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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON; STATE OF CONNECTICUT; STATE OF MARYLAND; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF OREGON; COMMONWEALTH OF MASSACHUSETTS; COMMONWEALTH OF PENNSYLVANIA; and the DISTRICT OF COLUMBIA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; DIRECTORATE OF DEFENSE TRADE CONTROLS; MIKE MILLER, in his official capacity as Acting Deputy Assistant Secretary of Defense Trade Controls; SARAH HEIDEMA, in her official capacity as Director of Policy, Office of Defense Trade Controls Policy; DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INC.; and CONN WILLIAMSON,

Defendants.

No. 2:18-cv-01115

OPPOSITION TO EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

ORAL ARGUMENT REQUESTED

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1 **I. The Plaintiffs Seek an Unconstitutional Prior Restraint on Speech**

2 The Attorneys General of eight states and the District of Columbia have styled this case
3 as a mundane administrative law matter. Their proposed remedy sounds innocuous enough, and
4 perhaps even a little familiar: enjoin the current administration from reversing a position taken
5 by the prior administration. However, that description of the case is dangerous window dressing.
6 This case implicates foundational principles of free speech.

7 Simply put, the States demand a prior restraint of constitutionally protected speech that is
8 *already* in the public domain. We know that “[a]ny system of prior restraints of expression
9 comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam*
10 *Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). That presumption of liberty is even heavier
11 where, as here, the speech is *already* available on the Internet, and has been available for years.
12 In *The Pentagon Papers Case*, Justice White remarked that when “publication has *already*
13 begun,” the “efficacy of equitable relief . . . to avert anticipated damages is doubtful at best.”
14 *New York Times Co. v. U.S.*, 403 U.S. 713, 732 (1971) (White, J., concurring) (emphasis added).
15 Yet, nine Attorneys General, who swore an oath to the Constitution, failed to even mention the
16 First Amendment in their emergency pleadings. Such a careless disregard for the Bill of Rights
17 fails to meet the “heavy burden” needed to justify a prior restraint. *Organization for a Better*
18 *Austin v. Keefe*, 402 U.S. 415, 419 (1971).

19 Moreover, the prior restraints in this case would not be restricted to the named
20 defendants: nine Attorneys General seek to infringe the liberties of *all* Americans. The settlement
21 under siege expressly protects the rights of “*any* United States person” to “access, discuss, use,
22 reproduce, or otherwise benefit from the technical data.” ECF 2-1 at 4-5 (emphasis added). *Any*
23 means *all*. Granting the proposed injunctive relief would not only silence the three named
24 Defendants, but it would immediately censor over three hundred million Americans. Today, the
25 validity of nationwide injunctions is subject to a robust debate. But never before has any court
26 entertained a global injunction on the freedom of speech of *all* Americans.

1 The constitutional principles at stake in this case are simple enough. Yet, the facts are
2 admittedly perplexing—especially for a Court asked to grant an emergency temporary
3 restraining order. The most straightforward way to understand this complicated case is to trace
4 the three documents that were generated by the State Department on July 27, 2018: (1) the
5 license, (2) the temporary modification, and (3) the settlement agreement. They are separate, but
6 interconnected.

- 7 1. The State Department issued a **license** that authorized Defense Distributed to publish,
8 for “unlimited distribution,” certain “technical data” that was subject to litigation in
9 the Western District of Texas. *See* Exhibit A at 2.
- 10 2. Through the **temporary modification**, the State Department authorized the
11 distribution of that “technical data,” in addition to certain “other files,” without any
12 prior restraint. *See* Exhibit B.¹
- 13 3. Under the terms of the **settlement agreement**, “any United States person” can now
14 “access, discuss, use, reproduce, or otherwise benefit from the technical data,” and
15 “other files,” that are covered by the **temporary modification**. *See* Exhibit C at 3
16 (emphasis added).

17 Let’s unpack this nesting doll. Through its unique **license**, Defense Distributed can
18 distribute the “technical data” that was at issue in the Western District of Texas litigation.
19 However, Defense Distributed, like “any [other] United States person,” can rely on the
20 **temporary modification**, working in tandem with the **settlement agreement**, in order to
21 “access, discuss, use, reproduce, or otherwise benefit from the technical data.” These acts are
22 *expressly* protected by the First Amendment. In *Sorrell v. IMS Health Inc.*, the Court recognized
23 “that the *creation and dissemination* of information are speech within the meaning of the First
24 Amendment.” 564 U.S. 552, 570 (2011). *See also* *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)
25 (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to
26

¹ In 1981, the Office of Legal Counsel warned the State Department that its regulation of
“technical data” raised “*serious constitutional questions*.” *See* Constitutionality of the
Proposed Revision of the Int’l Traffic in Arms Regulations, 5 U.S. Op. Off. Legal Counsel
202, 205-06 (1981) (emphasis added).

1 imagine what does fall within that category, as distinct from the category of expressive conduct”
2 (some internal quotation marks omitted). See Josh Blackman, *The 1st Amendment, 2nd*
3 *Amendment, and 3D Printed Guns*, 81 Tenn. L. Rev. 479 (2014), <http://bit.ly/2OvXBvu>.

4 Yet, the Plaintiffs seek to block all three attributes of this framework: the license, the
5 temporary modification, and the settlement agreement. Each of these injunctions would impose a
6 prior restraint on speech, and silence “any United States person” who was previously *authorized*
7 by the federal government to “creat[e] and disseminat[e] . . . information.”

8 Fortunately, the bedrock principles of the First Amendment make this case much easier.
9 A finding that a constitutional right “‘is either threatened or in fact being impaired’ . . . mandates
10 a finding of irreparable injury.” *Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 338
11 (5th Cir. 1981) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And “[t]he loss of First
12 Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable
13 injury.” *Elrod*, 427 U.S. at 373-74 (citations omitted). Outside of court papers, the Attorney General
14 of Washington bluntly acknowledged the purpose of his litigation: to “make it as difficult as
15 humanly possible to *access this information*.”² That statement against interest, by itself, is
16 enough to deny the Temporary Restraining Order in its entirety.

17 **II. The Plaintiffs Cannot Succeed on The Merits Because the Court has no Jurisdiction**

18 The Plaintiffs cannot succeed on the merits: the State Department’s actions are not
19 subject to judicial review, the duty to notify Congress has not yet been triggered, and the
20 Commodity Jurisdiction procedure simply does not apply. Their entire challenge under the
21 Administrative Procedure Act (“APA”) suffers from serious misunderstandings of the Arms
22 Export Control Act (“AECA”) and International Traffic in Arms Regulations (“ITAR”)
23 requirements. This complaint cannot form the basis for emergency injunctive relief.

24
25 ² Cyrus Farivar, 20 states take aim at 3D gun company, sue to get files off the Internet, *Ars*
26 *Technica* (Jul. 30, 2018), <http://bit.ly/2NX1dp7>.

1 **A. This Court Lacks Jurisdiction to Review State Department Licensing**
2 **Decisions Under the APA because of a Clear Delegation of Authority and**
3 **Lack of Judicially Manageable Standards**

4 The APA expressly excludes from review “agency action [that] is committed to agency
5 discretion by law.” 5 U.S.C. § 701(a)(2). Courts determine whether an agency action is
6 committed to the discretion of an agency based on the nature of the delegation of authority and
7 the statutory language. *See Webster v. Doe*, 486 U.S. 592, 599-600 (1988). This narrow
8 exception to judicial reviewability is especially prevalent in cases involving agency decisions
9 relating to foreign affairs and national security. Such cases involve “judgments on questions of
10 foreign policy and the national interest” that are not “fit for judicial involvement.” *See Dist. No.*
11 *I, Pac. Coast Dist., Marine Eng’rs’ Beneficial Ass’n v. Mar. Admin.*, 215 F.3d 37, 42 (D.C. Cir.
12 2000).

13 In addition, where the language of a statute provides no justiciable standard by which a
14 court can review the agency’s exercise of its delegated authority, the matter is treated as
15 committed to the agency’s discretion. *See Webster*, 486 U.S. at 600 (a statute allowing the
16 Director of the CIA to terminate employment of any employee whenever he found termination
17 “advisable” for the national interest “fairly exude[d] deference” and thereby precluded judicial
18 review under the APA). In particular, statutes have been consistently interpreted to preclude
19 judicial review under the APA when they use language that permits an executive official, such as
20 the President or another agency official, to take action that the official “deems” in the “national
21 interest.” *See Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005) (construing a statute, which
22 allows the Attorney General to waive a requirement if waiver is in the “national interest,” as
23 being committed to the discretion of the Attorney General).

24 Plaintiffs claim, without any authority, that “the State Department’s actions are
25 mandatory and non-discretionary.” ECF 2 at 14. However, the AECA delegates broad authority
26 and discretion to the President, or his delegate, to issue a license when he determines that such
action is “consistent with the foreign policy interests of the United States,” 22 U.S.C. § 2751,

1 and “in furtherance of world peace and the security and foreign policy of the United States.” *Id.*
2 § 2778(a)(1). “This standard fairly exudes deference to the [President], and appears to us to
3 foreclose the application of any meaningful judicial standard of review.” *See Webster*, 486 U.S.
4 at 600. Pursuant to this authority, the State Department has issued a license under ITAR
5 § 125.4(b)(13) for Defense Distributed and the Second Amendment Foundation (SAF) to publish
6 certain technical data on firearms into the public domain. *See Exhibit A*. The State Department
7 further issued a temporary modification under ITAR § 126.2 to permit United States persons to
8 access, discuss, use, reproduce, or otherwise benefit from the technical data at issue. *See Exhibit*
9 *B*.

10 The State Department’s licensing decisions fit squarely within 5 U.S.C. § 701(a)(2)’s
11 exclusion from judicial review, because it constitutes “agency action [that] is committed to
12 agency discretion by law.” The AECA’s delegation of authority to control arms exports is
13 decidedly one involving foreign affairs and national security—matters clearly within the State
14 Department’s discretionary authority. Furthermore, the lack of judicially manageable standards
15 precludes review. Courts have affirmed this broad grant of authority to the President under the
16 AECA to control the export of firearms on foreign policy grounds. In doing so, they broadly
17 construe statutes that grant the President authority to act in such sensitive matters of foreign
18 affairs. For example, the Federal Circuit observed:

19 In the external sector of the national life, Congress does not ordinarily bind the
20 President’s hands so tightly that he cannot respond promptly to changing
21 conditions or the fluctuating demands of foreign policy. Accordingly, when
22 Congress uses far-reaching words in delegating authority to the President in the
23 area of foreign relations, courts must assume, unless there is a specific contrary
24 showing elsewhere in the statute or in the legislative history, that the legislators
25 contemplate that the President may and will make full use of that power in any
26 manner not inconsistent with the provisions or purposes of the Act. In a statute
dealing with foreign affairs, a grant to the President which is expansive to the
reader’s eye should not be hemmed in or “cabined, cribbed, confined” by anxious
judicial blinders.

1 *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996) (quoting *South Puerto*
2 *Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 632 (Ct. Cl. 1964)); *see also*
3 *Samora v. United States*, 406 F.2d 1095 (5th Cir. 1969) (“The delegation to the President by
4 subsection (a) of the power ‘to control, in furtherance of world peace and the security and
5 foreign policy of the United States, the export and import of arms, ammunition, and implements
6 of war, including technical data relating thereto,’ is directed to the conduct of international
7 affairs, in which the executive branch of our government traditionally has been dominant.”).

8 In *U.S. Ordnance, Inc. v. U.S. Dep’t of State*, the Plaintiffs “ask[ed] the Court to
9 direct the Department of State (the ‘Department’) and its employees to issue plaintiff a
10 license to export M16 machine guns to foreign countries.” 432 F. Supp. 2d 94, 99 (D.D.C.
11 2006), vacated as moot sub nom. *U.S. Ordnance, Inc. v. Dep’t of State*, 231 F. App’x 2 (D.C.
12 Cir. 2007). Judge Huvelle found that the court lacked subject matter jurisdiction to review
13 the denial of the license under the Administrative Procedure Act. Specifically, the Court
14 cited two factors court for “reject[ing] plaintiff’s invocation of the APA and declin[ing] to
15 review the agency’s denial of plaintiff’s applications for licenses to export M16 machine
16 guns.” *Id.* at 99. First, she cited the “clear statutory language” of the Arms Export Control
17 Act, in which the “delegation of authority to control arms exports is decidedly one involving
18 foreign affairs and national security.” *Id.* at 98-99.

20 Second, Judge Huevelle recognized that there is an “absence of judicially manageable
21 standards to guide the Court’s review” concerning the issuance of export licenses. The Court
22 added, that “the AECA provides that the President, or his delegate, may approve the
23 exportation of defense articles when he determines that such action is ‘consistent with the
24 foreign policy interests of the United States,’ and ‘in furtherance of world peace and the
25 security and foreign policy of the United States.’” *Id.* (citations and quotations omitted). *See*
26

1 also *Corrie v. Caterpillar, Inc.* 503 F.3d 974 (9th Cir. 2007) (claims that implicated sales
2 financed under the AECA were nonjusticiable).

3 This determination of whether to issue a license is for the elected branches, and not
4 the courts—and certainly not for the states—to make. Indeed, the Plaintiffs’ suit stands as an
5 obstacle and frustrates the accomplishment of objectives authorized by federal export control
6 law. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375 (2000); *Nat’l Foreign*
7 *Trade Council, Inc. v. Giannoulis*, 523 F. Supp. 2d 731, 738-742 (N.D. Ill. 2007).
8 Moreover, the states are not within the “zone of interest” to challenge these actions. *See*
9 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). There is no
10 basis to review the State Department’s issuance of the license.

11 **B. AECA Section 2778(h) Precludes the Court from Reviewing the State**
12 **Department’s Decision to Remove Defense Articles from the USML**

13 The Plaintiffs contend that “Defendants have provided no explanation for the
14 Government’s complete reversal of its position on the files at issue.” ECF 2 at 18. Therefore, the
15 States claim, the government’s actions are arbitrary and capricious. This claim is reckless. As a
16 threshold matter, the changed position began during the Obama Administration; not the Trump
17 Administration. 78 Fed. Reg. 22,740 (April 16, 2013) (“The Department intends to publish final
18 rules implementing the revised USML categories and related ITAR amendments periodically,
19 beginning with this rule.”).

20 Moreover, the federal government has provided *ample* support to explain its position: the
21 Plaintiffs simply did not mention it. On May 24, 2018, the Department of State published a
22 proposed rule in the Federal Register seeking to transfer responsibility for the licensing of
23 firearms exports from the ITAR U.S. Munitions List (“USML”) to the Department of Commerce
24 Export Administration Regulations (“EAR”) Commerce Control List. 83 Fed. Reg. 24,198 (May
25 24, 2018). *See* Exhibit F. The proposed rule offers several detailed findings and studies to justify
26

1 transferring the responsibility from the State Department to the Commerce Department. For
2 example:

- 3 1. **Reduce burden hours:** “The Department believes the effect of this proposed rule
4 would decrease the number of license applications submitted to the Department under
5 OMB Control No. 1405–0003 by approximately 10,000 annually, for which the
6 average burden estimates are one hour per form, which results in a burden reduction
7 of 10,000 hours per year.” *Id.* at 24200.
- 8 2. **Reduced costs:** “In addition to the reduction in burden hours, there will be direct cost
9 savings to the State Department that would result from the 10,000 license applications
10 no longer being under the ITAR once these items are moved to the EAR.” *Id.*
- 11 3. **Save taxpayers \$2.5 million annually:** “It is the case, however, that the movement
12 of these items from the ITAR would result in a direct transfer of \$2,500,000 per year
13 from the government to the exporting public, less the increased cost to taxpayers,
14 because they would no longer pay fees to the State Department and there is no fee
15 charged by the Department of Commerce to apply for a license.” *Id.* at 24201.

16 Again, the Plaintiffs repeatedly make baseless charges that the government has failed to justify
17 this new position, yet they do not cite the Federal Register proposed rule that explains in depth
18 why the change was made. The intent of the proposed rule is fully consistent with the AECA,
19 which provides that “[t]he President is authorized to designate those items which shall be
20 considered as defense articles and defense services for the purposes of this section and to
21 promulgate regulations for the import and export of such articles and services.” 22 U.S.C. §
22 2778(a)(1). The items so designated constitute the ITAR USML. *Id.*

23 Plaintiffs also make another fatal error: they repeatedly assert, without any evidence that
24 the government failed to notify Congress prior to removing an article from the USML. However,
25 the proposed rule—which they do not cite—is only *proposed*. It is not final. Therefore, nothing
26 has been removed from the USML. Therefore, the requirement to notify Congress has not been
triggered yet. See 22 U.S.C. § 2778(f)(1) (“The President may not remove any item from the
Munitions List until 30 days after the date on which the President has provided notice of the
proposed removal [to Congress]”).

1 Moreover, the Settlement Agreement does not require the removal of anything from the
2 USML. *See* Exhibit C. Rather, Section 1(a) of the agreement only requires that the State
3 Department commit to draft and fully pursue removal of the technical data at issue in this action
4 from the USML, “to the extent authorized by law (including the Administrative Procedure Act).”
5 The proposed rule explained that the government was *expressly* complying with the requirements
6 of the notice-and-comment rulemaking process, even though it determined that it was not
7 required to do so:

8 The Department of State is of the opinion that controlling the import and export of
9 defense articles and services is a foreign affairs function of the United States government
10 and that rules implementing this function are exempt from sections 553 (rulemaking) and
11 554 (adjudications) of the Administrative Procedure Act (APA). Although the
12 Department is of the opinion that this proposed rule is exempt from the rulemaking
provisions of the APA and without prejudice to its determination that controlling the
import and export of defense services is a foreign affairs function, the Department is
publishing this proposed rule with a 45-day provision for public comment. *Id.* at 24200.

13 The government engaged in a sterling rulemaking process, and more than adequately justified its
14 agency action—the action is certainly not “arbitrary and capricious.”

15 In any event, even if the State Department removed the subject technical data from the
16 USML—it didn’t—the AECA expressly, clearly, and unequivocally precludes judicial review of
17 such decisions:

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

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

22 22 U.S.C. § 2778(h) (emphasis added).

23 The Plaintiffs contend that this provision is irrelevant because “the States are not
24 challenging the federal defendants’ designation of the computer code at issue as defense articles,
25 but instead their decision to remove the code from the USML.” ECF 2 at 15. We cannot repeat
26

1 this point enough: Nothing has been removed from the USML! The rule is only in its proposed
2 form.

3 Furthermore, Plaintiffs argue that “designation,” as used in 2778(h), does not include
4 decisions on what should not be designated. They argue that the section only applies to decisions
5 on what should be designated on the USML and not decisions on what should not be on the
6 USML. Plaintiffs do not offer any authority to support their position. Nor can they. Courts have
7 rejected prior attempts to narrow application of 2778(h) as “strained and unreasonable,”
8 especially in light of the overall intent of the AECA, which “was enacted to permit the Executive
9 Branch to control the export and import of certain items in order to further ‘world peace and the
10 security and foreign policy’ of the United States.” *Karn v. United States Department of State*,
11 925 F.Supp. 1, 6 (D.D.C. 1996) (“To parse the statute as the plaintiff suggests makes little sense
12 in light of the objectives of the AECA.”); *see also U.S. v. Roth*, 628 F.3d 827, 832 (6th Cir.
13 2011) (“Initially, we take note that courts may not review whether items are properly designated
14 as defense articles on the Munitions List.”).

15 Plaintiffs’ litigating position places more weight on “designation” than any reasonable
16 construction of the statute will bear because it is axiomatic that either decision necessarily entails
17 the other. Even if this Court was to accept Plaintiffs’ argument that 2778(h) only applies to
18 designations of items as defense articles, the question becomes one of semantics—i.e., the Court
19 can just as easily find that proposed rule seeks to designate a limited subset of firearms as
20 defense articles. Either way, such Department of State designations on the USML are not subject
21 to judicial review under 2778(h).

22 **C. No Congressional Notification Requirements Apply**

23 **Not a single Congressional notification requirement** applies to the State Department’s
24 issuance of the subject approvals or the proposed rule. Nevertheless, throughout various sections
25 of their Motion, the Plaintiffs claim that the State Department failed to provide Congressional
26

1 notifications. However, they fail to cite *any section* of the AECA that actually applies a
2 Congressional notification requirement to the actions at issue.

3 To be sure, the AECA contains various Congressional notification requirements.
4 Specifically, it requires the State Department to formally notify Congress:

- 5 • before issuance of any license or other approval for export sales of “Major
6 Defense Equipment” that exceed certain dollar-value thresholds;
- 7 • before the approval of exports of commercial communications satellites to certain
8 destinations and persons;
- 9 • and before approval of certain other transactions.

10 *See e.g.*, 22 U.S.C. §§ 2776(c), 2776(d). In addition, the President must provide
11 Congressional notification in advance of removing an item from the USML. *Id.* at
12 § 2778(f)(1). However, no Congressional notification requirements apply to the State
13 Department’s obligations under the terms of the Settlement Agreement.

14 Without question, Congressional notification requirements do not apply to the State
15 Department’s issuance of a license to publish technical data. Nor is Congressional notification
16 required for the State Department to make a commitment to draft and to fully pursue a
17 rulemaking authorized by law (including the Administrative Procedures Act). That commitment
18 can include the publication in the Federal Register of a notice of proposed rulemaking, seeking to
19 revise USML Category I to exclude the technical data that is the subject of the Action. Critically,
20 the Settlement Agreement does not require the State Department to remove anything from the
21 USML. It only requires that the State Department commit to draft and pursue such change in
22 compliance with the APA and any other applicable laws, to include the AECA and its
23 Congressional notification requirements. Any possible challenge to a potential removal is not yet
24 ripe.

25 Furthermore, Congressional notification requirements do not apply to the State
26 Department’s issuance of a *temporary* order suspending or modifying the ITAR under Section
126.2. *See* Exhibit B. Here, Plaintiffs confuse and conflate the difference between a temporary

1 order under ITAR Section 126.2 and the actual removal of an article from the USML requiring
2 Congressional notification. ITAR Section 126.2 permits the State Department to “**order** the
3 **temporary** suspension or modification of any or all of the regulations of this subchapter in the
4 interest of the security and foreign policy of the United States.” 22 C.F.R. 126.2 (emphasis
5 added). Such suspension is a temporary order that does not remove anything from the USML. In
6 sharp contrast, removal of a defense article from the USML is a permanent act that requires
7 rulemaking and Congressional notification.

8 Finally, as noted above, no Congressional notification is required for the State
9 Department to issue a proposed rule that merely *proposes* a transfer defense articles to
10 Commerce Department’s export jurisdiction. Of course, § 2778(f)(1) requires that the President
11 provide Congressional notification in advance of removing an item from the USML in a final
12 rule, but no final rule has been issued.

13 **D. No Commodity Jurisdiction Requirements Apply**

14 Plaintiffs claim “Defendants also lack statutory authority to issue the license and
15 temporary modification “without following the ‘established procedures’ for commodity
16 jurisdiction.” ECF 2 at 16. Here, the Plaintiffs fundamentally misunderstand the established
17 scope and purpose of the ITAR commodity jurisdiction procedure. Pursuant to ITAR Section
18 120.4, the government can respond to public requests for case-by-case determinations of whether
19 a particular product (*i.e.*, XYZ Company’s widget) is on the USML. *See* 22 C.F.R. 120.4. This
20 Commodity Jurisdiction procedure under ITAR Part 120 is a completely separate process from
21 the State Department licensing procedures. *See e.g.*, 22 C.F.R. 125 (“Licenses for the Export of
22 Technical Data and Classified Defense Articles”).

23 Plaintiffs also confuse and conflate the Commodity Jurisdiction procedure with State
24 Department decisions to remove an entire class of items from the USML. The District Court for
25 the District of Columbia explained this distinction in *Karn v. United States Department of State*:

1 Designating an export such that it is subject to the AECA and the ITAR requires
2 first describing the type of item in the regulations, and second, if asked by a
3 potential exporter, confirming that the item in question is or is not covered by
such description. The commodity jurisdiction procedure provides the latter
function. . . .

4 925 F.Supp. 1, at 7 (D.D.C. 1996).

5 The commodity jurisdiction process simply does not apply to temporary modifications of
6 the ITAR under 126.2 or other licensing decisions. Nor does it apply to agency decisions to
7 amend the regulations to transfer export jurisdiction of defense articles to the Department of
8 Commerce.

9 **III. Conclusion**

10 The Plaintiffs can challenge the proposed rule in due time when it is finalized. But they
11 cannot mount a collateral attack on a legitimate executive action in order to censor speech. *See*
12 Exhibit E. The Emergency Motion for a Temporary Restraining Order should be denied.

1 DATED this 31st day of July, 2018.

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1 **CERTIFICATE OF SERVICE**

2 I certify that on July 31, 2018, I served the foregoing by filing it with the Court's
3 CM/ECF system, which automatically notifies all counsel of record.

4
5 I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of
6 America that the foregoing is true and correct.

7 DATED this July 31, 2018.

8 IMMIX LAW GROUP PC

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