No. 20-35030

In the United States Court of Appeals
for the Ninth Circuit

State of Washington, et al.
Plaintiffs - Appellees,

v.

Defense Distributed
Defendant - Appellant,

and

U.S. Department of State, et al.,
Defendants.

Appeal from the United States District Court for the
Western District of Washington; No. 2:18-cv-01115-RSL

Appellant's Brief

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Felicia R. Lee, *3-D Printed Gun Goes on Display at London Museum*, N.Y. Times, Sept. 16, 2013 7

Jurisdictional Statement

The district court lacked subject-matter jurisdiction over the case for the reasons argued by Defense Distributed on appeal and by Defense Distributed and the federal defendants below. *See* ER14496–14500; ER14480–14482.

This Court has appellate jurisdiction because Defense Distributed filed a notice of appeal on January 14, 2020, ER23889, from the district court's judgment of November 15, 2019, ER23888, which resolves the entire action.

Issues Presented

I. Does subject-matter jurisdiction exist? No.

A. Did the plaintiffs demonstrate standing? No.

1. Is there a legally cognizable Article III injury-in-fact? No.

2. Does traceability exist? No.

3. Does redressability exist? No.

B. Did the district court have jurisdiction despite the Tucker Act? No.

II. Can relief obtained via the Administrative Procedure Act require abridgement of First Amendment freedoms? No.

III. Should the district court have rendered conclusions about the instant judgment's preclusive effect? No.

Statement of the Case

In this important First Amendment controversy about Second Amendment speech on the internet, the State Department did the right thing when it decided to cease imposing an unconstitutional prior restraint. The decision came after years of litigation with Defense Distributed and the Second Amendment Foundation, Inc., who led the charge in establishing that the regime violated free speech protections.

Pursuant to a settlement agreement that was valid when executed and is valid today, the State Department undertook to roll back its prior restraint by, among other things, temporarily modifying a pertinent regulation and issuing a license for Defense Distributed, SAF, and all U.S. persons to publish the computer files at issue. Quickly, these rights were exercised by Defense Distributed, SAF members, and many other law-abiding citizens. The files at issue are now readily available online.

Then came States that disfavor speech about the Second Amendment. Despite conceding that the files at issue are perfectly legal—they admit Defense Distributed has every right to "hand them around domestically," ER1787—these States insist that the State Department reimpose its prior restraints against online publication.

Thus, below, the States sued the State Department under the Administrative Procedure Act to have the temporary modification and license vacated. The district court granted relief, forcing the State Department to revive its unconstitutional regime on the theory that the "First Amendment is irrelevant." ER23698.

I. First Amendment Speech about the Second Amendment is at issue.

A. Digital firearms information is First Amendment speech.

This case is about digital firearms information. It is "digital" because it exists in the form of coded computer files, as opposed to analog media like printed books. It pertains to both entire firearms and individual firearm components, and addresses their physical properties, production methods, and uses. It is "information" because it conveys knowledge alone, without advocating. *See, e.g.*, ER14580 (Declaration of Jon Walker, original developer of the AutoCAD® design software).

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. *E.g.*, ER590–594; ER14641; ER14708–15699.

Digital firearms information includes, but is not limited to, what authorities now refer to as "Computer Aided Design files" or "CAD files." *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). 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). *Id.*

CAD files are used primarily for abstract design. With the requisite computer hardware, software, and expertise, users can employ CAD files to construct and manipulate complex two- and three-dimensional digital models of physical objects. ER800–802; ER14588; ER14641; ER14708–15699; ER14708–15699. These files serve a wide variety of important purposes apart from object fabrication. ER800–802; ER14580; ER14588; ER14641; ER14708–15699. Examples include the study of object properties, rendition of object images for product visualization, and parametric modeling of object families. ER800–802; ER14580; ER14588; ER14641; ER14708–15699.

Digital firearms information also includes, but is not limited to, what authorities now refer to as “Computer Aided Manufacturing files” or “CAM files.” *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). Authorities say that, unlike CAD files, CAM files are ready for insertion into object-producing equipment such as computer numerically controlled machine tools and additive manufacturing equipment. *Id.* 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. ER590–594; ER800–802; ER14588; ER14641; ER14708–15699.

With respect to 3D-printing processes, in particular, CAD files and CAM files do not produce anything automatically. ER14641; ER14708–15699. They are not functional software. ER14641; ER14708–15699. They do not self-execute. ER14641; ER14708–15699. They merely store information for people to utilize if they so choose. ER14641; ER14708–15699. The 3D-printing technologies at issue necessarily require a user's knowing application of deliberate, focused will for an extended period of time. To fabricate an object as designed in a CAD or CAM file, a decided individual 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, the 3D printer), and raw materials. *See* ER456; ER227; ER758; ER800–805; ER14580; ER14641; ER14708–15699.

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. Production 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. *See* ER456; ER227; ER758; ER800–805; ER14580; ER14641; ER14708–15699.

B. Defense Distributed published digital firearms information.

Defense Distributed is a private, non-profit business corporation organized under Texas law and headquartered in Austin. ER14519. Defense Distributed promotes the Second Amendment's individual right to keep and bear firearms by exercising the First Amendment right to speak about firearms. ER14519–14520. To that end, Defense Distributed is engaged in the publication of a wide variety of digital firearms information to the American public, primarily via the internet and also otherwise. ER528–29; ER14519–14520; ER1546–1547.

In particular, Defense Distributed published both the authorities' so-called "CAD files" and the authorities' so-called "CAM files," as well as non-CAD and non-CAM files such as plain text (.txt) files with notes, instructions, and comments. ER446–447; ER528–29; ER590–594; ER800–805; ER14520; ER1546–1547; ER1676. Defense Distributed itself authored some of the files it published. ER446; ER528–29; ER590–594; ER14520. The most well-known file set concerns a single-shot pistol known as the "Liberator." ER528–29; ER576–577;ER590–594.

Defense Distributed also collected, revised, and republished digital firearms information authored by others. ER446; ER528–29; ER590–594; ER14520.

The digital firearms information that Defense Distributed published constitutes speech. Akin to blueprints, these files supply information in the abstract. ER528–29; ER590–594; ER800–805; ER14520–23. Each and every file at issue is an important expression of technical, scientific, artistic, and political matter. ER528–29; ER590–594. They carry these values apart from any application that the information's recipient might choose to devote the information to. *See* Felicia R. Lee, *3-D Printed Gun Goes on Display at London Museum*, N.Y. Times, Sept. 16, 2013 ("'A non-designer [Cody Wilson] has managed to make the biggest impact in design this year,' said . . . the senior curator of contemporary architecture, design and digital at the Victoria and Albert Museum."). In other words, the digital firearms information that Defense Distributed published does not advocate, incite, or produce any action and is not intended to; and it certainly does not do so imminently.

On the basis of this action's extensive factual record, the digital firearms information at issue qualifies as First Amendment speech entitled to all of the Constitution's protections against censorship.[1]

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[1] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."); *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) ("[G]iven that the purpose of [the delivery of a tape recording] is to provide the recipient with the text

Hundreds of millions of Americans have the right to produce a firearm for personal use at home, and all Americans have the right to learn about firearms even if they never produce one. Defense Distributed has a right to share its digital firearms information with each of these citizens and each of these citizens has a right to hear what Defense Distributed has to say. Hence "DEFCAD," the website Defense Distributed published at defcad.org and defcad.com in the times at issue. ER14520; ER1546–1547.

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of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of 'speech' that the First Amendment protects."); *Junger v. Daley*, 209 F.3d 481, 482 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) ("[C]omputer code, and computer programs constructed from code can merit First Amendment protection."); *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) ("source code is speech"); Brief of Amicus Curiae Electronic Frontier Foundation in Support of Plaintiffs-Appellants, *Def. Distributed v. U.S. Dep't of State*, 2015 WL 9267338, at *11, 838 F.3d 451 (5th Cir. 2016) ("functional consequences of speech are considered not as a bar to protection, but to whether a regulation burdening the speech is appropriately tailored"); *Def. Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680, 692 (W.D. Tex. 2015). Technically, Defense Distributed does not bear the burden of proving that its expression constitutes protected speech (though it carried that burden here); the States bear the burden of proving that it is not protected, *see Freedman v. State of Md.*, 380 U.S. 51, 58 (1965), and failed.

C. Online publication occurred in 2012–13 and 2018.

Online at DEFCAD, Defense Distributed published important sets of digital firearms information to the internet's public domain on multiple occasions. One publication period lasted from December 2012 to May 2013. ER456; ER211–12; ER14521; ER1676–1677. Another publication period lasted from July 27, 2018, to July 31, 2018. ER802; ER14520–23; ER1546–1547. During these periods, Defense Distributed published the following digital firearms information on DEFCAD for free download by the public:

a. Liberator Pistol Data Files: Sixteen .stl CAD files for the various parts and components of the Liberator pistol, two "read me" text files that explained how to lawfully assemble the pistol, a diagram of a pistol, and a permissive software license. Defense Distributed authored these files, many of which entail a combination of already extant and working files and concepts. The pistol frame, trigger housing, and grip specifications were all taken directly from an AR-15 lower receiver file that is in the public domain. The spring file is taken from a toy car file available on Thingiverse. The hammer relies on striking a common roofing nail, and the barrel is a cylinder bored for .380. All of the technologies used to create the Liberator data files are widely available

in the public domain. *See* ER456; ER596–588; ER590–94; ER800–805; ER14520–23; ER1546–1547.

b. .22 Electric Data Files: Two .stl CAD files for models of a barrel and grip for a .22 caliber pistol. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

c. 125 mm BK- 14 M High Explosive Anti-Tank Warhead Model Data File: One .stl CAD file for a model of a BK-14M high explosive anti-tank warhead without fins. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

d. 5.56/.2 23 Muzzle Brake Data Files: One .igs CAD file, one .sldprt CAD file, and one .stl CAD file for a model of a 5.56/.223 muzzle brake. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

e. Springfield XD-40 Tactical Slide Assembly Data Files: Nineteen .sldprt CAD files for models of components of a pistol slide for the Springfield KD-40. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

f. Sound Moderator – Slip On File: One .stl Cad file for a model of a slip-on moderator for an air gun. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

g. "The Dirty Diane" ½-28 to ¾-16 STP S3600 Oil Filter Silencer Adapter Files: One .sldprt CAD file for a model of an oil filter silencer adapter. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

h. 12 Gauge to .22 CB Sub-Caliber Insert Files: One .skp CAD file for a model of a sub-caliber insert, two renderings of the sub-caliber insert, and a "read me" text file providing information about the National

Firearms Act and the Undetectable Firearms Act. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

i. Voltlock Electronic Black Powder System Files: eleven .stl CAD files and one .igs CAD file for models of cylinders of various bores with a touch hole. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; ER590–94; ER14520–23; ER1546–1547.

j. VZ-58 Front Sight Files: One .lsdprt CAD file and one rendering of a model of a sight for a VZ-58 rifle. Defense Distributed did not author these files. These files were provided to Defense Distributed by their author. These files were freely available for download by any person at the time. *See* ER596–588; E R590–94; ER14520–23; ER1546–1547.

The computer files that were published during these two periods were downloaded millions of times. ER14521–14523; ER1677 ("For example, Forbes reported in 2013 that '[i]f gun control advocates hoped to prevent blueprints for the

world's first fully 3D-printable gun from spreading online, that horse has now left the barn about a hundred thousand times'.").

D. *Defense Distributed I* interrupted publication.

The interruption of Defense Distributed's online publications was caused by a dispute with the State Department. ER456–457. The dispute resulted in litigation called *Defense Distributed I*, which originated in the Western District of Texas and made several trips to the Fifth Circuit. *See Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016) (panel opinion); *id.* at 461–76 (Jones, J., dissenting); *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); *Def. Distributed v. United States Dep't of State*, 947 F.3d 870 (5th Cir. 2020).

The plaintiffs in *Defense Distributed I* were Defense Distributed, the Second Amendment Foundation, Inc. ("SAF"), and an individual SAF member. *See* ER458. The defendants were the relevant State Department officials. *See* ER458.

Defense Distributed I began after the State Department used the Arms Export Control Act of 1976, 22 U.S.C. ch. 39 ("the AECA"), and its primary implementing regulations, the International Traffic in Arms Regulations, 22 C.F.R. Parts 120–130 ("the ITAR"), to impose a prior restraint on public speech concerning technical firearms data, including Defense Distributed's digital firearms information. ER456–458; ER558–576. Under this prior restraint, the State Department required that

Defense Distributed obtain prior United States government approval before publication of such technical data could occur on the internet and at other public venues. ER456–458; ER558.

In *Defense Distributed I*, Defense Distributed and SAF challenged the State Department's enforcement of the AECA/ITAR regime. ER458; ER266. In particular, they challenged the State Department's governance of the digital firearms information at issue (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. ER266; ER1067; ER1210.

At a preliminary stage of the litigation, the district court denied plaintiffs' motion for a preliminary injunction. *Def. Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015). Interlocutory appellate proceedings left that preliminary decision undisturbed. A divided Fifth Circuit panel affirmed the Court's preliminary decision. *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016). But it declined to reach the likelihood of success on the merits. *Id.* at 461. Instead, it ruled solely based on "the balance of harm and the public interest." *Id.*

The merits were, however, reached by two important opinions. Judge Jones emphasized the common 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 district court's kind of "flawed preliminary injunction analysis permits perhaps the most egregious deprivation of First Amendment rights possible: a content based prior restraint." *Id.* at 212.

E. The Settlement Agreement let publication resume.

After the interlocutory appeal concluded, parties to *Defense Distributed I* settled their dispute by agreement. ER445; ER460; ER520. Reports correctly understood that the State Department's decision to settle "essentially surrenders" to the constitutional challenge Defense Distributed 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." ER520.

The *Defense Distributed I* settlement agreement is memorialized by the "Settlement Agreement": a written contract that all sides executed validly. ER445; ER460; ER631–638. It obligates the State Department to do several key things with regard to the files at issue in *Defense Distributed I*. ER445; ER460.

The "files at issue in this case" are the files that were at issue in *Defense Distributed I* and the files that the Settlement Agreement addresses. The files at issue in this case include four subsets of files—"Published Files," "Ghost Gunner Files," "CAD Files," and "Other Files"—all of which are specifically defined by the Settlement Agreement and *Defense Distributed I* pleadings. ER461; ER631–638.

The first key Settlement Agreement obligation concerns a new final rule. ER631. 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 files at issue from the ITAR system of prior restraints. ER631.

The second key Settlement Agreement obligation concerns the issuance of a temporary modification during the new final rule's development. ER631–632. 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. ER631–632.

The third key Settlement Agreement obligation concerns a license. ER632. 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 certain 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). ER632.

The fourth key Settlement Agreement obligation concerns official acknowledgement. ER632. 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 files. ER632.

After the Settlement Agreement was executed, the State Department began to carry out its obligations. ER445. By July 27, 2018, it had addressed several of the compliance obligations as follows.

In an attempt to comply with the obligation imposed by Settlement Agreement Paragraph 1***(b)***, the State Department 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. ER445; ER640. By way of the Temporary Modification, the State Department authorized the distribution of the *Defense Distributed I* Files without any prior restraint. ER640.

In an attempt to comply with the obligation imposed by Settlement Agreement Paragraph 1***(c)***, the State Department 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." ER238.

In an attempt to comply with the obligation imposed by Settlement Agreement Paragraph 1***(d)***, the State Department 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.

Thus, from July 27, 2018, to July 31, 2018, Defense Distributed, SAF and its member litigant, and any "U.S. person" were free to publish the *Defense Distributed I* Files on the internet, free to receive them on the internet, and free to republish them on the internet. And so they did, as detailed above.[2]

II. The States sued to force the federal government to censor speech.

A. The States filed in their forum of choice.

Plaintiffs are "the States."[3] All have a Democrat governor and/or Democrat attorney general. The States chose to sue in their forum of choice, the Western District of Washington's Seattle division, before Judge Robert Lasnik. ER35.

The States sued both federal defendants and private defendants. The federal defendants are the State Department and its responsible officials. ER451–452. The private defendants are the plaintiffs from *Defense Distributed I*—Defense Distributed, SAF, and the SAF member. ER452–453.

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[2] Defense Distributed also published important sets of digital firearms information via the mail by making its computer files available for shipment on physical storage devices. *See* ER14524–14527. It did so after both the State Department and the States condoned this in the litigation below. *See* ER1787; ER1791.

[3] The plaintiffs are California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Pennsylvania, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington. ER444.

B. The States asserted two claims against the State Department and zero claims against Defense Distributed.

The States pleaded two Administrative Procedure Act claims that are still at issue. ER509–516.[4] One targeted the State Department's issuance of the license and the other targeted the State Department's issuance of the Temporary Modification. ER509–516. Each sought a declaration that the action at issue violated the APA and an order vacating the action. ER509–516. These claims went against the federal defendants alone. ER509–516.

The Settlement Agreement was *never* the subject of any claim in this case. The States never claimed that the Settlement Agreement was illegal and never sought relief against the Settlement Agreement. Their only claims targeted actions the State Department took *in an attempt to carry out* the Settlement Agreement. ER509–516.

Nor were the private defendants themselves the subject of any claim. The States asserted no cause of action and sought no relief against the private defendants. The APA claim about the license went against the federal defendants alone, did not allege that the private defendants did anything wrong, and did not seek relief against them. ER509–516. Likewise for the APA claim about the Temporary Modification.

[4] The States asserted additional claims in pleadings, ER509–516, and otherwise, ER14175. But these are no longer at issue because the district court rejected them, ER23888, and the States did not appeal.

It too went against the federal defendants alone, did not allege that the private defendants did anything wrong, and did not seek relief against them. ER509–516.

Despite this legal void, the States insisted on roping in the private defendants. To do so, the States argued that each private defendant was a "necessary party" under Federal Rule of Civil Procedure 19 because "the Settlement Agreement . . . may be affected by the requested relief." ER452–53. Hence the "defendant" moniker.

With respect to the technologies and speech at issue, obvious non sequiturs and oxymorons permeated the States' complaint. In reality, *speech about* a firearm is different than an *actual* firearm. But not in the complaint's fictional world. The complaint equated an *actual* firearm—the so-called "downloadable gun"—with *speech about* a firearm in the form "Computer Aided Design (CAD) files." ER444. Injuries caused by *speech about* firearms are nowhere to be found in the complaint. The complaint's only injuries are caused *not* by *speech about* firearms, but by the *uses* of *actual* firearms by third parties acting on their own accord. *E.g.*, ER444.

C. The States obtained preliminary injunctive relief against the license and Temporary Modification.

An all-too-familiar nationwide injunction blitz began the proceedings below. First came the States' effort to obtain an emergency temporary restraining order against the license and Temporary Modification. ER206; ER363. Both the federal defendants and private defendants opposed, ER235; ER282; ER371, and a hearing occurred, ER397. The district court ruled on July 31, 2018, two days before the

States had said any publication would occur—but after the files were in fact already published. ER390. It sided with the States and issued the following injunction:

> 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.

ER396.

Preliminary injunction proceedings followed suit. The States moved to convert the TRO into a preliminary injunction, ER708, both the federal defendants and private defendants opposed, ER1515; ER1639; ER1710, and a hearing occurred, ER1765. The district court sided with the States again, issuing a preliminary injunction that mirrored the TRO. ER1837.

A key concession occurred during the preliminary injunction proceedings: Both the State Department and 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 take no issue with Defense Distributed's right to distribute the very same computer files via other channels.

Specifically, 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

domestically" without violating any law. ER1787. 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." ER1791.

III. The district court vacated the license and Temporary Modification.

A. The court held that Defense Distributed is a "necessary party."

Before summary judgment proceedings occurred, the private defendants filed a Rule 12(c) motion for a judgment on the pleadings, seeking dismissal. ER1890. The Rule 12(c) motion argued that, contrary to the States' initial "necessary party" assertion, the States were now clearly "assert[ing] no claims against the Private Defendants, seek[ing] no relief against the Private Defendants, and ha[d] effectively conceded that the Private Defendants are not necessary parties." ER1893. The States opposed the motion, ER8604, and the private defendants replied, ER8662.

The district court denied the motion by holding that each private defendants was "necessary party" under Rule 19(a)(1). ER8671. That provision calls for a person's joinder if, *inter alia*, "(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of

incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1).

To reach its "necessary party" conclusion, the district court did *not* deny that the case entailed zero claims by or against the private defendants. It acknowledged this, but nonetheless held that the Rule 19 test had been met for two reasons. Reason one was that the private defendants would "have a chance to be heard and make their best arguments," ER8674, a logic that if true would make virtually every *amicus curiae* in the courts a full-fledged defendant or plaintiff. Reason two was the conclusion that "the Court's findings will bind all of the interested parties and preclude collateral challenges to the APA determination (such as an action for specific performance of the settlement agreement) that would raise the possibility of inconsistent rulings and obligations for the parties," ER8674, which contradicted both black-letter preclusion law and the fact that the States had *not* sued to upset the Settlement Agreement itself.

The rest of the case's key decisions occurred on summary judgment. *See* ER14150 (States' motion); ER14473 (federal defendants' opposition and cross-motion); ER14491 (private defendants' opposition and cross-motion); ER23677 (States' reply and response); ER23764 (private defendants' reply). Without a hearing, the district court ruled in a 25-page order. ER23863

B. The district court upheld subject-matter jurisdiction.

Subject-matter jurisdiction was litigated extensively below and is detailed extensively in this brief's argument. The point to emphasize now is that every issue being argued on appeal was asserted below, either by the federal defendants, the private defendants, or both. So to the extent that any of these problems entail the need for evidence, the States have no excuse for not supplying it already.

An argument about the States' violation of Article III standing requirements was raised below. *See* ER14480; ER383–384; ER1516; ER1527–1528; ER1653; ER1791–1793; ER1802–1804; ER14474; ER14480; ER14496;ER14499–14500; ER23767–23771. The district court rejected this. ER23870.

An argument about the Tucker Act and exclusive jurisdiction of the Court of Federal Claims was raised below. ER1710–1720; ER1805–1806; ER14498–14499. The district court rejected this. ER23874.

An argument about the States' violation of a prudential standing requirement—the zone of interests test—was raised below. *See* ER1655–1657; ER14474; ER14480–14481. The district court rejected this. ER23870–23872.

An argument about a lack of justiciability was raised below. ER14497. The district court rejected this, ER23874, as well as an argument about "agency action [that] is committed to agency discretion by law," ER23872–23873 (quoting 5 U.S.C. § 701(a)(2)).

C. The court held that the APA required vacatur of the license and temporary modification regardless of the First Amendment.

On the merits, the district court accepted both of the States' APA claims. ER23874–23877. First, the 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, ER23878–23875. Second, the 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, ER23884.

Apart from the APA claims' elements, the district court addressed the First Amendment implications of a decision vacating the Temporary Modification and license. It held the Constitution's First Amendment "not relevant to the merits":

> Whether or not the First Amendment 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. Plaintiffs allege that the federal defendants failed to follow prescribed procedures and acted in an arbitrary and capricious manner when they issued the temporary modification and letter authorizing the immediate publication of the CAD files. The State Department has not attempted to justify its action as compelled by the First Amendment, nor have the private defendants shown that their First Amendment interests are a defense to plaintiffs' claims or a talisman that excuses the federal defendants' failures under the APA.

ER23886 (emphasis added).

IV. This suit was too late. The files are already online.

The States' lawsuit is premised on the notion that the computer files at issue are *not* already online. That premise is false. The files at issue *are* already online.

To realize this, the Court need not delve far into the evidentiary record. The complaint's own Exhibit 1 showed that, long before the States began this suit, files for the Liberator had been "downloaded more than 100,000 times." ER527. In this way, the States pleaded themselves out of court on day one. *See, e.g.*, *Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 650 (7th Cir. 2006) ("a party may plead itself out of court by either including factual allegations that establish an impenetrable defense to its claims or by attaching exhibits that establish the same").

Furthermore, the summary judgment record contains overwhelming evidence of the files' permanent republication. Defense Distributed itself published all of the files at issue via DEFCAD in 2012–13 and in 2018. *See supra* Part I.C. And although Defense Distributed ceased making the files at issue available for download from DEFCAD on July 31, 2018, *others did not*. Without any coordination, many recipients of the files that Defense Distributed published in 2012–13 and in 2018 have persistently republished them on myriad other websites. ER762; ER1237; ER1242–43; ER1247–1251; ER1268–1271; ER14521–23; ER14660–14701; ER1553–1566; ER15720; ER15724; ER1676–1677.

The independently republished files are not "hidden in the dark or remote recesses of the internet," as the district court thought. ER1835. Simple Google searches yield the republished Defense Distributed files with ease. *E.g.*, ER15726. They are commonplace. *See also* ER1549 (Amazon.com listing for "The Liberator Code Book: An Exercise in the Freedom of Speech").

For an acute example, consider that in 2017—when Defense Distributed was *not* publishing the files at issue online—the Colorado Bureau of Investigation successfully "printed five 3D firearms from open-source plans similar to those offered by Defense Distributed":

- Reprringer .22 Long Rifle caliber derringer
- Grizzly .22 Long Rifle caliber pistol
- Liberator .380 Auto caliber pistol
- Pepperbox Liberator .380 Auto revolver
- Washbear .22 Long Rifle caliber revolver

ER762. The States' standing arguments refuse to grapple with their own proof.

The Washington Times aptly summarized the state of affairs: "Cody Wilson, [Defense Distributed's] founder, complied, but much of the rest of the internet stepped in to fill the void. 'Do your human duty and share,' said one Twitter user who linked to the files on a filesharing site." ER1568. "One website, CodeIsFreeSpeech.com, posted eight sets of files and reported more than 100,000 hits and nearly 1.5 terabytes of data downloaded by 6 a.m. [on August 1, 2018]." *Id.*

More reporting confirmed that the internet's publication of Defense Distributed's digital firearms information is "unstoppable": "There is no way to stop the anonymous file sharing of 3D-printed guns online." ER23769 (citing Jake Hanrahan, 3D-printed guns are back, and this time they are unstoppable, Wired Magazine, May 20, 2019). "As of now," the report says, the "thousands many more 3D-printed gun enthusiasts connected to each other worldwide" have "essentially let the cat out the bag." *Id.* Defense Distributed's files are "available for free." ER23769. It is "already too late to stop." ER23769. "Since there is not a central server, there is nothing to shut down." ER23769 "If one node is shut down multiple other nodes pop up." *Id.* The "distributors of these files seem to be unstoppable." *Id.*

Thus, permanent online republication of Defense Distributed's digital firearms information is a reality. The computer files that the States made this litigation about already belong to the public domain, and so do countless other files of the same variety. They are online now and always will be—no matter what.

Actually changing the online availability of Defense Distributed's most prolific files is not the States' goal because doing that is impossible. Partisan revenge is their only goal, and their method of choice entails abridgement of First Amendment rights.

Summary of the Argument

Suppose that in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), federal agencies ceased segregating school services *but* failed to satisfy all APA technicalities in doing so. Could recalcitrant states use an APA suit to force federal officials to reinstitute segregation policies? Of course not. The Constitution is always paramount.

Suppose that in the wake of *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), federal tax agencies ceased discriminating against same-sex couples *but* violated an APA technicality in doing so. Could states use the APA to force federal officials to reinstitute the discriminatory policies? No. The Constitution still prevails.

And yet here we are. In light of *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002), and every other modern First Amendment decision on point—not to mention *District of Columbia v. Heller*, 554 U.S. 570 (2008)—the State Department rightly ceased violating Defense Distributed's First Amendment rights by freeing them from a prior restraint on speech. But now recalcitrant States obtained an order re-imposing that unconstitutional regime on the theory that the First Amendment does not apply to this APA case at all. This is no hyperbole. The States really do say that the "First Amendment is irrelevant" to this action, ER23698, and the court below agreed.

On the merits, this attempt to have the Administrative Procedure Act override the First Amendment cannot work. States can neither violate the Constitution themselves nor commandeer the federal government via the APA to do their unconstitutional bidding. But this Court should not reach the merits for the same reason that the court below should not have: There is no standing.

The States have suffered no cognizable Article III injury at all, and certainly not one that is traceable to the agency actions at issue. The States' main alleged injury is a supposed deprivation of the "power to enact and enforce laws related to the ownership and use of firearms." ER450. But the States are as free as they ever were to make the state laws they choose and as free as they ever were to enforce the state laws they choose to enact. Nothing that the State Department did is stopping any of that. If the First Amendment keeps the States from making the new speech crimes they desire, so be it. That is not the State Department's fault. Indeed, it is no fault at all. It is the Constitution's feature.

Redressability is a decisive shortcoming as well. Even if an Article III injury would be caused by publication of the files at issue, this case will do nothing about such an injury because the files at issue *are already online and always will be*. Defense Distributed published the files online several days *before this suit began*, and ever since then, a multitude of third parties have persistently republished them despite the district court's orders below. They will be online forever, no matter what.

The impact of this critical fact—the files at issue have already been published online—is not debatable because the States have conceded it. Below, when the States erroneously assumed that publication had *not* occurred, the States took the position that online publication would be a "bell that cannot be un-rung." ER38. Proceeding as though it were hypothetical, the States said that, "[i]f the files are allowed to be published online, they will be permanently available to virtually anyone inside or outside the United States . . . ." ER14152. Their position all along has been that publication of the files online even once makes them "irretrievable." ER446. Now that their keystone assumption has been falsified, their own logic requires a conclusion of no standing.

Argument

De novo appellate review applies to the district court's summary judgment. *E.g.*, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1086 (9th Cir. 2013).

The States were not entitled to summary judgment. Defense Distributed was. The Court should reverse the district court's judgment and render a judgment either dismissing the case for lack of jurisdiction or holding that the States take nothing.

I. The district court lacked subject-matter jurisdiction.

A. The States did not satisfy Article III's standing requirements.

The district court granted the States' motion for summary judgment on the merits of two APA claims: the claim for an order vacating the license and the claim for an order vacating the Temporary Modification. ER23888. Because standing is never presumed, that decision must be reversed unless the States show that they both pleaded and conclusively proved sufficient standing facts for each claim. *See e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), *Lewis v. Casey*, 518 U.S. 343, 357–58 (1996). The States failed to carry their burden. There is no standing.

Under Article III, the "'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

Where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Lujan*, 504 U.S. at 562). The States here had to show that the agency actions at issue "will affect *them* in the manner described above." *Id.*

The States' position is that three categories of injury meet this test: "harms to their quasi sovereign authority, proprietary interests, and interests as *parens patriae*." ER450. But none of these constitutes a valid Article III injury-in-fact, and none of these meets either the traceability or redressability requirements.

1. The harm to "sovereign authority" does not suffice.

The leading supposed injury is to the States' "sovereign authority." ER218; ER444; ER450–51. As the argument goes, the agency actions at issue somehow "jeopardize[d] the States' ability to enforce their public safety laws" and made it "more difficult for the States to protect the safety of those within their borders":

> The Government Defendants' authorization of the release of CAD files for the automated production of 3-D printed weapons diminishes the States' sovereignty by seriously jeopardizing the States' ability to enforce their public safety laws, including those regulating who may possess firearms; what type of firearms and weapons they may possess; the manner in which firearms may be used; and the purchase and sale of firearms, including tracking serial numbers and ownership information. In addition, the imminent widespread availability of undetectable and untraceable weapons will make it far more difficult for the States to protect the safety of those within their borders, including through effective law enforcement measures that depend on

> the ability to track and forensically identify weapons, and the use of metal detectors in government buildings and other public places.

ER450–451. The Court should reject this argument for two initial reasons.

A "generalized grievance is not a particularized injury" that will confer standing. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). But that is all that the "sovereign authority" complaint addresses when it speaks of the overall "security" of the States, the "safety of those within its borders," and "the security and well-being of their residents." ER450. Such generalized interests lack the particularity that Article III requires because they do *not* "affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548.

Standing also requires that the interest at issue be "legally protected" or "legally cognizable." *McConnell v. FEC*, 540 U.S. 93, 227 (2003). But the supposed aspects of "sovereign authority" at issue here are not.

It is true that states have the right to *enact* the laws they prefer (subject always to the Constitution). But the right to enact preferred laws is not at issue here. The complaint does not allege that the actions at issue here stopped any of the States from enacting any state law. The States are now and always have been free to do that.

It is also true that states have the right to *attempt* enforcement of their laws in a variety of ways (subject always to the Constitution). But that is not at issue here either. The complaint does not allege that these agency actions stopped any *attempt* to enforce a state law. The States are now and always have been free to do that too.

At issue here is the very different proposition of a right to the *successful* enforcement of state laws—i.e., a right to the abstract state of affairs in which government enforcement efforts achieve success 100% of the time. No such right exists. The culprit, if there is one, is the advancement of modern technology that increases the citizenry's privacy. States have no legal right to stem the tide of social progress, even if it means that the job of policing their citizens gets harder.[5]

The complaint reveals this distinction. It shows that the "sovereign authority" at issue is *not* the authority to make a law and *not* the authority to attempt enforcement of a law, but is instead the States' supposed right to possess effective technological *means of* enforcement. The States' complaint is *not* that they lack their preferred laws regarding weapons, but that, because of changing social technologies, they now lack a completely effective "means of detecting" and "tracing" such weapons. *E.g.*, ER467. And as the States' own evidence shows, their law enforcement efforts get left behind by new firearms technology all the time. ER749 ("The Firearm Industry often outpaces state and federal laws."). The States'

[5] A simple hypothetical reveals the position's absurdity. States can assign speed limits to their roads and attempt to enforce them with radar detectors. But if those efforts fail to stop 100% of speeding because of car technology that avoids radar detection, states can either make a new state law or change their enforcement methods. What states cannot do—what they have no legally protected or cognizable right to do—is demand in court that a federal agency solve their speeding problem by making speeding a federal crime and deploying FBI agents to police it.

supposed interest in combatting this inevitable trend is not "legally protected" or "legally cognizable," and therefore does not entail an Article III injury.

2. The harm to "proprietary interests" does not suffice.

The States' other alleged injury is to "proprietary interests." ER444. They say that the agency actions at issue will cause an Article III injury by increasing activity involving "undetectable weapons" at places like jails and borders:

> The States have proprietary interests in their treasuries, the integrity of their borders, the safety of their jails and prisons, and the efficient performance of the work of their employees and officials. The Government Defendants' actions harm these interests. The Government Defendants' actions harm the States by increasing access through their borders of undetectable firearms. Their actions threaten state and county prison safety by facilitating the smuggling of undetectable weapons into prisons and jails. The Government Defendants' actions threaten state and county prison safety by easing access in their borders to undetectable firearms. Their actions make the States' state, county, and local detective work solving crimes more difficult by increasing access to untraceable and undetectable guns. Their actions also impede the States executive protection responsibilities. Further, the States – and border states like Washington in particular – spend substantial sums of State taxpayer money to protect their residents from terrorist attacks. Defendants' actions enhance the risk of terrorist attacks. This risk is not hypothetical; in 2001, Ahmed Ressam was convicted of planning to bomb the Los Angeles International Airport on New Year's Eve 1999, as part of the foiled 2000 millennium attack plots. Ressam entered the United States by taking the car and passenger ferry M/V Coho from Victoria, British Columbia to Port Angeles, Washington, where he was apprehended.

ER451.

The Court should reject this basis for standing because allegations of "*possible* future injury" do not suffice where, as here, the plaintiff fails to show that the alleged harm is "certainly impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013). The States showed nothing but a "highly speculative fear" based on a "highly attenuated chain of possibilities," which does not suffice. *Id.*

The chain of events needed to make the States' case work is far too speculative and attenuated. Step one is the State Department's issuance of the Temporary Modification and license, which is *not* what inflicts the injury. Step two is Defense Distributed's reliance upon the Temporary Modification and license to publish the computer files at issue, which is also *not* what inflicts the injury. Step three is a computer user's act of obtaining the files at issue from Defense Distributed's website (as opposed to the legion other sources), which is still *not* what inflicts the injury. Step four is that citizen's decision to produce an "undetectable" firearm, which is once again *not* what inflicts the injury. The States' supposed injuries would occur only at step five, where such a citizen does all of the foregoing and then *decides to break the law* as the complaint hypothesizes by "smuggling . . . undetectable weapons into prisons and jails" or "through their borders." ER451. "This theory stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (quoting *Lujan*, 504 U.S. at 560).

A key aspect of the speculation barrier is that the States never distinguished the harms posed by digital firearms information *in general* from the harms generated by the exact computer files *at issue in this case*. Everything about their standing argument concerned the former in gross, not the latter in particular. Yet the States' own filings made clear that very relevant differences exist. At the temporary injunction stage, the States argued that the existence of *some* digital firearms information online was *irrelevant* to the current action because, "while these older files may still be available, they may be piecemeal and not always reliable." ER226; *accord* ER1291. Yet when trying to show that the files at issue in this case posed harms, the States did not look at whether they are "piecemeal" or "reliable."[6]

Furthermore, the States here are akin to the plaintiff in *Whitmore v. Arkansas*, 495 U.S. 149, 157 (1990), who lacked standing for failing to show that the information to be distributed would be "relevant" to the wrongdoing he predicted. *Id.* at 157–58. Or as the Court put it in *Clapper*, standing does not exist because of the "numerous other methods" by which the wrongdoers could accomplish their objectives, "none of which is challenged here." *Clapper*, 568 U.S. at 412–13.[7]

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[6] Similarly, the States also failed to link the exact computer files at issue in this case to the particular variety of "undetectable weapons" that they think will show up at places like jails and borders.

[7] For example, the complaint links its harms to so-called "Ghost guns," which can stem from both the 3D printing technologies at issue in this case and *wholly*

Another distinct aspect of the speculation barrier is that the States failed to identify any particular location (e.g., a particular jail or border location) that might experience the alleged impacts. Harm to a "particular site" is required by *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009), and not shown here.

When Article III injuries depend on a plaintiff's future plans, those plans must be set forth with a "firm intention," as opposed to a "vague desire" or "'some day' intentions." *Summers*, 555 U.S. at 496–97. But when it comes to the States' supposed harm of expending treasury funds to alter their security practices, "'some day' intentions" are all that they offer. *See* ER451.

3. The *parens patriae* doctrine does not suffice.

The States' third alleged injury is to their "interests as parens patriae." ER444. The *parens patriae* doctrine sometimes "allows a State to sue in a representative capacity to vindicate its citizens' interests." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 178 (D.C. Cir. 2019). But as a matter of law, the States cannot use *parens patriae* here because their claims are against the federal government. "The traditional rule, the so-called '*Mellon* bar,' declares that a State lacks standing as *parens patriae* to bring an action against the federal government." *Id.* at 179.

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unrelated firearm manufacturing processes that are not at issue in this case. *Compare* ER468 (conflating the two), *and* ER549 (same), *with* ER446–446 (distinguishing the two), *and* ER533–534 (same), and ER596–603 (same).

The solution suggested by the States below was *Massachusetts v. EPA*, 549 U.S. 497 (2007). According to the States, footnote 17 of *Massachusetts v. EPA* eliminated this limitation and held that states can use *parens patriae* standing against the federal government. ER1700. But the States' reading of *Massachusetts v. EPA* is wrong. Footnote 17 does not change standing law as they say. The bar on states using *parens patriae* standing against the federal government remains.

This Court correctly concluded that states have no right to assert *parens patraei* standing in an action against the federal government in *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) ("California, like all states, 'does not have standing as parens patriae to bring an action against the Federal Government.'" (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). More recently, the D.C. Circuit in *Bernhardt* confronted and rejected the exact *parens patriae* argument being made by the States here.

In *Berhhardt*, as here, a state tried to argue that footnote 17 of *Massachusetts v. EPA* lets states employ *parens patriae* standing in APA actions against the federal government. *Bernhardt*, 923 F.3d at 181–83. But in a lengthy opinion, the D.C. Circuit rejected that argument: "In the end, we are unpersuaded by Missouri's argument that *Massachusetts v. EPA* alters our longstanding precedent that a State in general lacks *parens patriae* standing to sue the federal government." *Id.* at 183.

The States' argument stemming from footnote 17 is both an incorrect reading of *Massachusetts v. EPA* and wrong in principle. "The general supremacy of federal law" means "that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens." *Id.* For that reason, a "state can not have a quasi-sovereign interest because" matters of federal law "fall[ ] within the sovereignty of the Federal Government." *Id.* (omission in original).

Bernhardt is decisive and consistent with this Court's precedent. *See Sierra Forest Legacy*, 646 F.3d at 1178. The bar on states using *parens patriae* standing against the federal government applies here.

4. Traceability is missing.

Standing requires the injury at issue to be fairly traceable to the challenged conduct of the defendant. *E.g.*, *Spokeo*, 136 S. Ct. at 1547. The States' problem here has to do with "whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000). Given that the States are *not* themselves the "object of the action (or forgone action) at issue," the traceability inquiry turns on "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S.

at 560–61. The States' standing burden is therefore "substantially more difficult" to establish because the traceability element required a showing that "those choices have been or will be made in such manner as to produce causation" of the alleged injuries. *Id.*

The States' case fails to meet this aspect of the traceability requirement because they did not show that their harms are attributable to publication of *the computer files at issue here*—as opposed to the many similar files that are already available online and that this case's litigation does not cover. The States cannot determine *which files* the supposed wrongdoers will get their information from with anything more than "speculation," which does not suffice. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

At bottom, *Clapper*'s conclusion applies with full force: The States' "contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm [the States] seek to avoid is not certainly impending." *Id.* at 416. "In other words, [the States] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.*

5. Redressability is missing.

Standing requires the injury at issue to be "likely to be redressed by a favorable judicial decision." *E.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan*, 504 U.S. at 560–61. A claim "lacks redressability if the plaintiff will nonetheless suffer the claimed injury if a court rules in its favor." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 894 F.3d 1005, 1013 (9th Cir. 2018). As to all three of the States' alleged injuries, redressability is clearly missing.

This argument's key fact is proven by overwhelming evidence: The computer files at issue in this litigation have already been published on the internet by Defense Distributed and are currently being republished on the internet by countless persons with no connection to the instant action. *See supra* at 28–30. Because of those prior and ongoing publications, the files at issue have already been downloaded hundreds of thousands of times and will remain available for free downloading on the internet forever. *See id.* Hence, even if the district court's judgment were to remain in force, it would make no difference. No matter what, the injuries that supposedly confer standing on the States are being inflicted now and will always be inflicted.

The States never answered this point and the district court gave it short shrift. A footnote in the order acknowledged Defense Distributed's assertion of pre-TRO publication online and said that such "publication does not change the following analysis." ER23869. No authority was cited for that conclusion because it is wrong.

B. The Tucker Act deprived the district court of jurisdiction.

This action should have been dismissed for lack of subject-matter jurisdiction because of how the Tucker Act interacts with the APA. *See Tucson Airport Auth. v. Gen. Dynamics Corp.*, 14 136 F.3d 641, 646–48 (9th Cir. 1998). Except for "contract claims against the United States for less than $10,000," the Tucker Act "gives the Court of Federal Claims exclusive jurisdiction to award money damages, and "'impliedly forbids' declaratory and injunctive relief and precludes a § 702 waiver of sovereign immunity.'" *Id.* (quoting *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir.1985)). If this action adjudicates the Settlement Agreement's meaning or continuing legal effect, the Court lacks jurisdiction because the action is subject to the Tucker Act's bar on declaratory and injunctive relief and is not part of APA Section 702's waiver of sovereign immunity. *See id.*

The district court's order denying Defense Distributed's Rule 12(c) motion to dismiss triggers this rule by concluding that "the Court's findings will bind all of the interested parties and preclude collateral challenges to the APA determination (such as an action for specific performance of the settlement agreement)." ER8674. Under *Tuscon Airport Authority*, the Tucker Act deprived the district court of jurisdiction to render a judgment with any preclusive effect on "specific performance of the settlement agreement."

II. The APA cannot require abridgement of the First Amendment.

If the Court reaches the merits, it should reverse and hold that the States deserve no relief. Even if an APA violation had occurred, the district court should not have granted the States' requested relief because vacating the license and Temporary Modification causes a violation of the Constitution's First Amendment.

The Administrative Procedure Act could not possibly authorize a judgment that orders federal officials to violate the First Amendment. Nor does it. Rather, the statute acknowledges constitutional limitations on the relief it can supply by providing that "[n]othing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702; *see Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999).

Applicable guidance comes from *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the case establishing that courts cannot issue discovery orders that have the "practical effect 'of discouraging' the exercise of constitutionally protected political rights." *Id.* at 461. For decades, courts have understood this line of precedent to mean that First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see Perry v. Schwarzenegger*, 591 F.3d 1147, 1160–61 (9th Cir. 2010).

Given that a mere discovery order cannot be issued if its "practical effect" is to deny First Amendment rights, the same is true of a final judgment's issuance of declaratory or injunctive relief. Regardless of whether the APA would otherwise authorize it, courts cannot issue declaratory or injunctive relief if doing so would have the "practical effect" of abridging First Amendment rights. So since the States' requested remedy would have the "practical effect" of discouraging (chilling) conduct protected by the First Amendment, First Amendment rights are implicated.

Yet the States and district court refused to confront the First Amendment at all. The States said that the "First Amendment is irrelevant," ER23698, and the district court agreed by reasoning that Defense Distributed had failed to "show[] that their First Amendment interests are a defense to plaintiffs' claims or a talisman that excuses the federal defendants' failures under the APA." ER23886. Not so. Defense Distributed showed multiple ways in which the First Amendment does, indeed, operate as a defense to the claims at issue. *See* ER14513–14514.

First, the First Amendment bars the States' claim because the States failed to show how their requested remedy satisfies the First Amendment doctrine regarding prior restraints. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). "Prior restraints face a well-established presumption against their constitutionality," *Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488, 493 (5th Cir. 2013), and the States offered no analysis whatsoever of critical issues like "(1) the risk of

censorship associated with the vesting of unbridled discretion in government officials; and (2) 'the risk of indefinitely suppressing permissible speech' when a licensing law fails to provide for the prompt issuance of a license." *East Brooks Books, Inc. v. Shelby County*, 588 F.3d 360, 369 (6th Cir. 2009).

Second, the First Amendment bars the States' claim because the States failed to show how their requested remedy complied with the First Amendment doctrine regarding content-based speech restrictions. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). The relief they seek imposes content-based speech restrictions; as such, it would be an unconstitutional abridgement of First Amendment's freedoms because it does not serve a compelling governmental interest and is not narrowly drawn to serve any such interest. *See id.* The resulting strict scrutiny standard cannot be met for several reasons.

Most obviously, the States remedy does not survive strict scrutiny because it does not advance a compelling state interest. The holding of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), applies to this case. The government lacks a compelling state interest and "may not prohibit speech" if the speech merely "increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id.* at 253. A mere "remote connection" between speech and a third party's criminal conduct is not enough. *Id.* "Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may

encourage [third-parties] to engage in illegal conduct." *Id.* "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Id.*

In this context, the government can only prohibit speech to prevent illegal conduct when the speech is "*integral* to criminal conduct," *United States v. Stevens*, 559 U.S. 460, 468 (2010) (emphasis added). But speech cannot be "integral to criminal conduct" if it has only a "contingent and indirect" relationship to that conduct. *Ashcroft*, 535 U.S. at 250. It is not enough to contend, as the States do here, that there is "some unquantified potential for subsequent criminal acts." *Id.* Indeed, the Supreme Court has recognized that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law abiding third party." *Bartnicki*, 532 U.S. at 529–30.

Additionally, the States' requested relief does not meet the narrow tailorng requirement because of less restrictive alternatives. Namely, each of the States could achieve its ends by banning only the harmful conduct at issue—not speech that is merely and only sometimes remotely associated with that conduct. *See Bartnicki*, 532 U.S. at 529 ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."); *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) (government is entitled to no deference when assessing the fit between its purported interests and the means selected to advance them).

Another reason that the States' requested relief does not survive strict scrutiny is because they failed to prove that their requested relief will actually advance their aims. In the First Amendment context, justifications backed by mere "anecdote and supposition" do not suffice, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000), and neither does "ambiguous proof," *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 800 (2011). Compelling "empirical support" of efficacy must be given. *Globe Newspaper Co. v. Sup. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 (1982). None exists here.

In particular, the States' effort to prove efficacy is bound to fail because the information they seek to censor is already available across the internet. *See supra* at 28–30. The digital firearms information that Defense Distributed already published online under the State Department license before the States' filed this action was thereby committed to the internet's public domain, where independent republishers beyond anyone's control have made and will continue to make those files readily accessible on one website or another forever—regardless of whether or not the States succeed in maintaining this action's judgment. *Id.* Since publication has already been completed, the "efficacy of equitable relief . . . to avert anticipated damages is doubtful at best." *New York Times Co. v. United States*, 403 U.S. 713, 732 (1971) (White, J., concurring).

The district court's preliminary injunction decision rightly acknowledged that, as a result of the relief this APA action seeks, a First Amendment right to disseminate the files at issue "is currently abridged." ER1837. That does not require more balancing. That is the end of the matter. *See* U.S. Const. amend. I ("Congress shall make no law. . . abridging the freedom of speech, or of the press . . . .").

III. The district court's decision regarding this judgment's preclusive effects should be reversed.

The district court denied Defense Distributed's Rule 12(c) motion to dismiss by holding that Defense Distributed and the other private plaintiffs each qualified as a "necessary party" under Rule 19. ER8674. It did so by reaching two subsidiary conclusions:

> [P]articipation is appropriate for two reasons. First, the private defendants will have a chance to be heard and make their best arguments. Second, the Court's findings will bind all of the interested parties and preclude collateral challenges to the APA determination (such as an action for specific performance of the settlement agreement) that would raise the possibility of inconsistent rulings and obligations for the parties.

ER8674. The first subsidiary conclusion was wrong but innocuous, as it poses no risk of lasting prejudice. But the second subsidiary conclusion—the one about the preclusive effect of the decision below—is both wrong and dangerous, as it poses risks of prejudice in later litigation. It should be rejected for several reasons.

First, the district court's conclusion about this judgment's preclusive effect should be rejected because it is dicta. Courts do not decide the preclusive effect of their own judgments as they are rendered, let alone *in advance* of rendition as was done here. Instead, a judgment's preclusive effect is properly determined only *in the subsequent action* that the preclusion defense gets raised in. *See, e.g.*, *Bhd. of Maint. of Way Emps. v. Burlington N. R. Co.*, 24 F.3d 937, 940 (7th Cir. 1994).

Second, the district court's conclusion about its own judgment's preclusive effect should be rejected because it is wrong about what preclusion would extend to. Even if the district court were correct in saying that its judgment would preclude "collateral challenges to the APA determination," an "action for specific performance of the settlement agreement" is not such a collateral challenge. To the contrary, questions of the Settlement Agreement's endurance exist completely independently of the APA determinations that occurred in this case. This case is about what the State Department did in an attempt to comply with the Settlement Agreement—not whether, if that attempt is deemed ineffective, the State Department is obligated to make further efforts to comply.

Third, the district court's conclusion about its own judgment's preclusive effect should be rejected because the underlying Rule 19 "necessary party" conclusion is wrong. Rule 19(a)(1)(B)***(i)*** designates a party as necessary if "that person claims an interest relating to the subject of the action and is so situated that

disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). It does not apply here because Defense Distributed claims no such interest in the subject of this action,[8] and because, even if it had, Defense Distributed's absence does not impede its ability to protect the interest. Rule 19(a)(1)(B)***(ii)*** designates a party as necessary if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). In addition to the lack of a "claim," Rule 19(a)(1)(B)(ii) does not apply here because Defense Distributed's absence puts no one at risk of double, multiple, or otherwise inconsistent obligations.

[8] A Rule 19 necessary party is one who "*claims* an interest relating to the subject of the action" that can be protected only if they are a party. Fed. R. Civ. P. 19(a)(1)(B) (emphasis added). Yet Defense Distributed did *not* claim such an interest because its Settlement Agreement rights are not at issue in this action and need not be protected by it. To the contrary, Defense Distributed denied the States' Rule 19 allegations in the answer. ER1725–1726. Because of that denial, Defense Distributed is not a person that "claims" a Rule 19(a)(1)(B) interest. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (Rule 19(a)(1)(B) requires that the interest be affirmatively claimed).

The State Department must comply with the APA as a matter of law, and nothing in the Settlement Agreement says otherwise. To the contrary, the Settlement Agreement expressly requires that the State Department perform its obligations thereunder in compliance with the APA. *See* ER631. There is no risk of inconsistent obligations at all, let alone one that can be linked to Defense Distributed's absence.

IV. Adoption by reference.

All parties anticipate that this appeal will be consolidated with No. 20-35064, *Washington v. Second Amendment Foundation, Inc. et al.*. If so, Defense Distributed adopts by reference the arguments made by that appeal's appellants, which are equally applicable to all of the private defendants. *See* Fed. R. App. P. 28(i).

Conclusion

The Court should reverse the district court's judgment and render a judgment dismissing this action for want of jurisdiction.

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Respectfully submitted,

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Related Cases and Proceedings

This case is related to another case pending in the United States Court of Appeals for the Ninth Circuit, *Washington v. Second Amendment Foundation*, No. 20-35064 (9th Cir.).

This case is related to another case pending in the United States District Court for the Western District of Washington, *Washington v. United States Department of State.*, 2:20-cv-00111-RAJ (W.D. Wash.).

This case is related to another case pending in the in the United States Court of Appeals for the Ninth Circuit, *Washington v. United States Department of State*, No. 20-35391 (9th Cir.).

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