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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON; et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
STATE; et al,

Defendants.

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

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

**I. INTRODUCTION**

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

## II. BACKGROUND

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

### A. Arms Export Control Act (“AECA”)

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

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

### B. Export Control Reform Act

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

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

### 17 **C. Prior Litigation**

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

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

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

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

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

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

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

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

1 Munitions List. 85 Fed. Reg. 3819 (Jan. 23, 2020) (“State Rule”). The State Rule  
2 confirmed the removal of “all non-automatic firearms up to .50 caliber” and “related  
3 technical information” from Category I. The removed items would again be subject to a  
4 companion Commerce regulation. See 85 Fed. Reg. 4136 (Jan. 23, 2020) (“Commerce  
5 Rule”). Collectively, the Final Rules also announced a new jurisdictional change  
6 pertaining to 3-D gun files: Notwithstanding Commerce’s jurisdictional exemption for  
7 “published” technology or software, it would now retain jurisdiction over files “for the  
8 production of a firearm, or firearm frame or receiver” that are “made available by posting  
9 on the internet in electronic format” and are “ready for insertion” in a 3-D printer or  
10 similar equipment. Id. The Final Rules are set to go into effect on March 9, 2020.

11 On January 23, 2020, the States filed this lawsuit challenging the Final Rules under  
12 the APA. Dkt. # 1. The States contend that the Final Rules amount to a toothless  
13 prohibition on 3-D gun files that will lead to their widespread proliferation, including on  
14 the internet. After amending their complaint, the States filed this motion for a preliminary  
15 injunction. Dkt. # 55. On February 11, 2020, the National Shooting Sports Foundation,  
16 Inc. and Fredric’s Arms & Smiths, LLC jointly moved to intervene as defendants. Dkt. #  
17 63. The Court considered and granted their motion for the reasons indicated in their  
18 briefing. On February 24, 2020, the federal defendants, including Commerce and the  
19 State Department, and the intervenor defendants filed their oppositions. On February 27,  
20 2020, the States filed their reply. Dkt. # 87. On February 28, 2020, the Court held oral  
21 argument. Dkt. # 88. By March 5, 2020, the parties filed post-hearing briefing on the  
22 scope of injunctive relief. Dkt. ## 89-92. The Court has considered all submissions and  
23 argument to date.

### 24 III. LEGAL STANDARD

25 To issue a preliminary injunction, the Court must determine whether plaintiffs (1)  
26 are likely to succeed on the merits of their claim; (2) are likely to suffer irreparable harm  
27 in the absence of preliminary relief; (3) have shown that the balance of equities tips in

1 their favor, and (4) have shown that an injunction is in the public interest. Short v. Brown,  
2 893 F.3d 671, 675 (9th Cir. 2018) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S.  
3 7, 20 (2008)). In the alternative, “if a plaintiff can only show that there are serious  
4 questions going to the merits—a lesser showing than likelihood of success on the merits—  
5 then a preliminary injunction may still issue if the balance of hardships tips sharply in the  
6 plaintiff’s favor, and the other two Winter factors are satisfied.” Feldman v. Ariz. Sec. of  
7 State’s Office, 843 F.3d 366, 375 (9th Cir. 2016) (quoting Shell Offshore, Inc. v.  
8 Greenpeace, Inc., 709 F.3d 1281, 1291 (9th Cir. 2013)) (internal quotation marks omitted,  
9 emphasis in original).

#### 10 IV. DISCUSSION

11 The States bring three claims under APA. First, they claim that the federal  
12 defendants failed to abide by the APA’s notice-and-comment requirements. Second, they  
13 claim that the federal defendants’ actions were “arbitrary and capricious” in failing to  
14 consider relevant national security and foreign policy interests. Their final claim argues  
15 that the State Rule is contrary to the AECA.

##### 16 A. Standing

17 As they did in State of Washington, the federal defendants challenge the Court’s  
18 jurisdiction over this matter. The basis for the challenge remains the same: the States  
19 cannot meet prudential standing requirements and present a non-justiciable political  
20 question. The Court agrees with the States that the analysis is no different here than it was  
21 in State of Washington.

22 To present a justiciable case or controversy under Article III, plaintiffs must  
23 demonstrate an “injury in fact” that is “fairly traceable” to the defendants’ actions and will  
24 likely be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 204 U.S.  
25 555, 560 (1992). In an APA action, a state alleging a procedural violation has standing if  
26 there is a possibility that the relief requested will prompt the agency to reconsider the  
27 decision allegedly causing harm. Mass. v. EPA, 549 U.S. 497, 517 (2007). In addition, a

1 State has a legally protectable interest if it has a sovereign, quasi-sovereign, or proprietary  
2 interest that would be impacted by the litigation. Dep't of Fair Emp't & Hous. v. Lucent  
3 Techs., 642 F.3d 728, 753 n.5 (9th Cir. 2011).

4 This Court in State of Washington ruled that the States sufficiently alleged harm to  
5 their legally protectable sovereign interests under the traditional standing analysis.  
6 Specifically, the Court found that the government's alleged failure to provide notice or  
7 make a reasonable evaluation of the risks and benefits of the proposed action would  
8 greatly impact aviation and other security breaches, as well as gun control laws both  
9 abroad and at home. 318 F.Supp.3d at 1255-56. The Court also concluded that the States  
10 had standing to bring a procedural APA claim because there was a possibility that  
11 compelling compliance with the specified procedures would impact the decision-making  
12 process: "Forcing the federal defendants to evaluate the effect of the proposed delisting on  
13 world peace, national security, and the foreign policy of the United States (factors which  
14 Congress intended the President or his designee to consider) may also prompt a  
15 reconsideration of the decision to remove the CAD files from the [Munitions List]." Id.

16 The federal defendants try to distinguish the States' case for standing here but fall  
17 short in doing so. They again disclaim any possible connection between a shift in the  
18 government's export-control regulations and domestic injury to States—an argument  
19 made and rejected in State of Washington. 318 F.Supp.3d at 1255 (describing this  
20 argument as "so myopic and restrictive as to be unreasonable"). That argument still fails  
21 now as neither the global nature of the internet nor the substantial risk of harm alleged has  
22 changed.<sup>1</sup> The federal defendants also argue that, since the State Department has already  
23 reconsidered its decision to remove items from Munitions List and issued final rules to  
24 that effect, the States cannot show traceability. Dkt. # 82 at 32. However, claims resting

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26 <sup>1</sup> The government also contends that the States' injury in State of Washington was based  
27 on "particular files" that would produce undetectable firearms whereas the injury alleged  
28 here is not. Dkt. # 84 at 31. However, the States allege that those files and similar ones  
will be impacted by the Final Rules. See Dkt. # 54 at ¶¶ 103, 106.



1 on a procedural injury, including failure to provide notice and comment, relax some  
2 standing requirements. Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 817 (9th Cir.  
3 2017). There is also little to suggest that further reconsideration could not prompt change  
4 of the agency’s decisions—*e.g.*, changing the adequacy of Commerce’s jurisdiction over  
5 the 3-D gun files. See Massachusetts, 549 U.S. at 518. Accordingly, the Court finds that  
6 States have shown Article III standing.

7 Plaintiffs suing under the APA must also show their interests fall “arguably within  
8 the zone of interests” protected or regulated by the violated statute. Match-E-Be-Nash-She  
9 Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012). This is met here.  
10 The States’ interest in curbing violence, assassinations, terrorist threats, aviation and other  
11 security breaches, and violations of gun control laws within their borders is at least  
12 marginally related to the national security interests protected or regulated by the AECA and  
13 the ECRA. 22 U.S.C. § 2778(a)(1) (declaring the security of the United States as an  
14 objective underlying the AECA); 50 U.S.C. § 4811 (same as to the ECRA).

## 15 **B. Political Question**

16 While the political question doctrine raises both jurisdictional and prudential  
17 concerns, “it is at bottom a jurisdictional limitation imposed on the courts by the  
18 Constitution, and not by the judiciary itself.” Corrie v. Caterpillar, 503 F.3d 974, 981 (9th  
19 Cir. 2007). “[J]udicial restraint in the area of foreign affairs is often appropriate because  
20 such cases ‘frequently turn on standards that defy judicial application, or involve the  
21 exercise of a discretion demonstrably committed to the executive or legislature.’” Harbury  
22 v. Hayden, 522 F.3d 413, 419 (D.C. Cir. 2008) (quoting Baker v. Carr, 369 U.S. 186, 211  
23 (1962)).

24 The Court is not persuaded that this case lies beyond judicial cognizance. The  
25 federal defendants have framed this dispute as the States attacking whether a particular  
26 item is on the Munition List, a matter of policy entrusted to Congress and the President.  
27 Dkt. # 84 at 27 (citing United States v. Mandel, 914 F.2d 1215, 1223 (9th Cir. 1990)).

1 This is incorrect. The States again are challenging whether federal agencies complied  
2 with the APA in promulgating the Final Rules. “This is neither a political question nor  
3 one committed to the agency’s discretion.” State of Washington, 2019 WL 5892505, at  
4 \*5.

### 5 **C. Likelihood of Success on the Merits**

6 The APA sets forth the extent of judicial authority to review executive agency  
7 action. Under the APA, the district court may not set aside an agency’s action unless it is  
8 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ...”  
9 5 U.S.C. § 706(2)(A); Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir.  
10 2002). Review under this standard is narrow, and the court must not substitute its  
11 judgment for that of the agency. Id. at 1150.

#### 12 **1. Exemptions Under the AECA and ECRA –**

13 The federal defendants argue that the States cannot succeed on the merits because  
14 the Final Rules are explicitly exempt from judicial review under the APA. Although the  
15 APA embodies a “basic presumption of judicial review,” such review is not available “to  
16 the extent that” a relevant statute precludes it, § 701(a)(1), or the agency action is  
17 “committed to agency discretion by law,” § 701(a)(2).

18 The federal defendants point specifically to § 4821 of the ECRA and § 2778(h) of  
19 the AECA. Section 4821(a) exempts the “functions exercised” under the ECRA from the  
20 judicial review provisions of the APA. The States’ challenge to the Commerce Rule,  
21 when viewed in isolation, appears to fall within this exemption. Insofar as § 4821 bars  
22 judicial review of the Commerce Rule, however, the States argue that the agencies’ “joint  
23 action” of removing items from the Munitions List and transferring jurisdiction to  
24 Commerce is still reviewable via the State Rule.<sup>2</sup> Dkt. # 87 at 8. This Court has

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25  
26 <sup>2</sup> The State Department referred to the process as an ongoing interagency effort in which  
27 the Department coordinated principally with the Departments of Defense and Commerce  
28 and the Department of Justice’s Bureau of Alcohol, Tobacco, Firearms and Explosives to  
develop revisions to the Munitions List and CCL. Dkt. # 85-1 at ¶ 38.

1 acknowledged that § 2778(h)'s prohibition on judicial review does not apply to removals  
2 from the Munitions List. See State of Washington, 318 F.Supp.3d at 1260 (“The decision  
3 at issue here, however, is the removal of an item from the [Munitions List], which  
4 Congress chose not to make unreviewable.”). Accordingly, the Court will evaluate joint  
5 actions to the extent that they are reflected in the decision to remove the 3-D gun files  
6 from the Munitions List.

## 7 **2. Foreign Affairs Exemption**

8 The federal defendants argue separately that the APA's foreign affairs exemption  
9 exempts the State Rule from the notice-and-comment requirement. Under the foreign  
10 affairs exception, the APA's notice-and-comment procedures do not apply “to the extent  
11 that there is involved—a ... foreign affairs function of the United States.” 5 U.S.C. §  
12 553(a)(1); E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 775 (9th Cir. 2018). The  
13 purpose of the exemption is to allow more cautious and sensitive consideration of those  
14 matters which “so affect relations with other Governments that, for example, public rule-  
15 making provisions would provoke definitely undesirable international consequences.”  
16 H.Rep. No. 1980, 69th Cong., 2d Sess. 23 (1946); see also, S.Rep. No. 752, 69th Cong.,  
17 1st Sess. 13 (1945). Courts have required the government to do more than merely say that  
18 a rule “implicates” foreign affairs and have disapproved use of the exception where the  
19 Government has failed to offer evidence of consequences that would result from  
20 compliance with the APA's procedural requirements. E. Bay Sanctuary Covenant, 932  
21 F.3d 742 at 776.

22 The federal defendants state that the Final Rules are part of a decade-long reform to  
23 the export-control system. Since 2010, the State Department has published 26 final or  
24 interim rules with the goal of removing “less sensitive items from the [Munitions List].”  
25 Dkt. # 85-1 at ¶¶ 33-34. With this history, the evidence of undesirable international  
26 consequence needed to invoke the foreign affairs exemption is missing. E.g., Rajah v.  
27 Mukasey, 544 F.3d 427, 437 (2d Cir. 2008) (rule responding to September 11, 2001

1 attacks). “The court is simply unwilling to apply the exception without some evidence to  
2 support its application.” Doe v. Trump, 288 F. Supp. 3d 1045, 1076 (W.D. Wash. 2017).

3 The federal defendants argue that 22 C.F.R. § 128.1, an AECA regulation,  
4 demonstrates that the exemption applies. Section 128.1 acknowledges the Secretary of  
5 State’s power under the AECA “to make decisions on whether license applications or  
6 other written requests for approval shall be granted, or whether exemptions may be used,”  
7 and “to revoke, suspend or amend licenses or other written approvals whenever the  
8 Secretary deems such action deemed advisable.” The section goes onto say the  
9 “administration” of the AECA is a foreign affairs function within the meaning of the  
10 APA. Id. The federal defendants claim that removing an item from the Munitions List  
11 falls within § 128.1’s purview. However, nothing in the language of § 128.1, or in the  
12 AECA’s predecessor statute, supports the federal defendants’ expansive reading. See Pub.  
13 L. No. 83-665, 68 Stat. 832, 848 (1954) (granting authority to designate defense articles  
14 for munitions control to the President); 20 Fed. Reg. 6250, 6256 (Aug. 26, 1955)  
15 (excluding the designation of such articles and subsequent registration and licensing  
16 decisions from APA review). The Court concludes that the foreign affairs exception is  
17 inapplicable.

### 18 **3. Notice and Comment**

19 The Court turns to whether the federal defendants complied with notice-and-  
20 comment procedures in promulgating the State Rule. The APA requires an agency to  
21 notify the public of—and provide the public with an opportunity to comment on—the  
22 agency’s intention to change an existing regulation or to promulgate a new regulation.  
23 See 5 U.S.C. §§ 553(b), 553(c), 551(5). Adequate notice is crucial to “ensure that agency  
24 regulations are tested via exposure to diverse public comment,” “to ensure fairness to  
25 affected parties,” and “to give affected parties an opportunity to develop evidence in the  
26 record to support their objections to the rule and thereby enhance the quality of judicial  
27 review.” Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626

1 F.3d 84, 95 (D.C. Cir. 2010) (citation omitted).

2 The Ninth Circuit has held that when a court considers whether an agency has  
3 satisfied the APA's notice requirement, the "essential inquiry focuses on whether  
4 interested parties reasonably could have anticipated the final rulemaking from the draft  
5 [proposal]." Nat. Res. Def. Council v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002). In  
6 determining this, courts should consider "whether a new round of notice and comment  
7 would provide the first opportunity for interested parties to offer comments that could  
8 persuade the agency to modify its rule." Id. (quoting Am. Water Works Ass'n v. EPA, 40  
9 F.3d 1266, 1274 (D.C. Cir. 1994)). While a final rule need not be identical to the draft  
10 proposal, it must be a logical outgrowth of the proposed rule. Id. The States argue that  
11 the federal defendants gave no notice of their intent to regulate 3-D guns files. Dkt. # 55  
12 at 14. Specifically, the States complain that the notices of proposed rulemaking  
13 ("NPRMs") failed to mention 3-D printed guns at all and otherwise gave no indication that  
14 3-D gun files would be subject to unique jurisdiction under Commerce. Moreover,  
15 because the settlement agreement with Defense Distributed was not revealed until after the  
16 public comment period closed, the States argue that they were denied a right to comment  
17 on the "hidden-but-intended" effect of the Rules. Id. at 14.

18 Binding case law instructs that where a final rule's substance is "not foreshadowed  
19 in proposals and comments advanced during the rulemaking," it will not be considered a  
20 "logical outgrowth" because it may catch interested parties by surprise. Nat. Res. Def.  
21 Council, 279 F.3d at 1186. Prior to the publication of the Final Rules, neither agency gave  
22 any indication that a specific regulation would apply to the online dissemination of 3-D  
23 gun files.<sup>3</sup> The State Department's proposed rule only said that "removed items" would  
24 be subject to controls published in Commerce's proposed companion rule. 83 Fed. Reg.

25 \_\_\_\_\_  
26 <sup>3</sup> Commerce all but acknowledges this fact in the notice of final rulemaking. 85 Fed. Reg.  
27 4136, 4141–42 (explaining that the framework of Commerce's regulations as described in  
28 the proposed rule did not "adequately address the issue of regulating the unlimited access  
to certain files for the 3D printing of firearms").

1 24,198-01. Commerce’s proposal confirmed “[i]tems that would move to the CCL would  
2 be subject to *existing* EAR concepts of jurisdiction and controls related to ‘development’  
3 and ‘production,’ as well operation, installation, and maintenance ‘technology.’” 83 Fed.  
4 Reg. 24,166-01 (emphasis added). The substantive change in the Final Rules—that  
5 Commerce would retain now jurisdiction over 3-D gun files “made available by posting  
6 on the internet” and “ready for insertion” into a 3-D printer—seemingly comes out of left  
7 field.

8 The federal defendants say the State Department received an array of comments  
9 about 3-D firearm files which demonstrate the public had meaningful notice of the  
10 combined regulatory effect of the two rules. Dkt. # 84 at 37. This argument is blunted by  
11 the fact that the NPRMs fail to mention 3-D gun files at all. See CSX Transp., Inc. v.  
12 Surface Transp. Bd., 584 F.3d 1076, 1080 (D.C. Cir. 2009) (holding that a final rule  
13 “violates the APA’s notice requirement where ‘interested parties would have had to divine  
14 [the agency’s] unspoken thoughts’”(alteration in original) (quoting Int’l Union, United  
15 Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259–60 (D.C.  
16 Cir. 2005))). Additionally, the State Department’s notice of proposed rulemaking purports  
17 to keep defense articles “not otherwise widely available for commercial sale” within its  
18 jurisdiction while transferring to Commerce “many items which are widely available in  
19 the United States and abroad.” 83 Fed. Reg. 24198-01. Omissions that would permit  
20 potentially controversial subject matter to go unnoticed fail to “fairly apprise interested  
21 persons of the subjects and issues before the Agency.” See Natural Res. Def. Council,  
22 279 F.3d at 1186; Louis v. U.S. Dep’t of Labor, 419 F.3d 970, 975–76 (9th Cir. 2005).

23 Of course, not every violation of the APA invalidates an agency action. The failure  
24 to provide notice and comment is harmless only where the agency’s mistake “clearly had  
25 no bearing on the procedure used or the substance of decision reached.” Sagebrush  
26 Rebellion, Inc. v. Hodel, 790 F.2d 760, 764–65 (9th Cir. 1986); see Hodge v. Dalton, 107  
27 F.3d 705 (9th Cir. 1997) (rule merely made explicit what was already implicit in the

1 legislative history of the EEOC's authority). Here, the States say they had no opportunity  
2 to comment on a scheme that applies specifically to 3-D gun files, including the potential  
3 public safety implications that would occur from implementing the Final Rules in their  
4 current form. On the current record, the States are likely to succeed on the merits with  
5 respect to their notice-and-comment claim.

#### 6 **4. Arbitrary and Capricious**

7 The States allege that the federal defendant's decision to remove 3-D gun files from  
8 the Munitions List was arbitrary and capricious because the State Department failed to  
9 consider the factors set forth in the AECA and/or to overrule or even address its earlier  
10 findings justifying regulation of the 3-D gun files. An agency decision is "arbitrary and  
11 capricious" within the meaning of the APA, 5 U.S.C. § 706(2)(A), where the agency has  
12 relied on factors which Congress has not intended it to consider, entirely failed to consider  
13 an important aspect of the problem, offered an explanation for its decision that runs  
14 counter to the evidence before the agency, or is so implausible that it could not be ascribed  
15 to a difference in view or the product of agency expertise. Motor Vehicle Mfr. Ass'n v.  
16 State Farm Ins., 463 U.S. 29, 44 (1983). The Court's scope of review is "narrow" and  
17 focused on determining whether the agency "examined the relevant data and articulated a  
18 satisfactory explanation for [its] decision, including a rational connection between the  
19 facts found and the choice made." Dep't of Commerce v. New York, 139 S.Ct. 2551, 2569  
20 (2019) (citing State Farm, 463 U.S. at 43 (internal quotation marks omitted)); Beno v.  
21 Shalala, 30 F.3d 1057, 1074 (9th Cir. 1994).

22 In State of Washington, the Court determined that the federal defendants' previous  
23 decision to remove the 3-D gun files from the Munitions List was arbitrary and capricious.  
24 The administrative record gave no indication that the State Department considered the  
25 unique characteristics and qualities of plastic guns, or certain statutory requirements.  
26 2019 WL 5892505 at \*7. In its analysis, the Court specifically referenced the State  
27 Department's 2018 conclusion that the worldwide publication of computerized

1 instructions for the manufacture of undetectable firearms was a threat to world peace and  
2 the national security interests of the United States and would cause serious and long-  
3 lasting harm to its foreign policy. Id. at \*9. These findings, the Court found, went  
4 unaddressed by the State Department in making the change to remove 3-D gun files from  
5 the Munitions List. Id. Additionally, Congress directed the agency to consider how the  
6 proliferation of weaponry and related technical data would impact world peace, national  
7 security, and foreign policy, but the Court found that the State Department “evaluated the  
8 export controls on small caliber firearms only through the prism of whether restricting  
9 foreign access would provide the United States with a military or intelligence advantage.”  
10 Id. at \*8.

11 The record at the time of the Final Rules demonstrates that the States have raised  
12 serious questions going to the merits of their claim. The State Rule again focuses on its  
13 conclusion that the 3-D gun files “do not confer a critical military or intelligence  
14 advantage,” which purportedly took into account “the effect that a transfer to CCL would  
15 have on national security.”<sup>4</sup> As this Court stated previously, the agency’s determination  
16 that small-caliber firearms do not provide “critical military or intelligence advantages”  
17 does not explain why those previously-controlled items were removed from the list. State  
18 of Washington, 2019 WL 5892505 at \*8. Articles and services that provide a “military or  
19 intelligence advantage” “shall be” included on the Munitions List, but they are not the  
20 only items that can be included. Id. at \*8 (citing 22 C.F.R. § 120.3(b)). There is evidence  
21 to support the States’ contention that the federal defendants again failed to make their  
22 decision based on consideration of the relevant Congressional factors, such as the impact  
23 on world peace and national security. See id.

24 The same is true on the issue of whether the State Department addressed its earlier,  
25 contrary findings. In mid-2018, the State Department had taken the position that

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27 <sup>4</sup> The multi-year review upon which the decision was apparently based focused on small  
28 caliber firearms generally, not 3-D printed guns specifically.



1 significant national security concerns warranted subjecting 3-D gun files to ITAR. The  
2 record before the Court shows no analysis addressing these findings or otherwise  
3 supporting the federal defendants' conclusion that removing the 3-D gun files is now  
4 consistent with the AECA's goals of world peace, national security, and U.S. foreign  
5 policy.<sup>5</sup> See State Farm, 463 U.S. at 46-51 (agency's actions arbitrary and capricious  
6 because the agency did not address its prior, contrary factual findings); accord Asarco,  
7 Inc. v. U.S.E.P.A., 616 F.2d 1153, 1162 (9th Cir. 1980) (decision arbitrary and capricious  
8 where there was evidence agency had considered issues but did so in a manner which was  
9 insufficient and abstract). The federal defendants claim their position is not contrary to its  
10 previous findings because they now concur with regulating the 3-D gun files, but aver that  
11 it should be done by Commerce.<sup>6</sup> Even granting this change in philosophy, there are  
12 serious questions going to the merits of whether the agency action at the time was  
13 arbitrary and capricious. There is little evidence in the record that explains why regulating  
14 3-D gun files under ITAR is no longer necessary considering its previous findings.

##### 15 **5. Contrary to the AECA**

16 The States also contend that the State Rule is contrary to the AECA's purpose of  
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18 <sup>5</sup> The federal defendants also assert that Commerce's jurisdiction simply mimics what is  
19 currently the status quo under ITAR. Dkt. # 84 at 34-36. The language provided in the  
20 Commerce Rule does not comport with the language from the relevant ITAR provisions  
21 (even considering the "public domain" exemption) and appears narrower in scope, only  
22 excluding from § 734.7's definition of "published" those 3-D gun files "made available by  
23 posting on the internet in an electronic format and that may be directly loaded without  
24 further modification by the machine operator." Dkt. # 54 at 28. Additionally, the States  
25 allege that the Final Rules would permit the unrestricted export of published 3-D gun files  
26 by means other than "posting on the internet," which departs from the status quo under  
27 existing regulations. Dkt. # 54 at ¶11.

28 <sup>6</sup> The federal defendants attempt to bolster their rationale in declarations opposing the  
29 motion. See, e.g., Dkt. # 85-1 at ¶ 100 (referencing the enforcement resources available in  
30 Commerce Department). "However, district courts are not to rely upon litigation  
31 affidavits and 'post hoc' rationalizations for agency action." Presidio Golf Club v. Nat'l  
32 Park Serv., 155 F.3d 1153, 1164-65 (9th Cir. 1998); Sw. Ctr. for Biological Diversity v.  
33 U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996).

1 furthering “world peace and the security and foreign policy of the United States.” 22  
2 U.S.C. §§ 2751, 2778(a)(1). ““In order to be valid regulations must be consistent with the  
3 statute under which they are promulgated.”” E. Bay Sanctuary Covenant, 909 F.3d at  
4 1248.

5 In response, the federal defendants say that the AECA explicitly permits the State  
6 Department to “periodically review” items on the Munitions List and remove those that no  
7 longer warrant export controls. Dkt. # 84 at 43 (citing 22 U.S. 2778(f)(1)). This  
8 congressional affirmation certainly supports the federal defendants’ position that the  
9 actions here are “statutorily permissible.” Fox Television Stations, Inc. v. Aereokiller,  
10 LLC, 851 F.3d 1002, 1013 (9th Cir. 2017). This is likely true, in particular, for the  
11 categories of items that lack any recent assessment as to their national security risk and are  
12 otherwise commercially available. Nonetheless, there are serious questions going to the  
13 merits as applied to 3-D guns. Again, the record evidence fails to explain the deviation  
14 from the State Department’s prior determination that controlling certain 3-D gun files  
15 under ITAR was necessary to further world peace and national security.

#### 16 **D. Irreparable Harm**

17 As they did in State of Washington, the States again submit evidence, including  
18 declarations and the federal defendants’ prior findings, showing that they will likely suffer  
19 irreparable injury if the technical data for designing and producing undetectable weapons  
20 using a commercially-available 3-D printer become widely available on the internet. Dkt.  
21 ## 56, 57. Analysis of irreparable harm is well-documented in the prior litigation. The  
22 effect on nationwide public safety, law enforcement, and propriety interests as highlighted  
23 in State of Washington bears repeating:

24 The instability and inaccuracy of 3D printed firearms pose  
25 threats to the citizens of the plaintiff States, including both users  
26 and bystanders, while the toy-like appearance increases the risk  
27 of unintentional discharge, injury, and/or death. Guns that have  
no identifying information, guns that are undetectable, and guns

1 that thwart the use of standard forensic techniques to link a  
2 particular projectile to a particular weapon will hamper law  
3 enforcement efforts to prevent and/or investigate crime within  
4 the States’ respective jurisdictions. And to the extent a State  
5 itself utilizes metal detectors in its courthouses, jails, prisons, or  
6 public buildings, it will have to expend additional time or  
7 money in an effort to maintain security if ... every person owns  
8 a plastic gun.

9 318 F.Supp.3d at 1261-62.

10 The States also provide evidence that “virtually no expertise” is required to print a  
11 3-D gun even where the files reach the user in a format initially unreadable by a 3-D  
12 printer. Dkt. # 56 at 5-6. Thus, it takes little to connect the removal of certain 3-D gun  
13 files from the Munitions List and the likelihood of the irreparable injuries plaintiffs have  
14 identified. See State of Washington, 318 F.Supp.3d 1247, 1262 (finding irreparable harm  
15 because the publication of the technical data online would threaten the peace and security  
16 of the communities where these guns proliferate). The federal defendants argue once again  
17 that the availability of ongoing corrective relief—*i.e.*, state and federal laws prohibiting  
18 certain firearm possession and transfer—prevents finding irreparable harm. However, this  
19 ignores the unique danger presented by undetectable 3-D guns as demonstrated in the  
20 record. Consistent with those findings, the States have shown the likelihood of irreparable  
21 harm here.

#### 22 **E. The Balance of Equities and the Public Interest**

23 The final factors in the preliminary injunction analysis require considering the  
24 effects of an injunction on both parties and the public. Winter, 555 U.S. at 24. When the  
25 government is a party, these factors merge because the government represents the public  
26 interest. Nken v. Holder, 556 U.S. 418 (2009).

27 The federal defendants argue that national security will be harmed if an injunction  
28 issues because the State Department will be unable to focus its export-control resources on  
sensitive weapons and military technology. Dkt. # 85-1 at ¶ 100. Citing two executive

1 branch officials, they also argue that enjoining the Final Rules would cause other harms to  
2 important United States and public interests, including disruption to U.S. exporters and  
3 reputational damage. Id. at ¶ 104-05; see Dkt. # 85-2 at ¶ 54.

4 Although the government undoubtedly has a “compelling” interest in national  
5 security, see Haig v. Agee, 453 U.S. 280 (1981), it cannot simply rely on unspecified  
6 security concerns, Ziglar v. Abbasi, 137 S.Ct. 1843, 1862 (2017). To be sure, the Final  
7 Rules have yet to go into effect and allowing current regulations on 3-D gun files to stay  
8 in place will, in effect, maintain the status quo. It also strains reason that an injunction  
9 would create, in the government’s words, “a greater risk that these weapons could be used  
10 in a manner inconsistent with U.S. national security and foreign policy interests.” Dkt. #  
11 84 at 45. This is at least true when it comes to the 3-D gun files given the government’s  
12 previous findings. See Trump, 284 F.Supp. 3d at 1180 (government’s own actions  
13 undermined the position that the public interest will be harmed in the face of injunctive  
14 relief).

15 The Court must acknowledge the grave reality that is likely to occur without  
16 injunctive relief. As the agency’s specific findings in the record show, the proliferation of  
17 3-D gun files on the internet likely renders ineffective arms embargoes, export controls,  
18 and other measures used to restrict the availability of uniquely dangerous weapons sought  
19 by those seeking to commit acts of terrorism or other serious crime—implicates serious  
20 national security and public interests. See Defense Distributed, 121 F. Supp. 3d at 690  
21 (acknowledging the public’s “keen interest” in restricting the export of defense articles).  
22 After considering the parties’ competing interests on the issue of 3-D gun files, the Court  
23 finds that the balance of equities and the public interests tip sharply in the States’ favor.  
24 Feldman, 843 F.3d at 375.

#### 25 **F. Remedy**

26 Having found that the States established the elements necessary for a preliminary  
27 injunction, the Court turns to the scope of relief. Both the federal and intervenor

1 defendants argue that the scope of any injunction should be limited to redressing only the  
2 established injuries and irreparable harms identified by the States. Both point out that the  
3 contents of the Final Rules clearly reflect the agencies’ focus on countless matters  
4 unrelated to 3-D printed firearms. See Dkt. # 85-1 at ¶ 98; Dkt. # 85-2 at ¶¶ 52-53.  
5 Indeed, the Final Rules transfer regulatory jurisdiction over products affecting an  
6 estimated 10,000 State Department licenses. 85 Fed. Reg. at 413. For example,  
7 intervenors must register with DDTC and pay the \$2,250 annual registration fee—even  
8 though the business does not export firearms outside the United States. See Dkt. # 65 at  
9 ¶¶ 6–9.

10 The Court raised concerns about the scope of relief at oral argument.<sup>7</sup> Equitable  
11 principles require that an injunction “be no more burdensome to the defendant than  
12 necessary to provide complete relief to the plaintiffs.” Madsen v. Women’s Health Ctr.,  
13 Inc., 512 U.S. 753, 765 (1994). Following oral argument, the States narrowed their  
14 request for relief in light of the parties’ discussions that a narrower injunction than the one  
15 initially requested might be feasible and sufficient to prevent irreparable harm and  
16 preserve the status quo with respect to the 3-D gun files. Dkt. # 89. The federal  
17 defendants reiterated their position that this Court has no jurisdiction and no injunction  
18 should order, but conceded it is possible to implement the Final Rules and maintain the  
19 same level of regulation on the export of 3-D gun files. See Dkt. # 91. The intervenor  
20 defendants, who argue that the application of the Final Rules to 3-D gun files is severable,  
21 do not object to maintaining the status quo as to 3-D gun files. Dkt. # 92.

22 “Whether an administrative agency’s order or regulation is severable, permitting a  
23 court to affirm it in part and reverse it in part, depends on the issuing agency’s intent.”

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24 <sup>7</sup> During oral argument, the Court also inquired about the need of a separate hearing given  
25 the nationwide effect of the States’ request for a preliminary injunction. See California v.  
26 Azar, 911 F.3d 558, 583 (stating that courts “must require a showing of nationwide  
27 impact” and that injunctive relief “must be narrowed to redress only the injury show as to  
28 the plaintiff states”); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1140 (9th Cir. 2009). The  
parties agreed that a separate hearing was unnecessary.

1 Davis Cnty. Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (quoting  
2 North Carolina v. FERC, 730 F.2d 790, 795–96 (D.C. Cir. 1984)). There is no indication  
3 in the text of the NPRMs, for example, that the regulation would not have been passed but  
4 for their application to 3-D gun files, or that the regulation of 3-D gun files is so  
5 “intertwined” with the effect of the Final Rules on unrelated products. See Davis Cnty.,  
6 108 F.3d at 1459 (vacating the EPA’s emissions standards as applied to small municipal  
7 waste combustor units but leaving in place guidelines as applied to large units). By all  
8 accounts, the Final Rules are part of a decade-long reform to the export-control system  
9 and there is no indication, other than the Defense Distributed litigation, that any special  
10 attention was paid to 3-D gun files.

11 Having considered the parties’ arguments, the Court **ORDERS** the following  
12 injunction, which shall take effect immediately and shall remain in effect pending trial in  
13 this action or further order of the Court:

14 The federal defendants and their respective officers, agents, servants, employees,  
15 and attorneys, and any persons in active concern or participation with them, are  
16 **ENJOINED** from implementing or enforcing the regulation entitled International Traffic  
17 In Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 Fed. Reg. 3819 (Jan.  
18 23, 2020) insofar as it alters the status quo<sup>8</sup> restrictions on technical data<sup>9</sup> and software<sup>10</sup>  
19 directly related to the production of firearms or firearm parts using a 3D-printer or similar  
20 equipment. No bond shall be required.

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24 \_\_\_\_\_  
25 <sup>8</sup> In this case, the status quo preserves the restrictions on the relevant technical data and  
26 software currently covered by the Munitions List and subject to ITAR control. Such items  
27 shall be maintained on the Munitions List and regulated under ITAR. This injunction is  
28 not intended to modify any existing regulations.

<sup>9</sup>As defined in 22 C.F.R. § 120.10.

<sup>10</sup>As defined in 22 C.F.R. § 120.45.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS IN PART** the Motion. Dkt. # 55.

Dated this 6th day of March, 2020.



The Honorable Richard A. Jones  
United States District Judge

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