant’s recognition of  
 3 the wrongful nature of its conduct” is a factor in whether a permanent injunction should issue).  
 4 Even if a final rule that complies with the notice requirement is published in the near future, it  
 5 may not go into effect until six months later. *See* 83 Fed. Reg. 24,200 (May 24, 2018) (rules  
 6 revising Munitions List categories typically have a “delayed effective date of 180 days”).  
 7 Another procedurally improper deregulation in the meantime would again leave the states with  
 8 no option other than filing yet another complaint and seeking yet another TRO.

9 The standards for permanent and preliminary injunctions are “essentially the same,”  
 10 except that to obtain permanent relief, the plaintiff must show “actual success” on the merits  
 11 rather than a likelihood of success. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008).  
 12 Success on the merits, including as to procedural defectiveness, is established above. The  
 13 irreparable harm the States will suffer if the files are permitted to be published online, and the  
 14 strong public interest in preventing this, is also well established in the record of these  
 15 proceedings. *See* Dkt. # 95 at 20–25; Dkt. # 43 at 19–24 & accompanying citations. Anyone with  
 16 access to a public or commercially available, relatively inexpensive 3D printer<sup>54</sup>—regardless of  
 17 their age, mental health status, or criminal history—would be able to download and instantly use  
 18 the files to make functional weapons, fulfilling Defense Distributed co-founder Cody Wilson’s  
 19 “crypto-anarchist” vision of “evading and disintermediating” gun-safety regulations.<sup>55</sup> 3D-  
 20 printed weapons will only become deadlier as the technology continues to evolve.<sup>56</sup>

21 3D-printable firearms pose substantial threats to public health and safety. The Liberator  
 22 and other weapons made of plastic can evade metal detectors,<sup>57</sup> which are one of the most

23 \_\_\_\_\_  
 24 <sup>54</sup> Patel Decl., ¶¶ 9, 17–18, 26; Scott Decl., ¶¶ 4–5; Racine Decl., ¶¶ 3–6. Unless otherwise indicated, all  
 declarations cited in this section are filed at Dkt. # 43-2. An index of these declarations is filed at Dkt. # 43-1.

25 <sup>55</sup> *See* Dkt. # 44 (Rupert Decl.), Ex. 16.

26 <sup>56</sup> *See* Patel Decl., ¶¶ 21–26 (discussing emerging materials and technology that could be used to make  
 deadlier weapons).

<sup>57</sup> McCord Decl., ¶¶ 11–13; Hosko Decl., ¶ 14; Bisbee Decl., ¶ 18; Dkt. # 29-1, Ex. 2 (Johanknecht Decl.),  
 ¶ 7; Dkt. # 29-1, Ex. 3 (Best Decl.), ¶ 7; Coyne Decl., ¶ 4; Camper Decl., ¶ 7; Kyes Decl., ¶ 17.

1 significant forms of protection for public facilities such as airports, stadiums, courthouses and  
 2 other government buildings, schools,<sup>58</sup> and prisons.<sup>59</sup> For example, 3D-printable weapons will  
 3 make it possible for students to manufacture their own weapons that could be used in a school  
 4 shooting (and could evade metal detectors that some schools are installing to prevent such  
 5 shootings).<sup>60</sup> 3D-printed weapons such as the Liberator do not always look like conventional  
 6 firearms, and children may mistake them for toys and play with them—a common reason for  
 7 accidental gun deaths among children.<sup>61</sup>

8 3D-printable firearms would compromise law-enforcement efforts. They can be privately  
 9 manufactured with no serial numbers,<sup>62</sup> hampering law enforcement’s ability to “trace” a firearm  
 10 to its original seller and subsequent purchasers, which can be used to solve crimes and combat  
 11 gun trafficking.<sup>63</sup> Untraceable “ghost guns” of the non-3D-printed variety are already  
 12 increasingly popular<sup>64</sup>—and increasingly being used to commit horrific crimes, including  
 13 multiple mass shootings in California.<sup>65</sup> 3D-printed weapons would also undermine law  
 14 enforcement efforts to forensically match bullets used to commit crimes with the gun from which  
 15 they are shot, both because plastic weapons do not leave “ballistic fingerprints” on a bullet or  
 16 casing,<sup>66</sup> and because the firing conditions cannot be reliably or safely replicated since the gun  
 17 is unstable and dangerous even to the shooter.<sup>67</sup> For many of these reasons, 3D-printed weapons  
 18 may be particularly attractive to criminal enterprises, which would likely embrace the technology  
 19

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20 <sup>58</sup> McCord Decl., ¶¶ 7–8, 13, 18–21; Camper Decl., ¶ 7; Rivara Decl., ¶ 7; Hemenway Decl., ¶ 21;  
 Wintemute Decl., ¶ 14.

21 <sup>59</sup> *See generally* Herzog Decl.

22 <sup>60</sup> Rivara Decl., ¶ 7; *see also* Hemenway Decl., ¶ 21; Wintemute Decl., ¶ 14.

23 <sup>61</sup> Rivara Decl., ¶ 6; Hemenway Decl., ¶ 20; Wintemute Decl., ¶ 13.

24 <sup>62</sup> McCord Decl., ¶¶ 29–30, 33; Kyes Decl., ¶ 8; Graham Decl., ¶ 35.

25 <sup>63</sup> Hosko Decl., ¶¶ 11, 11; McCord Decl., ¶¶ 30–32, 34, 40; Bisbee Decl., ¶¶ 17–18; Camper Decl., ¶¶ 6,  
 8; Kyes Decl., ¶¶ 8, 11, 13, 15–16; Graham Decl., ¶¶ 16, 32; Dkt. # 29-1, Ex. 2 (Johanknecht Decl.), ¶ 8.

26 <sup>64</sup> Graham Decl., ¶¶ 17–18; *id.* ¶ 30 (noting increase in prohibited persons who possess ghost guns).

<sup>65</sup> *Id.*, ¶¶ 25(a)–(t), 33.

<sup>66</sup> Camper Decl., ¶ 12; *see also* McCord Decl., ¶ 35 (“law enforcement agencies and prosecutors will not  
 be able to rely on forensic experts to match bullets used to commit crimes with [3D-printed] firearms”).

<sup>67</sup> Camper Decl., ¶¶ 12–13; *see* Dkt. # 29, ¶¶ 74, 95, 109–10, 126, 131, 142, 150, 154, 157–58, 165,  
 170–71, 180–82, 207 (citing States’ laws establishing background-check requirements).

1 for use in engaging in the violence, proceeds-collection, and retaliation that commonly attends  
2 the work of those organizations.<sup>68</sup>

3 3D-printable firearms also create a heightened risk of terrorist attacks, as the State  
4 Department has acknowledged.<sup>69</sup> Undetectable and untraceable firearms could be used by  
5 foreign terrorist organizations for attacks within the United States, including against persons  
6 residing in or visiting the Plaintiff States.<sup>70</sup> The apparent effectiveness of metal detectors in  
7 hindering such attacks would become meaningless if undetectable weapons became widely  
8 available; for example, “the 72,000 fans who pack CenturyLink for a Seahawks game suddenly  
9 become much more vulnerable to terrorists who seek to cause as much bloodshed as possible.”<sup>71</sup>

10 Such “ongoing and concrete harm to [the States’] law enforcement and public safety  
11 interests . . . constitutes irreparable harm.” *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts,  
12 C.J., as Circuit Justice). In opposing entry of a preliminary injunction, the Federal Defendants  
13 “d[id] not argue that any of these injuries are reparable.” Dkt. # 95 at 22. The Federal Defendants  
14 would be unharmed by entry of a permanent injunction, which will merely prevent them from  
15 circumventing AECA’s procedural requirements and ensure that any future agency action  
16 affecting export control of the subject files is AECA-compliant.

#### 17 IV. CONCLUSION

18 For the reasons above, the Plaintiff States respectfully request that the Court enter  
19 summary judgment in their favor, vacate and set aside the Temporary Modification and Letter,  
20 and permanently enjoin the State Department from taking any other action to permit export of  
21 the subject files absent compliance with AECA.

22  
23 <sup>68</sup> Hosko Decl., ¶¶ 15–16; McCord Decl., ¶¶ 39–41; Graham Decl., ¶ 37.

<sup>69</sup> Ex. D at 10–11.

24 <sup>70</sup> McCord Decl., ¶¶ 14–22; *see also* Dkt. # 44-1, Ex. 9 (Sen. Menendez letter 8/8/2018). These concerns  
25 are perhaps particularly salient for the District of Columbia, which is entirely urban, densely populated, hosts  
26 hundreds of heavily attended events each year, including numerous political marches and protests, and is filled with  
thousands of high-ranking federal officials and diplomats from around the world. *Id.*, Ex. 20 (Lanier Decl.), ¶¶ 13–  
15; *see also id.*, Ex. 21 (Op-ed by former Chief of U.S. Capitol Police and Senate Sergeant at Arms).

<sup>71</sup> McCord Decl., ¶¶ 17–18, 22.

1 DATED this 15th day of February, 2019.

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The Honorable Robert S. Lasnik

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants.

NO. 2:18-cv-01115-RSL

ORDER GRANTING PLAINTIFF STATES' MOTION FOR SUMMARY JUDGMENT

[PROPOSED]

NOTED ON MOTION CALENDAR:  
APRIL 19, 2019

1 This matter came before the Court on the Plaintiff States' Motion for Summary  
2 Judgment, which seeks to vacate and set aside the Federal Defendants' Temporary  
3 Modification of the United States Munitions List (Temporary Modification) and letter to  
4 Defense Distributed (Letter), which removed the 3D-printable gun files at issue in this case  
5 from the U.S. Munitions List and authorized their "unlimited distribution." The Court has  
6 considered the motion and documents filed therewith, including declarations and the exhibits  
7 attached thereto, the pleadings and entire record in this case, and the arguments of counsel.  
8 Having considered the foregoing, the Court finds that the requested relief is warranted for the  
9 reasons below.

10 1. When agency action is "arbitrary, capricious, an abuse of discretion, or  
11 otherwise not in accordance with law," the APA provides that the reviewing court "shall . . .  
12 hold unlawful and set aside" the agency action. 5 U.S.C. § 706(2). Vacatur is the "normal  
13 remedy" for unlawful agency action. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110  
14 (D.C. Cir. 2014). Failure to provide required notice of the agency action is a "fundamental  
15 flaw," *id.*, and failure to address important aspects of the problem and ignoring relevant  
16 evidence are "major shortcomings," *Humane Soc'y*, 865 F.3d at 614, that make vacatur the  
17 appropriate remedy. The Temporary Modification and Letter are vacated because they are  
18 procedurally flawed, *ultra vires*, unconstitutional, and arbitrary and capricious.

19 2. The Federal Defendants failed to provide 30 days' notice of their removal of  
20 items from the U.S. Munitions List to the Committee on International Relations of the House  
21 of Representatives and the Committee on Foreign Relations of the Senate in accordance with  
22 established notification procedures, as required by the Arms Export Control Act (AECA). 22  
23 U.S.C. § 2778(f)(1). The Federal Defendants have acknowledged that this notice was not  
24 provided. The Federal Defendants also exceeded their delegated authority under AECA and  
25 violated the Tenth Amendment of the U.S. Constitution by purporting to authorize "any United  
26 States person" to "access, discuss, use, reproduce, or otherwise benefit from" the files, and to

1 authorize their “unlimited distribution,” undermining the Plaintiff States’ ability to enforce  
2 their respective laws restricting the possession and use of firearms.

3 3. The Temporary Modification and Letter are also arbitrary and capricious  
4 because the administrative record shows that the Federal Defendants failed to explain or  
5 support their shifting rationales for reversing their regulatory position on the subject files, and  
6 failed to consider evidence of the specific properties of 3D-printed guns in light of the  
7 important factors Congress identified, including the unique threats they pose to world peace,  
8 national security, and foreign policy.

9 4. In addition to vacating the Temporary Modification and Letter, the Court  
10 permanently enjoins the Federal Defendants from issuing any subsequent “temporary  
11 modification” or otherwise removing the subject files from the Munitions List or permitting  
12 their export without providing congressional notice as required by AECA. Where vacatur of a  
13 deregulation decision is not “sufficient to redress [plaintiffs’] injury,” a court may issue an  
14 injunction that has a “meaningful practical effect independent of its vacatur.” *Monsanto Co. v.*  
15 *Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). The standards for permanent and  
16 preliminary injunctions are “essentially the same,” except that to obtain permanent relief, the  
17 plaintiff must show “actual success” on the merits rather than a likelihood of success. *Winter*  
18 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). The other three factors are that plaintiffs  
19 are likely to suffer irreparable harm in the absence of relief; the balance of equities tips in their  
20 favor; and an injunction is in the public interest. *Id.* at 20.

21 5. Permanent injunctive relief is necessary to provide complete relief to the Plaintiff  
22 States because it will ensure that the Federal Defendants adhere to AECA’s procedural  
23 requirements with respect to any future efforts to remove the subject files from the U.S.  
24 Munitions List or permit their export. The Plaintiff States have shown a likelihood of irreparable  
25 injury if such unlawful deregulation of 3D-printable gun files is not permanently enjoined. The  
26 States will suffer irreparable harm to their ability to enforce their laws and protect the safety and

1 health of their residents and visitors due to the proliferation via the internet of undetectable,  
2 untraceable, 3D-printable firearms. The Federal Defendants would be unharmed by entry of a  
3 permanent injunction, which will merely prevent them from circumventing AECA’s  
4 procedural requirements and ensure that any future agency action affecting export control of  
5 the subject files is AECA-compliant.

6 For the foregoing reasons, the Plaintiff States’ Motion for Summary Judgment is  
7 GRANTED. The Court vacates the Temporary Modification and Letter and permanently  
8 enjoins the Federal Defendants as follows:

9 The federal government defendants and all of their respective officers, agents, servants,  
10 employees, and attorneys, and any other persons who are in active concert or participation with  
11 any of the foregoing persons or entities, are hereby permanently enjoined from issuing any  
12 subsequent “temporary modification” or otherwise removing the subject files from the  
13 Munitions List or permitting their export without providing congressional notice as required  
14 by the Arms Export Control Act.

15 It is SO ORDERED.

16 ISSUED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

17  
18 \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

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