

No. 26-

In the
Supreme Court of the United States

DEFENSE DISTRIBUTED, *et al.*,

Petitioners,

v.

JENNIFER DAVENPORT,
ATTORNEY GENERAL OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Josh Blackman
Josh Blackman LLC
1303 San Jacinto St.
Houston, Texas 77079

Charles R. Flores
Counsel of Record
Flores Law PLLC
917 Franklin Street,
Suite 600
Houston, Texas 77002
(713) 364-6640
chad@chadflores.law
Counsel for Petitioners

August 10, 2026

QUESTIONS PRESENTED

The Third and Fifth Circuits are split over venue in this very action. After the case was transferred from Texas to New Jersey, the Fifth Circuit held the transfer unlawful, vacated it, and directed a return request. Yet the District of New Jersey refused the resulting return request, and the Third Circuit affirmed retention on the opposite view of venue. On the merits, the Third Circuit created an acknowledged circuit split over when the First Amendment covers computer code. The questions presented are:

1. Whether a transferee court may retain a case after the transferor circuit holds the transfer unlawful, vacates it, and directs a formal return request.
2. Whether the First Amendment covers communicative computer code without more, or only upon additional indicia of expressiveness.

PARTIES TO THE PROCEEDINGS

The petitioners are Defense Distributed and Second Amendment Foundation, Inc. The respondent is Jennifer Davenport, Attorney General of New Jersey. No parties have stock ticker symbols.

CORPORATE DISCLOSURE STATEMENT

No Petitioner has a parent company or a publicly held company with a ten percent or greater ownership interest in it.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Defense Distributed, et al. v. Grewal, et al.*, No. 1:18-CV-637-RP (W.D. Tex.).
- *Defense Distributed v. Grewal*, No. 19-50723 (5th Cir.) (judgment entered Aug. 19, 2020), 971 F.3d 485.
- *Defense Distributed v. Bruck*, No. 21-50327 (5th Cir.) (judgment entered Apr. 1, 2022), 30 F.4th 414.
- *Defense Distributed v. Platkin*, No. 22-50669 (5th Cir.) (judgment entered Dec. 15, 2022), 48 F.4th 607 and 55 F.4th 486.

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceedings	ii
Corporate Disclosure Statement	ii
Related proceedings	ii
Table of Contents	iii
Table of Appendices	v
Table of Authorities	vii
Petition for a Writ of Certiorari	1
Decisions Below	1
Jurisdiction	2
Constitutional & Statutory Provisions Involved	2
Introduction	5
Statement	8
I. Factual Background	8
II. Procedural History	11
Reasons For Granting The Petition	17
I. The venue standoff warrants certiorari.	17
A. Two circuits have reached opposite venue decisions in the same action.....	17
B. The question is important to orderly intercircuit judicial administration and meaningful appellate review	19

C.	The decision below is wrong because the Fifth Circuit’s completed venue adjudication required return	20
D.	This case is an optimal vehicle	23
II.	The Court should resolve the circuit split about when the First Amendment covers communicative computer code.....	24
A.	There is an acknowledged split over First Amendment coverage of communicative computer code.....	24
B.	The question is very important, both doctrinally and practically.	26
C.	The decision below is wrong.....	29
D.	This case is an optimal vehicle	31
	Conclusion.....	33

TABLE OF APPENDICES

Appendix A — Opinion of the United States Court of Appeals for the Third Circuit filed February 12, 2026	1a
Appendix B — Opinion of the United States District Court for the District of New Jersey, filed September 29, 2023	39a
Appendix C — Order of the United States District Court, District of New Jersey, filed September 29, 2023	99a
Appendix D — Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit, filed April 10, 2026	101a
Appendix E — Plaintiffs’ Second Amended Complaint of the United States District Court for the Western District of Texas, Austin Division, filed November 10, 2020	103a
Appendix F — Order of the United States District Court, Western District of Texas, Austin Division, signed April 19, 2021	217a
Appendix G — Opinion of the United States Court of Appeals for the Fifth Circuit, filed April 1, 2022	239a
Appendix H — Order of the United States District Court for the Western District of Texas, Austin Division, filed April 13, 2022.....	284a

Appendix I — Order of the United States District Court for the Western District of Texas, Austin Division, filed July 22, 2022	286a
Appendix J — Opinion of the United States Court of Appeals for the Fifth Circuit, filed September 16, 2022	288a
Appendix K — Opinion of the United States Court of Appeals for the Fifth Circuit, filed December 15, 2022	292a
Appendix L — Memorandum Order of the United States District Court for the District of New Jersey, filed April 26, 2023	311a
Appendix M — Plaintiffs’ Third Amended Complaint of the United States District Court for the District of New Jersey, filed May 5, 2023	314a
Appendix N — Memorandum Opinion of the United States District Court for the District of New Jersey, filed June 14, 2023.....	394a
Appendix O — Order of the United States District Court for the District of New Jersey, filed June 14, 2023	404a
Appendix P — Text Order of the United States District Court for the District of New Jersey [Live], dated November 2, 2023	406a

TABLE OF AUTHORITIES

Cases

<i>Brown v. Entertainment Merchants Association</i> , 564 U.S. 786 (2011)	28
<i>Christianson v. Colt Industries Operating Corp.</i> , 486 U.S. 800 (1988)	19, 21, 22
<i>Commodity Futures Trading Commission v. Vartuli</i> , 228 F.3d 94 (2d Cir. 2000)	30
<i>Counterman v. Colorado</i> , 600 U.S. 66 (2023)	29
<i>CTRLPew LLC v. Chiu</i> , 2026 WL 554705 (M.D. Fla. Feb. 27, 2026).....	26
<i>Defense Distributed v. Attorney General of New Jersey</i> , 167 F.4th 65 (3d Cir. 2026)	2
<i>Defense Distributed v. Bruck</i> , 30 F.4th 414 (5th Cir. 2022) ...5, 6, 11, 12-15,	17-19, 21, 22
<i>Defense Distributed v. Bruck</i> , No. 1:18-CV-637-RP, 2022 WL 23043244 (W.D. Tex. Apr. 13, 2022).....	1

<i>Defense Distributed v. Grewal</i> , 971 F.3d 485 (5th Cir. 2020)	11
<i>Defense Distributed v. Grewal</i> , No. 1:18-CV-637-RP, 2021 WL 1614328 (W.D. Tex. Apr. 19, 2021).....	1
<i>Defense Distributed v. Platkin</i> , 48 F.4th 607 (5th Cir. 2022)	13, 17
<i>Defense Distributed v. Platkin</i> , 55 F.4th 486 (5th Cir. 2022)	6, 17
<i>Defense Distributed v. Platkin</i> , 617 F. Supp. 3d 213 (D.N.J. 2022).....	12
<i>Defense Distributed v. Platkin</i> , 697 F. Supp. 3d 241 (D.N.J. 2023).....	2
<i>Defense Distributed v. Platkin</i> , No. 19-04753, 2022 WL 14558237 (D.N.J. Oct. 25, 2022).....	1
<i>Defense Distributed v. Platkin</i> , No. 21-9867, 2023 WL 3996346 (D.N.J. June 14, 2023)	2
<i>Fine v. McGuire</i> , 433 F.2d 499 (D.C. Cir. 1970)	18
<i>Green v. U.S. Department of Justice</i> , 54 F.4th 738 (D.C. Cir. 2022).....	25

<i>Hall v. Hall</i> , 584 U.S. 59 (2018)	21
<i>Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston</i> , 515 U.S. 557 (1995)	28
<i>In re Levang</i> , 154 F.4th 444 (6th Cir. 2025)	18
<i>In re Nine Mile Ltd.</i> , 673 F.2d 242 (8th Cir. 1982)	18
<i>In re Nine Mile Ltd.</i> , 692 F.2d 56 (8th Cir. 1982)	18
<i>In re Red Barn Motors, Inc.</i> , 794 F.3d 481 (5th Cir. 2015)	17
<i>In re United States</i> , 273 F.3d 380 (3d Cir. 2001)	18, 20-21
<i>In re Warrick</i> , 70 F.3d 736 (2d Cir. 1995)	17
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952)	28
<i>Junger v. Daley</i> , 209 F.3d 481 (6th Cir. 2000)	6, 7, 16, 24-26, 29, 30, 31, 32

<i>Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.,</i> 342 U.S. 180 (1952)	20
<i>Moody v. NetChoice, LLC,</i> 603 U.S. 707 (2024)	30
<i>NBS Imaging Systems, Inc. v. U.S. District Court,</i> 841 F.2d 297 (9th Cir. 1988)	17
<i>Reno v. ACLU,</i> 521 U.S. 844 (1997)	28
<i>Trump v. Cook,</i> 146 S. Ct. 2234 (2026)	19
<i>Universal City Studios, Inc. v. Corley,</i> 273 F.3d 429 (2d Cir. 2001)	25, 26, 30, 31

Constitutional Provisions

U.S. Const. amend. I	2, 5, 6, 7, 15, 24-32
----------------------------	-----------------------

Statutes

28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	15, 23
28 U.S.C. § 1404(a)	2, 11, 19, 22, 23
N.J. Stat. § 2C:39-9(<i>l</i>)(1)	3

N.J. Stat. § 2C:39-9(<i>l</i>)(2).....	3, 10
--	-------

Rules

Fed. R. Civ. P. 12(b)(6).....	15
-------------------------------	----

Secondary Authorities

Lawrence Lessig, <i>The Law of the Horse: What Cyberlaw Might Teach</i> , 113 Harv. L. Rev. 501 (1999)	26
---	----

Harold Abelson & Gerald Jay Sussman, with Julie Sussman, <i>Structure and Interpretation of Computer Programs</i> xv (2d ed. 1996).....	27
---	----

James Grimmelmann, <i>Programming Languages and Law: A Research Agenda</i> , in <i>Proceedings of the 2022 ACM Symposium on Computer Science and Law</i> 155, 155–56 (2022).	27
---	----

Donald E. Knuth, <i>Literate Programming</i> , 27 Comput. J. 97, 97 (1984).....	27
---	----

Jorge R. Roig, <i>Decoding First Amendment Coverage of Computer Source Code in the Age of YouTube, Facebook and the Arab Spring</i> , 68 N.Y.U. Ann. Surv. Am. L. 319 (2012).....	26
---	----

Lee Tien, *Publishing Software as a Speech Act*, 15
Berkeley Tech. L.J. 629, 633, 662–63, 694–701 (2000)
.....27

Frederick Schauer, *The Boundaries of the First
Amendment: A Preliminary Exploration of
Constitutional Salience*, 117 Harv. L. Rev. 1765,
1767–69 (2004).....27

PETITION FOR A WRIT OF CERTIORARI

Defense Distributed and the Second Amendment Foundation, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

DECISIONS BELOW

The Western District of Texas's decision transferring the case from there to the District of New Jersey, App. 217a-238a, is not reported and is available at 2021 WL 1614328.

The Fifth Circuit's April 2022 decision holding that transfer order unlawful, vacating that transfer order, and directing a formal return request, App. 239a-283a, is reported at 30 F.4th 414. The Western District of Texas's order carrying out the mandate to request retransfer, App. 284a-285a, is not reported and is available at 2022 WL 23043244.

The District of New Jersey's July 2022 refusal to retransfer the case is reported at 617 F. Supp. 3d 213.

The Fifth Circuit's September 2022 decision regarding that refusal to return the case, App. 288a-291a, is reported at 48 F.4th 607.

The District of New Jersey's October 2022 refusal to retransfer the case is not reported but is available at 2022 WL 14558237.

The Fifth Circuit’s December 2022 decision regarding that refusal to return the case, App. 292a-310a, is reported at 55 F.4th 486.

The District of New Jersey’s final decision refusing to return the case to the Western District of Texas, App. 394a-403a, is not reported but is available at 2023 WL 3996346. Its decision dismissing the complaint, App. 39a-98a, is reported at 697 F. Supp. 3d 241.

The decision of the Third Circuit below, App. 1a-38a, is reported at 167 F.4th 65.

JURISDICTION

28 U.S.C. § 1254(1) confers jurisdiction on this Court. The court of appeals entered judgment on February 12, 2026, and denied rehearing on April 10, 2026. App. 101a-102a. On July 7, 2026, Justice Alito extended the time to file a petition for a writ of certiorari to August 8, 2026, a Saturday, making the filing deadline Monday, August 10, 2026.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part: “Congress shall make no law * * * abridging the freedom of speech.” U.S. Const. amend. I.

Section 1404(a) of Title 28 provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action

to any other district or division where it might have been brought or to any district or division to which all parties have consented.”

New Jersey Statutes § 2C:39-9 provides in pertinent part:

1. Manufacturing or facilitating the manufacture of a firearm using a three-dimensional printer. In addition to any other criminal penalties provided under law it is a second degree crime for:

(1) a person who is not registered or licensed to do so as a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, to use a three-dimensional printer or similar device to manufacture or produce a firearm, firearm receiver, magazine, or firearm component; or

(2) a person to distribute by any means, including the Internet, to a person in New Jersey who is not registered or licensed as a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.

As used in this subsection: “three-dimensional printer” means a computer or computer-driven machine or device capable of producing a three-dimensional object from a digital model; and “distribute” means to sell, or to manufacture, give,

provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute.

INTRODUCTION

Two important circuit splits converge in this case. On venue, the Third Circuit kept in New Jersey an action the Fifth Circuit held belongs in Texas. On the merits, the Third Circuit denied computer code’s First Amendment coverage by expressly rejecting a Sixth Circuit rule that would have supplied it. Both splits warrant review and this case is the ideal vehicle.

1. The venue question presents an unprecedented intercircuit standoff over control of the same case. It began in Texas and was transferred to New Jersey. The Fifth Circuit and Third Circuit now split over whether it should go back to its original Texas court.

The Fifth Circuit directed the case back to Texas. *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022) (Jones, J., joined by Elrod, J.), held the transfer order unlawful, vacated it, and directed a formal request for the District of New Jersey to return the case to Texas. App. 239a.

The Third Circuit kept the case in New Jersey. The District of New Jersey refused the return request after rejecting comity and law of the case; it then independently reweighed the transfer factors and reached the opposite venue result; the Third Circuit affirmed. App. 5a–10a.

Over time the standoff escalated. After New Jersey first refused the formal return request, Judges Ho and Elrod urged it to honor the “longstanding tradition of comity” and return the case. App. 289a–291a. New

Jersey refused again, prompting another Fifth Circuit panel to reiterate *Bruck* and hold that the case “should be heard” in Texas. *Defense Distributed v. Platkin*, 55 F.4th 486, 495 (5th Cir. 2022) (Smith, J.). New Jersey then refused a third time.

“The refusal of the District of New Jersey to retransfer is unprecedented in that regard.” *Id.* at 496. And “the effect of that decision permits a New Jersey district court functionally to nullify a Fifth Circuit decision.” *Id.*

This dire intra-case conflict cannot resolve itself. The Fifth Circuit holds that venue belongs in Texas; the Third Circuit insists that it stay in New Jersey. Only this Court can resolve the split and restore orderly judicial administration across circuit lines.

2. The merits question presents an acknowledged circuit split on a foundational question of First Amendment law about computer code as speech. The Sixth Circuit treats communicative computer code as covered speech despite its functionality. *Junger v. Daley*, 209 F.3d 481, 484–85 (6th Cir. 2000). The Third Circuit expressly rejected *Junger* and instead requires additional indicia of expressiveness before First Amendment coverage attaches. App. 29a–34a.

The dispute is one of doctrinal ordering: where does functionality enter the First Amendment analysis? *Junger* places it after coverage, where functional capacity may bear on the government’s justification for regulation and the scrutiny that regulation receives. *Id.* at 484–85. The Third Circuit

places it before coverage, using functionality to demand additional proof of expressiveness before the First Amendment applies at all. App. 29a–34a.

The case also presents the speech interests on both sides of that exchange. Members of the Second Amendment Foundation seek to receive Defense Distributed’s files and to publish their own through Defense Distributed’s facilities. App. 317a–318a.

The split is outcome-determinative. Petitioners allege that the files communicate technical, scientific, artistic, and political information and do not self-execute: “They are not functional software. They do not self-execute. They are mere information stores.” App. 35a. *Junger* treats those allegations as establishing coverage and considers functionality later; the Third Circuit’s contrary threshold rule does not. This case therefore cleanly presents the threshold rule and leaves the remaining First Amendment questions for remand.

The Court should grant the petition to resolve both of these important splits. The case should not have been dismissed in New Jersey. It should be sent back to Texas for real First Amendment scrutiny.

STATEMENT

I. Factual Background.

A. Defense Distributed engineers and shares information about 3D guns.

Defense Distributed is a Texas company that exists to promote the Second Amendment. App. 316a, 323a. Second Amendment Foundation, Inc. is a national membership organization supporting education, research, publication, and litigation concerning the right to keep and bear arms. SAF members seek to receive Defense Distributed's files and publish their own through Defense Distributed's facilities. App. 317a.

B. The files at issue convey a wealth of digital firearms information.

The complaint calls the files at issue "digital firearms information": coded files conveying information about firearms and firearm components, including physical properties, production methods, and uses. They appear in common formats such as .pdf and .txt and design formats such as .dwg, .stp, .stl, .igs, .sldprt, and .skp. App. 320a–321a.

The complaint distinguishes CAD from CAM files. CAD files let users construct and manipulate two- and three-dimensional models for design, study, visualization, and parametric modeling; they are not ready for direct insertion into object-producing equipment. CAM files likewise create and manipulate

digital models, though some can be prepared for manufacturing equipment. App. 321a–322a.

Neither category automatically manufactures anything. The files do not self-execute; fabrication requires additional software, hardware, materials, processes, and human judgment. App. 322a–323a. The complaint alleges that the files communicate information like blueprints and express technical, scientific, artistic, and political matter independent of any later use. App. 323a–324a.¹

Defense Distributed published these materials through DEFCAD in 2012–2013 and briefly in 2018, including files for the Liberator pistol and firearm components alongside diagrams, renderings, assembly notes, legal information, and licenses. Millions of downloads followed. App. 325a–328a. It also distributed files at an Austin library and on physical media, and resumed screened online distribution in 2020. App. 328a–331a. It excludes unlicensed New Jersey recipients because of the challenged law. App. 330a–332a. SAF members likewise allege that New Jersey’s enforcement threat prevents them from freely receiving and republishing Defense Distributed’s information. App. 371a–373a.

C. New Jersey targeted Defense Distributed’s publications through civil and criminal measures.

New Jersey targeted the publications directly. In July 2018, the Attorney General sent Defense Distributed a cease-and-desist letter asserting that

publication of printable-gun files violated New Jersey public-nuisance and negligence law and threatening suit unless publication stopped. He then urged Defense Distributed's internet-service providers to terminate their relationships with the company. App. 357a–360a. Those actions targeted Defense Distributed's publication from its Texas headquarters. App. 316a, 357a–360a.

New Jersey then enacted N.J. Stat. § 2C:39-9(*l*)(2). The statute makes it a second-degree crime to distribute to an unlicensed New Jersey person digital CAD files, code, or other electronically stored instructions that may be used to program a three-dimensional printer to produce a firearm or component. It defines “distribute” to include publishing, circulating, disseminating, displaying, sharing, advertising, offering, or making the information available online. App. 45a–46a.

The complaint alleges that New Jersey enacted the statute to stop Defense Distributed in particular. At the signing ceremony, the Governor linked the law to the Attorney General's earlier action against Defense Distributed, and the Attorney General identified Cody Wilson and his supporters, said they were “still trying to release these codes online,” announced stronger tools “to stop them,” and warned, “we will come after you.” App. 363a–366a.

II. Procedural History.

A. The Fifth Circuit held that the action belongs in Texas, vacated the order transferring the case to New Jersey, and ordered a request to return the case.

Petitioners filed this action in the Western District of Texas in 2018. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Petitioners asserted constitutional claims under 42 U.S.C. § 1983.

The district court initially dismissed the Attorney General for lack of personal jurisdiction. App. 5a–6a. *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020), reversed because the Attorney General had purposefully directed enforcement activity toward Texas. *Id.* at 490–96.

After remand, the Attorney General moved to sever the claims against him and transfer them to New Jersey under 28 U.S.C. § 1404(a). The Western District of Texas granted the motion. App. 217a–238a. Petitioners promptly appealed and later sought mandamus, but the transferred action was docketed in New Jersey before the Fifth Circuit resolved the challenge. App. 6a–7a.

Defense Distributed v. Bruck, 30 F.4th 414 (5th Cir. 2022), granted mandamus. It held severance a clear abuse of discretion because the claims were intertwined and splitting them created duplication, expense, and a risk of inconsistent constitutional

decisions. *Id.* at 427–33; App. 253a–267a. Independently, it held that “even setting aside severance as impermissible, any transfer of this case, in whole or in part,” was an abuse of discretion because the Attorney General had not shown New Jersey clearly more convenient. *Id.* at 433–36; App. 268a–275a.

With the action already docketed in New Jersey, *Bruck* vacated the sever-and-transfer order, directed the Western District of Texas to request return, and specified the proceedings to follow after return. *Id.* at 436–37; App. 275a–276a. The Western District of Texas promptly issued the formal request. App. 284a–285a.

B. The District of New Jersey refused the return request.

After the Western District of Texas issued the formal return request, the District of New Jersey ordered briefing and treated Petitioners’ response as a motion to retransfer the action to Texas. The District of New Jersey denied return on July 27, 2022. *Defense Distributed v. Platkin*, 617 F. Supp. 3d 213 (D.N.J. 2022); App. 7a, 395a–396a.

In this decision, the District of New Jersey treated *Bruck* and the Texas court’s request as nonbinding and conducted its own transfer analysis. It relied substantially on the *Bruck* dissent, disagreed with the Fifth Circuit’s assessment of the competing local interests, and relied in part on the transferred action’s consolidation with a protective New Jersey action.

The result left the claims in New Jersey notwithstanding *Bruck*'s vacatur of the order that had sent them there. App. 13a–16a, 297a

C. Judges Ho and Elrod urged return.

After New Jersey refused return, Petitioners sought relief again in Texas. They moved for a preliminary injunction against the Attorney General in the action still pending in the Western District of Texas. The district court dismissed the motion because the Attorney General was no longer a party there and the transferred claims had not returned from New Jersey. App. 286a–287a. Petitioners appealed. App. 7a–8a.

While that appeal was pending, a Fifth Circuit motions panel expedited the case. *Defense Distributed v. Platkin*, 48 F.4th 607 (5th Cir. 2022). Judge Ho, joined by Judge Elrod, wrote separately to address the unresolved transfer. They emphasized that neither the parties nor the court had identified another district court that had refused such a return request and expressly asked the District of New Jersey to follow the “longstanding tradition of comity” and return the action to Texas. *Id.* at 607–08; App. 288a–291a.

D. The Fifth Circuit reaffirmed that the case belongs in Texas.

Petitioners meanwhile renewed their request in New Jersey. They sought reconsideration and retransfer and brought Judges Ho and Elrod's request

to the court’s attention. The protective New Jersey action had been voluntarily dismissed, leaving the transferred Texas action as the operative case. App. 311a–312a, 395a–396a. The District of New Jersey again refused return on October 25, 2022. It reasoned that the Fifth Circuit concurrence supplied no basis to alter its prior ruling and reiterated that comity did not require it to substitute the Fifth Circuit’s transfer analysis for its own. *Defense Distributed v. Platkin*, No. 19-04753, 2022 WL 14558237, at *4, *6 (D.N.J. Oct. 25, 2022); App. 8a.

That left the Fifth Circuit to decide Petitioners’ appeal from the Texas court’s refusal to entertain the preliminary-injunction motion. *Defense Distributed v. Platkin*, 55 F.4th 486 (5th Cir. 2022), affirmed because the completed transfer left the Fifth Circuit and Western District of Texas without power to adjudicate the transferred claims. *Id.* at 489, 491–95. But the court reaffirmed that *Bruck* remained law of the circuit and that Petitioners’ claims “should be heard in the Western District of Texas.” *Id.* at 495. It also identified the resulting anomaly: New Jersey’s refusal could “functionally . . . nullify a Fifth Circuit decision.” *Id.* at 496; App. 292a–310a.

E. The District of New Jersey refused again and granted dismissal.

After reassignment, Petitioners renewed the transfer request so the new judge could consider it. The District of New Jersey again denied return. App. 394a–405a.

The court then dismissed Petitioners' claims under Rule 12(b)(6). It held that computer code may be purely functional and that Petitioners' allegations were insufficient to establish expressiveness. App. 9a–10a. The court granted leave to amend; Petitioners stood on the complaint and appealed. App. 10a. The Third Circuit had jurisdiction under 28 U.S.C. § 1291.

F. The Third Circuit affirmed the refusal to return the case.

The Third Circuit affirmed venue in New Jersey. It held that *Bruck* was not law of the case because the transferred claims were a separate “case” once docketed in New Jersey. App. 12a–13a. It also held that comity did not require return because the Western District of Texas's return request was nonbinding, then approved the District of New Jersey's independent transfer analysis. App. 13a–16a

The Third Circuit affirmed venue in New Jersey. It held that *Bruck* was not law of the case because the transferred claims were a separate “case” once docketed in New Jersey. App. 12a–13a. It also held that comity did not require return because the Texas courts had issued only nonbinding requests, then approved the District of New Jersey's independent transfer analysis. App. 13a–16a.

G. The Third Circuit affirmed the Rule 12(b)(6) dismissal.

On the First Amendment, the Third Circuit acknowledged an issue of first impression and

expressly declined to follow *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000). App. 21a–30a. It held that coverage “cannot be assumed” because code is “inherently functional,” and prescribed a five-part threshold inquiry into technical nature, use, participants, purpose, and message. App. 29a–34a.

Applying that test, the court held that Petitioners’ allegations did not establish coverage despite describing file formats, CAD and CAM functions, human interaction, and technical, scientific, artistic, and political content. App. 34a–38a. It affirmed dismissal without reaching scrutiny, content discrimination, prior restraint, or overbreadth. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The venue standoff warrants certiorari.

A. Two circuits have reached opposite venue decisions in the same action.

Two circuits reached opposite venue decisions in the same action. *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), held transfer to New Jersey a clear abuse of discretion. The Third Circuit held retention there permissible. App. 14a–16a. Same parties, claims, operative facts, and transfer standard—opposite results.

Most fundamentally, these circuits disagree about which venue adjudication controls. *Bruck* vacated the transfer order and directed a formal return request; the Third Circuit gave that adjudication no controlling effect and allowed the District of New Jersey to reconsider venue from the beginning. App. 12a–14a. *Defense Distributed v. Platkin*, 48 F.4th 607 (5th Cir. 2022), and *Defense Distributed v. Platkin*, 55 F.4th 486 (5th Cir. 2022), confirm the resulting divide: five Fifth Circuit judges held or expressly urged that the case belongs in Texas, while the Third Circuit permits New Jersey to keep it.

Formal return requests are a settled means of implementing appellate review after completed intercircuit transfers. See *In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015); *In re Warrick*, 70 F.3d 736, 740 (2d Cir. 1995); *NBS Imaging Systems, Inc. v. U.S. District Court*, 841 F.2d 297, 298 (9th Cir.

1988); *In re Nine Mile Ltd.*, 673 F.2d 242, 243–44 (8th Cir. 1982); *Fine v. McGuire*, 433 F.2d 499, 500 n.1 (D.C. Cir. 1970). The transferor court adjudicates the transfer and requests return; inter-court deference gives that adjudication effect across circuit lines.

The reported decisions reflect that practice. *In re Nine Mile Ltd.*, 692 F.2d 56, 57–58 (8th Cir. 1982), records that the transferee court returned the case after the Eighth Circuit’s request; *Fine v. McGuire*, 433 F.2d 499, 500 n.1 (D.C. Cir. 1970), records the same; and *In re United States*, 273 F.3d 380, 382 n.1 (3d Cir. 2001), praised cooperation that prevented “unseemly tension between federal jurisdictions.”

In re Levang, 154 F.4th 444 (6th Cir. 2025), recently confirmed that practice. It directed a formal return request and explained that a transferee court “generally will defer” under law of the case, which applies “with even greater force to transfer decisions.” *Id.* at 451, 453.

Before this case, no reported decision had rejected such a request after appellate vacatur. The Third Circuit supplied the first appellate approval of that result.

The conflict persists even if the Court brackets that antecedent question of controlling effect. The Fifth Circuit held, for example, that Texas’s local interest “cannot be overstated” and exceeds New Jersey’s; the District of New Jersey expressly declined to follow that conclusion, and the Third Circuit affirmed its contrary balancing. *Bruck*, 30 F.4th at

435–36; App. 15a–16a. Both courts thus addressed where the same transferred claims belong under § 1404(a), yet reached opposite results. That subsidiary disagreement confirms that the intercircuit standoff is concrete; the antecedent Question Presented remains which venue adjudication governs.

B. The question is important to orderly intercircuit judicial administration and meaningful appellate review.

The return-request mechanism protects the integrity of appellate review across circuit lines. If a transferee court may relitigate venue after the transferor circuit vacates the transfer and requests return, the same transfer can yield irreconcilable appellate judgments and no stable answer about where the action belongs.

This Court has already warned against that kind of jurisdictional ping-pong. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), held that law-of-the-case principles apply with special force to transfer decisions because repeated reconsideration creates a “vicious circle of litigation.” *Id.* at 816, 818–19. Here the first appellate court did more than enter a transfer: it reviewed the record, found a clear abuse, and vacated the order, yet the second circuit approved the opposite result.

This Court recently reaffirmed the vertical principle: lower courts have “no choice but to follow” this Court’s lead. *Trump v. Cook*, 146 S. Ct. 2234, 2253 (2026). The same institutional concern has a

horizontal analogue here. In the return-request setting, comity preserves a coordinate court's completed venue adjudication until this Court can resolve any intercircuit disagreement.

The conflict is structural, not merely procedural. A transferee court can now label the transferor circuit's adjudication nonbinding, reach its own answer, and obtain affirmance from a different circuit. Venue can also determine governing circuit law and delay review of constitutional claims, as this case's years-long standoff shows. Only this Court can supply a rule that both circuits must follow.

C. The decision below is wrong because the Fifth Circuit's completed venue adjudication required return.

1. Comity required return.

Comity required return. That comity lacks a mandate's binding force does not answer this special context. The formal return-request mechanism exists to give a completed appellate transfer adjudication effect across circuit lines.

This Court treats federal comity as a rule of "wise judicial administration" that prevents conflicting judgments. *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). The Third Circuit itself has praised cooperation that prevents "unseemly tension between federal jurisdictions." *In re United States*, 273 F.3d 380, 382

n.1 (3d Cir. 2001). Here the Fifth Circuit fully adjudicated the exact transfer, held it unlawful, vacated it, and directed a formal request after the Attorney General litigated and lost.

Nothing justified a second venue adjudication. Post-transfer consolidation could not erase the Fifth Circuit's decision; *Hall v. Hall*, 584 U.S. 59 (2018), confirms that consolidation does not merge separate actions or alter the parties' rights. *Id.* at 68–78. Comity that applies only when the second court independently agrees with the first is not comity; it is nullification.

2. Law of the case required return.

Law of the case independently required adherence. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), holds that the doctrine governs coordinate federal courts and applies “with even greater force to transfer decisions than to decisions of substantive law.” *Id.* at 816. A transferee court must follow the prior transfer decision if it is at least plausible. *Id.* at 819.

Bruck easily clears that standard. It was a published appellate decision on the exact transfer order after full briefing and a developed record, and the Fifth Circuit later confirmed that it remained law of the circuit. The Third Circuit avoided *Christianson* only by calling the New Jersey docket a different “case” because of the severance and transfer. App. 12a–13a.

That reasoning is circular. *Bruck* vacated the very order that supposedly created the separate case, and the same parties continue to litigate the same claims and transfer. Allowing physical docketing to defeat law-of-the-case effect invites the transfer-and-retransfer cycle *Christianson* forbids.

3. Even tested anew without any deference, the Fifth Circuit’s venue analysis is correct.

Even if fresh balancing were proper, the Fifth Circuit applied the better § 1404(a) analysis. The Attorney General sought the original Texas-to-New Jersey transfer, and *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), rightly placed the burden on him to show that New Jersey was clearly more convenient. *Id.* at 433. The Third Circuit instead treated Petitioners as new transfer movants after the challenged transfer had occurred. App. 14a.

The core considerations also reinforced Texas: *Defense Distributed* is headquartered there, the challenged enforcement targeted its Texas publication, and the principal claims arise under federal constitutional law. *Bruck*, 30 F.4th at 433–36. The Third Circuit relied heavily on New Jersey interests and post-transfer consolidation. App. 14a–16a. At minimum, those opposite appellate outcomes on materially the same transfer factors underscore why this Court should resolve which adjudication governs.

D. This case is an optimal vehicle.

The first Question Presented is clean, final, and dispositive. The Third Circuit squarely held that neither comity nor law of the case required return and that the District of New Jersey could retain the action under § 1404(a). App. 11a–16a. The Fifth Circuit’s contrary adjudication is published and reproduced in the appendix. App. 239a–283a. No further factual development is needed.

The case also avoids a collateral jurisdictional fight. The Court need not decide the outer limit of a transferor circuit’s power to compel direct return. It is enough to decide whether, after the transferor circuit adjudicates the transfer, holds it unlawful, vacates the order, and directs a formal return request, comity or law of the case permits the transferee court simply to refuse.

Final judgment eliminates any concern about premature review. The Third Circuit exercised jurisdiction under 28 U.S.C. § 1291, reviewed the venue ruling, and affirmed it. App. 10a–16a. A decision on the first Question Presented can establish the governing rule for this completed intercircuit transfer while leaving ordinary remedial consequences for remand.

- II. The Court should resolve the circuit split about when the First Amendment covers communicative computer code.**
 - A. There is an acknowledged split over First Amendment coverage of communicative computer code.**
 - 1. The Third Circuit decision below expressly rejects the Sixth Circuit test, generating an acknowledged circuit split.**

The Third Circuit decision below generated a clean circuit split and acknowledged it. It identified *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000), as the leading decision treating source code as covered expression, described *Junger* as adopting a “blanket application of the First Amendment to code,” and expressly rejected that rule. App. 24a, 27a, 29a–30a.

The Sixth Circuit’s *Junger* test holds that source code is “an expressive means for the exchange of information and ideas about computer programming.” *Junger*, 209 F.3d at 485. Communicative computer code’s functional capacity does not defeat First Amendment coverage as a threshold matter; it belongs instead in the later First Amendment merits analysis of the law’s constitutionality. *Id.* at 484–85.

The Third Circuit decision below rejects the Sixth Circuit’s *Junger* rule for First Amendment coverage and adopts an opposing threshold rule. It holds that, because even communicative computer code can be

“inherently functional,” coverage as First Amendment speech “cannot be assumed” and requires additional indicia of expressive purpose, use, participants, and message. App. 29a–34a. That legal rule, applied at Rule 12, produced dismissal here. App. 34a–38a.

This is not a conflict inferred from outcomes or dicta. The Third Circuit identified *Junger*, analyzed its rule at length, expressly rejected it, and adopted the contrary rule that controlled the judgment below.

2. The decision also breaks from the broader consensus.

The Sixth Circuit supplies the square conflict, but it does not stand alone. Decisions from the Second and D.C. Circuits reinforce a broader appellate consensus that communicative code receives First Amendment coverage despite its functional capacity—a consensus the Third Circuit had to expressly reject in order to resolve the case below.

Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001), strongly aligns with *Junger*. It held that “computer code conveying information is ‘speech’ within the meaning of the First Amendment” and treated functionality as relevant to the permissible scope of regulation, not as a categorical coverage bar. *Id.* at 445–54.

Green v. U.S. Department of Justice, 54 F.4th 738 (D.C. Cir. 2022), later described the appellate landscape as uniform. Although coverage was conceded there, *Green* observed that writing and

communicating code “qualifies as First Amendment protected speech” and that “[a]ll of our sister circuits to have addressed the issue agree,” citing *Junger* and *Corley*. *Id.* at 745. The Third Circuit is the first court of appeals to depart from that consensus after a quarter century.

The Third Circuit’s contrary rule is already propagating beyond that court. Just two weeks after the decision below, a district court in the Eleventh Circuit called the Third Circuit’s framing “persuasive,” adopted its five-factor inquiry, and denied temporary First Amendment relief because the pleadings lacked facts sufficient to apply those factors. *CTRLPew LLC v. Chiu*, 2026 WL 554705, at *2 (M.D. Fla. Feb. 27, 2026). The split is thus already shaping First Amendment adjudication beyond the circuits that created it.

**B. The question is very important,
both doctrinally and practically.**

Computer code is now a fully mainstream medium. It supplies basic infrastructure for modern science, engineering, commerce, and culture. *See, e.g.*, Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 506–08 (1999); Jorge R. Roig, *Decoding First Amendment Coverage of Computer Source Code in the Age of YouTube, Facebook and the Arab Spring*, 68 N.Y.U. Ann. Surv. Am. L. 319, 319–23 (2012).

Clear and predictable constitutional rules must govern that medium. First among them is the rule

that determines when the First Amendment applies at all. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1767–69 (2004).

A defining feature of computational expression makes that rule especially important: communication and function often coexist. Programming supplies the clearest example. Programming languages are formal media for expressing ideas. Humans read code that computers can also process. *See* Donald E. Knuth, *Literate Programming*, 27 Comput. J. 97, 97 (1984); Harold Abelson & Gerald Jay Sussman, with Julie Sussman, *Structure and Interpretation of Computer Programs* xv (2d ed. 1996); James Grimmelmann, *Programming Languages and Law: A Research Agenda*, in *Proceedings of the 2022 ACM Symposium on Computer Science and Law* 155, 155–56 (2022). The same precision that makes code communicative can also make it operational. *See* Lee Tien, *Publishing Software as a Speech Act*, 15 Berkeley Tech. L.J. 629, 633, 662–63, 694–701 (2000).

The Third Circuit’s threshold rule therefore reaches the heartland of modern computational expression. As code increasingly combines human communication with machine operation, functionality is not an edge characteristic but a defining one. A rule that uses that functionality to withhold ordinary First Amendment coverage is correspondingly broad and important.

Emerging computational formats make a precise rule more important, not less. New forms will not always resemble familiar text, images, or conventional software. Courts will encounter some before terminology and precedent settle. A clear coverage rule lets judges apply constitutional principle without making coverage turn on technical familiarity with the particular medium.

The Third Circuit’s doctrinal ordering makes the pleading stage consequential. Because functionality enters at coverage, a plaintiff must address the code’s technical nature, use, participants, purpose, and message in the complaint just to reach First Amendment scrutiny. App. 29a–38a. For unfamiliar technology, that can effectively demand expert-level technical exposition at Rule 12 before ordinary factual development begins.

This Court has repeatedly refused categorical exclusions for new or unfamiliar media. It did so for motion pictures in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952), internet speech in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), and video games in *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790 (2011). *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), likewise rejected a requirement that protected expression convey a narrow, articulable message. Computer code presents the same need for doctrinal precision. Technical unfamiliarity should not decide whether First Amendment scrutiny begins at all.

C. The decision below is wrong.

1. *Junger* gives the correct rule.

Junger v. Daley, 209 F.3d 481 (6th Cir. 2000), states the correct threshold rule. Computer code does not lose First Amendment coverage because it also has functional capacity. *Junger* held source code covered because it is “an expressive means for the exchange of information and ideas,” and placed functionality where it belongs: in the analysis of permissible government regulation, not in the antecedent question of coverage. *Id.* at 484–85.

The Third Circuit inverted that rule. Because code is “inherently functional,” it held that coverage “cannot be assumed” and required additional indicia concerning technical nature, use, participants, purpose, and message before any scrutiny applies. App. 29a–34a. Functionality thus became a reason to withhold First Amendment coverage rather than a consideration in determining whether government may regulate covered speech.

The Third Circuit’s approach is foreign to this Court’s First Amendment cases. Incitement is speech intended to cause unlawful action; true threats produce fear and disruption. Yet this Court does not treat those practical effects as grounds for denying speech status and ending the inquiry. It asks whether and under what constitutional conditions government may punish the expression. *Counterman v. Colorado*, 600 U.S. 66, 72–78 (2023). Code warrants the same ordering. Its capacity to contribute to a practical

result may justify regulation; it does not erase communication at the threshold.

The Second Circuit confirms *Junger*'s line. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), held that computer code conveying information is speech despite its functional capabilities. *Id.* at 445–49. And *Commodity Futures Trading Commission v. Vartuli*, 228 F.3d 94 (2d Cir. 2000), denied coverage where software was designed to induce action “without the intercession of the mind or the will of the recipient,” while expressly distinguishing dissemination of software “as speech—conveying information or opinions.” *Id.* at 111–12. The relevant line is communication to human beings, not functional capacity as such.

Recent authority reinforces the point. In the editorial-selection context, Justice Barrett explained that an algorithm may “simply implement human beings’ inherently expressive choice” even when the software itself performs the resulting act. *Moody v. NetChoice, LLC*, 603 U.S. 707, 746 (2024) (Barrett, J., concurring). Functional execution and human expression are not opposites. The Third Circuit erred by treating functionality as a reason to demand more before the First Amendment applies.

2. Petitioners’ files are covered code under *Junger*.

Under *Junger*, Petitioners’ files are communicative code the First Amendment covers. The complaint identifies the file formats, explains

how CAD and CAM files embody and permit manipulation of digital models, alleges that the files do not self-execute, and pleads that they communicate technical, scientific, artistic, and political information. App. 320a–324a. Those allegations describe code that communicates information and ideas—the category *Junger* treats as covered despite functionality.

The Third Circuit reached the opposite result because it applied a different threshold rule. It required additional indicia concerning technical nature, use, participants, purpose, and message before coverage attaches. App. 29a–38a.

Correcting that error would not require this Court to decide the ultimate First Amendment merits. The Third Circuit stopped at coverage and never addressed scrutiny, content discrimination, prior restraint, overbreadth, or whether New Jersey can justify its restriction. App. 34a–38a. A ruling for Petitioners would restore the ordinary sequence: communicative code receives First Amendment coverage, and the lower courts decide the remaining constitutional questions under the proper framework.

D. This case is an optimal vehicle.

The second Question Presented is preserved and dispositive. Petitioners argued that the complaint alleged covered speech under *Junger* and *Corley*. The Third Circuit rejected *Junger*, adopted its five-factor threshold test, and affirmed dismissal because the complaint failed that test. App. 21a–38a. The conflict

is therefore one of governing law, not factual development.

Nor was the complaint bare. It alleges that the files “do not produce anything automatically” and “do not self-execute”; fabrication instead requires “substantial additional software” and human “volition and judgment.” App. 322a–323a. It also alleges that the files express “technical, scientific, artistic, and political matter,” with expressive value existing “in the abstract, apart from any application” a recipient may make of them. App. 323a. The allegations thus present both sides of the issue: the files communicate information while also possessing practical capacity.

The case also includes both sides of the communicative exchange. Defense Distributed seeks to publish the information; SAF members seek to receive it and to republish Defense Distributed’s files or publish their own through Defense Distributed’s facilities. App. 317a–318a, 372a–373a.

That makes this case an unusually clean vehicle. More technical detail could not eliminate the circuit conflict: *Junger* treats communicative code as covered despite functionality, while the Third Circuit demands additional indicia before coverage begins. The complaint and statute are reproduced in the appendix, and no disputed facts or technical record stand in the way. The Court can resolve the governing coverage rule and leave scrutiny and the remaining First Amendment questions for remand.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Charles R. Flores
Counsel of Record
Flores Law PLLC
917 Franklin Street
Suite 600
Houston, Texas 77002
(713) 364-6640
chad@chadflores.law

Josh Blackman
Josh Blackman LLC
1303 San Jacinto St.
Houston, Texas 77079

August 10, 2026

APPENDIX

TABLE OF APPENDICES

Page

Volume I

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED FEBRUARY 12, 2026.....	1a
APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED SEPTEMBER 29, 2023.....	39a
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY, FILED SEPTEMBER 29, 2023.....	99a
APPENDIX D — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 10, 2026 . . .	101a
APPENDIX E — PLAINTIFFS’ SECOND AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED NOVEMBER 10, 2020	103a

Table of Appendices

Page

Volume II

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, SIGNED APRIL 19, 2021	217a
APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 1, 2022.....	239a
APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED APRIL 13, 2022.....	284a
APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED JULY 22, 2022.....	286a
APPENDIX J — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 16, 2022	288a

Table of Appendices

	<i>Page</i>
APPENDIX K — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 15, 2022	292a
APPENDIX L — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED APRIL 26, 2023	311a
APPENDIX M — PLAINTIFFS’ THIRD AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED MAY 5, 2023	314a
APPENDIX N — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED JUNE 14, 2023	394a
APPENDIX O — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED JUNE 14, 2023	404a
APPENDIX P — TEXT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY [LIVE], DATED NOVEMBER 2, 2023	406a

1a

**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT,
FILED FEBRUARY 12, 2026**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3058

DEFENSE DISTRIBUTED; SECOND
AMENDMENT FOUNDATION, INC.,

Appellants,

v.

ATTORNEY GENERAL OF NEW JERSEY

Appeal from the U.S. District Court, D.N.J.
Judge Michael A. Shipp
No. 3:21-cv-09867

Before: Krause, Scirica, and Rendell, *Circuit Judges*
Argued Nov. 4, 2024; Filed Feb. 12, 2026

OPINION OF THE COURT

KRAUSE, *Circuit Judge.*

When it comes to the regulation of firearms, the Second Amendment is the usual battleground. But in this case, where the regulation relates to 3D-printing of ghost guns, the fray shifts into First Amendment territory and

Appendix A

treads fresh ground on the constitutional protections afforded to computer code.

Appellant Defense Distributed is a developer and online publisher of computer files that allow anyone with a 3D printer, including members of Appellant Second Amendment Foundation, Inc., to produce a fully functional, single-shot plastic pistol that has no serial number and cannot be traced by law enforcement. After the Attorney General of New Jersey and the New Jersey legislature took action to prohibit the distribution of such files to residents who are not registered or licensed as gun manufacturers, Appellants sued, claiming that New Jersey's actions impermissibly burdened the distribution of Defense Distributed's computer code in contravention of the First Amendment. But while it is certainly true that some computer code falls under the purview of the First Amendment, purely functional code with no actual or intended expressive use does not. Because Appellants failed to plead sufficient factual matter to permit the Court to assess whether Defense Distributed's code is covered, let alone protected by, the First Amendment, we will affirm the District Court's dismissal of the complaint with prejudice.

I. BACKGROUND**A. Factual Background**

Defense Distributed is a Texas-based company that produces and distributes "digital firearms information" (DFI) used specifically to manufacture functional firearms

Appendix A

and firearm components using a 3D printer. Members of the Second Amendment Foundation, a non-profit membership organization based in the State of Washington, would like to receive Defense Distributed's DFI. DFI is an expansive term, one that Defense Distributed uses to describe the variety of "coded computer files" it distributes through its website, including "files concerning a single-shot firearm known as the 'Liberator,'" "files concerning a firearm receiver for AR-15 rifles," and "files concerning a magazine for AR-15 rifles." App. 260-61; *see also* App. 256. These files take several forms, including both "Computer Aided Manufacturing" (CAM) files—which can be used to construct and manipulate digital models of physical objects and are "ready for insertion into object-producing equipment" like 3D printers—and "Computer Aided Design" (CAD) files—which Appellants allege serve a similar function but are not ready for insertion into 3D printers.

The DFI also includes some common file types, like plain text (.txt) files about firearm assembly methods, the National Firearms Act and the Undetectable Firearms Act, and portable document format (.pdf) files, alongside the more technical "stereolithography (.stl) files," "Initial Graphics Exchange Specification (.igs) files," "SoLiDworks PaRT (.sldprt) files," "SketchUp (.skp) files," and "Standard for the Exchange of Product Data ('STEP') (.stp) files," all of which are "about firearm components." App. 256, 260-61. The complaint does not identify which of the more technical files identified, if any, are CAM or CAD files.

Initially, anyone who visited the website could download the files directly. But in July 2018, the Attorney

Appendix A

General of New Jersey (NJAG) issued a letter threatening legal action if, by August 1, Defense Distributed did not “cease and desist from publishing printable-gun computer files for use by New Jersey residents” because they could be used to create untraceable firearms and assault weapons illegal in the state, and so their publication violated New Jersey’s public nuisance and negligence laws. App. 334. Defense Distributed complied, and the files were not published on the website as of July 31. Instead, from August to November, Defense Distributed operated its website as an ecommerce platform and mailed USB drives or SD cards with the files on them to customers who placed orders.

Then, in November 2018, the New Jersey legislature followed up with legislation that made it a crime for:

- (1) a person who is not registered or licensed to do so as a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, to use a three-dimensional printer or similar device to manufacture or produce a firearm, firearm receiver, magazine, or firearm component; or
- (2) a person to distribute by any means, including the Internet, to a person in New Jersey who is not registered or licensed as a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a

Appendix A

digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.

N.J. Stat. Ann. § 2C:39-9(l)(1)-(2) (the New Jersey Statute).

Defense Distributed resumed publication of its files on its website in 2020 and continues to do so. Now, however, the files are transferred through secure, encrypted transmissions rather than user generated downloads, and unlike prior periods of publication, there are screening procedures in place which “deem[] certain [website] visitors ineligible for file distribution.” App. 263. Given the New Jersey Statute, Defense Distributed’s distribution excludes “residents of and persons in the State of New Jersey who lack a federal firearms license” and those outside the United States. App. 263.

B. Procedural History

This case comes to us with an extensive procedural history. Appellants filed suit in the Western District of Texas in July 2018 (the Texas Action), alleging that the NJAG’s cease-and-desist letter was an unconstitutional restraint on speech. The district court in Texas initially dismissed the Texas Action for lack of personal jurisdiction in January 2019, after which Appellants, along with five additional plaintiffs, filed a complaint and motion for preliminary injunction in the District of New Jersey. The claims brought in this second action were largely identical to the Texas Action but included new allegations that the New Jersey Statute amounted to criminal censorship.

Appendix A

After filing suit in New Jersey, Appellants appealed the dismissal of the Texas Action to the Fifth Circuit, and the District of New Jersey stayed proceedings pending resolution of that appeal. When the Fifth Circuit reversed the dismissal, Appellants amended their complaint in the revived Texas Action to add claims related to the New Jersey Statute and to add the United States Department of State as a second defendant alongside the NJAG. The NJAG, however, moved to sever the claims against it from those asserted against the Department of State and to transfer them to New Jersey.

In April 2021, the Texas district court granted severance and transferred the claims against the NJAG in the Texas Action to the District of New Jersey. The next day, Appellants filed another notice of appeal to the Fifth Circuit. Importantly, they did not move to stay the transfer order, so the claims against the NJAG were docketed in the District of New Jersey, where the NJAG subsequently moved for their consolidation with the preexisting District of New Jersey suit. Appellants did not oppose the motion to consolidate before the court-ordered deadline, so the District Court substantively consolidated the cases in June 2021.

Almost two months after the transfer had occurred, and nearly a week after the District Court consolidated the cases, Appellants for the first time challenged the transfer of the claims against the NJAG in the Texas Action to the District of New Jersey by petitioning the Fifth Circuit for a writ of mandamus. Five days later, the Fifth Circuit issued an order purporting, post hoc,

Appendix A

to stay the Texas district court’s transfer. Thereafter, on April 1, 2022, a divided Fifth Circuit panel issued its opinion in *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), holding that the Western District of Texas had abused its discretion both in severing the claims against the NJAG from those against the Department of State and in transferring that part of the Texas Action to the District of New Jersey. The Court noted that it “lacks power to order a return of the case to our circuit,” *id.* at 423, but issued a writ of mandamus ordering the Texas district court to vacate its transfer decision and to “[r]equest” that the District Court in New Jersey return the transferred (and, at this point, consolidated) case. *Id.* at 437. The Texas district court promptly made the request to the New Jersey District Court.

Back in the Third Circuit, the New Jersey District Court ordered briefing on the Texas district court’s request, construed Appellants’ responsive letter as a motion to retransfer the consolidated action back to the Western District of Texas, and, in July 2022, denied that motion.

Nonetheless, Appellants sought to continue litigating against the NJAG in Texas. In the action pending there against the Department of State (i.e., the case from which the NJAG had been severed), Appellants moved for a preliminary injunction against the NJAG. But the Texas district court denied that motion because the NJAG was no longer a party to the case. Again, Appellants appealed, and, in September 2022, a Fifth Circuit motions panel expedited the appeal, with a concurrence by Judge Ho

Appendix A

that again requested that the District Court in New Jersey return the case to Texas. *Def. Distributed v. Platkin*, 48 F.4th 607, 608 (5th Cir. 2022) (Ho, J., concurring) (“[W]e’re unaware of any district court anywhere in the nation to have ever denied such a request.”).

Concurrent with the expedited appeal in the Fifth Circuit, Appellants filed a second motion to retransfer in the New Jersey District Court in light of Judge Ho’s concurrence. The District Court denied this renewed motion, concluding that it lacked “valid legal justification” insofar as the basis for the motion rested “entirely on the concurrence” from the Fifth Circuit. *Def. Distributed v. Platkin*, No. 19-04753, 2022 U.S. Dist. LEXIS 194017, 2022 WL 14558237, at *4 (D.N.J. Oct. 25, 2022). It also noted that “the Fifth Circuit’s request may have been improvidently made,” and observed “comity in no way requires that [the District Court] substitute the analysis of the Fifth Circuit for [its] own.” *Id.*

In December 2022, a merits panel of the Fifth Circuit affirmed the Texas district court’s denial of Appellants’ motion for a preliminary injunction, concluding that it “no longer has the power to hear the case or grant the relief requested.” *Def. Distributed v. Platkin*, 55 F.4th 486, 489 (5th Cir. 2022). After observing that the case was “marked as terminated on the docket sheet” and was “transferred in its entirety to the District of New Jersey,” the Fifth Circuit concluded that “[a]lthough this court has politely requested that the New Jersey district court return the case, we can do no more.” *Id.* at 493.

Appendix A

Meanwhile, litigation proceeded in the District of New Jersey. While the case was pending there, the presiding judge retired, and the matter was reassigned. Appellants again sought reconsideration of their transfer motion in light of this development, but they again were unsuccessful. The District Court noted that Appellants “d[id] not identify any intervening change in the controlling law or any new evidence” and that reconsideration simply because a case has been reassigned is “impermissible.” *Def. Distributed v. Platkin*, No. 21-9867, 2023 U.S. Dist. LEXIS 103651, 2023 WL 3996346, at *2-3 (D.N.J. June 14, 2023). It also observed that although Appellants had three months “to file a writ of mandamus with the Third Circuit between the filing of the Second Transfer Opinion and the reassignment of this case—they chose not to seek such relief.” 2023 U.S. Dist. LEXIS 103651, [WL] at *2. Accordingly, the District Court denied reconsideration.

On the merits, the District Court granted the NJAG’s Rule 12 motion to dismiss all of Appellants’ claims.¹ *See Def. Distributed v. Platkin*, 697 F. Supp. 3d 241, 250 (D.N.J. 2023). It held that Appellants lacked standing to bring a Second Amendment challenge to the New Jersey Statute,

1. In the District Court, Appellants asserted violations of the First Amendment, the Second Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Commerce Clause, the Arms Export Control Act, and the Communications Decency Act, as well as two claims of tortious interference with contract. Because this appeal is limited to the District Court’s dismissal of Appellants’ First Amendment, Second Amendment, and Due Process claims, we likewise limit our discussion of the District Court’s decision to those claims.

Appendix A

which criminalized the manufacture of 3D-printed arms without a license, because the complaint did not allege that Defense Distributed, Second Amendment Foundation, or Second Amendment Foundation’s members were prevented from 3D printing a firearm or had attempted and could not do so. *Id.* at 260-61. It also dismissed Appellants’ Due Process claim, concluding that the New Jersey Statute gives a person of ordinary intelligence “fair notice of the types and files prohibited by the statute and what function those files cannot be used to perform” and “because there is no risk of discriminatory enforcement of the statute.” *Id.* at 264.

Finally, addressing the First Amendment claims of unconstitutional speech restriction, prior restraint, and overbreadth, the District Court (1) adopted the distinction between expressive computer code, which it held is protected speech, and functional computer code, which it concluded might not be protected; (2) concluded that Appellants had not pleaded sufficient facts regarding the code’s expressiveness for the Court to assess which type of code it was; and (3) declined to reach the issues of content-neutrality, prior restraint, and overbreadth because of the pleading deficiency. *Id.* at 257-59. The Court gave Appellants leave to amend with instructions as to what additional information it required, *id.* at 259, but Appellants elected to stand on their complaint. This timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331 and § 1343. We have jurisdiction under 28 U.S.C.

Appendix A

§ 1291. We review a district court’s dismissal for lack of standing and for failure to state a claim de novo, considering only the allegations in the complaint and any documents attached or referenced therein, while accepting all well-pleaded factual allegations as true and drawing reasonable inferences therefrom in the plaintiff’s favor. *Nekrilov v. City of Jersey City*, 45 F.4th 662, 668 (3d Cir. 2022); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). On the other hand, we review the denial of a motion to transfer under 28 U.S.C. § 1404(a) for abuse of discretion. *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 129 (3d Cir. 2020).

III. DISCUSSION

On appeal, Appellants contend (1) that the District Court should have transferred this case back to the Western District of Texas; (2) that the District Court erred by dismissing the Second Amendment claim for lack of standing; (3) that the New Jersey Statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment; and (4) that the code Defense Distributed seeks to distribute is protected by the First Amendment. We address each argument below.

A. Transfer

Appellants’ primary challenge is to “the district court’s repeated denial of the Fifth Circuit’s request to retransfer this action to the Western District of Texas.” Opening Br. at 24. They argue that the law-of-the-

Appendix A

case doctrine and principles of comity each separately required retransfer and, alternatively, that transfer was appropriate under 28 U.S.C. § 1404(a). We disagree and address each of these arguments in turn.

First, Appellants contend that they have a “clear and indisputable right to retransfer” under the law-of-the-case doctrine because of the Fifth Circuit’s holding in *Bruck* that the district court in Texas abused its discretion by severing and transferring Appellants’ claims against NJAG. Opening Br. at 28-29. That doctrine “posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). While law-of-the-case serves important values like judicial efficiency and respect for prior determinations in litigation, it is not an inexorable command, and it “does not limit the tribunal’s power” to decide a case. *Id.* Rather, the doctrine “governs [a court’s] exercise of discretion,” *In re City of Phila. Litig.*, 158 F.3d 711, 718 (3d Cir. 1998), and because it “only extends to issues that were actually decided in prior proceedings,” *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 62 (3d Cir. 2023) (quoting *Farina v. Nokia, Inc.*, 625 F.3d 97, 117 n.21 (3d Cir. 2010)), it presupposes that the predecessor court had jurisdiction over the matter when its decision issued.

That was not the case here. As the Fifth Circuit repeatedly observed, “[t]he transfer of the case files to the district court in New Jersey ended the power of [the Fifth] [C]ircuit over the transferred claims. Again, the

Appendix A

sever-and-transfer order created two separate suits: one in New Jersey where NJAG was a party and one in Texas where NJAG was not.” *Platkin*, 55 F.4th at 494 (citation omitted). The Fifth Circuit thus recognized that its decision in *Bruck* was not issued in “the same case,” but rather as part of a different action that remained in Texas. *See Bruck*, 30 F.4th at 423 (“This court lacks power to order a return of the case to our circuit.”). So while it may well be true that “*Bruck* remains the law of [the Fifth] [C]ircuit,” *Platkin*, 55 F.4th at 495, that does not make it the law of the case before us.

Second, Appellants contend that principles of comity “dictate” retransfer to the Western District of Texas. Opening Br. at 25. But their argument falters out of the gate because it is “not a rule of law, but one of practice.” *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, 1900 Dec. Comm’r Pat. 285 (1900). As the Supreme Court has explained, “[c]omity persuades; but it does not command.” *Id.* In cases of doubt, comity may counsel in favor of “deference . . . to the judgments of other co-ordinate tribunals,” but it “demands of no one that he shall abdicate his individual judgment” on a question of law. *Id.* at 489.

In this case, the New Jersey District Court weighed the interests of comity and concluded that there was no binding order from the originating court to which comity would be owed. Instead, there was only a non-binding request from the Western District of Texas, a request the New Jersey District Court declined after recognizing that the cases had already been consolidated and “duly

Appendix A

consider[ing]” the Fifth Circuit’s opinion “[a]s a matter of inter-circuit courtesy.” *Platkin*, 2022 U.S. Dist. LEXIS 194017, 2022 WL 14558237, at *4 (citation modified). This situation differs from the cases cited by Appellants that featured orders, rather than non-binding requests. So we cannot say that the District Court abused its discretion, much less ignored any legal duty to retransfer on the basis of comity.

Third, § 1404(a) does not require retransfer. That statute provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a). The NJAG did not consent to retransferring the case to Texas. Thus, as the movant, Appellants bear the burden of demonstrating the need for transfer, meaning they must show that the balancing of public and private interests tilts in their favor. *Jumara v. State Farm Ins.*, 55 F.3d 873, 879 (3d Cir. 1995). If the movant makes this showing, the district court still has discretion to grant the transfer. *See id.* at 878.

Section 1404(a) “vest[s] district courts with broad discretion” in transferring cases, but we have identified several factors district courts must consider. *Id.* at 883. As to the public interest, courts must consider (1) the enforceability of the judgment; (2) the practical considerations that make trial easy, expeditious, or inexpensive; (3) the court congestion in the fora; (4) the local interest in deciding local controversies at home; (5)

Appendix A

the public policies of the fora; and (6) the familiarity of the judge with applicable state law in diversity cases. *Id.* at 879-80. District courts must also consider private interest factors, including (1) each party's forum preference; (2) where the claims arose; (3) the convenience to parties and witnesses; and (4) the location of books and records.² *Id.* at 879.

Here, the District Court conducted a methodical analysis of each of the enumerated factors, concluding that the private interest factors, as well as the public interest factors regarding enforceability of the judgment, court congestion, and familiarity with applicable law were either in equipoise or marginally favored New Jersey. *See Def. Distributed v. Platkin*, 617 F. Supp. 3d 213, 232-40 (D.N.J. 2022). The District Court conducted an extensive analysis of the most contested factors: practical considerations and local interest in deciding local controversies at home. *Id.* It considered the implications of transferring the entire consolidated action versus only the claims in the Texas Action, the likelihood of duplicative outcomes in each scenario, and the efficiencies to be gained by litigating in a jurisdiction able to certify questions to the New Jersey Supreme Court. *Id.* at 234-37. In addressing the local interests, the District Court weighed the potential consequences for New Jersey's regulation of firearms and the fact that it is New Jersey's law being challenged;

2. In the unusual case where transfer is sought after final judgment, the movant must also show that the result would have been different had the suit been transferred. *See Paramount Pictures v. Rodney*, 186 F.2d 111, 116 (3d Cir. 1950); *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003).

Appendix A

considered the Fifth Circuit’s take on these issues; and explained its reluctance to transfer back to Texas now-consolidated claims that included non-Texas plaintiffs who were never in the Texas Action. *Id.* at 237-40. Weighing all these considerations, the District Court ultimately concluded that transfer was not appropriate. *Id.* at 239-40.

Given the District Court’s thorough consideration of the relevant factors, we cannot say that it abused its discretion by denying Appellants’ motion under § 1404(a).

* * *

Appellants misconstrue the demands of comity and the law-of-the-case doctrine, and they do not show the District Court “base[d] its decision upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact.” *Satterfield v. Dist. Att’y Phila.*, 872 F.3d 152, 158 (3d Cir. 2017) (citation modified). Accordingly, we will affirm the District Court’s denial of Appellants’ motion to retransfer this case to the Western District of Texas.

B. Second Amendment Claim

Appellants next dispute the District Court’s determination that they lack standing to bring a Second Amendment challenge to the New Jersey Statute. For standing to challenge the enforcement of a statute, a plaintiff “must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or

Appendix A

hypothetical.” *Ellison v. Am. Bd. of Orthopaedic Surgery*, 11 F.4th 200, 205 (3d Cir. 2021) (citation modified) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)). Because a plaintiff must make such a showing “for each claim that [it] press[es] and for each form of relief that [it] seek[s],” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), standing “often turns on the nature and source of the claim asserted,” *Associated Builders & Contractors W. Pa. v. Cmty. Coll. of Allegheny Cnty.*, 81 F.4th 279, 288 (3d Cir. 2023) (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

Both Defense Distributed and the Second Amendment Foundation claim that the NJAG’s threatened enforcement of the New Jersey Statute violates the Second Amendment by “infring[ing] the individual right to make and acquire Arms.” App. 299. Putting aside the novelty of their asserted Second Amendment right to “self-manufacture firearms . . . free from any major regulation whatsoever,” Opening Br. at 53-55, we agree with the District Court that Appellants have failed to plead that the alleged violation of this right resulted in any actual and concrete Second Amendment injury.

As the District Court observed, the operative complaint includes “no allegation” that Defense Distributed, the Second Amendment Foundation, “or any member of either entity attempted to or was prevented from 3D printing a firearm but could not do so.” *Platkin*, 697 F. Supp. 3d at 261. This omission is fatal, for even accepting the merits of their claim as true for standing purposes, *see FEC v.*

Appendix A

Cruz, 596 U.S. 289, 298, 142 S. Ct. 1638, 212 L. Ed. 2d 654 (2022), Appellants have not alleged that the New Jersey Statute prevented them or any of their members from exercising that putative Second Amendment right.³

On appeal, Appellants contend that they need not allege that anyone was prevented from or unable to 3D print a firearm, but only that the computer files themselves (i.e., the alleged speech) are “integral to the Constitution’s ‘right to make and acquire Arms.’” Opening Br. 52 (quoting App. 299). But “to be sufficiently particularized, an injury must affect the plaintiff in a personal and individual way,” *Finkelman v. Nat’l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (citation modified), and nothing in the operative complaint indicates that Appellants (or any members) sought to self-manufacture a 3D printed firearm and were prevented from doing so by the New Jersey Statute. Nor does the complaint support the inference that a burden on Appellants’ ability to share files that would enable *others* to self-manufacture firearms intrudes upon Appellants’ own purported right to self-manufacture. As a result, Appellants do not have Article III standing for their Second Amendment claim, and the District Court correctly dismissed it.

3. The complaint asserts that the Second Amendment Foundation “also brings this action on behalf of its members because at least one of its members would have standing to sue in his own right.” App. 254. Appellants have not invoked associational standing before us, but even if they had, their pleading deficiency would taint their associational standing claims as well. *See Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (insisting on a proper showing of injury-in-fact to an organizational plaintiff).

*Appendix A***C. Due Process - Vagueness**

Appellants next argue that the District Court erred by dismissing their claim that subsection (l)(2) of the New Jersey Statute is void for vagueness under the Due Process Clause. To recap, that provision bars the distribution of “digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used” to manufacture 3D firearms and parts to New Jersey residents who are not registered or licensed as firearms manufacturers. N.J. Stat. Ann. § 2C:39-9(l)(2). Specifically, Appellants contend the statute’s use of the phrase “may be used” makes it “impossible for a speaker to know what counts” as prohibited conduct. Opening Br. at 56. A statute is void for vagueness if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). While they concede that “some of [their] speech is clearly covered,” Appellants nonetheless maintain that the statute’s application to other speech is vague because “what ‘may be used’ by one programmer can be totally useless to another.” Opening Br. at 55-56. We disagree for two reasons.

First, for due process purposes, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Williams*, 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*,

Appendix A

491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). And here, read in context, the statute covers a narrow category of files and code, and within that narrowed category, circumscribes distribution of only that code which may be used for a particular function. Specifically, the statute regulates only the distribution of “digital instructions in the form of computer-aided design files” and “other code or instructions stored and displayed in electronic format as a digital model.” N.J. Stat. Ann. § 2C:39-9(l)(2). This precision excludes the vast majority of extant code and file formats from its purview and provides “individuals and law enforcement officers with relatively clear guidelines as to prohibited conduct.” *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 525, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994). And the statute narrows its prohibition even further by clarifying that, within that category, it reaches only those files, code, or instructions “that may be used to program a three-dimensional printer to manufacture or produce” a firearm. N.J. Stat. Ann. § 2C:39-9(l)(2). As a result, the statute does provide a person of ordinary intelligence fair notice of what is proscribed and does not invite arbitrary enforcement.

Second, by characterizing the statute as limiting the distribution of code “‘that may be used to’ *engage in such programming*,” Appellants manufacture ambiguity. Opening Br. at 56 (citation modified). The characterization, of “engag[ing] in such programming,” invokes a broader category of conduct that includes acts reliant upon the subjective abilities of a given programmer. But the statute does not cover that broader category. It only covers the specified files, code, and instructions that “one may use

Appendix A

to engage in the process of programming a 3D printer to manufacture a firearm.” N.J. Stat. Ann. § 2C:39-9(l)(2).

In any event, “[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *Williams*, 553 U.S. at 306. Accordingly, the Supreme Court has “struck down statutes that tied criminal culpability to . . . wholly subjective judgments without . . . narrowing context.” *Id.* But the New Jersey Statute does not suffer from such indeterminacy. Instead, it ties criminal culpability to a defendant’s distribution of a specific type of code or file that, irrespective of any other uses it may have, is able to “program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.” N.J. Stat. Ann. § 2C:39-9(l)(2). Whether a code or file meets these criteria involves “clear questions of fact,” and while “it may be difficult in some cases to determine whether these clear requirements have been met,” “courts and juries every day pass upon” such technical inquiries. *Williams*, 553 U.S. at 306 (citation modified). In such instances, the problem of close cases “is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.” *Id.* So Appellants’ vagueness challenge fails too.

D. First Amendment Claim

Finally, we reach the heart of the case before us, which raises a complicated question of first impression for our

Appendix A

Court—whether regulations of computer code trigger constitutional scrutiny under the First Amendment. In the District Court, Appellants contended that all computer code is protected expression, *see Platkin*, 697 F. Supp. 3d at 258 n.11, and, as discussed above, the District Court rejected this argument, concluding that some functional code “may not be speech,” *id.* at 258. Appellants’ argument before us appears unchanged, except to add that the allegations about Defense Distributed’s code in the complaint establish protected expression under “any conceivable test.” Opening Br. at 36-37. To assess these contentions and the sufficiency of the complaint, we must determine whether, and under what circumstances, code enjoys First Amendment coverage.

Before turning to the merits of that question, however, some background proves helpful, so we frame our analysis with a basic overview of what code is, how we interact with it, and the difficulty of assessing its constitutional salience. We then consider the First Amendment’s application to the code before us.

1. Applicable Concepts and Principles

Generally speaking, code is “prepared by a programmer” and “instruct[s] [a] computer to perform certain functions.” *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 674 (3d Cir. 1991). We often interact with it in the form of software or computer programs, which package code to serve a particular purpose. *See Whelan Assocs., Inc. v. Jaslow Dental Lab’y, Inc.*, 797 F.2d 1222, 1229-30 (3d Cir. 1986); *see also* Xiangnong Wang, *De-Coding*

Appendix A

Free Speech: A First Amendment Theory for the Digital Age, 2021 Wis. L. Rev. 1373, 1381 (2021). In this way, code is ubiquitous; it powers products as varied as self-driving cars, internet search engines, facial recognition software, web browsers, word processing systems, and home appliances.

Plainly, code is functional. It provides much of the architecture for modern society. In doing so, it frequently functions mechanically—like a machine with which one tinkers until it is capable of producing a specific outcome or completing a desired task with little to no meaningful human engagement. Just as there is nothing inherently expressive in building a functional car engine, one could also argue that there is nothing inherently expressive in building purely functional code. But some code is more than functional. Code is based in language. *See, e.g., Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001). And code may, at times, communicate ideas and information.

The interplay between function, communication, conduct, and language makes the constitutional salience of code difficult to discern. This puzzle squarely implicates the sometimes-implicit threshold inquiry of First Amendment *coverage* as distinct from First Amendment *protection*. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (“[W]e have rejected ‘the view that an apparently limitless variety of conduct can be labeled “speech” whenever the person engaging in the conduct intends thereby to express an idea.’” (quoting *United States v. O’Brien*, 391 U.S. 367, 376,

Appendix A

88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (“[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.”); *see also* Frederick Schauer, *Free Speech: A Philosophical Enquiry* 90 (1982) (“[W]hen we say that certain acts, or a certain class of acts, are covered by a right, we are not necessarily saying that those acts will always be protected. We are saying only that these acts have a facial claim to be considered with reference to the reasons underlying the decision to put those acts within the coverage of a right.”).

We are not the first court to consider these nuances and their First Amendment implications. Indeed, some twenty-five years ago, three of our sister circuits grappled with the issue. These cases—*Bernstein v. United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999), *reh’g granted, opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999),⁴ *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000), and *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001)—are often cited as the origin for a “code is speech” theory of First Amendment coverage in which *all* code is presumptively protected by the First Amendment and thus subject to constitutional scrutiny. *See* Wang, *supra*, at 1380, 1385-89 (collecting cases and describing the development of “code is speech” theory). And, consistent with that understanding, Appellants rely

4. Though vacated pending a rehearing that was ultimately withdrawn as moot, the Ninth Circuit’s decision in *Bernstein* is nonetheless illuminating.

Appendix A

on these cases for their argument here. But fresh appraisal of their contents reveals a more complicated landscape that warrants our attention.

The Ninth Circuit was the first to address the issue in *Bernstein v. United States Department of Justice*. There, a professor who wished to publish the code for his encryption algorithm brought a facial challenge to the export-control regulation requiring him to obtain a prepublication license. 176 F.3d at 1136. In its reasoning, the Ninth Circuit recognized the distinction between source code and object code, a distinction we have also drawn.

Source code is the text of a program written in a programming language that may be read and understood by humans. *Id.* at 1140; *Pyrotechnics Mgmt., Inc. v. XFX Pyrotechnics LLC*, 38 F.4th 331, 336 n.5 (3d Cir. 2022) (“‘Source code’ refers to the human-readable statements—written in a syntax defined by a programming language like JavaScript or Python—that make up a computer program.”). But a computer cannot use source code until it has been compiled into a machine language called object code. *Bernstein*, 176 F.3d at 1140. Object code is meant to be read by computers, not humans. *Id.*; see also *Pyrotechnics Mgmt.*, 38 F.4th at 336 n.5. To determine whether the challenged regulations exhibited “‘a close enough nexus to expression, or to conduct commonly associated with expression,’” such that there was a risk of censorship, the court first had to decide “whether encryption source code is expression for First Amendment purposes.” *Bernstein*, 176 F.3d at 1139 (quoting *City of*

Appendix A

Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988)). The opinions of the fractured panel anticipated the debate that has since emerged.

The majority concluded that the “encryption software, in its source code form and as employed by those in the field of cryptography, must be viewed as expressive for First Amendment purposes.” *Id.* at 1141 (footnote omitted). It reasoned that (1) source code, unlike object code, is meant for human understanding,⁵ and (2) although not all uses of source code would be expressive, the record demonstrated that, in cryptography, it was “the preferred means” of expressing “cryptographic ideas,” and was put to actual expressive uses like “precisely articul[at]ing hypotheses and formal empirical testing,” and “facilitating peer review.” *Id.* at 1140-41. In a concurring opinion, Judge Bright observed that “encryption source code also has the functional purpose of controlling computers and in that regard does not command protection under the First Amendment.” *Id.* at 1147 (Bright, J., concurring). The dissent, meanwhile, concluded that “[e]ncryption source code is a building tool,” and although academics can share their code “to reveal the encryption machine they have built,” its “ultimate purpose . . . [is] to perform the function of encrypting messages.” *Id.* at 1148 (Nelson, J., dissenting).

5. The court ultimately “express[ed] no opinion” on whether object code was, or could be, expressive because the record contained no information regarding its “expressive uses.” *Bernstein v. United States DOJ*, 176 F.3d 1132, 1141 n.15 (9th Cir. 1999).

Appendix A

The Sixth Circuit encountered this issue in *Junger v. Daley*, where a different professor challenged the same combination of encryption regulations at issue in *Bernstein* because he wanted to freely post on his website the encryption source code he “wr[ote] to demonstrate how computers work.” 209 F.3d at 483-84. Sweeping more broadly than the Ninth Circuit, the court concluded that source code is “protected by the First Amendment” because it “is an expressive means for the exchange of information and ideas about computer programming.” *Id.* at 485.

Unlike the Ninth Circuit, the Sixth Circuit paid no mind to actual expressive use, but gave primacy to the mere *possibility* of expressive use. As a result, it treated all source code as not only covered by the First Amendment, but protected and subject to heightened scrutiny. It reasoned that in the same manner that “a musical score cannot be read by the majority of the public” and is “not traditional speech,” but is nonetheless “used as a means of communication among musicians,” computer source code may also be “unintelligible to many” but is still “the preferred method of communication among computer programmers.” *Id.* at 484. The court acknowledged that source code has both expressive and functional features but concluded that consideration of functional capacity was best accounted for in “the analysis of permitted government regulation” through the application of intermediate scrutiny. *Id.* at 484-85. It remanded for application of that standard of review without deciding whether the regulations—or their amendments—could stand.

Appendix A

Last, we consider the Second Circuit’s analysis in *Universal City Studios, Inc. v. Corley*, where the defendant, who posted online the source and object code for software designed to unlock DVD encryption protections, raised a First Amendment defense to the anti-trafficking provision of the Digital Millenium Copyright Act. 273 F.3d at 439, 452-54. The court’s decision in *Corley* built directly on its earlier disposition in *Commodity Futures Trading Comm’n v. Vartuli*, 228 F.3d 94 (2d Cir. 2000), which predetermined the constitutional salience of “two ways in which a programmer might be said to communicate through code.” *Corley*, 273 F.3d at 449.

The first way was a programmer’s use of code to communicate “to the computer.” *Id.* This, the *Corley* court held, is “never protected” because “the interaction between ‘programming commands as triggers and semiconductors as a conduit,’ even though communication, is not ‘speech’ within the meaning of the First Amendment.” *Id.* at 449 & n.23 (quoting *Vartuli*, 228 F.3d at 111).

The second was a programmer’s communication “to the user of the program”—that is, a lay consumer. *Id.* at 449. In the court’s view, that communication could be, but is “not necessarily[,] protected,” depending on whether it implicates First Amendment interests or conveys information that engages in the intercession of mind or will of the recipient. *Id.* As to this category, the court cautioned that “[m]omentary intercession of human action” required to cause a code product to perform its function does not “diminish the nonspeech component” or bring it under the purview of the First Amendment. *Id.* at 451.

Appendix A

Against that backdrop, *Corley* itself addressed a third category—a programmer’s communication through code “to another programmer,” presumably one capable of understanding code. *Id.* at 449. Within this third category, the Second Circuit presumed both source code and object code are protected by the First Amendment because they are able to convey information comprehensible to a human. *Id.* at 446, 448. Its analysis went on to discern the appropriate standard of review, *id.* at 450-51, which the Second Circuit, like the Sixth Circuit in *Junger*, concluded was intermediate scrutiny, *see id.* at 454. Applying that standard, it upheld the provision of the statute, reasoning it applied only because of the code’s “capacity to instruct a computer to decrypt CSS,” and “[t]hat functional capability is not speech within the meaning of the First Amendment.” *Id.*

In sum, the Second Circuit’s treatment of the issue also focused on the “manner” of intended and actual use, *see id.* at 449, but with unique emphasis on who or what interacted with the code and how they did so, and specific recognition that at least some lines of communication are not subject to the First Amendment at all. And, in the context of programmer-to-programmer communications through code, it set aside any distinction between object and source code. *Id.* at 446.

2. Coverage Depends on Expressive Use

We join our sister circuits in holding that computer code can be covered by the First Amendment. But we also hold that coverage cannot be assumed because

Appendix A

code is inherently functional. See Orin S. Kerr, *Are We Overprotecting Code? Thoughts on First-Generation Internet Law*, 57 Wash. & Lee L. Rev. 1287, 1291-93 (2000). To invoke the protections of the First Amendment, the proponent must show that the particular use of the code burdened by a regulation involves the expression or communication of ideas in a way that implicates the First Amendment. Purely functional code with no expressive purpose, use, or intent is simply not covered by the First Amendment.

It is this possibility—that some code is purely functional and therefore outside the First Amendment’s purview—that debunks the analogy the *Junger* court drew between code and musical scores to justify a blanket application of the First Amendment to code. See 209 F.3d at 484. That analogy has intuitive appeal. As described in *Junger*, a score cannot be understood without training, and it is the preferred means of communication among musicians. But “[m]usic is one of the oldest forms of human expression,” *Ward*, 491 U.S. at 790, and there is no purely functional use of a music score. The playing and composition of music are inherently expressive in every instance, and unlike code, a musical score is not capable of making a purely inexpressive task or act occur by the very fact of its having been written.

In contrast, conduct that merely has the capacity to communicate something does not necessarily warrant First Amendment coverage. Robbing a bank, for example, “provides the most instructive way to teach someone how to rob a bank.” Kerr, *supra*, at 1292. So, too, is “kicking

Appendix A

someone in the shins . . . an excellent way of communicating the concept of kicking someone in the shins.” *Id.* But we do not have a First Amendment right to do either because our jurisprudence recognizes that the mere capacity to communicate does not transform physical conduct into protected speech. *Id.*

The same is true in cyberspace. Laws that prevent the distribution of destructive viruses or ransomware are not per se unconstitutional on the ground that they infringe upon coders’ freedom of expression. Nor does the First Amendment provide absolute protection against tort liability for manufacturers whose products cause damage because they run on defective code. In short, a blanket protection because “code is speech” is no more viable in cyberspace than it is in physical space. *See id.* at 1291-93; Wang, *supra*, at 1389.

Appellants next argue that all of Defense Distributed’s code is protected because it is “information,” invoking the Supreme Court’s decisions in *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011). But these cases do not support such a broad reading of First Amendment protection for “information” writ large. *Sorrell* addressed a statute that prohibited pharmacies from selling prescriber data to certain buyers and included dictum saying that “the creation and dissemination of information are speech within the meaning of the First Amendment.” 564 U.S. at 570. In its holding, however, the Court assumed the underlying information was a “mere commodity” rather

Appendix A

than speech and struck down the law prohibiting the sale of that information to certain buyers. *Id.* at 571. It did so not because of the underlying information, but because the law operated as a form of viewpoint discrimination and because the government specifically intended to suppress marketing messages conflicting with the goals of the state.⁶ *See id.* at 571, 580.

Bartnicki, for its part, addressed federal and state wiretapping statutes that prohibited disclosure of information acquired by illegally intercepting communications. 532 U.S. at 519-20, 525. The case involved the interception of a private phone call between union leaders and the subsequent delivery of a recording of that call. *Id.* at 518-19. There, the Court reasoned that the “*purpose* of such a delivery [was] to provide the recipient with the text of recorded statements . . . like the delivery of a handbill or a pamphlet,” so the law was a regulation of “pure speech” rather than a regulation of conduct focused on the “‘use’ of the contents.” *Id.* at 526-27 (emphasis added). It is notable that the underlying information in *Bartnicki* was itself within the core of the First Amendment’s classic speech protections. *See id.* at 517-18 (describing a “cellular telephone conversation about a public issue,” namely strategy in a teachers’ union’s collective bargaining negotiations). The Court

6. Though the Court mused that there was “a strong argument” that the underlying information was “speech for First Amendment purposes,” it did not decide as much, and its observation does not compel Appellants’ desired outcome under the distinct facts before us. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011).

Appendix A

nonetheless relied on the *purpose* of the distribution as the key consideration in its First Amendment analysis. Again, the mere dissemination of information in the abstract was not the driver of First Amendment doctrine.

This is particularly salient given the unique features of code that remove it from the realm of “pure speech.” The question before us bears greater resemblance to the cases in which courts have addressed whether the First Amendment applies to navigational charts and concluded that, although they convey information, they are not covered by the First Amendment. *See Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1035-36 (9th Cir. 1991) (distinguishing information in a book about mushrooms from aeronautical charts because “[a]eronautical charts are highly technical tools. They are graphic depictions of technical, mechanical data[, and] [t]he best analogy to an aeronautical chart is a compass. The chart itself is like a physical ‘product’ while the . . . book is pure thought and expression”); *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1254 (1995) (“Navigation charts do not receive First Amendment protection . . . because we interpret them as speaking monologically to their audience, as inviting their audience to assume a position of dependence and to rely on them.”).

Drawing on these cases and discussion, we hold that the determination of whether code enjoys First Amendment protection requires a fact-based and context-specific analysis. Such analysis is shaped by the technical nature of the code (e.g., source code or object code), how that code is used in context (e.g., precisely how the writer

Appendix A

or user of the code might interact with the code), who is communicating through the code and the intended recipient of the communication (e.g., programmer-to-human communication, human-to-machine communication, and so forth), for what purpose or purposes the computer code operates (e.g., to perform a function, to express an idea, or some combination thereof), and what, if anything, the code communicates.

But, as explained below, we do not have occasion today to go beyond recognition of this fact-based and context-specific inquiry because, here, Appellants failed to plead any of these indicia of expressiveness that are necessary to trigger First Amendment coverage.

3. Appellants Have Not Pleaded Facts Sufficient to Assess Whether Defense Distributed’s Code is Implicated by the Statute or Covered by the First Amendment

With this framework as our guide, we agree with the District Court that Appellants’ operative complaint lacks the information necessary to determine whether the coded computer files Defense Distributed seeks to distribute are expressive or functional and, consequently, whether it implicates the First Amendment.

The complaint alleges that the digital firearms information “includes, but is not limited to . . . ‘Computer Aided Design files’ or ‘CAD files,’” as well as “‘Computer Aided Manufacturing files’ or ‘CAM files,’” and “non-CAD and non-CAM files such as plain text (.txt) files.”

Appendix A

App. 258-59. CAD files can be used “to construct and manipulate complex two- and three-dimensional digital models of physical objects” and they “are not ready for insertion into” 3D printers. App. 256-57. CAM files can be used “to construct and manipulate the digital two- and three-dimensional models of physical objects” but “*are* ready for insertion into” 3D printers. App. 257 (emphasis added). And, “[w]ith respect to the 3D-printing processes in particular, CAD files and CAM files do not produce anything automatically. They are not functional software. They do not self-execute. They are mere information stores.” App. 257. The complaint then alleges that the coded computer files include, by way of example, the following: “files concerning a single-shot firearm known as the ‘Liberator,’” “files concerning an assembly of the AR-15 rifle and magazine,” “files concerning an assembly of the AKM rifle and magazine,” “stereolightography (.stl) files about firearm components,” “Initial Graphics Exchange Specification (.igs) files about firearm components,” and “‘read me’ plain text files about the National Firearms Act and the Undetectable Firearms Act.” App. 261.

These allegations fall short of plausibly alleging that Defense Distributed’s code triggers First Amendment coverage. Because “the plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully,” a complaint that “pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation modified). And here, Appellants’ allegations suffer from two fatal deficiencies:

Appendix A

(1) they do not allege how sharing their coded computer files violates the New Jersey Statute; and (2) they have not plausibly pleaded that Defense Distributed's code is covered by the First Amendment.

As to the first deficiency, the statute by its terms regulates code that "may be used to program" a 3D printer. N.J. Stat. Ann. § 2C:39-9(l)(2). Consistent with our previous analysis of the statute's scope, it simply does not prohibit or burden the distribution of things like "files about the National Firearms Act." App. 261. But the complaint fails to identify, or provide information sufficient to infer, which aspects of the digital firearms information *are* proscribed by the statute.

While the complaint lists a variety of file types (e.g., (.igs), (.stl), (.skp) (.pdf) (.stp)), it is unclear which, if any, of those are CAD or CAM files. It is unclear what information those files provide, how they are used, whether they are part of the 3D printing process, or what ideas they convey, if any. And, by way of further example, it does not make clear what the "files concerning" the Liberator or an AR-15 magazine are. App. 261. From the face of the complaint, we have no way to determine whether those files include details about the Liberator's history or a comparison of the AR-15 magazine to the magazines of other weapons, in which case the statute has nothing to say about their distribution.

The second deficiency is that, even assuming the digital firearms information includes code whose distribution is limited by the New Jersey Statute because it "may be used

Appendix A

to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component,” N.J. Stat. Ann. § 2C:39-9(l)(2), the complaint does not include sufficient allegations to assess whether that code is covered by the First Amendment. Appellants allege only that “digital firearms information . . . is an important expression of technical, scientific, artistic, and political matter” and that “[e]ach and every computer file at issue has these values in the abstract.” App. 258. But we must “disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements.” *Oakwood Lab’s LLC v. Thanoo*, 999 F.3d 892, 904 (3d Cir. 2021) (quoting *James v. City of Wilkes-Barre*, 700 F.3d 675, 681 (3d Cir. 2012)). Setting aside such conclusory allegations, Appellants’ complaint is left with nothing sufficient to assess whether there is a plausible entitlement to relief.

It is not lost on us that CAD and CAM files may not, as a technical matter, fit neatly within the source-code/object-code framework. After all, useful as it is for a First Amendment analysis of that code and analogous files, different file formats could raise somewhat different issues, and here, we have a variety in play (.dwg, .stp, .stl, .igs, .sldprt, .skp, .txt). Ultimately, however, we have no occasion to consider the specific properties of CAD and CAM files, nor whether those properties suggest they are protected by the First Amendment, because the complaint does not sufficiently explain the technical nature of those files. Indeed, the District Court provided Appellants with an opportunity to amend their complaint and include additional allegations that would enable the Court to

Appendix A

assess whether they have plausibly alleged that the code at issue is covered by the First Amendment. Appellants declined to do so, and the District Court therefore correctly dismissed their complaint with prejudice.

IV. CONCLUSION

For the foregoing reasons, we will affirm the District Court's order.

**APPENDIX B — OPINION OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY, FILED SEPTEMBER 29, 2023**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 21-9867 (MAS) (TJB)

DEFENSE DISTRIBUTED *et al.*,

Plaintiffs,

v.

MATTHEW J. PLATKIN, ATTORNEY
GENERAL OF THE STATE OF NEW JERSEY,

Defendant.

September 29, 2023, Filed

OPINION

SHIPP, District Judge

This matter comes before the Court upon Defendant Matthew J. Platkin, the Attorney General of New Jersey’s (“Defendant” or “State”) Motion to Dismiss Defense Distributed (“DD”) and Second Amendment Foundation, Inc.’s (“SAF”) (collectively “Plaintiffs”) Third Amended Complaint (“TAC”). (ECF No. 181.) Plaintiffs opposed (ECF No. 184), and Defendant replied (ECF No. 185). After careful consideration of the parties’ submissions, the

Appendix B

Court decides Defendant's motion without oral argument pursuant to Local Civil Rule 78.1. For the reasons outlined below, Defendant's motion to dismiss is granted. Counts One through Seven are dismissed without prejudice, and Counts Eight and Nine are dismissed with prejudice.

I. BACKGROUND¹**A. Factual Background****i. The Parties**

DD is a Texas corporation founded by Cody Wilson ("Wilson"). (TAC ¶¶ 4, 8, ECF No. 180.) Wilson currently serves as DD's director. (*Id.* ¶ 9.) DD "exists to promote the Second Amendment's individual right to keep and bear [a]rms." (*Id.* ¶ 30.) In service to this ideal, DD has published, is publishing, and intends to continue publishing digital firearms information to the American public. (*Id.*) SAF is a Washington-based non-profit membership organization. (*Id.* ¶ 10.) "SAF promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution's right to privately own and possess firearms and the consequences of gun control." (*Id.* ¶ 11.) Some members of SAF seek out DD's digital firearms information, and some SAF members "seek to share their own computer files by utilizing [DD's] facilities." (*Id.*)

1. For the purpose of considering the instant motion, the Court accepts all factual allegations in the TAC as true. *See Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

Appendix B

Defendant is the current New Jersey Attorney General (“NJAG”). (*Id.* ¶ 13.) In his capacity as NJAG, Defendant is responsible for all of New Jersey’s civil and criminal enforcement efforts. (*Id.*)

ii. Publishing of Digital Firearms Information

“Digital firearms information,” as Plaintiffs use the term, is information in the form of coded computer files that acts as an “information store.”² (*Id.* ¶¶ 24, 25, 28.) This “digital firearms information” includes, in part, Computer Aided Design files (“CAD Files”) and Computer Aided Manufacturing files (“CAM Files”). (*Id.* ¶¶ 26-27.) CAD Files are files primarily used for abstract design wherein a user can “construct and manipulate complex [two-dimensional (“2D”) and three-dimensional (“3D”)] digital models of physical objects.” (*Id.* ¶ 26.) CAD Files are not ready for insertion into object-producing equipment such as a 3D printer. (*Id.*) CAM Files, on the other hand, can be used to construct and manipulate 2D and 3D models of physical objects. (*Id.* ¶ 27.) Unlike CAD Files, CAM Files are ready for insertion into object-producing equipment such as a 3D printer. (*Id.*)

From December 2012 to May 2013, DD published a substantial set of computer files with digital firearms information to its website, Defcad.com (“DEFCAD”).

2. This digital firearms information exists in a wide variety of computer file formats, such as portable document format (“PDF”), Standard for the Exchange of Product Data (“STEP”) files, and plain text files. (TAC ¶ 25.)

Appendix B

(*Id.* ¶ 41.) Any visitor to the website could download the published digital firearms information for free. (*Id.*) Some of the digital firearms information published via DEFCAD during this period included: (1) files concerning a single-shot firearm known as the “Liberator”; (2) files concerning a magazine for AR-15 rifles; and (3) diagrams of firearm components. (*Id.*) These computer files, in addition to other digital firearms information published by DD, were downloaded “millions of times” by site visitors. (*Id.* ¶ 42.)

In July 2018, DD again published a substantial set of computer files with digital firearms information to DEFCAD and let any site visitor download the information for free. (*Id.* ¶ 43.) This downloadable information included, in part: (1) files concerning an assembly of the AR-15 rifle and magazine; (2) SOLIDWORKS part (“.sldprt”) files about firearm components; and (3) plain text files about firearm assembly methods. (*Id.*) These files were downloaded “hundreds of thousands of times.” (*Id.* ¶ 44.)

Later that year, between August and November 2018, DD again published a substantial set of computer files with digital firearms information. (*Id.* ¶ 46.) This time, however, DD made its computer files available for mailed shipment on physical storage devices like USBs and SD cards. (*Id.* ¶ 46.) To accomplish this mailed delivery, DD used an ecommerce platform on DEFCAD to facilitate all online orders, and then used the U.S. Postal Service (“USPS”) to deliver the firearms information ordered by DD’s website visitors. (*Id.*) It is unclear whether DD customers had to pay for the digital firearms information shipped in this physical form. (*See id.*)

Appendix B

On March 27, 2020, DD published a substantial set of computer files with digital firearms information via DEFCAD. (*Id.* ¶ 49.) This group of files is still published on DEFCAD to date. (*Id.* ¶ 55.) The files published during this period include: (1) original and legacy firearm models; (2) CAD Files; (3) CAM Files; and (4) blueprints and drawings (*Id.* ¶ 49.) Unlike DD's prior periods of publication, however, the current publication period does not let DEFCAD visitors download files freely. (*Id.* ¶ 50.) Instead, DEFCAD now utilizes secure end-to-end encryption, screens DEFCAD visitors that attempt to access files, deems some DEFCAD visitors ineligible for file distribution, prevents DEFCAD files from being made available outside the United States, and does not make any files available to New Jersey residents or persons who lack a federal firearms license. (*Id.* ¶¶ 49-54.)

While DD's March 2020 computer files continue to be available on DEFCAD, all computer files published by DD prior to March 2020, while no longer available on DEFCAD, continue to be available on the Internet more generally. (*See id.* ¶ 56.) This is because many recipients of DD information persistently republish DD files online via their own websites. (*Id.*) While DD ceased publishing new digital firearms information due to the current legal climate, DD intends to publish digital firearms information in the future when it is legal to do so. (*Id.* ¶ 57.) Specifically, DD seeks to, in part, make all previously published digital firearms information, including the information published in 2012, 2013, 2018, and 2020, freely available to DEFCAD visitors. (*Id.*) DD also plans to publish additional CAD, CAM, and computer files with other digital firearms information in the future. (*Id.*)

*Appendix B***iii. The NJAG's Alleged Censorship of DD's Speech**

On July 26, 2018, the NJAG issued DD a formal cease-and-desist correspondence (the “Correspondence”). (*Id.* ¶ 120.) The Correspondence instructed DD to cease publishing digital firearms information “for use by New Jersey residents.” (*Id.* ¶ 121.) The Correspondence stated that the publishing of digital firearms information was a violation of New Jersey’s public nuisance and negligence laws. (*Id.*) The Correspondence concluded that legal action would be brought against DD by August 1, 2018 if DD’s efforts to publish digital firearms information did not cease. (*Id.*)

That same day, the NJAG issued a press release informing the public that if DD failed to comply with the NJAG’s demands, legal action would follow. (*Id.* ¶ 122.) The press release also took the position that posting digital firearms information online is “no different than driving to New Jersey and handing out hard-copy files on any street corner.” (*Id.*)

On July 27, 2018, DD replied to the NJAG with a letter stating that all of DD’s actions “are fully protected by the First Amendment” and that the NJAG’s attempts to restrict DD’s publications constitute an unconstitutional prior restraint in violation of the United States Constitution. (*Id.* ¶ 123.) Nevertheless, DD stated in its letter that it would attempt to restrict files made available on the Internet to prevent them from being downloaded within New Jersey. (*Id.*)

Appendix B

On July 30, 2018, the NJAG contacted one of DD’s Internet security service providers, DreamHost. (*See id.* ¶¶ 124-26.) The NJAG informed DreamHost that DD planned to use DEFCAD in a manner that violated DreamHost’s Acceptable Use Policy. (*Id.* ¶ 127.) Moreover, the letter informed DreamHost that DD’s publication of digital firearms information violates New Jersey law. (*Id.*) That same day, the NJAG sent Cloudflare, Inc. (“Cloudflare”), another of DD’s Internet security service providers, a copy of the Correspondence. (*Id.* ¶ 128.)

On November 8, 2018, the New Jersey Legislature passed Senate Bill 2465, later codified at N.J. Stat. Ann. 2C:39-9(l)(2) (the “Challenged Statute”). (*Id.* ¶ 129; *see also* N.J. Stat. Ann. 2C:39-9(l)(2).) The law, in pertinent part, reads as follows:

[I]t is a second[-]degree crime for:

...

(2) a person to distribute by any means, including the Internet, to a person in New Jersey who is not registered or licensed as a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a [3D] printer to manufacture or produce a firearm, firearm, receiver, magazine, or firearm component.

Appendix B

As used in this subsection: ‘[3D] printer’ means a computer or computer-driven machine or device capable of producing a [3D] object from a digital model; and ‘distribute’ means to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute.

N.J. Stat. Ann. 2C:39-9(l).

DD alleges that the Challenged Statute was passed in order to “jail” DD, SAF, and anyone else that shares digital firearms information. (TAC ¶¶ 130, 135.) At the signing ceremony for the Challenged Statute, New Jersey Governor Phil Murphy referred to DD when he stated that the NJAG “issued [the Correspondence] to the companies that deal in ghost guns,³ saying explicitly that New Jersey is off limits to them.” (*Id.* ¶ 136.) The NJAG then said, at the same signing ceremony, that the Challenged Statute was a “stronger tool” that the NJAG could use to stop DD founder Cody Wilson and his supporters from releasing

3. “Typically, 3D[-]printed firearms are made from plastic parts that may bypass security systems, and they are printed without serial numbers or other types of identification. As such, they are usually referred to as ‘ghost guns.’” *Def. Distrib. v. Platkin*, 617 F. Supp. 3d 213, 221 n.2 (D.N.J. 2022) (citing *Gun Owners of Am., Inc. v. City of Philadelphia*, No. 21-2630, 2021 U.S. Dist. LEXIS 193662, 2021 WL 4627556, at *1 (E.D. Pa. Oct. 7, 2021)).

Appendix B

digital firearms information online. (*Id.* ¶ 137.) The NJAG also stated that he hoped to “stop the next Cody Wilson” and that the NJAG will come after any “ghost gun company” that is “contemplating making a printable gun.” (*Id.* ¶¶ 138-39.)

In light of the Challenged Statute’s passage, DD ceased its activities in New Jersey because it feared that the NJAG would commence enforcement of the new law against DD at any moment. (*See id.* ¶¶ 141-42.) DD and SAF took legal action against the Challenged Statute shortly thereafter. *Def. Distrib., et al. v. Grewal*, No. 19-4753, ECF No. 1.

B. Procedural Background

This case has a long and contentious procedural history that is well-documented on the docket and need not be revisited in full. As such, the Court recites only the procedural history necessary to contextualize the instant motion.

i Relevant History from Previous Litigation Between the Parties

Almost all cases in the United States addressing 3D-printed guns in the context of the First and Second Amendment stem from an initial action filed by Plaintiffs in the Western District of Texas in 2015. *See Def. Distrib. v. U.S. Dep’t of State*, 121 F. Supp. 3d 680, 701 (W.D. Tex. 2015). This first case (the “First Texas Case”) was brought by Plaintiffs against the United States Department of

Appendix B

State (the “State Department”). *See generally id.* In that action, Plaintiffs sought an allowance to publish digital firearms information on DEFCAD despite the State Department’s concerns that the practice violated the International Traffic in Arms Regulations (“ITAR”) and jeopardized national security. *Id.* at 689-90.

Years later, on June 29, 2018, the State Department entered into a settlement agreement in the First Texas Case whereby the federal government agreed:

[1] [to] publish a notice of proposed rulemaking and final rule revising the United States Munitions List [(“USML”)] to allow the distribution of [CAD] files for the automated production of [3D-printed] weapons[;] [2] to announce a temporary modification of the USML to allow such distribution[;] . . . and [3] to issue a letter to DD [and others] that the CAD files are approved for public release and unlimited distribution.

Washington v. U.S. Dep’t of State, 315 F. Supp. 3d 1202, 1203 (W.D. Wa. 2018). Shortly thereafter, various Attorneys General, including the NJAG, sued the State Department (the “First Washington Case”) for various administrative procedure violations and for allowing DD to publish digital firearms information containing code for use in a 3D printer. *See generally id.*

Not long after the filing of the First Washington Case, the instant matter was separately filed in the

Appendix B

Western District of Texas against the NJAG and the State Department. (ECF No. 1.) Various procedural or administrative appeals stemming from the First Texas Case, the First Washington Case, and the instant matter comprise much of the jurisprudence regarding whether the distribution of digital firearms information is constitutionally protected speech. *See, e.g., Def. Distrib. v. Bruck*, 30 F.4th 414, 421-23 (5th Cir. 2022); *Def. Distrib. v. Att’y Gen. of N.J.*, 972 F.3d 193, 195-97 (3d Cir. 2020); *Def. Distrib. v. U.S. Dep’t of State*, 838 F.3d 451, 454-56 (5th Cir. 2016); *Defense Distrib.*, 617 F. Supp. 3d at 221-24; *Washington v. U.S. Dep’t of State*, 420 F. Supp. 3d 1130, 1135-39 (W.D. Wash. 2019); *Wash. v. U.S. Dep’t of State*, No. C18-1115RSL, 2019 U.S. Dist. LEXIS 54830, 2019 WL 1318704, at *1-2 (W.D. Wash. Mar. 22, 2019); *Washington v. U.S. Dep’t of State*, No. C18-1115RSL, 2018 WL 5921011, at *1-2 (W.D. Wash. Nov. 13, 2018); *Washington v. U.S. Dep’t of State*, 318 F. Supp. 3d 1247, 1250-54 (W.D. Wash. 2018). This Court, for the first time, reaches the merits of DD’s constitutional contentions separate and distinct from any breach of contract claims it brought against the State Department. *See Def. Distrib. & Second Amend. Found.*, No. 18-637, 2023 U.S. Dist. LEXIS 44199, 2023 WL 2544334, at *7 (W.D. Tex. Mar. 15, 2023).

ii. Recent Procedural History in this Matter

On April 26, 2023, the Court deconsolidated this matter from *Defense Distributed et al. v. Grewal*, Civ. No. 19-4753, after certain plaintiffs voluntarily dismissed their claims in that action. (*Def Distrib., et al. v. Grewal*, No. 19-4753, ECF No. 60.) Plaintiffs then filed the TAC

Appendix B

in this matter (ECF No. 180), which Defendant moved to dismiss (ECF No. 181). Plaintiffs opposed the motion (ECF No. 184), and Defendant replied (ECF No. 185). On June 14, 2023, this Court denied Plaintiffs' third and final attempt to transfer this matter to the Western District of Texas (ECF No. 187), concluding a years-long dispute over the proper forum for this case to be litigated. With the procedural tapestry woven, the Court now turns to the merits of Defendant's motion.

Plaintiffs' TAC alleges nine causes of action: (1) violation of the First Amendment's freedom of speech and of the press (Count One); (2) violation of the Second Amendment's right to keep and bear arms (Count Two); (3) violation of the Fourteenth Amendment's equal protection clause (Count Three); (4) violation of the Fourteenth Amendment's due process clause (Count Four); (5) violation of the dormant Commerce Clause (Count Five); (6) federal preemption through the Arms Export Control Act ("AECA") (Count Six); (7) federal preemption through the Communications Decency Act ("CDA") (Count Seven); (8) tortious interference with a settlement agreement between DD and the State Department (Count Eight); and (9) tortious interference with existing contracts (Count Nine). (TAC ¶¶ 175-246.) All of these claims arise from the passing of the Challenged Statute and Defendant's sending of the Correspondence to DD.

*Appendix B***II. LEGAL STANDARD**

Federal Rule of Civil Procedure 8(a)(2)⁴ “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

A district court conducts a three-part analysis when considering a motion to dismiss pursuant to Rule 12(b)(6). *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). “First, the court must ‘tak[e] note of the elements a plaintiff must plead to state a claim.’” *Id.* (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Second, the court must accept as true all of the plaintiff’s well-pleaded factual allegations and “construe the complaint in the light most favorable to the plaintiff.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citation omitted). The court, however, may ignore legal conclusions or factually unsupported accusations that merely state that the defendant unlawfully harmed the plaintiff. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Finally, the court must determine whether “the facts alleged in the complaint are sufficient to show that the plaintiff has a ‘plausible claim for relief.’” *Fowler*, 578 F.3d at 211

4. All references to “Rule” or “Rules” hereinafter refer to the Federal Rules of Civil Procedure.

Appendix B

(quoting *Iqbal*, 556 U.S. at 679). A facially plausible claim “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 210 (quoting *Iqbal*, 556 U.S. at 678). On a Rule 12(b)(6) motion, the “defendant bears the burden of showing that no claim has been presented.” *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (citing *Kehr Packages, Inc. v. Fidelcor Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)).

III. DISCUSSION

The manufacturing of “ghost guns” is a relatively recent phenomena, and legal jurisprudence stemming from the practice is therefore in its infancy. *See N.Y. State Rifle & Pistol Assoc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 2180, 213 L. Ed. 2d 387 (2022) (Breyer, J., dissenting) (anticipating, in light of current Second Amendment jurisprudence, challenges with how courts will assess the constitutionality of ghost guns). In fact, this case is one of the first in the country to assess both whether CAD and CAM Files are protected speech under the First Amendment and whether the Second Amendment allows an individual a constitutional right to manufacture firearms. *See, e.g., Rigby v. Jennings*, 630 F. Supp. 3d 602, 615-16 (D. Del. 2022); *Fahr v. City of San Diego*, No. 21-1676, 2021 U.S. Dist. LEXIS 202302, 2021 WL 4895974, at *4 (S.D. Ca. Oct. 20, 2021).

Ultimately, Plaintiffs bring nine causes of action against the Attorney General of New Jersey consisting of: (1) First Amendment Claims; (2) Second Amendment Claims; (3) Fourteenth Amendment Due Process Claims;

Appendix B

(4) a dormant Commerce Clause claim; (5) federal preemption claims; and (6) state law tortious interference claims.⁵ (TAC ¶¶ 175-246.) The Court will address each grouping of these claims in turn.⁶

A. First Amendment Claim (Count One)

Plaintiffs allege three First Amendment violation theories: (1) unconstitutional speech restrictions; (2) prior restraint; and (3) overbreadth. (TAC ¶¶ 175-85.) Defendant moves to dismiss each theory. (*See generally* Def.’s Moving Br., ECF No. 181-1.) The Court addresses each in turn.

5. All of Plaintiffs’ constitutional claims are brought pursuant to 42 U.S.C. § 1983. (TAC ¶¶ 175-246.)

6. The Court notes Plaintiffs’ contention that Defendant’s motion should be denied because Defendant’s motion to dismiss did not address Plaintiffs’ allegations of “[c]ivil censorship (via [the Correspondence]) [but only] criminal censorship” via the passing of the Challenged Statute. (Pls.’ Opp’n Br. 2, ECF No. 184.) The Court does not read Defendant’s motion to dismiss as failing to address the constitutionality of the Correspondence. While Plaintiffs insist that Defendant must do two separate factual analyses, one addressing Defendant’s alleged civil restrictions on Plaintiffs’ speech, and one for criminal restrictions on Plaintiffs’ speech, such contention is somewhat perplexing considering Plaintiffs makes no effort to separate their nine Counts in this manner. As such, Plaintiffs’ contention that “[t]he [NJ]AG’s failure to argue about civil censorship means that those claims survive no matter what” is unpersuasive. Moreover, Plaintiffs cite no case law to support their contentions on this issue.

*Appendix B***i. Unconstitutional Speech Restrictions**

The alleged speech at issue in this matter, as described by the Challenged Statute, is:

[D]igital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a [3D] printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.

N.J. Stat. Ann. 2C:39-9(l).⁷ Before delving into a First Amendment analysis as to whether this alleged speech can be regulated, the Court must recognize the difficulty of the First Amendment question presented.⁸ *See Universal*

7. The Court notes that the Challenged Statute does not appear to stop DD from discussing the best way to 3D print a firearm or from distributing non-utilizable information, such as sheet instructions, to a resident in New Jersey. *See* N.J. Stat. Ann. 2C:39-9(l). Instead, the only “speech” that the Challenged Statute appears to regulate is digital instructions that can be “used to program” a 3D printer to construct a 3D-printed firearm. (*See* Def.’s Moving Br. 13 (stating that the Challenged Statute “does not restrict any components that express ideas advocating for printable firearms, such as instructional files[, instead] New Jersey law is specifically concerned with the unregulated distribution of the functional capability to make firearms, not the communicative content of code or its ability to convey a particular message”).)

8. *See also* Xiangnon Wang, *De-Coding Free Speech: A First Amendment Theory for the Digital Age*, 2021 WIS. L. REV. 1373, 1406 (2021) (identifying two key reasons it is difficult to assess whether

Appendix B

City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001) (“The[] realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements.” (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969)).

Whether computer code constitutes protected speech is a question of first impression in this District and this Circuit, and the question has not yet been addressed by the Supreme Court. In fact, only a handful of courts across the country have ruled on the issue at all. The courts that have taken on the issue have not yet taken a definitive stance on a critical question: whether all computer code is speech protected by the First Amendment, or whether some computer code, while speech generally, is functional or nonexpressive such that it is unprotected by the First Amendment.⁹ See e.g., *Rigby*, 630 F. Supp. 3d at 616 n.15 (denying a motion for preliminary injunction as to a First Amendment claim on nearly identical facts to this case while assuming 3D-printing computer code was protected First Amendment speech and noting “[t]he Court is skeptical that [the challenged statute] implicates

computer code is protected speech: (1) because “code challenges how [courts] perceive the boundary between ‘speech’ and ‘conduct’”; and (2) “because code can be used in many ways” such as “calculating taxes, vacuuming floors, or for engaging in public discourse”).

9. See also Mark C. Bennett, *Was I Speaking to You? Purely Functional Source Code as Non-covered Speech*, 92 N.Y.U. L. REV. 1494, 1514 (2017) (identifying that when courts are considering this question they are often “inclined to assume the presence of speech [rather] than to decide the question definitively”).

Appendix B

the First Amendment” but stating that the Court need not decide the issue because the defendant prevailed on other grounds); *Karn v. U.S. Dept of State*, 925 F. Supp. 1, 9 (D.D.C. 1996) (“As a threshold matter, for the purpose of addressing the dispositive issue whether [a] regulation is justified and permissible, the Court will assume that the protection of the First Amendment extends to [] source code.”)

The Court does not find this avoidance constructive where, as here, the issue of whether computer code is protected by the First Amendment is directly at issue and it appears that the alleged “speech” may be serving to effectuate an entirely non-expressive function: printing a firearm with little human involvement. *See Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (rejecting “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea” let alone where a person intends to create an object through use of a machine (citing *United States v. O’Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968))); *Spence v. State of Washington*, 418 U.S. 405, 410, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (considering non-verbal speech and noting that for a court to determine if such speech is expressive and protected the court must combine “the nature of [plaintiffs’] activity . . . with the factual context and environment in which it was undertaken” before concluding whether the expression or speech is protected); *Tenafty Eruv Ass’n, Inc. v. Borough of Tenafty*, 309 F.3d 144, 159 (3d Cir. 2002) (noting that where speech “does not involve the use of words” that

Appendix B

speech can only be protected if it is “expressive” as opposed to non-expressive). As such, the Court finds that it is necessary to reach this oft-avoided question on the facts of this case.

Courts generally agree that computer code constitutes a form of speech. *Corley*, 273 F.3d at 449-50 (collecting cases) (concluding “that computer code conveying information is ‘speech’”); *see also Junger v. Daley*, 209 F.3d 481, 484-85 (6th Cir. 2000); *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (noting that “the functionality of a language does not make it any less like speech”). There is, however, an open question as to whether computer code is always *protected* speech.¹⁰

10. An assortment of speech is unprotected by the First Amendment. For example, “[s]pecific criminal acts are not protected speech even if speech is the means for their commission.” *United States v. Gonzalez*, 905 F.3d 165, 192 (3d Cir. 2018) (quoting *Packingham v. North Carolina*, 582 U.S. 98, 107, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017)). This is because “[s]peech intended to bring about a particular unlawful act has no social value,” and is thus, in a sense, nonexpressive. *United States v. Hansen*, 599 U.S. 762, 143 S. Ct. 1932, 1947, 216 L. Ed. 2d 692 (2023). Nonexpressive conduct, like sleeping on sidewalk, is also unprotected by the First Amendment. *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996). This is because certain conduct may not be “sufficiently imbued with elements of communication to fall within the scope of the First” Amendment. *Johnson*, 491 U.S. at 404 (citation omitted). With this in mind, the Court notes that just because computer code has elements of both conduct and speech does not mean that all computer code is *per se* protected by the First Amendment. Some greater analysis must occur, and while “jilt is possible to find some kernel of expression in almost every activity a person undertakes” it is this Court’s responsibility to ascertain whether “such a kernel

Appendix B

Specifically, many of the courts that have dealt with this issue acknowledge a distinction between expressive computer code, which is constitutionally protected, and functional computer code, which may not be. *See Corley*, 273 F.3d at 449 (concluding source code is speech, but suggesting that where code operates “mechanically” and “without intercession of the mind or will of the recipient,” it may not be speech, while crediting a previous Second Circuit decision that found that where a programmer communicates through code to the user of the program, such speech is protected, but where a programmer communicates through code with a machine or computer, such speech is “never protected”); *Junger*, 209 F.3d at 485 (finding on the facts of the case before the court that source code “is an expressive means for the exchange of information and ideas about computer programming” but not addressing the constitutional status of source code where the code only serves a functional use that does not serve to assist in the exchange of information or ideas about computer programming); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 222 (S.D.N.Y. 2000) (assuming, in the context of a preliminary injunction, that “executable code is sufficiently expressive to merit some constitutional protection” but later noting that the computer code at issue in the case did not serve the goals of the First Amendment due to its functionality); *Karn*, 925 F. Supp. at 9 & n.19 (assuming that source code with expressive qualities like the source code in the case before the court, which contained comments embedded within

is . . . sufficient to bring the activity within the protection of the First Amendment.” *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989).

Appendix B

the code serving an instructive purpose, is protected, but casting doubt that source code without such comments would be protected, stating that “[s]ource codes are merely a means of commanding a computer to perform a function.”). This Court is inclined to follow the courts before it that have recognized a First Amendment distinction between expressive and non-expressive, functional computer code, as such distinction arises logically from, and is consistent with, the First Amendment more generally.¹¹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) (“It is true that restrictions on protected expression [in the context of the First Amendment] are distinct from restrictions on economic activity or, more generally, [from] nonexpressive conduct.”)

With this distinction in mind, the TAC lacks sufficient information regarding DD’s computer code for the Court to analyze the sufficiency of Plaintiffs’ allegations. The above outlined fact-intensive First Amendment standard necessarily requires detailed, technical allegations regarding the types of computer code at issue in this case (i.e., source code, origin code, other), how that code is used

11. Were the Court to credit Plaintiffs’ position that all computer code, including the alleged speech in this case, is protected as expressive under the First Amendment, then an AI-operated lawnmower which runs on code with no human involvement, an online recruiting service that develops software, or an automated household vacuum performing its core function of cleaning a home could all potentially constitute speech under the First Amendment. Xiangnon Wang, *De-Coding Free Speech*, 2021 WIS. L. REV. at 1377 (providing several of these challenging examples in the context of viewing code as speech). No reasonable interpretation of First Amendment jurisprudence compels this Court to reach such a conclusion. See *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 410.

Appendix B

(i.e., precisely how the writer or user of the code might interact with the code), whom or what is communicating through the code (programmer-to-human communication, human-to-machine communication, or other), and for what purpose the computer code operates (i.e., to perform a function, to express an idea, or some combination thereof). While some of this information is contained in the TAC, the TAC does not engage in a sufficiently detailed account of DD's computer code for the Court to conduct the necessary analysis. (*See* TAC ¶¶ 24-29.) As such, Plaintiffs will be provided an opportunity to clarify their allegations, consistent with this Opinion, as to the type of code comprising the digital firearms information, how that code produces a firearm, and whether the programming communication that is being regulated is between a human and human, a machine and a human, or some hybrid of both.

The Court notes separately that it is unclear what speech Plaintiffs perceive the Challenged Statute as regulating. As previously noted, the Challenged Statute explicitly regulates only computer code that “is used to program” a 3D printer. N.J. Stat. Ann. 2C:39-9(l). Plaintiffs, in the TAC, appear to suggest, for example, that the Challenged Statute regulates information that “conveys knowledge without advocating action” such as “plain text . . . files” containing “notes, instructions, and comments.” (TAC ¶¶ 24-25.) Plaintiffs also allege, however, that the Challenged Statute regulates distribution of CAM Files, which are “ready for insertion into object-producing equipment.” (*Id.* ¶¶ 25, 28.) These forms of computer code appear to be materially different for purposes of the Court's analysis. Should Plaintiffs wish to allege all

Appendix B

computer code they offer on DEFCAD is protected speech, they will need to allege how each form of digital firearms information they offer constitutes protected speech based on the general distinction outlined above, and how the Challenged Statute regulates each form of code.

In light of the above findings, the Court does not reach any discussion of content-neutrality as the Court is not yet persuaded that the speech the Challenged Statute regulates is protected. As such, Plaintiffs' direct speech regulation theory of First Amendment violation is rejected at this time.

ii. Prior Restraint and Overbreadth

As the Court has yet to establish whether DD's digital firearms information constitutes protected speech, the Court does not reach Plaintiffs' prior restraint or overbreadth theories.¹² Accordingly, Count One is dismissed without prejudice.

12. The Court notes that to the extent Plaintiffs seek to contend the Challenged Statute is an unconstitutional prior restraint, the Court need not reach that issue unless DD's digital firearms information is found to be protected speech. The Court does note, however, that it is skeptical that the Challenged Statute constitutes a prior restraint where it outlines a punishment for speech *after* such impermissible speech occurs. *Cf. Alexander v. United States*, 509 U.S. 544, 553, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993). To the extent that Plaintiffs intend to contend that the Correspondence constitutes a prior restraint, Plaintiffs provide no case law as to whether a cease-and-desist correspondence can constitute a prior restraint. (*See generally* Pls.' Opp'n Br.) Should Plaintiffs file a fourth amended complaint and wish to reallege their prior restraint claim, they are advised to take note of this deficiency in their briefing.

*Appendix B***B. Second Amendment Claim (Count Two)**

Plaintiffs allege that the Challenged Statute abridges the individual right to keep and bear Arms under the Second Amendment. (TAC ¶¶ 187.) More specifically, Plaintiffs allege that Defendant’s conduct “infringes the individual right to make and acquire Arms, which is part and parcel of the right to keep and bear arms.” (*Id.* ¶ 190.) Defendant moves to dismiss Plaintiffs’ Second Amendment claim arguing: (1) that “a limitation on the distribution of printable gun files does not implicate the plain text of the Second Amendment” because computer code does not constitute an “Arm”; and (2) even if the Second Amendment is implicated, the Second Amendment only protects a “law-abiding citizen[']s right to armed self-defense,” and by subverting background check laws by using computer code to print a gun, the manufacture of a 3D-printed gun is unlawful. (Def.’s Moving Br. 19-22.) Plaintiffs in opposition argue that the “right to self-manufacture firearms and to maintain them” is at issue in this case and that the right to self-manufacture firearms has been recognized since the colonial period. (Pls.’ Opp’n Br. 23-30.)

While a 3D-printed gun itself may be an “Arm,” the computer codes sent to someone else to manufacture such an “Arm” does not constitute an “Arm” under the Second Amendment. The term “Arms” in the Second Amendment was defined by the Supreme Court. *District of Columbia v. Heller*, 554 U.S. 570, 581, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Specifically, the Supreme Court held that “[t]he 18th-century meaning” of “Arms” is no different

Appendix B

from the meaning today.” *Id.* “Arms” are “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” *Id.* (citing to “Timothy Cunningham’s important 1771 legal dictionary” defining “arms” (quoting 1 A NEW AND COMPLETE LAW DICTIONARY)). Computer code cannot be worn for defense, taken into ones hands, or used to cast down an enemy. Only the firearm or weapon it creates can perform such function.

Plaintiffs, however, do not appear to be alleging that computer code constitutes an “Arm” so much as they are alleging that the Second Amendment’s “keep and bear” language protects a right to self-manufacture a firearm. (TAC ¶ 190.) Plaintiffs, therefore, allege that the Challenged Statute violates the Second Amendment’s right to “keep and bear Arms” by criminalizing the manufacture of 3D-printed arms without a license. (*See id.* (alleging that the Challenged Statute infringes the individual right to make and acquire Arms, which is part and parcel of the *right to keep and bear Arms*).) As to this assertion, the Court is not satisfied that Plaintiffs have Article III standing to bring such a claim. *Associated Builders & Contractors W. Pa. v. Cmty. Coll. of Allegheny Cnty.*, No. 22-2030, 2023 U.S. App. LEXIS 22733, 2023 WL 5539276, at *4 (3d Cir. Aug. 29, 2023) (“[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” (internal quotation marks and citation omitted)). While Defendant did not identify Article III standing as a cause for dismissal of Plaintiff’s Second Amendment claim, Article III standing implicates this Court’s subject-matter jurisdiction. *Hartig*

Appendix B

Drug Co. v. Senju Pharm. Co., 836 F.3d 261, 269 (3d Cir. 2016) (“Article III standing is essential to federal subject[-] matter jurisdiction and is thus ‘a threshold issue that must be addressed before considering issues of prudential standing.’” (citation omitted)). As such, the Court must be satisfied that standing exists before adjudicating Plaintiffs’ Second Amendment claim. *N.J. Second Amend. Soc’y v. N.J. Press Assoc.*, No. 22-2938, 2023 U.S. App. LEXIS 23652, 2023 WL 5740239, at *1 (3d Cir. Sept. 6, 2023) (“Standing is a jurisdictional requirement . . . so when its conditions are unmet, [courts] have no authority under Article III to consider the merits of the case.” (citations omitted)); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCardle*, 74 U.S. 506, 514, 19 L. Ed. 264 (1868))).

To establish Article III standing, a plaintiff must demonstrate: “(1) an injury-in-fact[;] (2) a sufficient causal connection between the injury and the conduct complained of[;] and (3) a likelihood that the injury will be redressed by a favorable decision.” *Finkelman v. Nat’l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (citations omitted). The “injury in fact” inquiry is often determinative of standing. *Ellison v. Am. Bd. of Orthopaedic Surgery*, 11 F.4th 200, 205 (3d Cir. 2021) (citations omitted). “A plaintiff seeking to establish [an] injury in fact ‘must show that he or she suffered “an invasion of a legally protected interest” that

Appendix B

is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”” *Id.* (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)). “To be ‘concrete,’ an injury must be ‘real, or distinct and palpable, as opposed to merely abstract.”” *Finkelman*, 810 F.3d at 193 (quoting *N.J. Physicians, Inc. v. President of the United States*, 653 F.3d 234, 238 (3d Cir. 2011)). “To be sufficiently ‘particularized,’ an injury must ‘affect the plaintiff in a personal and individual way.’” *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a plaintiff is an association seeking to invoke associational standing, it may “bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citation omitted).

Here, the TAC does not appear to allege a concrete and particularized Second Amendment injury. (*See generally* TAC.) There is no allegation in the TAC that DD, SAF, or any member of either entity attempted to or was prevented from 3D printing a firearms but could not do so. (*Id.*) Instead, the TAC focuses exclusively on DD’s reluctance to publish digital firearm information as a result of the Challenged Statute and the Correspondence. These allegations only invoke a First Amendment injury. With no allegations that either Plaintiff or any association member sought to manufacture a 3D-printed firearm

Appendix B

and could not as a result of the Challenge Statute or the Correspondence, Plaintiffs have failed to allege a concrete and particularized Second Amendment injury. As such, Plaintiffs fail to allege an injury-in-fact capable of establishing Article III standing to challenge the Challenged Statute on Second Amendment grounds. The Court, therefore, is unable to satisfy itself that it has subject-matter jurisdiction over Plaintiffs' Second Amendment claim, and dismisses Count Two without prejudice.¹³

C. Fourteenth Amendment Claims (Counts Three and Four)

Under the Fourteenth Amendment, Plaintiffs allege two violations: (1) violation of the equal protection clause

13. Although Count Two is dismissed on standing grounds, the Court notes that should Plaintiffs be able to show that the plain text of the Second Amendment contains a right to self-manufacture a firearm, under *Bruen*, Defendant will have a burden to show how the Challenged Statute comports with this Nation's "historical tradition." See *Bruen*, 142 S. Ct. at 2126. Specifically, the Supreme Court established in *Bruen* that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Range v. AG United States*, 69 F.4th 96, 100 (3d Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2126). In such case, the government may regulate that conduct "[o]nly if a firearms regulation is consistent with this Nation's historical tradition." *Id.* Ultimately, it is the government's burden to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127. Here, Defendant did not provide any historical analysis justifying its regulation. Should Defendant wish to move to dismiss any renewed Count Two, Defendant will be expected to brief in accordance with *Bruen*.

Appendix B

through selective enforcement (Count Three); and (2) violation of the due process clause for lack of fair notice, overbreadth, and deprivation of property (Count Four). (TAC ¶¶ 194-211.)

i. Count Three: Selective Enforcement

Defendant contends that Count Three fails because the TAC identifies no parties who have violated the Challenged Statute, let alone any parties who violated the Challenged Statute and were not prosecuted. (Def.'s Moving Br. 27-28.) Accordingly, Defendant contends that Count Three is not ripe for adjudication as there has been no enforcement of the Challenged Statute. (*See id.*) Moreover, Defendant contends that Plaintiffs' conclusory allegation that the NJAG "disagrees with the content" of DD's speech and "dislikes the persons involved in the speech" is not evidence of improper motive or intent. (*Id.* at 29.) Plaintiffs argue in opposition that their allegation that Defendant "took action against [DD] but not similarly situated persons engaged in publication of [DD files] because [Defendant] disagrees with the content of [DD's] speech" is sufficient to survive the pleading stage. (Pls.' Opp'n Br. 30-31.)

The Fourteenth Amendment prohibits states from denying "any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. This clause protects individuals "against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*,

Appendix B

528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445, 43 S. Ct. 190, 67 L. Ed. 340 (1923)). To prevail on a selective enforcement claim under the equal protection clause, Plaintiffs must demonstrate: (1) that they were “treated differently from other similarly situated individuals; and (2) that this selective treatment was based on an ‘unjustifiable standard . . . or to prevent the exercise of a fundamental right.’” *Dique v. N.J. State Police*, 603 F.3d 181, 184 n.5 (3d Cir. 2010) (quoting *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005)). To sustain their claim, Plaintiffs must provide evidence that a government decisionmaker took a particular course of action because it would have adverse effects on Plaintiffs. *Jewish Home of E. Pa. v. Ctrs. for Medicare & Medicaid Servs.*, 693 F.3d 359, 363 (3d Cir. 2012); see *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979).

Plaintiffs’ selective enforcement claim fails because they do not allege that the NJAG treated similarly situated parties differently in enforcing the Challenged Statute or sending the Correspondence. To the contrary, Plaintiffs allege that other 3D-printed gun manufacturers and information distributors were treated similarly. (See TAC ¶ 136 (“The Attorney General . . . issued a cease-and-desist letter to the *companies* that deal in ghost guns” (emphasis added)); ¶ 138 (quoting the Attorney General as saying “[e]arlier this year, we went after some of the biggest *players* in this industry” and directing his comments toward “*anyone* who is contemplating making a printable gun” (emphasis added)).) As such, Plaintiffs

Appendix B

fail to plausibly allege that the Challenged Statute itself was passed to selectively prevent Plaintiffs from acting. For these reasons, Plaintiffs' selective enforcement theory must fail. Accordingly, Defendant's motion to dismiss Count Three is granted, and Count Three is dismissed without prejudice.

ii. Count Four: Due Process Violations

Defendant next contends that Plaintiffs' due process claim fails. (Def.'s Moving Br. 29-32.) Plaintiffs allege three theories of due process violation: (1) vagueness; (2) overbreadth; and (3) deprivation of property. (*See* TAC ¶¶ 206-08.) First, Plaintiffs do not expound upon their overbreadth theory, and the Court cannot discern any due process-related overbreadth theory separate and distinct from Plaintiffs' overbreadth theory mentioned in the context of the First Amendment. (*Id.* ¶ 206 ("The NJAG's conduct forbids a substantial amount of constitutionally protected speech; as such, it is an unconstitutional deprivation of liberty and property without due process of law."); *see generally* Pls.' Opp'n Br.) As such, the Court construes Plaintiffs' due process and First Amendment overbreadth theories as resting on the same factual allegations. Accordingly, for the reasons stated earlier in this Opinion, the Court does not reach this issue pending determination of whether the digital firearms information at issue in this litigation is protected speech. If Plaintiffs intend to bring this due process-overbreadth theory again, Plaintiffs are encouraged to better clarify their theory in the due process context if they intend to defeat any renewed motion to dismiss.

Appendix B

Second, Plaintiffs’ deprivation-of-property theory relies on the factual allegation that the NJAG “deprive[d] [DD] and SAF of a license issued by the Secretary of State pursuant to federal law . . . without supplying adequate pre-deprivation notice and an opportunity to be heard.” (*Id.* ¶ 208.) The State Department is no longer a party to this matter, and Plaintiffs fail to plausibly allege how this claim is sustainable in the absence of the State Department. (*Id.*) Moreover, as Defendant correctly notes, “no injunction could be granted against the NJAG that would result in [the State Department] restoring a license that the Western District of Washington has held violates the APA.” (Def.’s Moving Br. 31-32; *see also Washington v. Dep’t of State*, 420 F. Supp. 3d at 1135-39.) As such, even if Plaintiffs could state a claim for relief, Plaintiffs fail to allege how any deprivation-of-property theory by Plaintiffs is redressable under Article III. In light of the Western District of Washington’s holding, therefore, Plaintiffs do not have Article III standing to bring a deprivation-of-property claim. *Finkelman*, 810 F.3d at 193 (finding that to establish Article III standing, a plaintiff must demonstrate . . . a likelihood that the injury will be redressed by a favorable decision.”)

Finally, Plaintiffs aver that the Challenged Statute is void for vagueness. (TAC ¶ 206.) A statute is unconstitutionally vague when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012) (citing *United States v.*

Appendix B

Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). A statute need not be “vague in all its application[s]” to be void for vagueness. *Johnson v. United States*, 576 U.S. 591, 597-98, 603, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

Plaintiffs assert that “it is impossible for a speaker to know what counts as ‘code . . . *that may be* used to’ engage in” programming a 3D printer to produce a firearm because “what ‘may be used’ by one programmer can be totally useless to another.” (Pls.’ Opp’n Br. 32-33 (alteration in original).) Plaintiffs’ contention that the code may be useless to some programmers does not render the language of the statute so vague that it fails to provide a person of ordinary intelligence fair notice of what is prohibited.

The Challenged Statute provides that it is a second-degree crime to facilitate the manufacturing of a firearm by distributing “digital instructions” that may be used to program a 3D printer to manufacture a firearm or firearm components. N.J. Stat. Ann. 2C:39-9(l)(2). The term “may,” which Plaintiffs contend renders the Challenged Statute vague, in the context it is used, appears to refer to any digital instruction *with the capability* to program a 3D printer to produce a firearm. This does not appear to be a vague prohibition as a person of ordinary intelligence can conclude from this language that any digital instruction capable of programming a 3D printer to produce a firearm or firearm component is prohibited.¹⁴ Instead, when read as

14. To the extent the parties disagree as to what type of digital instruction is capable of “programming” a 3D printer to

Appendix B

a whole, the Challenged Statute’s language clearly defines the type of digital files and the methods of distribution that qualify as prohibited conduct. *See* N.J. Stat. Ann. 2C:39-9(l)(2). In this way, the Challenged Statute alleviates the risk of arbitrary and discriminatory enforcement by setting forth a cognizable standard. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 503, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (finding that where an ordinance was “sufficiently clear” the “speculative danger of arbitrary enforcement d[id] not render the ordinance void for vagueness” (citation omitted)). Therefore, because a person of ordinary intelligence is given fair notice of the types and files prohibited by the statute and what function those files cannot be used to perform, and because there is no risk of discriminatory enforcement of the statute, Plaintiffs’ claim that the Challenged Statute is void for vagueness fails. Accordingly, Count Four is dismissed without prejudice.

D. Dormant Commerce Clause Claim (Count Five)

Defendant next moves to dismiss Plaintiffs’ dormant Commerce Clause claim. (Def.’s Moving Br. 22-26.) Plaintiffs allege that the Challenged Statute “directly regulates interstate commerce by projecting New Jersey law into other states” and “discriminate[s] against interstate commerce” without serving a compelling governmental interest. (TAC ¶¶ 212-21.) Moreover,

produce a firearm, the Court does not reach such issue here where, as elaborated upon in the Court’s First Amendment analysis, the Court does not yet have before it sufficient briefing to assess the nature and capability of the computer code at issue in this matter.

Appendix B

Plaintiffs contend that the Challenged Statute “expressly projects New Jersey’s law . . . throughout the entire Union,” because regulating website publications creates “extraterritorial discrimination” violative of the dormant Commerce Clause. (Pls.’ Opp’n Br. 34 (quoting *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997).) Defendant, on the other hand, contends that the Challenged Statute is neutral, does not regulate conduct beyond the State of New Jersey, and creates no impermissible extraterritorial effects. (Def.’s Moving Br. 22-26.)

The Commerce Clause states that “Congress shall have [the] Power . . . [t]o regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3. “This affirmative grant of authority to Congress ‘also encompasses an implicit or “dormant” limitation on the authority of the States to enact legislation affecting interstate commerce.’” *TitleMax of Del., Inc. v. Weissmann*, 24 F.4th 230, 237-38 (3d Cir. 2022) (quoting *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 823 (3d Cir. 1994)). “When evaluating whether a statute violates the Commerce Clause, [courts] examine the statute’s effect on interstate commerce.” *Id.* at 238 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)). “[W]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [courts] generally str[ike] down the statute without further inquiry.” *Instructional Sys.*, 35 F.3d at 824 (quoting *Brown-Forman*, 476 U.S. at 579). “When,

Appendix B

however, a statute only has indirect effects on interstate commerce and regulates evenhandedly, [courts] examine[] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)).

Just this year, in *National Pork*, the Supreme Court clarified its dormant Commerce Clause jurisprudence. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 37435680, 143 S. Ct. 1142, 215 L. Ed. 2d 336 (2023). In *National Pork*, a California law, Proposition 12, was challenged under the dormant Commerce Clause. *Id.* at 365. The law banned "the in-state sale of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around." *Id.* at 364. Two groups of out-of-state pork producers challenged the law and argued that it "unconstitutionally interferes with their preferred way of doing business in violation of the dormant Commerce Clause. *Id.* at 363-64.

The Supreme Court in *National Pork* set forth a comprehensive history of dormant Commerce Clause jurisprudence. *Id.* at 368-71. The Supreme Court identified, in part, "that state laws offend the Commerce Clause when they seek to "'build up . . . domestic commerce' through 'burdens upon the industry and business of other States,' regardless of whether Congress has spoken." *Id.* at 369 (quoting *Guy v. City of Baltimore*, 100 U.S. 434, 443, 25 L. Ed. 743, 1 Ky. L. Rptr. 205 (1880)). This behavior, i.e., building up one state's economy to the detriment

Appendix B

of other states' economies, is the type of behavior that constitutes "discriminatory" conduct violative of the dormant Commerce Clause. *See id.* at 369-70 (confirming this definition of "discriminatory" in modern cases and finding that "the Commerce Clause prohibits the enforcement of state laws 'driven by . . . "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"" (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)). Importantly, however, the Supreme Court noted that, "absent discrimination, 'a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to' the interest of its citizens." *Id.* at 369 (quoting *Guy*, 100 U.S. at 443).

Here, Plaintiffs expressly bring a "discrimination-based claim" against Defendant. (Pls.' Opp'n Br. 34.) From Plaintiffs' briefing, it appears that they raise a "discrimination-based" claim in an effort to try and distance their dormant Commerce Clause claim from *National Pork* by noting that the plaintiffs in *National Pork* "disavow[ed] any discrimination-based claim." (*Id.* (quoting *Nat'l Pork*, 598 U.S. at 370).) While this assertion is true, it does not make the Supreme Court's interpretation of dormant Commerce Clause jurisprudence concerning discriminatory and non-discriminatory challenges any less relevant to Plaintiffs' "discrimination-based claim." As such, the Court rejects Plaintiffs' attempts to subvert *National Pork*.

Appendix B

As mentioned above, the Supreme Court in *National Pork* identified that, “state laws offend the Commerce Clause when they seek to ‘build up . . . domestic commerce’ through ‘burdens upon the industry and business of other States,’” regardless of whether Congress has spoken. *Nat’l Pork*, 598 U.S. at 369 (quoting *Guy*, 100 U.S. at 443)). This antidiscrimination principle is at the heart of most dormant Commerce Clause challenges, and it follows from this principle that “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors” is prohibited under the dormant Commerce Clause. *Id.* (“[A]ntidiscrimination principles lie[] at the ‘very core’ of our dormant Commerce Clause jurisprudence.” (quoting *Dep’t of Revenue of Ky.*, 553 U.S. at 337-38)). Here, the Challenged Statute clearly does not discriminate against out-of-state corporations.

The Challenged Statute provides that any “person” in New Jersey is prohibited from manufacturing a firearm without a proper manufacturer’s license or registration, and any distribution of digital firearms information to a person in New Jersey “who is not registered or licensed as a manufacturer” is a crime. N.J. Stat. Ann. 2C:39-9(l). While it is certainly true that Plaintiffs, out-of-state corporations dealing in a now criminalized activity in New Jersey, are economically restricted by the Challenged Statute, such restriction is not a *per se* violation of the dormant Commerce Clause. *See Nat’l Pork*, 598 U.S. at 371-76 (rejecting plaintiffs’ argument that the dormant Commerce Clause suggests an “almost *per se*” rule “forbidding enforcement of state laws that have the “practical effect of controlling commerce outside the

Appendix B

state,’ even when those laws do not purposely discriminate against out-of-state economic interests”). This is because the Challenged Statute treats in-state and out-of-state distributors of digital firearms information equally: whether a company is a New Jersey or Texas-based digital firearms information distributor, it is illegal for that company to distribute such information into New Jersey. For these reasons, Plaintiffs’ “discrimination-based claim” under the dormant Commerce Clause fails as alleged.

The Court’s analysis does not end there, however. There are at least two ways to show a state statute facially violates the dormant Commerce Clause: (1) facial discrimination; or (2) direct regulation. *Instructional Sys.*, 35 F.3d at 824 (“When a state statute *directly regulates or discriminates* against interstate commerce . . . [courts] generally [strike] down the statute without further inquiry.”) (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579). Plaintiffs, while claiming to only bring a “discrimination-based claim,” also clearly allege and argue that the Challenged Statute directly regulates interstate commerce where Plaintiffs invoke the phrase “extraterritorial discrimination.” (TAC ¶ 216 (“The NJAG’s conduct violates the dormant Commerce Clause doctrine regarding laws that directly regulate interstate commerce.”); Pls.’ Opp’n Br. 34 (referring to the Challenged Statute’s regulation as “extraterritorial discrimination,” a phrase that conflates legal terms related to direct regulation and direct discrimination); *TitleMax*, 24 F.4th at 238 (finding that “[o]ne way a challenged statute can ‘directly regulate’ interstate commerce is if the statute has ‘extraterritorial effects’ that adversely affect

Appendix B

economic production (and hence interstate commerce) in other states” (quoting *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261-62 (3d Cir. 2006))).¹⁵ As such, the Court briefly assesses whether the Challenged Statute violates the dormant Commerce Clause by directly regulating interstate commerce.

Plaintiffs appear to argue that the Challenged Statute creates extraterritorial effects by regulating what information can be published on the Internet, i.e., by prohibiting the distribution of digital instructions capable of producing a 3D-firearm on the Internet. (Pls.’ Opp’n Br. 34; N.J. Stat. Ann. 2C:39-9(l).) The regulation of information published on the Internet, such as digital firearms information that is free to download, can be particularly challenging in this context. This is because, as the Second Circuit in *Dean* noted in 2003, “the [I]nternet does not recognize geographic boundaries, [and as such,] it is difficult, if not impossible, for a state to regulate [I]nternet activities without ‘projecting its legislation into other States.’” *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 334, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)). Nevertheless, *National Pork* again offers useful insight

15. Facial discrimination is a separate dormant Commerce Clause violation theory from direct regulation and extraterritorial effects. See *Instructional Sys.*, 35 F.3d at 824. “Extraterritorial discrimination,” stated conjunctively, is Plaintiffs’ creation, as this Court could find no case law using this phrase and Plaintiffs provide no case law using this phrase. (See generally Pls.’ Opp’n Br.) As such, the Court assumes that Plaintiffs allege both theories of dormant Commerce Clause violation separately and addresses both.

Appendix B

into why a State's regulation of Internet behavior within that State does not directly regulate interstate commerce. Specifically, the Supreme Court in *National Pork* sets forth the following persuasive analysis:

In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions. Environmental laws often prove decisive when businesses choose where to manufacture their goods. Add to the extraterritorial-effects list all manner of libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws, and plenty else besides. Nor, as we have seen, is this a recent development. Since the founding, States have enacted an immense mass of [i]nspection laws, quarantine laws, [and] health laws of every description that have a considerable influence on commerce outside their borders. [An] "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results.

Appendix B

Nat'l Pork, 598 U.S. at 374-75 (internal quotation marks and citations omitted). Moreover, as directly applicable to this matter, the Supreme Court in *Strassheim* noted that the dormant Commerce Clause does not, for example, prohibit one state from prosecuting citizens of another state for “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it.” *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S. Ct. 558, 55 L. Ed. 735 (1911). The Supreme Court then reaffirmed this notion in *National Pork*, emphasizing that, “absent discrimination,” the dormant Commerce Clause does not forbid states from prohibiting “the sale therein of articles which, in its judgment . . . are prejudicial to’ the interests of its citizens.” *Nat'l Pork*, 598 U.S. at 369 (quoting *Guy*, 100 U.S. at 443).

Here, Plaintiffs contend that because the Challenged Statute regulates the Internet by criminalizing the transmittal of information via the Internet to New Jersey residents, it violates the dormant Commerce Clause. First, the Supreme Court stated in *National Pork* that the dormant Commerce Clause does not prevent a state from criminalizing behavior originating in another state that might produce detrimental effects within the state. *Id.* That is precisely what is happening here. DD, a Texas corporation, published information on the Internet that New Jersey determined produced detrimental effects in the State of New Jersey. As such, New Jersey criminalized the behavior in the Challenged Statute *but only in New Jersey*. This action does not violate the dormant Commerce Clause even if it produces some modicum of extraterritorial effects.

Appendix B

Second, Plaintiffs' suggestion that any regulation of the Internet is effectively a regulation "throughout the entire Union" is not tenable. (Pls.' Opp'n Br. 34.) Web-content providers, for example, frequently control content flows from state to state and can do so by conditioning access to certain content on the presentation of payment information or by geographical filtering.¹⁶ As such, just because a state regulates certain behavior on the Internet within its borders does not necessarily establish that the state directly regulates interstate commerce by creating extraterritorial effects. For these reasons, any contention by Plaintiffs that the Challenged Statute directly regulates interstate commerce is also rejected. Accordingly, the Court finds that the Challenged Statute does not directly regulate interstate commerce and does not discriminate against out-of-state interests.

Finally, the Court briefly mentions the *Pike* balancing test. See *Brown-Forman*, 476 U.S. at 579 (finding that "[w]hen . . . a statute only has indirect effects on interstate commerce and regulates evenhandedly," courts then conduct a *Pike* balancing test (citing *Pike*, 397 U.S. at 142)). "Under that test, '[w]here [a state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Yerger v. Mass. Turnpike Auth.*, 395 F. App'x 878, 883 (3d Cir. 2010) (citing *Pike*, 397 U.S. at 142). Other than baldly asserting that "[t]he NJAG's

16. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 809-10 (2001).

Appendix B

conduct imposes burdens on interstate commerce that are clearly excessive in relation to putative local benefits,” Plaintiffs’ TAC provides no further allegations as to what burden is placed on interstate commerce and how that burden outweighs New Jersey’s interest in “preventing individuals ‘from manufacturing deadly weapons entirely outside of the state’s regulatory regime.” (Def.’s Reply Br. 14, ECF No. 185; *see generally* TAC.) As such, the Court cannot conduct the *Pike* balancing test, and Plaintiffs’ dormant Commerce Clause claim, Count Five, is dismissed without prejudice.¹⁷

E. Federal Preemption Claims (Counts Six and Seven)

Defendant next argues that the Challenged Statute is not preempted by either the AECA or CDA. (Def.’s Moving.

17. Moreover, the Court cautions Plaintiffs that if they wish to amend their dormant Commerce Clause allegations, the Supreme Court in *National Pork* clarified that “‘no clear line’ separates the *Pike* line of cases from [the Supreme Court’s] core antidiscrimination precedents.” *Nat’l Pork*, 598 U.S. at 377. To be clear, the Supreme Court held that *Pike* is only intended to be utilized where a state law does not discriminate on its face to assess whether there is nevertheless, in effect, a “discriminatory character [to] the state regulation[.]” *Id.* at 377-78. As noted by the Court above, the Challenged Statute does not discriminate either facially or implicitly against interstate commerce on the facts alleged because there is no allegation that out-of-state distributors of firearms information like DD are treated less favorably than New Jersey distributors of the same information. (*See generally* TAC.) To this end, if Plaintiffs seek to amend their dormant Commerce Clause claim, such amended claim must account for the Supreme Court’s *Pike* interpretation outlined in *National Pork*.

Appendix B

Br. 35.) “The doctrine of preemption is derived from the Supremacy Clause of Article IV of the Constitution, which provides that ‘the Laws of the United States . . . shall be the supreme Law of the Land.’” *Lupian v. Joseph Cory Holdings*, 905 F.3d 127, 131 (3d Cir. 2018) (citing U.S. CONST. art. VI). “There are three types of federal preemption: field preemption, implied conflict preemption, and . . . express preemption.” *Id.* (citation omitted). “Express preemption occurs when a federal law contains express language providing for the preemption of any conflicting state law.” *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395 (3d Cir. 2010) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)). “Implied conflict preemption occurs when it is either impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (internal quotation marks omitted) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)). Finally, field preemption “arises when a state law or regulation intrudes upon a ‘field reserved for federal regulation.’” *Id.* at 396 (quoting *United States v. Locke*, 529 U.S. 89, 111, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)).

i. AECA Preemption Analysis (Count Six)

Defendant moves to dismiss Plaintiffs’ claim that the AECA and the related ITAR preempt the Challenged Statute. (*See* Def.’s Moving Br. at 35-38.) Defendant contends that the Challenged Statute does not forbid anything that federal law authorizes and that it is possible

Appendix B

to comply both with the federal regulations applicable to Plaintiffs' digital firearms data and the Challenged Statute, which prohibits distribution in New Jersey. (*See id.*) Defendant specifically highlights that relevant agency rulemakings indicate that such federal administrative rules do not purport to displace existing federal or state law. (*See id.* at 36.) In opposition, Plaintiffs contend that "[b]y seeking to criminalize Plaintiffs' publication of matters that the State Department has expressly authorized for publication, New Jersey seeks to have its legislature take over the President's job of 'control[ling] the import and export of defense articles.' (Pls.' Opp'n Br. at 36 (citing 22 U.S.C. § 2778(a)(1)).) Plaintiffs further dispute that it is possible to comply with both federal and state law where "the federal law goes far beyond not forbidding conduct and *affirmatively licenses it.*" (*Id.* at 37 (emphasis in original).)

"The AECA regulates the export of arms, ammunition, and other military and defense technology." *Washington v. U.S. Dep't of State*, 443 F. Supp. 3d 1245, 1250 (W.D. Wa. 2020) (citing 22 U.S.C. § 2778(a)(1)), *vacated on other grounds by* 996 F.3d 552 (9th Cir. 2021). Under the AECA, "the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services." 22 U.S.C. § 2778(a)(1). The same section of the AECA authorizes the President to "promulgate regulations for the . . . export of such articles and services." *Id.* The President delegated the authority to promulgate implementing regulations to the

Appendix B

Secretary of State. *Washington*, 443 F. Supp. 3d at 1250. Those regulations, the ITAR, are administered by the Directorate of Defense Trade Controls (the “DDTC”). 22 C.F.R. § 120.1(a); *see Stagg, P.C. v. U.S. Dep’t of State*, 983 F.3d 589, 595 (2d Cir. 2020). A “list of items designated as ‘defense articles and defense services’ is identified as the” USML and appears within the ITAR. *Stagg*, 983 F.3d at 595 (citing 22 C.F.R. § 121.1).

“Under the AECA, any person ‘who engages in the business of manufacturing, exporting, or importing any’ of the items on the USML must register” with DDTC and obtain a license from the State Department. *Id.* (citing 22 U.S.C. § 2778(b)(1)(A)(i)). “The ITAR specify that ‘engaging in such a business requires only one occasion of manufacturing or exporting or temporarily importing a defense article or furnishing a defense service.’ *Id.* (citing 22 C.F.R. § 122.1(a)). “Each of the 21 categories designated as ‘defense articles or defense services’ in the USML is defined to include ‘technical data’ either ‘relating’ or ‘directly related’ to the listed articles.” *Id.* (citing 22 C.F.R. § 121.1). “[T]he term ‘technical data’ is defined to include ‘[i]nformation . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance[,] or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions[,] or documentation.’” *Id.* (quoting 22 C.F.R. § 120.10(a)(1)). “Computer software for the production of a Category I firearm or its components using a 3[D] printer (“3D gun files”), such as [CAD] files, is ‘technical data’ subject to the AECA and ITAR.” *Washington*, 433

Appendix B

F. Supp. 3d at 1251. And “[s]ince about 2013, it had been the government’s position that posting [3D] gun files on the [I]nternet was an ‘export’ subject to the AECA and ITAR.” *Id.*

Relevant here, on January 23, 2020, the State Department and Commerce Department published two separate but related final rules affecting regulation of the technical data at issue in this action under the AECA. First, the State Department published a final rule revising the USML. *See* 85 Fed. Reg. 3819 (Jan. 23, 2020) (“State Rule”). The State Rule, among other things, removed all non-automatic firearms up to .50 caliber and related technical data from Category I of the USML. *See id.* at 3823. Second, a companion final rule published by the Commerce Department confirmed that such technical data would still be controlled on the Commerce Control List (“CCL”) of the Export Administration Regulations (“EAR”). *See* 85 Fed. Reg. 4136 (Jan. 23, 2020) (“Commerce Rule”). Pursuant to the EAR, notwithstanding the Commerce Department’s jurisdictional exemption for “published” technology or software, it retains jurisdiction over:

‘[S]oftware’ or ‘technology’ for the production of a firearm, or firearm frame or receiver, . . . that is made available by posting on the [I]nternet in an electronic format . . . and is ready for insertion into a computer numerically controlled machine tool, additive manufacturing equipment, or any other equipment that makes use of the ‘software’ or ‘technology’ to produce

Appendix B

the firearm frame or receiver or complete firearm.

15 C.F.R. § 734.7(c).

Against this federal regulatory framework, Plaintiffs claim that Defendant's use of the Challenged Statute to stop Plaintiffs' publication of digital firearms data "is preempted by the federal government's exclusive authority over foreign affairs." (Pls.' Opp'n Br. at 35; *see* TAC ¶¶ 224-26.) Plaintiffs also emphasize that, prior to the State Rule and the Commerce Rule, the State Department issued Plaintiffs a license to publish the firearms data at issue. (*See* TAC ¶¶ 75-82, 224.) Aside from such broad and conclusory assertions, however, nothing in the TAC or opposition to Defendant's Motion demonstrates federal preemption of the Challenged Statute.

First, the Challenged Statute is not expressly preempted by the relevant federal statutory provisions and regulations as the regulations do not "contain[] express language providing for the preemption of any conflicting state law." *Kurns*, 620 F.3d at 395. Nor do Plaintiffs argue as much.

Second, the Challenged Statute and the federal framework regulate distinct conduct, and thus there is no basis to find the Challenged Statute invalid under a field preemption theory. While Plaintiffs' basic contention that the federal government retains exclusive authority over foreign affairs is correct, it hardly follows that states are therefore unable to regulate goods, services, or data

Appendix B

available within their borders via the Internet. Field preemption “exists if ‘federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.’” *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 269 (3d Cir. 2004) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

Here, the State Rule explicitly contemplates supplementary regulation of domestic distribution of defense articles, including technical data related to firearms. Specifically, the State Rule provides that “[n]either the AECA nor ITAR expressly provide the Department with authority to regulate the distribution of technical data in the United States to U.S. persons.” 85 Fed. Reg. 3819, 3822. The State Rule further states that “the AECA does not provide the Department with the authority to . . . regulate the domestic distribution among U.S. persons of any defense article,” and that “[d]omestic activities that do not involve release to foreign persons are generally left to other federal agencies—and the states—to regulate.” 85 Fed. Reg. 3819, 3822-23. Similarly, the Commerce Rule states that “the domestic transfer of commodities is outside” the Commerce Department’s jurisdiction and that “nothing in this final rule affects existing federal or state laws that pertain to the manufacture, possession, use, or commercial sale of firearms.” 85 Fed. Reg. 4136, 4141. Because the Challenged Statute merely supplements the federal regulatory framework, New Jersey’s prohibition of Plaintiffs’ technical data within its borders absent proper licensing does not intrude upon the federal government’s

Appendix B

authority over the import and export of defense articles, including via the Internet, under the AECA.¹⁸ Indeed, as the federal government acknowledges, there is ample room in the legislative field for state regulation.

Third, the Challenged Statute does not prevent Plaintiffs' compliance with the relevant federal law. Conflict preemption exists "where it is impossible for a private party to comply with both state and federal law" or "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)). "The

18. The Commerce Rule notes that "[t]he release of controlled technology in the United States would only be regulated to the extent it would constitute a deemed export (i.e., release to a foreign person)." 85 Fed. Reg. 4136, 4141. The Commerce Rule further explains that, in general, the Commerce Department maintains "controls over the 3D printing of firearms when such software and technology is posted on the [I]nternet." 85 Fed. Reg. 4136, 4142. The fact of federal controls in this area, however, does not prevent supplementary state regulation providing for further restriction applicable only to distribution within state borders. Mere regulatory overlap does not imply field preemption. *See Farina v. Nokia Inc.*, 625 F.3d 97, 116 (3d Cir. 2010) (explaining that the "presumption against pre-emption" "applies with particular force in fields within the police power of the state," including "the field of public health and welfare" and that "the presence of federal regulation, however longstanding, does not by itself defeat the application of the presumption" (citing *Wyeth v. Levine*, 555 U.S. 555, 565 n.3, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009))).

Appendix B

mere fact of ‘tension’ between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.” *Id.* (quoting *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)).

Here, Plaintiffs are obligated to comply with the licensing requirements of ITAR and EAR with respect to the export of technical data and the Challenged Statute, which applies only to distribution within New Jersey’s borders. *See* N.J. Ann. Stat. § 2C:39-9(l)(2). Plaintiffs’ only particularized argument as to any conflict between these federal and state regimes is that they were allegedly previously granted a license for “unlimited distribution” of technical firearm data by the State Department as part of a settlement agreement related to a separate litigation and that the Challenged Statute forbids conduct that was approved by the license. (*See* TAC ¶¶ 77-79, 224-26.) But the existence of such a license is refuted by Plaintiffs’ own allegations. (*See id.* ¶¶ 83-119.) In fact, Plaintiffs allege that the State Department ultimately “disavowed” and “refused to supply” such a license. (*See id.* ¶¶ 98-106.) Moreover, as described above and as Defendant highlights, the State Department is no longer responsible for the licensing procedures that apply to the technical data, or the majority of technical data, at issue in this matter. (*See* Def.’s Moving Br. at 32 n.9.) Notably, rather than establishing the Challenged Statute as an obstacle to the federal scheme, Plaintiffs’ own allegations appear to demonstrate that dual compliance proves no issue, as Plaintiffs admit that their publications of technical data

Appendix B

from March 2020 to present were not made available to persons outside the United States and were similarly made unavailable to persons in New Jersey who lack a firearms license. (*See* TAC ¶¶ 52-53.) Plaintiffs' TAC, therefore, fails to set forth any convincing basis for conflict preemption.

In sum, Plaintiffs' AECA preemption claim is less an argument about preemption than it is an apparent grievance with the State Department's supposed repudiation of a previous settlement agreement. In opposing Defendant's Motion, Plaintiffs offer no reasoning or authority supporting the conclusion that the federal regulatory scheme invalidates New Jersey's efforts to preclude illicit distribution of technical firearms data within its borders. As such, Defendant's Motion is granted as to Count Six, and Plaintiffs' AECA preemption claim is dismissed without prejudice.

ii. CDA Preemption Analysis (Count Seven)

Plaintiffs also allege that § 230(c)(1) of the CDA expressly preempts the Challenged Statute. (*See* Pls.' Opp'n Br. 37-38 (citing 47 U.S.C. § 230(e)(3)).) Defendant moves to dismiss arguing that § 230(c)(1) only applies if the relevant content at issue did not originate from the website operator itself, i.e., did not originate from DD. (Def.'s Moving Br. 36-37.) Defendant then argues that the plain text of the Challenged Statute "applies to the actor's *own* distribution of printable gun files, and is silent regarding" a website's accountability for the posts of another. (*Id.* at 37.) In opposition, Plaintiffs argue that the Challenged

Appendix B

Statute is preempted because it does in fact criminalize the republishing of digital firearms information provided by another information content provider. (Pls.' Opp'n Br. 38.)

The CDA provides, in relevant part, that “[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Essentially, this provision “bars attempts to treat websites as publishers or speakers of content posted by others.” *Hepp v. Facebook*, 14 F.4th 204, 209 (3d Cir. 2021); *see also Backpage.com, LLC v. Hoffman*, No. 13-03952, 2013 U.S. Dist. LEXIS 119811, 2013 WL 4502097, at *6 (D.N.J. Aug. 20, 2013) (“[W]hat matters is not the name of the cause of action . . . [but] whether [it] inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009))). “The CDA reflects Congress’s decision not to treat websites and other providers of interactive computer services like . . . information providers, such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing defamatory material written by others.” *Obado v. Magedson*, 612 F. App’x 90, 93 (3d Cir. 2015) (citing *Green v. Am. Online (AOL)*, 318 F.3d, 465, 471 (3d Cir. 2003)). The CDA expressly preempts any state or local law that is inconsistent with any provision of the CDA. *See* 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

Appendix B

The question here is whether enforcing the Challenged Statute against DD for publication of digital firearms information to its own website, DEFCAD, would “treat” DD as the “publisher or speaker” of that content. *See Backpage.com*, 2013 U.S. Dist. LEXIS 119811, 2013 WL 4502097, at *6 (citation omitted). The parties do not dispute that DD is an interactive computer service as defined in 47 U.S.C. § 230(f).¹⁹ The TAC alleges that DD is a provider of an “interactive computer service,” as defined in § 230(f), because it is a provider and user of an interactive online service at DEFCAD. (TAC ¶ 230.) Critically, however, “[b]y its terms, § 230 provides immunity [only] to [a party] as a publisher or speaker of information *originating from another information content provider*.” *Green*, 318 F.3d at 471 (emphasis added).²⁰ In other words, § 230 only grants immunity to a computer service provider from liability “that would hold a service provider liable for its exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone, or alter content” originating from an entity other than itself. *Id.* (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

19. Section 230(f)(2) defines “interactive computer service” to mean “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f).

20. An “information content provider” is defined under § 230(f)(3) to mean “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f).

Appendix B

Here, the Court finds that § 230(c)(1) does not apply to the instant case. As plead in the TAC, the content at issue in this case is the digital firearms information that DD published, from 2012 through 2020, to its own website, DEFCAD. (TAC ¶¶ 41, 43, 46, 49, 50, 55, 56.) Indeed, the basis for DD’s liability under the Challenged Statute is DD’s own posting of information onto its own website, not any “actions quintessentially related to a publisher’s role” that would implicate protection under § 230. *Green*, 318 F.3d at 471. Thus, because the Challenged Statute does not seek to treat DD as the publisher of a third party’s statements, CDA protection under § 230 does not apply.²¹

21. In their opposition brief, Plaintiffs focus their arguments on “Plaintiffs’ right to *republish* digital firearms information that was provided by other people engaged in the open-source development process.” (Pls.’ Opp’n Br. 38 (emphasis in original).) Specifically, they allege that the Challenged Statute criminalizes the distribution of information regardless of whether information was republished. (*Id.*) For instance, the Challenged Statute could penalize DD if it were to republish digital firearms information from a third party. This argument is unavailing, however, given the TAC fails to contain any allegations of republishing. The only allegation with respect to republishing is that “many recipients of [DD]’s digital firearms information have persistently republished those same files online *via their own websites*,” not on DD’s own website. (TAC ¶ 56 (emphasis added).) The TAC does not allege any facts as to whether DD even allows for other information content providers, besides itself, to post or host content onto its website. Nor does the TAC allege any specific incidents in which DD republished a third party’s digital firearms information or even that such republishing would be subject to penalty under the Challenged Statute. As such, Plaintiffs’ alleged increased risk of future liability under the Challenged Statute based on republishing is a hypothetical and speculative harm that is insufficient to sustain their CDA preemption claim. *See*

Appendix B

Accordingly, the Court grants Defendant's Motion to Dismiss with respect to Plaintiffs' CDA preemption claim and dismisses Count Seven without prejudice.

F. Tortious Interference Claims (Counts Eight and Nine)

Finally, Plaintiffs bring two state-law tortious interference claims. (TAC ¶¶ 236-46.) Sovereign immunity, however, protects Defendant from both Counts.

The Eleventh Amendment “grants a state immunity” from being sued by private parties in federal court. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) (citation omitted); *see also MCI Telecomms. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 503 (3d Cir. 2001) (collecting cases). “This immunity extends to state agencies and departments.” *MCI Telecomms.*, 271 F.3d at 503. “[A] suit against a state official in his or her official capacity is not a suit against the official[,] but rather is a suit against the official's office.” *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985)). A state, however, “may waive its Eleventh Amendment immunity” by either voluntarily invoking federal jurisdiction when bringing a suit or by making a clear declaration that it intends to submit itself to federal jurisdiction. *Allen v. N.J. State Police*, 974

Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011) (stating that “allegations of ‘possible future injury’ are not sufficient to satisfy Article III” standing).

Appendix B

F.3d 497, 505 (3d Cir. 2020) (citing *MCI Telecomms.*, 271 F.3d at 504). “Waiver of Eleventh Amendment immunity will be found ‘only where the state’s consent is stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” *Id.* (citing *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark*, 344 F.3d 335, 345 (3d Cir. 2003)).

Here, Plaintiffs are private actors bringing this federal lawsuit against the NJAG for actions taken in his official capacity. Plaintiffs seek only declaratory and injunctive relief, in addition to attorney’s fees. (TAC ¶¶ 246, 250.) Typically, where Plaintiffs seek injunctive relief against state officials to end ongoing violations of federal law, such claims are not barred by the Eleventh Amendment. *MCI Telecomms.*, 271 F.3d at 513-14 (citations omitted). Importantly, however, this Eleventh Amendment exception does not apply where, as here, a plaintiff brings state law claims against a state actor. *King v. Christie*, 981 F. Supp. 2d 296, 310 n.12 (D.N.J. 2013) (finding a plaintiff “may not bring state law claims . . . against the State regardless [of] the type of relief it seeks” (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984))). As such, in order for Plaintiffs’ state law claims to proceed at all, Plaintiffs must show that Defendant waived sovereign immunity.

Plaintiffs first contend that Defendant waived immunity by “voluntarily proceeding in federal court against the Plaintiffs” in the First Washington Case. (Pls.’

Appendix B

Opp'n Br. 39 (citing *Lapides*, 535 U.S. at 619).) In *Lapides*, the Supreme Court held in the context of a defendant's removal of a matter to federal court from state court that "a State's voluntary appearance in federal court amount[s] to a waiver of its Eleventh Amendment immunity." 535 U.S. at 619 (citing *Clark v. Barnard*, 108 U.S. 436, 447, 2 S. Ct. 878, 27 L. Ed. 780 (1883)). Critically, Defendant neither filed this action nor voluntarily appeared in federal court by removing this action from state court like the defendant in *Lapides*. Plaintiffs were the only party that decided to litigate this matter voluntarily in a federal court where they chose to file their claims against the NJAG in a Texas federal court. (Compl., ECF No. 1.) Further, the Court is unpersuaded that *Lapides* stands for the proposition that Defendant's filing of the First Washington Case in a separate, but factually adjacent, matter constitutes a waiver of sovereign immunity in a Texas/New Jersey matter that Defendant did not voluntarily file or remove to federal court. See *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 198 (3d Cir. 2008) (holding that in light of *Lapides*, a "State's ability to raise sovereign immunity when it is involuntarily brought into federal court[]" is not affected). Plaintiffs certainly cite no case law that leads this Court to make such a conclusion. (See Pls.' Opp'n Br. 39.) As such, Plaintiffs fail to plausibly allege that Defendant waived sovereign immunity and therefore Plaintiffs' state law claims cannot succeed against Defendant. Accordingly, Counts Eight and Nine are dismissed with prejudice.

Appendix B

IV. CONCLUSION

For the reasons discussed in this Opinion, Defendant's motion to dismiss is granted. Counts One through Seven are dismissed without prejudice. Counts Eight and Nine are dismissed with prejudice. The Court will issue an Order consistent with this Opinion.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

**APPENDIX C — ORDER OF THE UNITED STATES
DISTRICT COURT DISTRICT OF NEW JERSEY,
FILED SEPTEMBER 29, 2023**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 21-9867 (MAS) (TJB)

DEFENSE DISTRIBUTED *et al.*,

Plaintiffs,

v.

MATTHEW J. PLATKIN, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Defendant.

Filed September 29, 2023

ORDER

This matter comes before the Court upon Defendant Matthew J. Platkin, the Attorney General of New Jersey's ("Defendant") Motion to Dismiss Defense Distributed and Second Amendment Foundation, Inc.'s ("Plaintiffs") Third Amended Complaint. (ECF No. 181.) Plaintiffs opposed (ECF No. 184), and Defendant replied (ECF No. 185). For the reasons outlined in the Court's Opinion,

100a

Appendix C

IT IS on this 29th day of September 2023, **ORDERED**
that:

1. Defendant's motion to dismiss is **GRANTED**.
2. Counts One, Two, Three, Four, Five, Six, and Seven are **DISMISSED WITHOUT PREJUDICE**.
3. Counts Eight and Nine are **DISMISSED WITH PREJUDICE**.
4. Plaintiffs will be granted 30 days from the filing of this Order on the docket to file a fourth amended complaint.

/s/ Michael A. Shipp

Michael A. Shipp

UNITED STATES DISTRICT JUDGE

101a

**APPENDIX D — SUR PETITION FOR
REHEARING OF THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT,
FILED APRIL 10, 2026**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3058

DEFENSE DISTRIBUTED; SECOND
AMENDMENT FOUNDATION, INC.,

Appellants,

v.

ATTORNEY GENERAL NEW JERSEY

(3:21-cv-09867)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, HARDIMAN,
SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, PHIPPS, FREEMAN,
MONTGOMERY-REEVES, CHUNG, BOVE,
MASCOTT, *SCIRICA, and *RENDELL, Circuit Judges

The petition for rehearing filed by Appellants Defense
Distributed and Second Amendment Foundation Inc. in

* Judge Scirica and Judge Rendell votes are limited to panel
rehearing only not having voted for rehearing, the petition for
rehearing by the panel and the Court en banc, is denied.

Appendix D

the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Cheryl Ann Krause
Circuit Judge

Dated: April 10, 2026
Amr/cc: All counsel of record

**APPENDIX E — PLAINTIFFS' SECOND
AMENDED COMPLAINT OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF TEXAS, AUSTIN DIVISION,
FILED NOVEMBER 10, 2020**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. 1:18-CV-637

DEFENSE DISTRIBUTED AND SECOND
AMENDMENT FOUNDATION, INC.,

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,

and

Appendix E

GURBIR GREWAL, ATTORNEY GENERAL OF
THE STATE OF NEW JERSEY,

Defendants.

PLAINTIFFS' SECOND AMENDED COMPLAINT

[Tables Intentionally Omitted]

I. Introduction

1. This case concerns extraordinarily important questions of free speech regarding the First Amendment right to speak about the Second Amendment. Defense Distributed and the Second Amendment Foundation are peaceful, law-abiding organizations committed to preserving, protecting, and promoting America's individual right to keep and bear Arms in both traditional and modern contexts. At stake now is the modern right to speak about the Second Amendment by sharing computer files with digital firearms information. Even though federal free speech laws protect this freedom with full force, both the United States Department of State and the New Jersey Attorney General are breaking the law multiple times over with unprecedented acts of censorship.

2. The State Department can never abridge the freedom of speech—especially where, as here, the State Department made a legally-enforceable contract to protect Defense Distributed and the Second Amendment Foundation's right to engage in the speech at issue by performing a series of administrative obligations. But

Appendix E

instead of performing those critical protective obligations, the State Department violated administrative law in failing to comply. Hence, Defense Distributed and the Second Amendment Foundation sue the State Department to halt this wrongdoing and obtain remedies due to them under the Administrative Procedure Act and other federal law.

3. Meanwhile, New Jersey's Attorney General is abridging Defense Distributed and the Second Amendment Foundation's freedom of speech as well. He denies the right to share digital firearms information because he cannot stand to let people speak out in favor of the Second Amendment. Through a torrent of civil and criminal enforcement actions, Grewal has punished and threatens to continue punishing Defense Distributed and the Second Amendment Foundation's members for exercising their right to speak freely about firearms. Hence, Defense Distributed and the Second Amendment Foundation sue Grewal to halt his censorship under 42 U.S.C. § 1983.

II. Parties**A. Defense Distributed**

4. Plaintiff Defense Distributed is a private business corporation that is headquartered and has its principal place of business in Austin, Texas. It did so at all relevant times in the past.

Appendix E

5. Currently and at all relevant times in the past, most of Defense Distributed's activities, including research, design, development, manufacturing, and publishing occurred in and around Austin.

6. Currently and at all relevant times in the past, all of Defense Distributed's employees lived in or near Austin.

7. Currently and at all relevant times in the past, a public library that displayed Defense Distributed's publications from time to time has been in Austin, Texas.

8. Cody Wilson founded Defense Distributed.

9. Cody Wilson serves as Defense Distributed's Director.

B. Second Amendment Foundation, Inc.

10. Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of the State of Washington. SAF's principal place of business is in Bellevue, Washington.

11. SAF promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution's right to privately own and possess firearms and the consequences of gun control. Some SAF members seek to receive the computer files that Defense Distributed seeks to publish, and some SAF members seek to share their own computer files

Appendix E

by utilizing Defense Distributed's facilities. These SAF members seek to exchange this information because of its technical, scientific, artistic, and political value.

12. SAF brings this action on behalf of itself. SAF also brings this action on behalf of its members because at least one of its members would have standing to sue in his own right, the interests the suit seeks to vindicate are germane to the SAF's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

C. The State Department

13. Defendant the United States Department of State is, and was at all relevant times, an executive department of the United States subject to the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 551(1). The United States Department of State is located at 2201 C Street, Northwest, Washington, District of Columbia 20520.

14. Defendant Michael R. Pompeo is United States Secretary of State. He is sued in his official capacity. In that capacity, he oversees the United States Department of State, its Bureau of Political Military Affairs, and its Directorate of Defense Trade Controls. He is responsible for the federal conduct that is the subject of this action and for the related acts and omissions alleged herein.

15. Defendant Directorate of Defense Trade Controls is, and was at all relevant times, a component of the United States Department of State's Bureau of

Appendix E

Political Military Affairs subject to the APA. *See* 5 U.S.C. § 551(1). The Directorate of Defense Trade Controls is located at SA-1 Columbia Plaza, 2401 E Street Northwest, Washington, District of Columbia 20037.

16. Defendant Mike Miller is the United States Department of State's Deputy Assistant Secretary of State for Defense Trade in the Bureau of Political-Military Affairs (PM). He is sued in his official capacity. In that capacity, he is responsible for the federal conduct that is the subject of this action and for the related acts and omissions alleged herein.

17. Defendant Sarah Heidema is the Director of the Office of Defense Trade Controls Policy within the Directorate of Defense Trade Controls. She is sued in her official capacity. In that capacity, she is responsible for the conduct that is the subject of this action and for the related acts and omissions alleged herein.

D. Gurbir Grewal

18. Defendant Gurbir Grewal is the New Jersey Attorney General. In that capacity, he is responsible for all of the New Jersey civil and criminal enforcement efforts at issue. He is sued for declaratory and injunctive relief in his official capacity. Grewal's counsel expressly consented to the Plaintiffs' submission of a second amended complaint updating the claims against him.

*Appendix E***III. Subject Matter Jurisdiction**

19. 28 U.S.C. § 1331 supplies the Court with original federal question jurisdiction over this action because it arises under the Constitution and laws of the United States.

20. 28 U.S.C. § 1332 supplies the Court with original diversity jurisdiction over this action because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States.

21. 28 U.S.C. § 1343 supplies the Court with original federal question jurisdiction over this action because it is an action to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution and statutes providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

22. 28 U.S.C. § 1367 supplies the Court with supplemental subject-matter jurisdiction over the action's state-law claims because the state-law claims are so related to claims in the action within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. The action's state-law claims do not raise novel or complex issues of state law. The action's state-law claims do not substantially predominate over the claim or claims over which the district court has original jurisdiction.

Appendix E

23. This action seeks declaratory, injunctive, and other relief pursuant to the Constitution of the United States of America, 5 U.S.C. § 702, 5 U.S.C. § 705, 5 U.S.C. § 706, 28 U.S.C. § 1651(a), 28 U.S.C. § 2201, 28 U.S.C. § 2202, 42 U.S.C. § 1983, and 42 U.S.C. § 1988.

24. There exists an active, justiciable controversy amongst the parties about whether the State Department complied with the Settlement Agreement attached to this complaint as Exhibit A. Declaratory relief will resolve this controversy and eliminate the burden imposed on Plaintiffs' stemming therefrom.

25. There exists an active, justiciable controversy amongst the parties about what the Settlement Agreement attached to this complaint as Exhibit A still requires of the State Department. Declaratory relief will resolve this controversy and eliminate the burden imposed on Plaintiffs stemming therefrom.

26. There exists an active, justiciable controversy amongst the parties about whether Grewal's civil and criminal censorship actions violate Defense Distributed and SAF's rights under the Constitution and other federal laws. Declaratory relief will resolve this controversy and eliminate the burden imposed on Plaintiffs stemming therefrom.

IV. Venue

27. This Court constitutes a proper venue for this action because a substantial part of the events or omissions

Appendix E

giving rise to the claims occurred here. *See* 28 U.S.C. § 1391(e)(1)(B).

28. This Court constitutes a proper venue for this action because a substantial part of the property that is subject of the action is situated here. *See* 28 U.S.C. § 1391(b)(2).

29. This Court constitutes a proper venue for this action because this is an action against officers and agencies of the United States, a plaintiff resides in this judicial district, and a substantial part of the events or omissions giving rise to the claims occurred here. *See* 28 U.S.C. § 1391(e)(1)(B).

30. This Court constitutes a proper venue for this action because this is an action against officers and agencies of the United States, a plaintiff resides in this judicial district, and a substantial part of the property that is subject of the action is situated here. *See* 28 U.S.C. § 1391(e)(1)(C).

31. This Court constitutes a proper venue for this action because this is an action against officers and agencies of the United States, a plaintiff resides in this judicial district, and no real property is involved in the action. *See* 28 U.S.C. § 1391(e)(1)(C).

32. This action arises from actions that the State Department took and intends to take against Defense Distributed's activities in Austin, Texas and Defense Distributed's property in Austin, Texas.

Appendix E

33. This action arises from actions that Grewal took and intends to take against Defense Distributed's activities in Austin, Texas and Defense Distributed's property in Austin, Texas. *See Def. Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020).

V. Permissive Joinder

34. Grewal and the State Department can be permissively joined as defendants in this action because the claims against them are with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences. *See* Fed. R. Civ. P. 20(a)(2)(A). The common transactions and/or occurrences include but are not limited to the execution, temporary fulfillment, temporary enjoyment, and violation of the Settlement Agreement described *infra* Part V.E-H.

35. Grewal and the State Department can be permissively joined as defendants in this action because questions of law and/or fact common to all defendants will arise in the action. *See* Fed. R. Civ. P. 20(a)(2)(B). The common questions include but are not limited to (1) whether the publications at issue qualify speech for purposes of federal free speech law, (2) if so, which species of constitutional scrutiny applies to government actions implicating that speech, and (3) whether anything about the nature of the speech warrants elevated or lowered scrutiny.

VI. Facts**A. Digital Firearms Information is Speech.**

36. This action concerns digital firearms information. Digital firearms information is “digital” because it exists in the form of coded computer files, as opposed to analog media like printed books. It is “information” because it conveys knowledge without advocating action. It pertains to both entire firearms and individual firearm components, and addresses their physical properties, production methods, and uses.

37. Digital firearms information exists in a wide variety of computer file formats. Common formats include portable document format (.pdf) files, DWG (.dwg) files, Standard for the Exchange of Product Data (“STEP”) (.stp) files, stereolithography (.stl) files, Initial Graphics Exchange Specification (.igs) files, SoLiDworks PaRT (.sldprt) files, and SketchUp (.skp) files, as well as plain text (.txt) files with notes, instructions, and comments.

38. Digital firearms information includes, but is not limited to, what authorities refer to as “Computer Aided Design files” or “CAD files.” *See, e.g.,* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020). CAD files are used primarily for abstract design. Users with the requisite computer hardware, software, and expertise can employ CAD files to construct and manipulate complex

Appendix E

two- and three-dimensional digital models of physical objects. These models serve a wide variety of important purposes apart from object fabrication. Examples include the computerized study of object properties, rendition of object images for product visualization, and parametric modeling of object families. According to authorities, CAD files are not ready for insertion into object-producing equipment such as computer numerically controlled machine tools and additive manufacturing equipment (e.g., 3D printers). *See, e.g., id.*

39. Digital firearms information also includes, but is not limited to, what authorities refer to as “Computer Aided Manufacturing files” or “CAM files.” *See, e.g.,* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020). Like CAD files, CAM files can be used to construct and manipulate the digital two- and three-dimensional models of physical objects that serve design purposes apart from production. According to authorities, unlike CAD files, CAM files are ready for insertion into object-producing equipment such as computer numerically controlled machine tools and additive manufacturing equipment (*e.g.*, 3D printers). *See, e.g., id.*

40. With respect to 3D-printing processes in particular, CAD files and CAM files do not produce anything automatically. They are not functional software. They do not self-execute. They are mere information stores. To fabricate an object as designed in a CAD or

Appendix E

CAM file, a user must know how and choose to orchestrate a process involving substantial additional software (to interpret and implement the files into the motions of a 3D print head), substantial additional hardware (e.g., the computer running the software, the 3D printer), substantial physical labor, substantial amounts of time, and the requisite raw materials.

41. The physical laws governing 3D-printer fabrication processes apply to all objects, including firearms. Even with a perfectly accurate set of digital firearms information, the most powerful software, and a state-of-the-art 3D printer, the digital model of a firearm component does not fabricate the component on its own. Firearm component fabrication is not an automatic process. It occurs only if and when a person chooses to perform a complex series of actions entailing considered volition and judgment, such as adapting and tailoring the design, selecting suitable component materials, choosing an effective manufacturing process, and opting to personally complete an extensive set of fabrication steps with the requisite software, hardware, and raw materials.

B. Defense Distributed's Digital Firearms Information Publications.

42. Defense Distributed exists to promote the Second Amendment's individual right to keep and bear Arms. To that end, Defense Distributed has published, is publishing, and intends to continue publishing digital firearms information to the American public.

Appendix E

43. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing is an important expression of technical, scientific, artistic, and political matter. Each and every computer file at issue has these values in the abstract, apart from any application that the information's recipient might choose to devote it to. Akin to blueprints, each computer file's sole purpose is to supply information in the abstract. It is constitutionally protected speech in every respect.

44. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing includes, but is not limited to, what authorities refer to as "Computer Aided Design files" or "CAD files." *See, e.g.*, Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020).

45. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing includes, but is not limited to, what authorities refer to as "Computer Aided Manufacturing files" or "CAM files." *See, e.g., id.*

46. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing includes, but is not limited to, non-CAD and non-CAM files such as plain text (.txt) files with notes, instructions, and comments.

Appendix E

47. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing pertains to both entire firearms and to individual firearm components. A representative example of the digital firearms information that Defense Distributed has published concerns the single-shot pistol known as the “Liberator.”

48. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing does not and is not intended to advocate action. It especially does not advocate or intend to advocate any imminent action.

49. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing does not and is not intended to incite action. It especially does not incite or intend to incite any imminent action.

50. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing does not and is not intended to produce action. It especially does not produce or intend to produce any imminent action.

51. None of the digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing involves “imminent” fabrication. The 3D-printing technologies at issue necessarily require a user to knowingly apply deliberate, focused will over the course of an extended period of time to fabricate an object.

Appendix E

52. Defcad.com (hereinafter “DEFCAD”) is a website for which Defense Distributed is and at all relevant times has been responsible. Via DEFCAD, Defense Distributed has published, republished, and facilitated the distribution of a wide variety of digital firearms information.

1. Defense Distributed’s 2012–2013 Publications.

53. From approximately December 2012 to May 2013, Defense Distributed published a substantial set of computer files with digital firearms information to DEFCAD by letting any site visitor download them directly for free. The computer files with digital firearms information published via DEFCAD during this period included the following:

- (a) files concerning a single-shot firearm known as the “Liberator”;
- (b) files concerning a firearm receiver for AR-15 rifles;
- (c) files concerning a magazine for AR-15 rifles;
- (d) stereolithography (.stl) files about firearm components;
- (e) Initial Graphics Exchange Specification (.igs) files about firearm components;

Appendix E

- (f) SoLiDworks PaRT (.sldprt) files about firearm components;
- (g) SketchUp (.skp) files about firearm components;
- (h) Standard for the Exchange of Product Data (“STEP”) (.stp) files about firearm components;
- (i) diagrams of firearm components;
- (j) renderings;
- (k) “read me” plain text files about firearm assembly methods;
- (l) “read me” plain text files about the National Firearms Act and the Undetectable Firearms Act; and
- (m) software licenses.

54. The computer files that Defense Distributed published to DEFCAD during this period were downloaded millions of times.

2. Defense Distributed’s July 2018 Publications.

55. From the evening of July 27, 2018 until the afternoon of July 31, 2018, Defense Distributed published a substantial set of computer files with digital firearms information to DEFCAD by letting any site visitor

Appendix E

download them directly for free. The State Department provided advance approval of these publications. The computer files with digital firearms information so published via DEFCAD during this period included the following:

- (a) files concerning a single-shot firearm known as the “Liberator”;
- (b) files concerning an assembly of the AR-15 rifle and magazine;
- (c) files concerning an assembly of the AKM rifle and magazine;
- (d) stereolithography (.stl) files about firearm components;
- (e) Initial Graphics Exchange Specification (.igs) files about firearm components;
- (f) SoLiDworks PaRT (.sldprt) files about firearm components;
- (g) SketchUp (.skp) files about firearm components;
- (h) Standard for the Exchange of Product Data (“STEP”) (.stp) files about firearm components;
- (i) diagrams of firearm components;
- (j) renderings;

Appendix E

- (k) NC files concerning fire control pocket milling;
- (l) “read me” plain text files about firearm assembly methods;
- (m) “read me” plain text files about the National Firearms Act and the Undetectable Firearms Act; and
- (n) software licenses.

56. The computer files that Defense Distributed published to DEFCAD during this period were downloaded hundreds of thousands of times.

57. During this period, Defense Distributed also published the same computer files with digital firearms information at a brick-and-mortar public library in Austin, Texas by hosting the computer files in formats that patrons could access via computer workstations.

3. Defense Distributed’s August–November 2018 Publications.

58. From approximately August 2018 to November 2018, Defense Distributed distributed a substantial set of computer files with digital firearms information via the mail by making its computer files available for shipment on physical storage devices. Defense Distributed did so by using an ecommerce platform on DEFCAD to facilitate the transaction and using the U.S. Postal Service as its means of delivering the information. After customers

Appendix E

entered an order using DEFCAD's online ecommerce platform, Defense Distributed put the information on a USB drive or SD card and mailed the drive or card to customers via the U.S. Postal Service.

59. During this period, Defense Distributed also offered and advertised its mailed distribution of digital firearms information to potential recipients. These efforts included advertisements and offers on DEFCAD itself, participation in trade shows, and e-mail advertisements.

60. For anyone dealing with digital firearms information, the postal mail alternative to internet publication is not an adequate substitute. Internet communication of and about Defense Distributed's digital firearms information is essential for many reasons. Moreover, internet communication is important because it is the *only* way to ensure open source development and commitment to the public domain/ placement outside the bounds of intellectual property strictures.

4. Defense Distributed's 2020-Present Publications.

61. From March 27, 2020, to present, Defense Distributed published a substantial set of computer files with digital firearms information via DEFCAD. The computer files with digital firearms information published via DEFCAD during this period include original and legacy firearms models, CAD data, CAM data, blueprints and drawings.

Appendix E

62. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did not let DEFCAD visitors download files freely. In this publication period, Defense Distributed used DEFCAD to facilitate secure file transfer via electronic transmissions that comply with current federal law by, *inter alia*, utilizing secure end-to-end encryption.

63. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did not let DEFCAD visitors access the files at issue without any screening. In this publication period, Defense Distributed's screening procedures deemed certain DEFCAD visitors ineligible for file distribution.

64. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did not let DEFCAD make files available to persons outside the United States.

65. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did *not* make its files available to residents of and persons in the State of New Jersey who lack a federal firearms license.

66. As compared to Defense Distributed's prior methods of publication on DEFCAD, Defense Distributed's latest method of publication on DEFCAD substantially burdens Defense Distributed's exercise of free speech and would not be utilized but for the wrongful actions of the State Department and Grewal.

Appendix E

67. Currently, Defense Distributed continues to publish a substantial set of computer files with digital firearms information via DEFCAD in the manner that it has done so since March 27, 2020. The number of files published in this manner to date is at least 16,354.

5. Published files will always remain online.

68. The computer files with digital firearms information that Defense Distributed published in the past will always be available on the internet, regardless of whether or not Defense Distributed itself continues to publish them. Without any coordination, many recipients of Defense Distributed's digital firearms information have persistently republished those same files online via their own websites. The independently-republished versions of Defense Distributed's files are not hidden in dark or remote recesses of the internet. Simple Google searches yield the republished Defense Distributed files with ease.

6. Defense Distributed's Future Publications.

69. To the extent that and as soon as it is legal to do so, Defense Distributed currently intends to publish the following computer files with digital firearms information online at DEFCAD by letting any site visitor download them directly for free:

- (a) The computer files that Defense Distributed published online via DEFCAD from December 2012 to May 2013. These include CAD files, CAM files, and non-CAD and non-CAM files.

Appendix E

- (b) The computer files that Defense Distributed published online via DEF CAD from July 27, 2018, to July 31, 2018. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (c) The computer files that Defense Distributed published via the mail from late August 2018 through early November 2018. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (d) The computer files that Defense Distributed published online via DEF CAD from March 27, 2020, to present. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (e) Computer files authored by Defense Distributed that Defense Distributed has not published before. These include CAD files, CAM files, and computer files with other digital firearms information.

C. The State Department’s International Traffic in Arms Regulations.

70. The Arms Export Control Act of 1976, 22 U.S.C. ch. 22 (the “AECA”), addresses the President’s authority to control the import and export of defense articles and defense services.

71. The International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130 (“ITAR”), constitute AECA’s primary implementing regulations.

Appendix E

72. The State Department administers the AECA and the ITAR. Within the State Department, primary responsibility for administering the AECA and the ITAR lies with the Directorate of Defense Trade Controls (“DDTC”) in the Bureau of Political-Military Affairs.

73. The AECA provides that “no defense articles or defense services . . . may be exported or imported without a license for such export or import.” 22 U.S.C. § 2778(b) (2). It provides for criminal penalties up to a \$1,000,000 fine and 20 years in prison for “[a]ny person who willfully violates any provision of this section ... or any rule or regulation issued under this section.” *Id.* § 2778(c).

74. The AECA authorizes the President “to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.” *Id.* § 2778(a)(1). The President, by executive order, has delegated to the State Department the authority to regulate under the AECA and to designate defense “articles” and “services” for inclusion on the United States Munitions List (“USML”). *See* Exec. Order No. 13,637, § 1 (n)(i), 78 Fed. Reg. 16,129 (Mar. 8, 2013).

75. DDTC has from time to time promulgated regulations known as the International Traffic in Arms Regulations (“ITAR”). *See* 22 C.F.R. pts. 120-130 (2019). The ITAR make it unlawful to, *inter alia*, “export or attempt to export from the United States any defense

Appendix E

article or technical data or to furnish or attempt to furnish any defense service for which a license or written approval is required” without such a license. *Id.* § 127.1(a)(1).

76. The ITAR’s definition of “export” includes the “actual shipment or transmission out of the United States, including the sending or taking of a defense article out of the United States in any manner.” *Id.* § 120.17(a)(1). The ITAR also provides that a “deemed export,” defined as “[r]eleasing or otherwise transferring technical data to a foreign person in the United States,” constitutes an “export.” *Id.* § 120.17(a)(2).

77. The ITAR also include, at 22 C.F.R. § 121.1, the USML, which enumerates the “articles, services, and related technical data [that] are designated as defense articles or defense services” for purposes of the AECA and ITAR. *Id.* § 121.1(a). The USML organizes the designated items into twenty-one categories, encompassing various forms of weaponry, ammunition, explosives, military-type equipment and vessels, toxicological agents, classified data, and more. Each of the twenty-one categories includes as a designated item “[t]echnical data” and “defense services” that are “directly related to the defense articles” listed in that category. *See, e.g., id.* §§ 121.1(I)(i), (II)(k), (III)(e), (IV)(i), (V)(j), (VI)(g), (VII)(h). The ITAR define “technical data” to include “[i]nformation ... required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.” *Id.* § 120.10(a)(1).

*Appendix E***D. *Defense Distributed I*: Litigation**

78. “*Defense Distributed I*” refers to a federal civil action docketed in the United States District Court for the Western District of Texas, Austin Division as *Defense Distributed, et al. v. United States Department of State, et al.*, No. 1:15-CV-372-RP (W.D. Tex.), and in the United States Court of Appeals for the Fifth Circuit first as *Defense Distributed, et al. v. United States Department of State, et al.*, No. 15-50759 (5th Cir.) and later as *Defense Distributed, et al. v. United States Department of State, et al.*, No. 18-50811 (W.D. Tex.). *Defense Distributed I* yielded the following reported opinions:

- (a) *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015)
- (b) *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016) (panel opinion)
- (c) *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 461–76 (Jones, J., dissenting)
- (d) *Def. Distributed v. U.S. Dep’t of State*, 865 F.3d 211 (5th Cir. 2017) (Elrod, Jones, Smith and Clement, JJ., dissenting from the denial of rehearing en banc)
- (e) *Def. Distributed v. United States Dep’t of State*, 947 F.3d 870 (5th Cir. 2020).

Appendix E

79. The plaintiffs in *Defense Distributed I* were Defense Distributed, SAF, and an individual SAF member, Conn Williamson.

80. The defendants in *Defense Distributed I* match the defendants in this case: the United States Department of State, the Secretary of State, the State Department's Directorate of Defense Trade Controls, the Acting Deputy Assistant Secretary of State for Defense Trade Controls in the Bureau of Political-Military Affairs, and the Acting Director of the Office of Defense Trade Controls Policy Division. They are referred to collectively as "the State Department."

81. *Defense Distributed I* concerned four categories of computer files defined by that action's pleadings: the "Published Files," the "Ghost Gunner Files," "CAD Files," and the "Other Files." Together, these categories of files are referred to as the "*Defense Distributed I* Files."

- (a) The "Published Files" category of *Defense Distributed I* Files consists of ten separate sets of files. It includes stereolithography (.stl) files about firearm components, Initial Graphics Exchange Specification (.igs) files about firearm components, SoLiDworks PaRT (.sldprt) files about firearm components, SketchUp (.skp) files about firearm components, Standard for the Exchange of Product Data ("STEP") (.stp) files about firearm components, diagrams of firearm components, renderings, "read me" plain text files about firearm assembly methods, "read me"

Appendix E

plain text files about the National Firearms Act and the Undetectable Firearms Act, and software licenses. From approximately December 2012 to May 2013, Defense Distributed published these files to DEFCAD for free download by the public.

- (b) The “Ghost Gunner Files” category of *Defense Distributed I* Files consists of software, data files, project files, coding, and models containing technical information for a machine, named the “Ghost Gunner,” that can be used to manufacture a variety of items, including gun parts.
- (c) The “CAD Files” category of *Defense Distributed I* Files consists of STEP (.stp) and stereolithography (.stl) files about a lower receiver to the AR-15 rifle.
- (d) The “Other Files” category of *Defense Distributed I* Files consists of files that contain technical information, to include design drawings, rendered images, written manufacturing instructions, and other technical information that Defense Distributed intends to post to public forums on the Internet; provided, however, that this category only extends insofar as those files regard items that, as of June 29, 2018, were exclusively: (i) in Category I(a) of the United States Munitions List, as well as barrels and receivers covered by Category I(g) of the United States Munitions List that are components of such items; or (ii) items covered by Category I(h) of the United States

Appendix E

Munitions List solely by reference to Category I(a), excluding Military Equipment.

82. *Defense Distributed I* began after the State Department used the AECA and ITAR regime to impose an illegal prior restraint on public speech concerning technical firearms data, including the *Defense Distributed I* Files. Under this regime, the State Department required that *Defense Distributed* obtain prior United States government approval before publication of the *Defense Distributed I* Files could occur on the internet and at other public venues.

83. The *Defense Distributed I* plaintiffs challenged the legality of the State Department's enforcement of the AECA/ITAR regime vis-à-vis the *Defense Distributed I* Files. In particular, they challenged the State Department's governance of the *Defense Distributed I* Files as ultra vires action not authorized by the statutes and regulations at issue, and as violations of the First, Second, and Fifth Amendments of the Constitution.

84. At a preliminary stage, the district court in *Defense Distributed I* denied the *Defense Distributed I* plaintiffs' motion for a preliminary injunction. *Def. Distributed v. Dep't of State*, 121 F. Supp.3d 680 (W.D. Tex. 2015).

85. An interlocutory appeal of the *Defense Distributed I* preliminary injunction denial was taken to the Fifth Circuit. A divided Fifth Circuit panel affirmed the district court's decision. *Def. Distributed v. United*

Appendix E

States Dep't of State, 838 F.3d 451 (5th Cir. 2016). But it declined to reach the merits, ruling solely based on “the balance of harm and the public interest.” *Id.* at 461.

86. The merits of *Defense Distributed I*'s preliminary injunction were, however, reached by two important opinions. Judge Jones emphasized the protected nature of this speech in a panel dissent: “the State Department’s application of its ‘export’ control regulations to this domestic Internet posting appears to violate the governing statute, represents an irrational interpretation of the regulations, and violates the First Amendment as a content-based regulation and a prior restraint.” *Id.* at 463–64. (Jones, J. dissenting). The judges dissenting from the denial of rehearing en banc also reached the merits. *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211 (5th Cir. 2017). Their opinion explained that the lower court’s “flawed preliminary injunction analysis permits perhaps the most egregious deprivation of First Amendment rights possible: a content based prior restraint.” *Id.* at 212.

E. *Defense Distributed I*: Settlement Agreement

87. After the *Defense Distributed I* interlocutory appeal concluded, the district court in *Defense Distributed I* ordered the parties to engage in settlement negotiations. The parties did so successfully and settled their dispute by agreement.

88. The *Defense Distributed I* settlement amounted to a victory for the plaintiffs. Press reports correctly understood that the State Department’s decision to settle

Appendix E

“essentially surrenders” to the constitutional challenge Defense Distributed and SAF had been pressing all along; that the settlement “promises to change the export control rules surrounding any firearm below .50 caliber – with a few exceptions like fully automatic weapons and rare gun designs that use caseless ammunition – and move their regulation to the Commerce Department, which won’t try to police technical data about the guns posted on the internet”; and that, in the meantime, the settlement “gives [Defense Distributed] a unique license to publish data about those weapons anywhere [it] chooses.” Andy Greenberg, *A Landmark Legal Shift Opens Pandora’s Box for DIY Guns*, Wired Magazine (July 18, 2018), available at <https://bit.ly/2QK3is6>.

89. The *Defense Distributed I* settlement agreement is memorialized by the “Settlement Agreement”: a written contract that all sides executed validly on June 29, 2018. A copy of that instrument is attached to this complaint as Exhibit A. Among other things, the Settlement Agreement obligates the State Department to do the following:

(a) Settlement Agreement Paragraph 1(a) - New Rule

Settlement Agreement Paragraph 1(a) requires the State Department to draft and fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising United States Munitions List (“USML”) Category I to exclude the *Defense Distributed I* Files. The pertinent text provides

Appendix E

as follows: “Defendants agree to the following . . . :
(a) Defendants’ commitment to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising USML Category I to exclude the technical data that is the subject of the Action.”

(b) Settlement Agreement Paragraph 1(b) -
Temporary Modification:

Settlement Agreement Paragraph 1(b) requires the State Department to announce, while the above-referenced final rule is in development, a temporary modification, consistent with International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the *Defense Distributed I* Files; and to publish the announcement on the Directorate of Defense Trade Controls website on or before July, 27, 2018. The pertinent text provides as follows: “Defendants agree to the following . . . (b) Defendants’ announcement, while the above-referenced final rule is in development, of a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that is the subject of the Action. The announcement will appear on the DDTC website, www.pmddtc.state.gov, on or before July 27, 2018.”

Appendix E

(c) Settlement Agreement Paragraph 1(c) - License

Settlement Agreement Paragraph 1(c) requires the State Department to issue a license to the *Defense Distributed I* plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). The pertinent text provides as follows: “Defendants agree to the following . . . (c) Defendants’ issuance of a letter to Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). For the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U. S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue this approval.”

Appendix E(d) Settlement Agreement Paragraph 1(d) -
Acknowledgement

Settlement Agreement Paragraph 1(d) requires the State Department to acknowledge and agree that the temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the *Defense Distributed I* Files, and that the license issued to the *Defense Distributed I* plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files. The pertinent text provides as follows: "Defendants agree to the following . . . (d) Defendants' acknowledgment and agreement that the temporary modification of USML Category I permits any United States person, to include DD's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the letter to Plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files."

90. The Settlement Agreement binds all of the parties to *Defense Distributed I* and all of this action's parties. Settlement Agreement paragraph 7 provides that the "Settlement Agreement" shall be binding upon and inure to the benefit of Plaintiffs and Defendants, and the respective heirs, executors, successors, assigns and

Appendix E

personal representatives, including any persons, entities, departments or agencies succeeding to the interest of obligations of the Parties.”

F. Settlement Agreement Fulfillment Begins

91. After the Settlement Agreement’s execution on July 27, 2018, the State Department began to fulfill—temporarily—certain of its Settlement Agreement obligations:

(a) Settlement Agreement Paragraph 1(a) -
New Rule

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(a). It published in the Federal Register a notice of proposed rulemaking revising USML Category I to exclude the *Defense Distributed I* Files. *See* 83 Fed. Reg. 24,198 (May 24, 2018).

(b) Settlement Agreement Paragraph 1(b) -
Temporary Modification

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(b). It made a temporary modification to USML Category I, pursuant to 22 C.F.R. § 126.2, to “exclude” the *Defense Distributed I* Files from Category I. A copy of that instrument is attached to this complaint as Exhibit B.

Appendix E

(c) Settlement Agreement Paragraph 1(c) - License

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(c). It issued *Defense Distributed* a license—a letter issued by the State Department’s Acting Deputy Assistant Secretary for the Directorate of Defense Trade Controls—authorizing the Defendants to publish the Published Files, Ghost Gunner Files, and CAD Files for “unlimited distribution.” A copy of that instrument is attached to this complaint as Exhibit C.

(d) Settlement Agreement Paragraph 1(d) - Acknowledgement

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(d). It acknowledged and agreed that the temporary modification permits any United States person to access, discuss, use, reproduce, or otherwise benefit from the *Defense Distributed I* Files; and that the license issued to the *Defense Distributed I* plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files. *See* Ex. A at 2.

92. On June 29, 2018, the parties to *Defense Distributed I* filed a joint stipulation of dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The filing

Appendix E

provided as follows: “Pursuant to Federal Rule of Civil Procedure 41(a)(I)(A)(ii) and 41(a)(I)(B), and a settlement agreement among Plaintiffs (Defense Distributed, Second Amendment Foundation, Inc., and Conn Williamson) and Defendants (the United States Department of State, the Secretary of State, the Directorate of Defense Trade Controls, the Deputy Assistant Secretary, Defense Trade Controls. and the Director, Office of Defense Trade Controls Policy), the Plaintiffs and the Defendants hereby stipulate to the dismissal with prejudice of this action.”

93. On July 30, 2018, the *Defense Distributed I* district court entered an order providing that “the case is **DISMISSED WITH PREJUDICE**” and the “action is **CLOSED**.”

94. The State Department’s temporary fulfillment of the Settlement Agreement obligations lasted from July 27, 2018 until the afternoon of July 31, 2018. During that period, Defense Distributed engaged in the publication addressed *supra* at Part V.B.2 (“Defense Distributed’s July 2018 Publications”).

G. The State Department Stopped Fulfilling the Settlement Agreement

95. On July 30, 2018, Grewal and a group of state attorneys general (hereinafter “the States”) initiated a civil action against the State Department, Defense Distributed, SAF, and Conn Williamson. The States chose to sue in their forum of choice, the Western District of Washington’s Seattle division, before Judge Robert

Appendix E

Lasnik. The suit was docketed in the district court as *State of Washington et al., v. United States Department of State et al.*, No. 2:18-cv-1115-RSL.

96. Grewal explained the nature of the States' involvement in this litigation by saying the following on the record: "The federal government is no longer willing to stop Defense Distributed from publishing this dangerous code, and so New Jersey must step up."

97. The States' *Washington* complaint alleged that, by issuing the Temporary Modification and license, the State Department had violated the Administrative Procedure Act (APA). The suit sought a preliminary nationwide injunction and a final judgment vacating the Temporary Modification and license. These claims went against the State Department alone.

98. The Settlement Agreement was never the subject of any claim in the *Washington* case. The States never claimed that the Settlement Agreement was illegal and never sought relief against the Settlement Agreement. Their only claims targeted two of the actions the State Department took in an attempt to fulfill the Settlement Agreement.

99. Nor were Defense Distributed and SAF the subject of any claim. The States asserted no cause of action and sought no relief against Defense Distributed or SAF. The APA claim about the license went against the State Department alone, did not allege that Defense Distributed or SAF did anything wrong, and did not seek relief against

Appendix E

them. Likewise for the APA claim about the Temporary Modification. It too went against the State Department alone, did not allege that Defense Distributed or SAF did anything wrong, and did not seek relief against Defense Distributed or SAF.

100. On July 31, 2018, the States obtained from the United States District Court for the Western District of Washington a temporary restraining order against the State Department: “The federal government defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the ‘Temporary Modification of Category I of the United States Munitions List’ and the letter to Cody R. Wilson, Defense Distributed, and Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued.”

101. A key concession occurred during the preliminary injunction proceedings: Both the State Department and the States conceded that there *is nothing inherently illegal about the computer files at issue*. Aside from concerns about Defense Distributed’s files being *on the internet*, the States and State Department took no issue with anyone’s right to distribute the very same computer files via other channels. At the preliminary injunction hearing, counsel for the States took the position that, apart from internet publication, Defense Distributed had a right to distribute digital firearms information via the mail or otherwise “hand them around

Appendix E

domestically” without violating any law. Counsel for the State Department agreed, stating that, “even if the Court were to grant plaintiffs every ounce of relief that they seek in this case, Defense Distributed could still mail every American citizen in the country the files that are at issue here.” In light of this concession, Defense Distributed engaged in the publication addressed *supra* at Part V.B.3 (“Defense Distributed’s August-November 2018 Publications”).

102. On August 27, 2018, the States obtained from the United States District Court for the Western District of Washington a preliminary injunction against the State Department: “The federal defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the ‘Temporary Modification of Category I of the United States Munitions List’ and the letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued until further order of the Court.” *Washington v. U.S. Dep’t of State*, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018).

103. Even though the State Department had a right to appeal the *Washington* case’s preliminary injunction decision, and even though it had preserved arguments that would have succeeded in having the district court’s judgment vacated or reversed, the State Department refused to appeal. It let the deadline for that interlocutory appeal come and go without taking any appellate action.

Appendix E

The State Department refused to appeal this preliminary injunction because of partisan politics and in spite of federal legal advisors that deemed an appeal legally necessary.

104. The rest of the *Washington* case’s key decisions occurred on summary judgment. On the merits, the *Washington* district court accepted both of the States’ APA claims. First, the *Washington* district court held that the State Department’s issuance of the Temporary Modification was “without observance of procedure required by law,” 5 U.S.C. § 706, because a Congressional notice requirement had not been met. *Washington v. U.S. Dep’t of State*, 420 F. Supp. 3d 1130, 1141-43 (W.D. Wash. 2019). Second, the *Washington* district court held that the State Department’s issuance of both the Temporary Modification and the license were “arbitrary and capricious,” 5 U.S.C. § 706, because of insufficient explanation and evidentiary support in the administrative record. *Id.* at 1144-47. Neither of these claims are meritorious.

105. The *Washington* action’s final judgment orders as follows: “The July 27, 2018, ‘Temporary Modification of Category I of the United States Munitions List’ and letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation were unlawful and are hereby VACATED.” Part of the *Washington* district court’s decision addressed the First Amendment implications of vacating the Temporary Modification and license. It held the Constitution’s First Amendment was “not relevant to the merits”: “Whether or not the First Amendment

Appendix E

precludes the federal government from regulating the publication of technical data under the authority granted by the AECA is not relevant to the merits of the APA claims plaintiffs assert in this litigation.” *Washington v. U.S. Dep’t of State*, 420 F. Supp. 3d 1130, 1147 (W.D. Wash. 2019). It also held that the First Amendment can be “abridged” so long as it is not “abrogated.” *Washington v. U.S. Dep’t of State*, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018).

106. Defense Distributed and SAF demanded that the State Department appeal. The demand asserted that a failure to appeal constituted a breach of the Settlement Agreement. The demand occurred in a January 15, 2020, letter from counsel for Defense Distributed and SAF to the State Department. A copy of that instrument is attached to this complaint as Exhibit E.

107. Even though the State Department had a right to appeal the final judgment, and even though it had preserved arguments that would have succeeded in having the district court’s judgment vacated or reversed, the State Department refused to appeal. It let the deadline for that appeal come and go without taking any appellate action. The State Department refused to appeal this final injunction because of partisan politics and in spite of federal legal advisors that deemed an appeal legally necessary.

108. Defense Distributed and SAF appealed the *Washington* action’s final judgment. Defense Distributed’s appellant’s brief showed that the district court both lacked

Appendix E

subject-matter jurisdiction because of multiple Article III shortcomings and was wrong on the merits because the APA cannot require abridgement of the First Amendment. So rather than be squarely defeated, the States moved to dismiss both appeals as moot. Defense Distributed and SAF responded jointly, opposing the dismissal request with several categories of argument. First, the response defeated the States' mootness suggestion on its own terms. Second, it showed that mootness-based dismissals cannot occur unless and until disputes regarding the district court's subject-matter jurisdiction are resolved. Third, the response showed that, if the case were moot, *Munsingwear* required vacatur of the district court's judgment.

109. The *Washington* action's Ninth Circuit panel accepted the mootness suggestion and dismissed the appeal. *Washington v. Def. Distributed*, No. 20-35030, 2020 WL 4332902 (9th Cir. July 21, 2020). Its order gives no meaningful indication of the mootness reasoning. It says nothing about the district court's jurisdiction. And it says nothing about *Munsingwear*, silently leaving the district court's judgment intact. A petition for rehearing en banc is now pending.

1. The State Department disavowed the license.

110. On or before August 2, 2018, the State Department disavowed the license it had originally issued to Defense Distributed and SAF in July 2018.

Appendix E

111. The State Department's disavowal of the July 2018 license constitutes final agency action.

112. The State Department's disavowal of the July 2018 license is reflected in an August 2, 2018, letter from counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit D.

113. The August 2, 2018, letter from counsel for the State Department established that, as of August 2, 2018, the State Department had decided to proceed as though the July 2018 license "had not been issued." This indicates the State Department's disavowal of the July 2018 license.

114. The August 2, 2018, letter from counsel for the State Department establishes that, as of August 2, 2018, the State Department had decided to proceed as though the license was a "nullity." This letter indicates the State Department's disavowal of the July 2018 license.

2. After disavowal, the State Department refused to supply a license.

115. After the State Department disavowed the license it had originally issued to Defense Distributed and SAF in July 2018, the State Department refused to supply Defense Distributed and SAF with the license that Settlement Agreement Paragraph 1(c) requires the State Department to supply.

116. The State Department's refusal to supply Defense Distributed and SAF with the license that

Appendix E

Settlement Agreement Paragraph 1(c) requires the State Department to supply entitles them to constitutes final agency action.

117. Defense Distributed and SAF demanded that the State Department issue a license in compliance with Settlement Agreement Paragraph 1(c) on January 15, 2020. They did so by transmitting a letter from counsel for Defense Distributed and SAF to counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit E.

118. Defense Distributed and SAF demanded that the State Department issue a license in compliance with Settlement Agreement Paragraph 1(c) on February 11, 2020. They did so by transmitting a letter from counsel for Defense Distributed and SAF to counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit F.

3. The State Department disavowed the Temporary Modification.

119. On or before August 2, 2018, the State Department disavowed the Temporary Modification that it had originally issued in July 2018.

120. The State Department's August 2018 disavowal of the July 2018 Temporary Modification constitutes final agency action.

Appendix E

121. The State Department's disavowal of the July 2018 Temporary Modification is reflected in the August 2, 2018, letter from counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit D.

122. The August 2, 2018, letter from counsel for the State Department establishes that, as of August 2, 2018, the State Department had decided to cease "implementing or enforcing" the July 2018 Temporary Modification. This letter indicates the State Department's disavowal of the July 2018 Temporary Modification.

123. The August 2, 2018, letter from counsel for the State Department establishes that, as of August 2, 2018, the State Department had decided to proceed as though the July 2018 Temporary Modification "had not occurred." This indicates the State Department's disavowal of the July 2018 Temporary Modification.

124. The State Department removed the July 2018 Temporary Modification from its website on July 31, 2018. This removal indicates the State Department's disavowal of the July 2018 Temporary Modification.

4. After disavowal, the State Department refused to supply a Temporary Modification.

125. After the State Department disavowed the July 2018 Temporary Modification, the State Department refused to supply Defense Distributed and SAF with

Appendix E

the temporary modification that Settlement Agreement Paragraph 1(b) requires the State Department to supply.

126. The State Department's refusal to supply Defense Distributed and SAF with the temporary modification that Settlement Agreement Paragraph 1(b) requires the State Department to supply constitutes final agency action.

5. The State Department failed to supply the required regulatory changes.

127. The State Department refused to supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply.

128. The State Department's refusal to supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply constitutes final agency action.

129. The State Department's refusal to supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply constitutes a breach of the Settlement Agreement.

130. The State Department issued a new final rule that pertains to the Settlement Agreement in January 2020. *See* International Traffic in Arms Regulations: U.S.

Appendix E

Munitions List Categories I, II, and III, 85 Fed. Reg. 3819 (Jan. 23, 2020). It did so in conjunction with a new rule issued by the Commerce Department. *See* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020). These new rules do not discharge the State Department's obligations under Settlement Agreement Paragraph 1(a) because they do not exclude *all* of the technical data that was the subject of *Defense Distributed I* from United States Munitions List ("USML") Category I. Separately, these new rules do not discharge the State Department's obligations under Settlement Agreement Paragraph 1(a) because they have been enjoined by the United States District Court for the Western District of Washington.

131. On April 29, 2020, Defense Distributed and SAF demanded that the State Department supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply. They did so by transmitting a letter from counsel for Defense Distributed and SAF to counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit G.

H. Grewal Censors Defense Distributed

1. Grewal Engages in Civil Censorship

132. On July 26, 2018, Grewal issued Defense Distributed a formal cease-and-desist letter. A copy is attached to this complaint as Exhibit H.

Appendix E

133. Grewal’s July 26, 2018, cease-and-desist letter commanded Defense Distributed to cease publishing its digital firearms information: “You are directed to cease and desist from publishing printable-gun computer files for use by New Jersey residents.” It repeatedly declared Defense Distributed’s publication of digital firearms information to be a violation of New Jersey law. It said that publication “violates New Jersey’s public nuisance and negligence laws.” It said that publication “violates our public nuisance law.” It said that publication “constitute[s] a public nuisance.” It said that publication “is negligent.” It threatened to punish Defense Distributed for publishing any more digital firearms information: “If you do not halt your efforts to proceed with publication, I will bring legal action against your company before August 1, 2018.” It ended by delivering another command backed by a threat of punishment: “As the chief law enforcement officer for New Jersey, I demand that you halt publication of the printable-gun computer files. Should you fail to comply with this letter, my Office will initiate legal action barring you from publishing these files before August 1, 2018.”

134. On July 26, 2018, after sending the cease-and-desist letter, Grewal issued a press release reiterating the threat: “Attorney General Grewal threatened Defense Distributed with ‘legal action’ if it fails to comply with his demand.” The press release also took the position that “[p]osting this material online is no different than driving to New Jersey and handing out hard-copy files on any street corner.”

Appendix E

135. On July 27, 2018, Defense Distributed responded to Grewal's July 26, 2018, cease-and-desist letter with a letter of its own. The response letter explained that "all actions contemplated by Defense Distributed are fully protected by the First Amendment," and that the Attorney General's "attempts to prevent such action constitute an unconstitutional prior restraint and otherwise violate the United States Constitution." It also explained that Defense Distributed would attempt to restrict files made available on the internet to prevent download within New Jersey. Finally, it demanded that General withdraw his cease-and-desist command. He did not.

136. On July 30, 2018, Grewal took coercive action against Defense Distributed by targeting its internet service providers.

137. DreamHost is a company that contracted to provide internet security services for Defense Distributed. DreamHost's Acceptable Use Policy formed part of the contract between Defense Distributed and DreamHost.

138. On July 30, 2018, Grewal sent a letter to DreamHost. A copy is attached to this complaint as Exhibit I.

139. Grewal's July 30, 2018, letter to DreamHost attempted to make DreamHost terminate its provision of services to Defense Distributed. It declared that, by planning to publish digital firearms files on a website, "Defense Distributed is plainly planning to use the Defcad Website in a way that violates DreamHost's Acceptable

Appendix E

Use Policy.” The letter declared that Defense Distributed’s publication of digital firearms files violated New Jersey law. It said that “posting them violates New Jersey’s public nuisance and negligence laws.” It said that “posting them would . . . be illegal.”

140. On July 30, 2018, Grewal sent a copy of the July 26, 2018, cease-and desist letter to Cloudflare, Inc.’s legal department. Cloudflare, Inc., provides internet security services for Defense Distributed.

2. Grewal Engages in Criminal Censorship

141. On November 8, 2018, New Jersey armed Attorney General Gurbir Grewal with Senate Bill 2465’s Section 3(l)2. S. 2465, 218th Leg., Reg. Sess. (N.J. Nov. 2018) (codified as N.J. Stat. 2C:39-9(1)2)). The law is codified as Section (l)(2) of New Jersey Code of Criminal Justice 2C:39-9. Section (l)(2) creates the following speech crime:

l. Manufacturing or facilitating the manufacture of a firearm using a three dimensional printer. In addition to any other criminal penalties provided under law it is a third degree crime for:

...

(2) a person to distribute by any means, including the Internet, to a person in New Jersey who is not registered or licensed as

Appendix E

a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.

As used in this subsection: “three-dimensional printer” means a computer or computer-driven machine or device capable of producing a three-dimensional object from a digital model; and “distribute” means to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute.

N.J. Stat 2C:39-9(l)(2).

142. Section (l)(2) is a speech crime. It outlaws the sharing of digital firearms information. With Grewal as its prime enforcer, New Jersey’s Section (l)(2) speech crime outlaws constitutionally protected speech that Plaintiffs would engage in but for Grewal’s enforcement threats. Calling New Jersey’s Section (l)(2) speech crime his favorite new “tool,” Grewal aims to jail Defense Distributed, SAF, the CodeIsFreeSpeech.com publishers,

Appendix E

and anyone else that dares to exercise their right to share digital firearms information.

143. New Jersey's Section (l)(2) speech crime does not criminalize conduct. It criminalizes speech as such: any "digital instructions" that "may be used" by a person to "produce a firearm" with a "three dimensional printer." N.J. Stat 2C:39-9(l)(2). It is now a "third degree crime" to "distribute" that speech "to a person in New Jersey" (except for licensed manufacturers). *Id.* Convictions under Grewal's new speech crime entail a prison sentence of three to five years. N.J. Stat 2C:43-6.

144. New Jersey's Section (l)(2) speech crime criminalizes every conceivable mode of communication. No meaningful form of human interaction survives. The keystone "distribute" term means "to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute." N.J. Stat 2C:39-9(l)(2). The law also specifies that it outlaws speech delivered "by any means," including "the Internet" and including standard postal "mail." *Id.*

145. No type of digital firearms information survives New Jersey's Section (l)(2) speech crime either. Section (l)(2) outlaws both "computer-aided design files" and "other code or instructions stored and displayed in electronic format as a digital model." N.J. Stat 2C:39-9(l)(2).

Appendix E

146. Information's actual use is irrelevant to New Jersey's Section (l)(2) speech crime. Section (l)(2) lets Grewal jail speakers regardless of whether or not any actual danger or harm exists. The crime occurs if the information "**may** be used" in a proscribed way. *Id.* (emphasis added). Critically, the new speech crime also lacks any meaningful intent requirement.

147. New Jersey's Section (l)(2) speech crime was enacted for the purpose of discriminating against and censoring Defense Distributed and SAF's members, in particular.

148. At the Section (l)(2) speech crime's signing ceremony, New Jersey Governor Phil Murphy linked the bill to the cease-and-desist letter that Grewal issued to Defense Distributed:

The Attorney General has been a national leader in this fight. Last June he issued ***a cease and desist letter to the companies that deal in ghost guns, saying explicitly that New Jersey is off limits to them.*** He joined likeminded attorneys general in successfully stopping in federal court the release of blueprints that would have allowed anyone with a computer and access to a 3D printer the ability to build their own, untraceable firearm. This law that we're going to sign today further backs up his efforts, and I thank him for all that he has done. Thank you, Gurbir.

Appendix E

149. At the Section (l)(2) speech crime’s signing ceremony, Grewal said that the bill was a “stronger tool[]” that he could use to “stop” Defense Distributed founder “Cody Wilson” and “his supporters” from “release[ing] these codes online”:

[T]oday, we’re . . . closing dangerous loopholes in our existing laws - loopholes that some companies and individuals have tried to exploit. This summer, for example, **a Texan named Cody Wilson** promised to publicly release computer files that would let anyone, even terrorists, felons, and domestic abusers, create firearms using a 3D printer. . . . And so back in July, we successfully challenged Cody Wilson in court. We obtained legal orders that temporarily halted the release of these codes. ***But his supporters are not relenting, they’re still trying to release these codes online.*** And so it’s clear that we need stronger tools to stop them . . . tools like the legislation crafted by Senator Cryan and that Governor Murphy is signing today.

150. At the Section (l)(2) speech crime’s signing ceremony, Grewal said that Senate Bill 2465 was “right on point” to “address[] printable guns or ghost guns” and that it was enacted “to stop the next Cody Wilson, to fight the ghost gun industry”:

[E]arlier this year, we went after some of the biggest players in this industry. We told them

Appendix E

that they were wrong on the law. We told them that they were, in fact, breaking the law here in New Jersey by selling those weapons here. And we told them to stop. And some of them complied. But others did not, and so those investigations are ongoing at this time.

But in both of those cases, ***bad actors were trying to take advantage of loopholes because no law squarely addressed printable guns or ghost guns.*** So we had to rely on other laws, like our public nuisance law or our assault weapons law, to fight back. Now don't get me wrong: Those laws are important and they're great tools, and they helped us stop the spread of these dangerous, untraceable weapons. ***But a law right on point strengthens law enforcement's hand even more.***

And so today, there is no question that printable guns and ghost guns are deadly, and selling them in New Jersey is illegal. And that's why I'm so proud to support Governor Murphy's efforts and the legislature's efforts to close those loopholes, ***to stop the next Cody Wilson, to fight the ghost gun industry,*** and to regulate the next dangerous gun models before they spread into our communities.

151. At the Senate Bill 2465 signing ceremony, Grewal threatened to "come after" "anyone who is contemplating making a printable gun" and "the next ghost gun company":

Appendix E

And here's my message today *to anyone who is contemplating making a printable gun or to the next ghost gun company* trying to sell their dangerous weapons into New Jersey: Your products are unlawful and if you break our laws *we will come after you*. And to anyone else who thinks of trying to find other loopholes in our laws, especially to sell dangerous firearms, we're just as committed to *stopping each of you*.

152. A press release further touted Grewal's enforcement threats.

153. Defense Distributed knew of the Section (l)(2) speech crime passage on the day that it became law and witnessed the signing ceremony. At that time, Defense Distributed reasonably feared that Grewal would commence enforcement of the new law against Defense Distributed, its officers, its employees, and/or its agents at any moment.

154. Hence, Grewal is illegally censoring three distinct categories of Defense Distributed and SAF's speech. If not for Grewal's unconstitutional actions, Defense Distributed and SAF would be freely exercising their First Amendment rights. These losses amount to irreparable harm in every instance.

155. Category one is the free and open publication of digital firearms information on the internet to persons in New Jersey. This right has been exercised in the past by Defense Distributed. If not for Grewal's ongoing

Appendix E

censorship, this right would be exercised in the future by Defense Distributed and SAF and its members.

156. Category two is the free and open publication of digital firearms information via the mail to persons in New Jersey. This right has been exercised in the past by Defense Distributed. If not for Grewal's ongoing censorship, this right would be exercised in the future by Defense Distributed.

157. Category three is the free and open offering and advertisement of digital firearms information to persons in New Jersey. This right has been exercised in the past by Defense Distributed. If not for Grewal's ongoing censorship, this right would be exercised in the future by Defense Distributed and SAF and its members.

158. Grewal's criminal censorship covers all three categories of conduct. Internet publications are covered because Section 3(1)(2) makes it a crime to distribute the banned "digital instructions" "by any means, including the Internet." N.J. Stat 2C:39-9(1)(2). Mailed publications are covered because the speech crime also defines "distribute" to mean "mail." And offers and advertisements are covered because Section 3(1)(2) defines "distribute" to mean "offer" and "advertise." *Id.*

159. Grewal's civil censorship covers all three categories of conduct as well. His cease-and-desist order said to "halt publication" of any and all so-called "printable gun computer files." The civil lawsuits sought prior restraints against all manner of "distributing"

Appendix E

“printable-gun computer files.” And the threats against internet service providers targeted all “computer files” with digital firearms information.

160. Grewal’s censorship of *non-internet speech* is completely unique. Neither the federal government nor any other state government seeks to censor the non-internet speech of Defense Distributed and SAF that Grewal does. The resulting censorship of constitutionally protected speech is uniquely attributable to Grewal alone.

161. Grewal’s censorship of *internet speech* is unique as well—both in breadth and nature. His civil and criminal censorship efforts against Defense Distributed and SAF’s internet speech apply to more speech than federal officials’ efforts do, impose different burdens than federal officials’ efforts do, and threaten far greater penalties than federal officials’ efforts do. The resulting censorship of constitutionally protected speech is uniquely attributable to Grewal alone.

I. Irreparable Harm**1. The State Department’s illegal conduct causes irreparable harm.**

162. In the past, the State Department’s illegal conduct irreparably harmed Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal speech protections.

Appendix E

163. In the past, the State Department's illegal conduct irreparably harmed Defense Distributed and SAF by causing Defense Distributed and SAF to refrain from publishing digital firearms information that Defense Distributed and SAF had a right to publish, by causing Defense Distributed and SAF to refrain from receiving digital firearms information that Defense Distributed and SAF had a right to receive, and by causing Defense Distributed and SAF to refrain from republishing digital firearms information that Defense Distributed had a right to republish.

164. In the past, the State Department's illegal conduct irreparably harmed Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of First Amendment rights.

165. In the past, the State Department's illegal conduct irreparably harmed Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of Second Amendment rights.

166. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal speech protections.

167. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by causing Defense Distributed and SAF to refrain from publishing digital firearms information that Defense

Appendix E

Distributed and SAF have a right to publish, by causing Defense Distributed and SAF to refrain from receiving digital firearms information that Defense Distributed and SAF have a right to receive, and by causing Defense Distributed and SAF to refrain from republishing digital firearms information that Defense Distributed and SAF have a right to republish.

168. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of First Amendment rights.

169. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of Second Amendment rights.

170. Absent relief from this Court, the State Department will continue to engage in the illegal conduct that has caused Defense Distributed and SAF irreparable harm in the past and is causing Defense Distributed and SAF irreparable harm at present.

2. Grewal's illegal conduct causes irreparable harm.

171. In the past, Grewal's illegal conduct irreparably harmed Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal law.

Appendix E

172. In the past, Grewal's illegal conduct irreparably harmed Defense Distributed and SAF by causing them to refrain from publishing digital firearms information they have a right to publish, by causing them to refrain from receiving digital firearms information they have a right to receive, by causing them to refrain from republish firearms information they have a right to republish, and by chilling their exercise of First Amendment rights.

173. At present, Grewal's illegal conduct irreparably harms Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal law.

174. At present, Grewal's illegal conduct irreparably harms Defense Distributed and SAF by causing them to refrain from publishing digital firearms information they have a right to publish, by causing them to refrain from receiving digital firearms information they have a right to receive, by causing them to refrain from republishing firearms information they have a right to republish, and by chilling their exercise of First Amendment rights.

175. Absent relief from this Court, Grewal will continue to engage in the illegal conduct that has caused Defense Distributed and SAF irreparable harm in the past and is causing Defense Distributed and SAF irreparable harm at present.

176. Defense Distributed refrains from freely and openly publishing digital firearms information via the internet to persons in New Jersey for fear of being

Appendix E

punished by Grewal. Once that threat ceases, Defense Distributed will resume engaging in this speech with persons in New Jersey and SAF's members in New Jersey will resume receiving it, benefitting from it, and republishing it.

177. Defense Distributed refrains from freely and openly distributing digital firearms information via the mail to persons in New Jersey for fear of being punished by Grewal. Once that threat ceases, Defense Distributed will resume engaging in this speech and SAF's members will resume receiving it, benefitting from it, and republishing it.

178. Defense Distributed refrains from freely and openly offering and advertising its mailed digital firearms information to persons in New Jersey for fear of being punished by Grewal. Once that threat ceases, Defense Distributed will resume making offers and advertisements about its mailed publications to persons in New Jersey.

179. SAF members have received and republished Defense Distributed's digital firearms information in the past. But now they refrain from freely and openly receiving and republishing Defense Distributed's files for fear of being prosecuted by states like New Jersey. Once those threats cease, SAF's members will continue to freely and openly receive and republish information from Defense Distributed.

180. Because of Grewal's evident intention of enforcing Section () (2) against Defense Distributed and

Appendix E

SAF, Defense Distributed and SAF have refrained from engaging in speech that Constitution and other federal law guarantees their right to engage in.

181. If Defense Distributed publishes its digital firearms information via the internet by making its computer files freely and openly available for download on a website, Grewal will enforce New Jersey's Section (l)(2) speech crime against Defense Distributed. If SAF members publish or republish Defense Distributed's computer files via the internet by making them available for download on a website, Grewal will enforce New Jersey's Section (l)(2) speech crime against them.

182. If Defense Distributed publishes its digital firearms information via the mail by making its computer files available for shipment on physical storage devices to persons in New Jersey, Grewal will enforce New Jersey's Section (l)(2) speech crime against Defense Distributed. Likewise, if SAF members make Defense Distributed's computer files available for shipment on physical storage devices to persons in New Jersey, Grewal will enforce New Jersey's Section (l)(2) speech crime against them.

183. If Defense Distributed engages in advertising and offering activities regarding its files to persons in New Jersey, Grewal will enforce New Jersey's Section (l)(2) speech crime against Defense Distributed. Likewise, if SAF members engage in advertising and offering activities regarding Defense Distributed's files to persons in New Jersey, Grewal will enforce New Jersey's Section (l)(2) speech crime against them.

*Appendix E***VII. Causes of Action Against the State Department****A. Count One: APA § 706(2)(A).**

184. Defense Distributed & SAF incorporate the preceding paragraphs.

185. The Administrative Procedure Act requires the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

186. The State Department committed a final agency action that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), by disavowing the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

187. The State Department committed a final agency action that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed I*’s Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because

Appendix E

they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

188. The State Department committed a final agency action that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), by refusing to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

189. The State Department committed a final agency action that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

190. The State Department committed a final agency action that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”

Appendix E

5 U.S.C. § 706(2)(A), by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

191. The State Department committed a final agency action that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed’s customers and SAF’s members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

B. Count Two: APA § 706(2)(B).

192. Defense Distributed & SAF incorporate the preceding paragraphs.

193. The Administrative Procedure Act requires the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are found to be “contrary

Appendix E

to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

194. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by disavowing the license it had originally issued to Defense Distributed and SAF in July 2018.. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

195. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed I’s* Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

196. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by refusing

Appendix E

to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

197. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

198. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

199. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by refusing to acknowledge and agree that the 2018 temporary

Appendix E

modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

C. Count Three: APA § 706(2)(C).

200. Defense Distributed & SAF incorporate the preceding paragraphs.

201. The Administrative Procedure Act requires the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

202. The State Department committed a final agency action that was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), by disavowing the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

Appendix E

203. The State Department committed a final agency action that was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed I*’s Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

204. The State Department committed a final agency action that was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), by refusing to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

205. The State Department committed a final agency action that was “in excess of statutory jurisdiction,

Appendix E

authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

206. The State Department committed a final agency action that was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

207. The State Department committed a final agency action that was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C), by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed’s customers and SAF’s members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

*Appendix E***D. Count Four: APA § 706(2)(D).**

208. Defense Distributed & SAF incorporate the preceding paragraphs.

209. The Administrative Procedure Act requires the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are found to be “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

210. The State Department committed a final agency action that was “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), by disavowing the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

211. The State Department committed a final agency action that was “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed*’s Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and

Appendix E

the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

212. The State Department committed a final agency action that was “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), by refusing to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

213. The State Department committed a final agency action that was “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful and setting it aside.

214. The State Department committed a final agency action that was “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was

Appendix E

the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

215. The State Department committed a final agency action that was “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed’s customers and SAF’s members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful.

E. Count Five: Breach of contract.

216. Defense Distributed & SAF incorporate the preceding paragraphs.

217. Defense Distributed, SAF, and Conn Williamson timely performed all of their obligations under the Settlement Agreement. Defense Distributed, SAF, and Conn Williamson did not commit any material breach of the Settlement Agreement.

218. The State Department committed an unexcused material breach of the Settlement Agreement by

Appendix E

disavowing the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins further breaches of this kind, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

219. The State Department breached the Settlement Agreement by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed* I's Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins further breaches of this kind, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

Appendix E

220. The State Department committed an unexcused material breach of the Settlement Agreement by refusing to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins further breaches of this kind, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

221. The State Department committed an unexcused material breach of the Settlement Agreement by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins further breaches of this kind, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

Appendix E

222. The State Department committed an unexcused material breach of the Settlement Agreement by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins further breaches of this kind, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

223. The State Department committed an unexcused material breach of the Settlement Agreement by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins further breaches of this kind, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

Appendix E

224. The State Department waived any and all grounds of opposition to court enforcement of the Settlement Agreement. Settlement Agreement paragraph 4 entails the State Department's consent to "any civil, criminal, or administrative action . . . permitted by law, if any, that may be necessary to consummate or enforce this Settlement Agreement."

F. Count Six: Freedom of Speech and of the Press

225. Defense Distributed & SAF incorporate the preceding paragraphs.

226. The First Amendment of the Constitution of the United States forbids government actions abridging the freedom of speech or of the press. It applies to the State Department.

227. The State Department's conduct violates the First Amendment doctrine regarding prior restraints. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The State Department's conduct constitutes a prior restraint of expression; as such, it is an unconstitutional abridgement of First Amendment freedoms because the State Department cannot carry the heavy burden of justifying a prior restraint and because the prior restraint does not operate under sufficient judicial superintendence.

228. The State Department's conduct violates the First Amendment doctrine regarding content-based speech restrictions. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). The State Department's

Appendix E

conduct imposes content-based speech restrictions; as such, the conduct is an unconstitutional abridgement of First Amendment's freedoms because the State Department cannot carry the heavy burden of justifying a content-based speech restriction and because it does not serve a compelling governmental interest and is not narrowly drawn to serve any such interest.

229. The State Department's conduct violates the First Amendment doctrine regarding content-neutral speech restrictions. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Even if the State Department's conduct is deemed to impose content-neutral speech restrictions, it is an unconstitutional abridgement of First Amendment's freedoms because it does not serve a significant governmental interest and is not narrowly drawn to serve any such interest.

230. The State Department's conduct violates the First Amendment doctrine regarding overbreadth. *See, e.g., City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987). The State Department's conduct forbids a substantial amount of constitutionally protected speech and is not narrowly tailored to prohibit only constitutionally unprotected speech; as such, it is an unconstitutional abridgement of First Amendment's freedoms.

231. The State Department violated Defense Distributed and SAF's First Amendment rights by disavowing the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1)

Appendix E

declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

232. The State Department violated Defense Distributed and SAF's First Amendment rights by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed I's* Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

233. The State Department violated Defense Distributed and SAF's First Amendment rights by refusing to draft and to fully pursue, to the extent

Appendix E

authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

234. The State Department violated Defense Distributed and SAF's First Amendment rights by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

235. The State Department violated Defense Distributed and SAF's First Amendment rights by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent

Appendix E

with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment holding this conduct unlawful. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

236. The State Department violated Defense Distributed and SAF's First Amendment rights by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

*Appendix E***G. Count Seven: Right to Keep and Bear Arms**

237. Defense Distributed & SAF incorporate the preceding paragraphs.

238. The Second Amendment of the Constitution of the United States forbids laws abridging the individual right to keep and bear Arms.

239. The State Department violated the Second Amendment by subjecting Defense Distributed & SAF to an unconstitutional abridgement of Second Amendment rights. *See District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). The State Department's conduct infringes the individual right to make and acquire Arms, which is part and parcel of the right to keep and bear Arms; as such, it is an unconstitutional abridgement of Second Amendment rights.

240. The State Department violated Defense Distributed and SAF's Second Amendment rights by disavowing the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

Appendix E

241. The State Department violated Defense Distributed and SAF's Second Amendment rights by refusing to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed I's* Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

242. The State Department violated Defense Distributed and SAF's Second Amendment rights by refusing to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further

Appendix E

wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

243. The State Department violated Defense Distributed and SAF's Second Amendment rights by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

244. The State Department violated Defense Distributed and SAF's Second Amendment rights by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately

Appendix E

caused by this wrongdoing in an amount no less than five million dollars.

245. The State Department violated Defense Distributed and SAF's Second Amendment rights by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

H. Count Eight: Due Process

246. Defense Distributed & SAF incorporate the preceding paragraphs.

247. The Due Process Clause of the Fifth Amendment of the Constitution of the United States forbids the federal government from depriving any person of life, liberty, or property without due process of law.

Appendix E

248. The State Department violated the Due Process Clause of the Fifth Amendment of the Constitution of the United States by depriving Defense Distributed & SAF of liberty and property without due process of law. *See, e.g., Matthews v. Eldridge*, 424 U.S. 319 (1976). The State Department's conduct deprives Defense Distributed & SAF of a license issued by the Secretary of State pursuant to federal law, and does so without supplying adequate pre-deprivation notice and an opportunity to be heard; as such, it is an unconstitutional deprivation of property without due process of law. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages in an amount no less than five million dollars.

249. The State Department violated Defense Distributed and SAF's Fifth Amendment rights by disavowing the 2018 License. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

250. The State Department violated Defense Distributed and SAF's Fifth Amendment rights by refusing to issue a letter to Defense Distributed & SAF,

Appendix E

signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed I's* Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

251. The State Department violated Defense Distributed and SAF's Fifth Amendment rights by refusing to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately

Appendix E

caused by this wrongdoing in an amount no less than five million dollars.

252. The State Department violated Defense Distributed and SAF's Fifth Amendment rights by disavowing the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

253. The State Department violated Defense Distributed and SAF's Fifth Amendment rights by refusing to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

Appendix E

254. The State Department violated Defense Distributed and SAF's Fifth Amendment rights by refusing to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF are therefore entitled to a judgment that (1) declares this conduct unlawful, (2) enjoins such further wrongdoing, (3) awards Defense Distributed & SAF nominal damages, (4) awards Defense Distributed & SAF exemplary damages, and (5) awards Defense Distributed actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

VIII. Causes of Action Against Grewal.

255. New Jersey Attorney General Gurbir Grewal denies Defense Distributed's right to publish digital firearms information in the form of computer files. He denies Defense Distributed's right to do so via the internet; he denies Defense Distributed's right to do so via the mail; he denies Defense Distributed's right to do so via brick-and-mortar public libraries; and he denies Defense Distributed's right to do so via any other means of publication. He also denies Defense Distributed's right to conduct secondary activities that accompany all of

Appendix E

these publication methods, such as advertising. In each of these respects, Grewal acts knowingly, intentionally, and selectively. Many people engage in the activities for which Defense Distributed and SAF are being persecuted. But Grewal does not target them as he targets Defense Distributed and SAF.

256. Grewal's conduct subjects Defense Distributed and SAF to an unconstitutional abridgement of First Amendment freedoms; an unconstitutional infringement of Second Amendment rights; an unconstitutional violation of the right to equal protection of the laws; an unconstitutional deprivation of liberty and property without due process of law; an unconstitutional violation of the Commerce Clause, regulation by way of state laws that are preempted by federal law, and tortious interference with valid legal contracts.

A. Count Nine: 42 U.S.C. § 1983—Freedom of Speech and of the Press

257. Defense Distributed & SAF incorporate the preceding paragraphs.

258. The First Amendment of the Constitution of the United States forbids government actions abridging the freedom of speech or of the press. It applies to Attorney General Gurbir Grewal by virtue of the Fourteenth Amendment of the Constitution of the United States.

259. Grewal violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed

Appendix E

and SAF to an unconstitutional abridgement of First Amendment freedoms.

260. Grewal violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of First Amendment freedoms.

261. Grewal's conduct violates the First Amendment doctrine regarding prior restraints. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Grewal's conduct constitutes a prior restraint of expression; as such, it is an unconstitutional abridgement of First Amendment's freedoms because Grewal cannot carry the heavy burden of justifying a prior restraint and because the prior restraint does not operate under sufficient judicial superintendence.

262. Grewal's conduct violates the First Amendment doctrine regarding content based speech restrictions. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). Grewal's conduct imposes content-based speech restrictions; as such, the restrictions are an unconstitutional abridgement of First Amendment's freedoms because they do not serve a compelling governmental interest and are not narrowly drawn to serve any such interest.

263. Grewal's conduct violates the First Amendment doctrine regarding content neutral speech restrictions. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Even if Grewal's conduct is deemed to impose content-neutral

Appendix E

speech restrictions, it is an unconstitutional abridgement of First Amendment's freedoms because it does not serve a significant governmental interest and is not narrowly drawn to serve any such interest.

264. Grewal's conduct violates the First Amendment doctrine regarding overbreadth. *See, e.g., City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987). Grewal's conduct forbids a substantial amount of constitutionally protected speech and is not narrowly tailored to prohibit only constitutionally unprotected speech; as such, it is an unconstitutional abridgement of First Amendment's freedoms.

265. In each of these respects, Grewal's conduct results in an unconstitutional abridgement of First Amendment freedoms both facially and as applied to these circumstances.

266. Grewal's conduct proximately caused damages to Defense Distributed and SAF, to the persons with whom Defense Distributed and SAF have communicated, to the persons who desire to communicate with Defense Distributed and SAF, and to other persons wishing to engage in similar communications. The damages include, but are not limited to, the loss of First Amendment rights, the chilling effect on conduct protected by the First Amendment, and the substantial time and resources expended in defense of these rights.

267. Defense Distributed and SAF are therefore entitled to a judgment against Grewal awarding Defense

Appendix E

Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

B. Count Ten: 42 U.S.C. § 1983—Right to Keep and Bear Arms

268. Defense Distributed & SAF incorporate the preceding paragraphs.

269. The Second Amendment of the Constitution of the United States forbids laws abridging the individual right to keep and bear Arms. It applies to Grewal in his official capacity by virtue of the Fourteenth Amendment of the Constitution of the United States.

270. Grewal violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of Second Amendment rights.

271. Grewal additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of Second Amendment rights.

272. Grewal's conduct violates the individual Second Amendment right to keep and bear Arms. *See District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); *McDonald v. Chicago*, 561 U. S. 742 (2010). Grewal's conduct infringes the individual right to make and acquire Arms, which is part and parcel of the right to

Appendix E

keep and bear Arms; as such, it is an unconstitutional abridgement of Second Amendment rights.

273. In each of these respects, Grewal's conduct constitutes an unconstitutional abridgement of Second Amendment rights both facially and as applied to these circumstances.

274. Grewal's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of Second Amendment rights, the chilling effect on conduct protected by the Second Amendment, and the substantial time and resources expended in defense of these rights.

275. Defense Distributed and SAF are therefore entitled to a judgment against Grewal awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

C. Count Eleven: 42 U.S.C. § 1983—Equal Protection

276. Defense Distributed & SAF incorporate the preceding paragraphs.

277. The Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States forbids the several States from denying to any person within their jurisdictions the equal protection of the laws. It applies to Grewal in his official capacity.

Appendix E

278. Grewal violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to an unconstitutional violation of the Equal Protection Clause.

279. Grewal additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to an unconstitutional violation of the Equal Protection Clause.

280. Grewal's conduct violates the Equal Protection Clause's doctrine regarding selective enforcement. *See, e.g., Whren v. United States*, 517 U.S. 806 (1996). Grewal took action against Defense Distributed-but not similarly situated persons engaged in publication of the Defense Distributed I Files-because Grewal disagrees with the content of Defense Distributed's constitutionally protected speech and because Grewal dislikes the persons involved in the speech; as such, Grewal's conduct violates Defense Distributed and SAF's right to the equal protection of the laws.

281. In each of these respects, Grewal's conduct constitutes an unconstitutional violation of the Equal Protection Clause both facially and as applied to these circumstances.

282. Grewal's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, Defense Distributed and SAF's loss of

Appendix E

Equal Protection Clause rights and the substantial time and resources expended in defense these rights.

283. Defense Distributed and SAF are therefore entitled to a judgment against Grewal awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

D. Count Twelve: 42 U.S.C. § 1983—Due Process

284. Defense Distributed & SAF incorporate the preceding paragraphs.

285. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States forbids the several States from depriving any person of life, liberty, or property without due process of law. It applies to Grewal in his official capacity.

286. Grewal violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to a deprivation of liberty and property without due process of law.

287. Grewal additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to a deprivation of liberty and property without due process of law.

288. Grewal's conduct violates the Due Process Clause doctrine regarding vagueness. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

Appendix E

Grewal's conduct forbids expression without giving fair notice of what is forbidden; as such, it is an unconstitutional deprivation of liberty and property without due process of law.

289. Grewal's conduct violates the Due Process Clause doctrine regarding overbreadth. *See, e.g., Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Grewal's conduct forbids a substantial amount of constitutionally protected speech; as such, it is an unconstitutional deprivation of liberty and property without due process of law.

290. Grewal's conduct violates the Due Process Clause doctrine regarding deprivations of property. *See, e.g., Matthews v. Eldridge*, 424 U.S. 319 (1976). Grewal's conduct deprives Defense Distributed and SAF of a license issued by the Secretary of State pursuant to federal law, and does so without supplying adequate pre-deprivation notice and an opportunity to be heard; as such, it is an unconstitutional deprivation of property without due process of law.

291. In each of these respects, Grewal's conduct constitutes an unconstitutional abridgement of Due Process Clause rights both facially and as applied to these circumstances.

292. Grewal's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of Defense Distributed and

Appendix E

SAF's Due Process Clause rights and the substantial time and resources expended in defense these rights.

293. Defense Distributed and SAF are therefore entitled to a judgment against Grewal awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

E. Count Thirteen: 42 U.S.C. § 1983—Commerce Clause

294. Defense Distributed & SAF incorporate the preceding paragraphs.

295. The Commerce Clause of Article I, Section 8 of the Constitution of the United States imposes a negative command, known as the dormant Commerce Clause, that limits the authority of the several States to enact laws burdening interstate commerce. It applies to Grewal in his official capacity.

296. Grewal violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to a deprivation of the right to be free of commercial restraints that violate the dormant Commerce Clause.

297. Grewal additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to a deprivation of the right to be free of commercial restraints that violate the dormant Commerce Clause.

Appendix E

298. Grewal's conduct violates the dormant Commerce Clause doctrine regarding laws that directly regulate interstate commerce. *See, e.g., Granholm v. Heald*, 125 S. Ct. 1885 (2005). Grewal's conduct directly regulates interstate commerce by projecting New Jersey law into other states. Grewal's conduct does not serve a compelling governmental interest. And Grewal's conduct is not the least restrictive means of accomplishing any such interest. As such, it violates the Commerce Clause.

299. Grewal's conduct violates the dormant Commerce Clause doctrine regarding laws that discriminate against interstate commerce. *See, e.g., Granholm*, 125 S. Ct. 1885. Grewal's conduct discriminates against interstate commerce on purpose, on its face, and in effect. Grewal's conduct does not serve a compelling governmental interest. And Grewal's conduct is not the least restrictive means of accomplishing any such interest. As such, it violates the Commerce Clause.

300. Grewal's conduct violates the dormant Commerce Clause doctrine regarding all laws that implicate interstate commerce. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Grewal's conduct imposes burdens on interstate commerce that are clearly excessive in relation to putative local benefits; as such, it violates the Commerce Clause.

301. In each of these respects, Grewal's conduct constitutes an unconstitutional abridgement of Due Process Clause rights both facially and as applied to these circumstances.

Appendix E

302. Grewal's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of Dormant Commerce Clause rights in the past and the substantial time and resources expended in defense these rights.

303. Defense Distributed and SAF are therefore entitled to a judgment against Grewal awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

F. Count Fourteen: 42 U.S.C. § 1983—Arms Export Control Act

304. Defense Distributed & SAF incorporate the preceding paragraphs.

305. The Supremacy Clause of the Constitution of the United States provides that the Constitution of the United States and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land. It applies to Grewal by virtue of Article VI of the Constitution of the United States.

306. The federal government has exclusive authority to administer and enforce the provisions of the AECA and ITAR. Pursuant to that authority, the federal government entered into the Settlement Agreement with Plaintiffs and granted Plaintiffs a license to publish the Defense Distributed I Files.

Appendix E

307. Grewal violated the AECA and ITAR by acting, under color of state law, to regulate conduct that the federal government has expressly authorized pursuant to its authority under the AECA and ITAR. Grewal therefore violated 42 U.S.C. § 1983 by acting, under color of state law, to regulate Defense Distributed and SAF pursuant to state laws that are preempted by federal law. “[I]f an individual claims federal law immunizes [the plaintiff] from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.” *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

308. In this respect, Grewal’s conduct is preempted both facially and as applied to these circumstances.

309. Grewal’s conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of immunity from preempted state regulation in the past and the substantial time and resources expended in defense these rights.

310. Defense Distributed and SAF are therefore entitled to a judgment against the Defendants awarding Defense Distributed and SAF declaratory relief and injunctive relief, and attorney fees and costs.

*Appendix E***G. Count Fifteen: 42 U.S.C. § 1983—
Communications Decency Act**

311. Defense Distributed & SAF incorporate the preceding paragraphs.

312. The Communications Decency Act, 47 U.S.C. § 230, immunizes service providers for information originating with a third-party user of the service. Defense Distributed is a provider and user of an “interactive computer service” within the meaning of 47 U.S.C. § 230 because it operates an interactive online service at DEFCAD.com.

313. Senate Bill 2465 violates Defense Distributed’s rights under 47 U.S.C. § 230(c)(1) because it treats them, providers of interactive computer services, as publishers or speakers of information provided by another information content provider. Specifically, Senate Bill 2465 treats Defense Distributed as a publishers or speaker because it makes it a crime to “distribute” the “information” at issue regardless of whether the information was “provided by another information content provider.”

314. Senate Bill 2465 is a “State . . . law that is inconsistent with” § 230, in direct violation of 47 U.S.C. § 230(e)(3).

315. In this respect, Defendant Grewal’s conduct is preempted both facially and as applied to these circumstances.

Appendix E

316. Grewal's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of immunity from preempted state regulation in the past and the substantial time and resources expended in defense these rights.

317. Defense Distributed and SAF are therefore entitled to a judgment against the Defendants awarding Defense Distributed and SAF declaratory relief and injunctive relief, and attorney fees and costs.

H. Count Sixteen: Tortious Interference with the Settlement Agreement

318. Defense Distributed & SAF incorporate the preceding paragraphs.

319. The Settlement Agreement is an existing, valid contract between the Defense Distributed I Plaintiffs and the State Department.

320. The Defendants committed the tort of intentional interference with an existing contract by willfully and intentionally engaging in conduct that made the State Department's performance of the Settlement Agreement burdensome, more difficult, and of less or no value to the Defense Distributed I Plaintiffs. See, e.g., Restatement (Second) of Torts § 766 (1979); *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000).

Appendix E

321. The Defendants' conduct proximately caused Defense Distributed to suffer substantial actual damages in excess of \$75,000 per year.

322. Plaintiff Defense Distributed is therefore entitled to a judgment against the Defendants awarding declaratory relief, injunctive relief, and attorney fees and costs.

I. Count Seventeen: Tortious Interference with Existing Contracts

323. Defense Distributed & SAF incorporate the preceding paragraphs.

324. Defense Distributed and DreamHost had an existing, valid contract for the provision of internet security services regarding Defense Distributed's website.

325. Defendant Gurbir Grewal committed the tort of intentional interference with an existing contract by willfully and intentionally engaging in conduct that made the performance of Defense Distributed's contract with DreamHost burdensome, more difficult, and of less or no value to Defense Distributed. *See, e.g.*, Restatement (Second) of Torts § 766 (1979); *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000). Defendant Gurbir Grewal's conduct proximately caused Defense Distributed to suffer substantial actual damages in excess of \$75,000 per year.

Appendix E

326. Defense Distributed and Cloudflare, Inc. have an existing, valid contract for the provision of internet security services regarding Defense Distributed's website.

327. Defendant Gurbir Grewal committed the tort of intentional interference with an existing contract by willfully and intentionally engaging in conduct that made the performance of Defense Distributed's contract with Cloudflare, Inc. burdensome, more difficult, and of less or no value to Defense Distributed. *See, e.g.*, Restatement (Second) of Torts § 766 (1979); *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000). Defendant Gurbir Grewal's conduct proximately caused Defense Distributed to suffer substantial actual damages substantial actual damages in excess of \$75,000 per year.

328. Defense Distributed is therefore entitled to a judgment against Defendant Gurbir Grewal awarding declaratory relief, injunctive relief, and attorney fees and costs.

IX. Requests for Relief**A. Defense Distributed and SAF should prevail against the State Department.**

329. Defense Distributed and SAF request a judgment in their favor as to all claims against the State Department awarding them all relief they are entitled to.

330. Defense Distributed and SAF request a judgment against the State Department declaring

Appendix E

unlawful and setting aside the State Department's disavowal of the license it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently. With respect to this conduct, Defense Distributed & SAF request an award of nominal damages, punitive damages, and actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

331. Defense Distributed and SAF request a judgment against the State Department declaring unlawful and setting aside the State Department's disavowal of the temporary modification it had originally issued to Defense Distributed and SAF in July 2018. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently. With respect to this conduct, Defense Distributed & SAF request an award of nominal damages, punitive damages, and actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

332. Defense Distributed and SAF request a judgment against the State Department declaring unlawful the State Department's refusal to issue a letter to Defense Distributed & SAF, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that (1) *Defense Distributed*'s Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e.,

Appendix E

unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13), and (2) for the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue the approval. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently. With respect to this conduct, Defense Distributed & SAF request an award of nominal damages, punitive damages, and actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

333. Defense Distributed and SAF request a judgment against the State Department declaring unlawful the State Department's refusal to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule revising USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently. With respect to this conduct, Defense Distributed & SAF request an award of nominal damages, punitive damages, and actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

Appendix E

334. Defense Distributed and SAF request a judgment against the State Department declaring unlawful the State Department's refusal to announce, while the above-referenced final rule is in development, a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that was the subject of *Defense Distributed I*. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently. With respect to this conduct, Defense Distributed & SAF request an award of nominal damages, punitive damages, and actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

335. Defense Distributed and SAF request a judgment against the State Department declaring unlawful the State Department's refusal to acknowledge and agree that the 2018 temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the 2018 License permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files of *Defense Distributed I*. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future— both on a preliminary basis while this action is pending and

Appendix E

permanently. With respect to this conduct, Defense Distributed & SAF request an award of nominal damages, punitive damages, and actual damages proximately caused by this wrongdoing in an amount no less than five million dollars.

336. Defense Distributed & SAF request an award against the State Department of costs, including reasonable attorney fees, against the State Department.

337. Defense Distributed and SAF request any other relief against the State Department to which they are entitled.

B. Defense Distributed and SAF should prevail against Grewal.

338. Defense Distributed and SAF request a judgment in their favor as to all claims against Grewal awarding them all relief they are entitled to.

339. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal unconstitutionally abridged Defense Distributed and SAF's First Amendment freedoms. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

340. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal

Appendix E

unconstitutionally infringed Defense Distributed and SAF's Second Amendment rights. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

341. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal unconstitutionally denied Defense Distributed and SAF the equal protection of the laws. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

342. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal unconstitutionally subjected Defense Distributed and SAF to a deprivation of liberty and property without due process of law. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

343. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal unconstitutionally violated Defense Distributed and SAF's dormant Commerce Clause rights. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

Appendix E

344. Defense Distributed and SAF request a judgment against Grewal declaring that federal law preempts and immunizes Defense Distributed and SAF from Grewal’s civil and criminal censorship. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

345. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal’s conduct constitutes tortious interference with the Settlement Agreement. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

346. Defense Distributed and SAF request a judgment against Grewal declaring that Grewal’s conduct constitutes tortious interference with the contracts between Defense Distributed and DreamHost and Cloudflare, Inc. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

347. Defense Distributed and SAF request an award against Grewal of costs, including reasonable attorney fees and costs, pursuant to 42 U.S.C. § 1988.

348. Defense Distributed and SAF request any other relief against Grewal to which they are entitled.

216a

Appendix E

Respectfully submitted,

BECK REDDEN LLP

By /s/ Chad Flores

Chad Flores

cflores@beckredden.com

State Bar No. 24059759

Daniel Nightingale

dhammond@beckredden.com

State Bar No. 24098886

Hannah Roblyer

hroblyer@beckredden.com

State Bar No. 24106356

1221 McKinney St., Suite 4500

Houston, TX 77010

(713) 951-3700 | (713) 952-3720 (fax)

FARHANG & MEDCOFF

Matthew Goldstein

mgoldstein@farhangmedcoff.com

D.C. Bar No. 975000

4801 E. Broadway Blvd., Suite 311

Tucson, AZ 85711

(202) 550-0040 | (520) 790-5433 (fax)

Josh Blackman

joshblackman@gmail.com

Texas Bar No. 24118169

1303 San Jacinto Street

Houston, TX 77002

(202) 294-9003 | (713) 646-1766 (fax)

Attorneys for Plaintiffs Defense

Distributed and Second

Amendment Foundation, Inc.