

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON; et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE; et al,

Defendants.

Case No. 2:20-cv-00111-RAJ

**ORDER GRANTING IN PART
PLAINTIFF STATES' MOTION
FOR PRELIMINARY
INJUNCTION**

I. INTRODUCTION

This matter comes before the Court on the Plaintiff States' Motion for Preliminary Injunction ("Motion"). Dkt. # 55. For the reasons below, the Court **GRANTS IN PART** the Motion.

II. BACKGROUND

1
2 Plaintiffs are seventeen States challenging companion regulations promulgated by
3 the Department of State and the Department of Commerce. This action is the latest in a
4 series of litigation over export controls on technical data related to 3-D printed firearms.
5 The Court examines the statutory framework and prior litigation before turning to its
6 analysis.

A. Arms Export Control Act (“AECA”)

7
8 The AECA regulates the export of arms, ammunition, and other military and
9 defense technology. 22 U.S.C. § 2778(a)(1). It delegates to the President the task of
10 creating the United States Munitions List (“Munitions List”), which designates certain
11 items as defense articles and defense services. *Id.* The term “defense articles” specifically
12 includes “technical data recorded or stored in any physical form, models, mockups or
13 other items that reveal technical data directly relating to items designated in” the
14 Munitions List. 22 C.F.R. § 120.6. Category I of the Munitions List includes “Firearms,
15 Close Assault Weapons and Combat Shotguns.” 22 C.F.R. § 121.1. “Nonautomatic and
16 semi-automatic firearms to caliber .50 inclusive,” their “components, parts, accessories
17 and attachments,” and related “technical data” are currently within Category I. *Id.* §
18 121.1(a), (h), (i).

19 The AECA also tasks the President with promulgating regulations for the import
20 and export of such defense articles and services. 22 U.S.C. § 2778(a)(1). The President
21 has delegated his authority to promulgate implementing regulations to the Secretary of
22 State. Those regulations, the International Traffic in Arms Regulations (“ITAR”), are
23 administered by the DDTC [Directorate of Defense Trade Controls] and its employees. 22
24 C.F.R. § 120.1(a). Under ITAR, persons who want to export items on the Munitions List
25 must first obtain a license from the Department of State (“State Department”).

B. Export Control Reform Act

26
27 The Department of Commerce (“Commerce”) regulates exports pursuant to the
28

1 Export Control Reform Act of 2018, 50 U.S.C. §§ 4801-52 (“ECRA”), which directs that
2 export controls be used to “further significantly the foreign policy of the United States,” to
3 “fulfill [the] declared international obligations” of the United States, or to limit exports
4 that would make a “significant contribution to the military potential of any other country
5 or . . . would prove detrimental to . . . national security.” *Id.* § 4811(1)(A)-(B).

6 To carry out these purposes, the ECRA directs that Commerce shall “establish and
7 maintain a list of items that are controlled”—the Commerce Control List (“CCL”)—and
8 “prohibit unauthorized exports, reexports, and in-country transfers of controlled items.” 50
9 U.S.C. § 4813(a)(1), (3). The Export Administration Regulations (“EAR”), 15 C.F.R.
10 parts 730-774, implement the ECRA, identifying the items and activities subject to the
11 jurisdiction of the EAR as well as those not subject to the EAR. The EAR’s definition of
12 “export” is comprehensive, and extends to, *inter alia*, “(1) An actual shipment or
13 transmission out of the United States, including the sending or taking of an item out of the
14 United States, in any manner;” or “(2) Releasing or otherwise transferring ‘technology’ or
15 source code (but not object code) to a foreign person in the United States (a ‘deemed
16 export’).” 15 C.F.R. § 734.13(a).

17 **C. Prior Litigation**

18 Computer software for the production of a Category I firearm or its components
19 using a 3-D printer (“3-D gun files”), such as computer aided design (CAD) files, is
20 “technical data” subject to the AECA and ITAR. Since about 2013, it had been the
21 government’s position that posting 3-D gun files on the internet was an “export” subject to
22 the AECA and ITAR. Defense Distributed, a private company with the stated objective of
23 facilitating global, unrestricted access to firearms and evading gun-safety laws, challenged
24 the government’s authority in a lawsuit filed in the United States District Court for the
25 Western District of Texas. *Distributed v. U.S. Dep’t of State*, C15-0372RP (W.D. Tex).
26 The company alleged that the government’s prepublication approval requirements under
27 ITAR were unconstitutionally applied to its gun-related speech. *Id.* Defense Distributed

1 sought an injunction so that it could post its 3-D gun files on the internet without
2 restriction to allow people to easily produce their own weapons and weapon parts using
3 relatively affordable and readily available equipment.

4 Throughout the litigation, the government argued that the export of certain Defense
5 Distributed 3-D gun files could “cause serious harm to U.S. national security and foreign
6 policy interests” that “warrant subjecting [the files] to ITAR’s export licensing regime.”
7 Dkt. # 32 at 19-20 (W.D. Tex.). The government specifically expressed that the 3-D gun
8 files could be modified to create lethal firearms that were “virtually undetectable” by
9 conventional security measures such as metal detectors. Additionally, the government
10 contended that permitting unrestricted access to the 3-D gun files on the internet would
11 increase the risk of their use in assassinations, in manufacturing spare component parts by
12 embargoed nations, terrorist groups, or guerrilla groups, or in compromising aviation
13 security overseas in a manner specifically directed at U.S. persons or interests. Id. The
14 government also argued that “the available alternatives clearly would be ineffective at
15 preventing the broad circumvention of export controls for munitions technology.” Dkt. #
16 92 at 27 (W.D. Tex.). The district court ultimately denied Defense Distributed’s motion
17 for preliminary injunction and the Fifth Circuit affirmed. Defense Distributed v. U.S.
18 Dep’t of State, 838 F.3d 451, 458 (5th Cir. 2016). The Fifth Circuit highlighted the State
19 Department’s very strong public interest in national defense and national security, noting
20 that the unregulated export of the 3-D gun files could cause permanent harm. Id. at 458.

21 In April 2018, Defense Distributed and the federal government reached a tentative
22 agreement to settle the dispute. Dkt. # 57 at 75-83. Pursuant to the settlement, the State
23 Department reversed its prior regulatory and litigation positions on publishing 3-D gun
24 files. It now agreed to (i) publish a notice of proposed rulemaking and final rule that
25 removes certain 3-D gun files from the Munitions List; (ii) announce a temporary
26 modification of the Munitions List to allow immediate distribution while the final rule was
27 in development; and (iii) issue a letter to Defense Distributed and others advising that 3-D

1 gun files were approved for public release and unlimited distribution. Id.

2 One month later, on May 24, 2018, the State Department published a notice of
3 proposed rulemaking that implicated the technical data at issue in the Defense Distributed
4 litigation. 83 Fed. Reg. 24,198 (May 24, 2018). By the proposed rule, the State
5 Department would no longer have the authority to control the export of certain 3-D gun
6 files, but instead Commerce would control such exports under a companion regulation.
7 See 83 Fed. Reg. 24,166 (May 24, 2018). During the comment period, some members of
8 the public recognized the regulation implicated 3-D gun files and raised concerns that
9 Commerce lacked authority to control the export of “published” items. Dkt. # 80-2; Dkt.
10 # 85-1, ¶ 51. They argued that these regulations would ineffectively guard against the
11 proliferation of 3-D gun files posted on the internet. Id. The public comment on the
12 proposed rules ended on July 9, 2018. The Defense Distributed settlement agreement was
13 made public the following day. As contemplated by the settlement agreement, the
14 temporary modification was published and the letter to the private defendants was issued
15 on July 27, 2018.

16 The temporary modification of the Munitions List was the subject of a 2018 lawsuit
17 filed by eight States in this Court. State of Washington v. United States Department of
18 State, No. C18-1115RSL (W.D. Wash.) (“State of Washington”). Addressing the
19 government’s jurisdictional challenges, this Court ruled that issues concerning the State
20 Department’s process for removing items from the Munitions List, its compliance with the
21 standards furnished by AECA, and the adequacy of the agency’s analysis of and
22 explanation for its decision were subject to judicial review under the Administrative
23 Procedure Act (“APA”). State of Washington, 318 F.Supp.3d 1247, 1255 (W.D. Wash.
24 2018). The Court later concluded that the government’s decision to modify the Munitions
25 List was arbitrary and capricious and procedurally improper in violation of the APA.
26 2019 WL 6892505 (W.D. Wash. Nov. 12, 2019).

27 On January 23, 2020, the State Department published its final rule revising the

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