

# THE RIGHT TO CODE AND SHARE ARMS

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## I

### INTRODUCTION

In 2014, I wrote two law review articles about the interaction between the First Amendment and technology. The first article considered whether data was speech.<sup>1</sup> The second article questioned whether the Government could prohibit sharing the files used to manufacture 3D-printed guns.<sup>2</sup> At the time, I doubted these writings would have much of an impact beyond the literature. I was wrong. In December 2014, I received an email out of the blue from Cody Wilson, the founder of Defense Distributed. The previous year, he had achieved international infamy for creating the world's first 3D-printed gun. In response, the State Department ordered him to remove from the internet the files that could be used to make that gun. Cody planned to sue the Federal Government for violating his rights under the First and Second Amendments, and for running afoul of federal export control law. And he wanted me to help.

Initially, I was skeptical. But after some research, I concluded that Cody had a strong case. I soon joined Defense Distributed's legal team, along with Matt Goldstein, an export control specialist, and Alan Gura, a constitutional litigator. We filed suit in May 2015 in the U.S. District Court for the Western District of Texas. The next two years of litigation were quite exciting, largely unsuccessful, and mostly formulaic. The District Court denied our preliminary injunction. A divided panel of the Fifth Circuit affirmed. The en banc court split nine to five. And the Supreme Court denied certiorari.

Following the remand, however, the case took a positive turn. The District Court encouraged the parties to consider a settlement. Soon, we reached an agreement with the State Department. The Government would rescind the regulation that prevented Cody, and all Americans, from posting "technical data" about firearms to the internet. Or at least that was the plan.

On the eve of the settlement date, gun control groups and two dozen state attorneys general sought emergency injunctive relief to prevent Defense

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This Article is also available online at <http://lcp.law.duke.edu/>.

\* Professor, South Texas College of Law Houston. I serve as counsel for Defense Distributed, Cody Wilson, and the Second Amendment Foundation in the 3D-printed gun litigation. I am grateful to my co-counsel, including Alan Gura, Matt Goldstein, Chad Flores, Daniel Schmutter, Joel Ard, and many others. The filings in the Defense Distributed litigation referenced in this Article can be accessed at <https://bit.ly/2x0Mp65>.

1. Josh Blackman, *What Happens if Data is Speech?*, 16 U. PA. J. CONST. L. ONLINE 25 (2014).

2. Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2014).

Distributed from posting the files online. Over the course of five hectic days, I would brief and argue four temporary restraining order (TRO) motions in four courts. I prevailed on the first three. The fourth court, alas, issued a global injunction that blocked our settlement. Prior to that decision, however, the files were available online and downloaded thousands of times. They remain readily available to this day.

This Article, written as the litigation continues apace, has three primary goals. First, it encapsulates the complicated, and somewhat confusing, posture of these cases. This firsthand perspective is necessarily informed by—and, unavoidably, shaded by—my personal advocacy. Many of the arguments in this piece are derived from our briefs. Second, this Article illustrates the folly, and indeed irrationality, of trying to censor the internet. The genie cannot be put back in the bottle. Third, this Article explains how the political stigma of guns taints an important free speech issue that would otherwise receive widespread support.

This Article proceeds in five parts. Part II contends that the “creation and dissemination of information” that could be used to 3D-print firearm parts “are speech within the meaning of the First Amendment.”<sup>3</sup> Part III recounts the Obama administration’s efforts to shut down Defense Distributed’s online file sharing site, DEFCAD.org. Part IV describes Defense Distributed’s litigation against the State Department. Part V narrates the twists and turns in the states’ suits against Defense Distributed. Part VI provides an update on the current state of the litigation.

## II

### THE FIRST AMENDMENT AND 3D-PRINTED GUNS

The courts have recognized that the First Amendment protects data, and in many instances, computer code. Moreover, the freedom of speech extends to the “creation and dissemination” of such information. Computer-Aided Design (CAD) files fall within this category: these files allow an artist to design objects in three-dimensions, by specifying the sizes and positions of various shapes. These files are, in every sense, expressive. The First Amendment protects such files, even if the objects depicted on screen are firearm parts, and those files could be used to engage in criminal conduct.

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3. Sorrell v. IMS Health, 564 U.S. 552, 570 (2011). This Article does not consider whether the Constitution protects the right to print 3D firearm parts. Throughout the litigation, Defense Distributed has only challenged limitations on the “dissemination” of the information, not on how those files are ultimately used. The possession and use of homebrew firearms gives rise to different constitutional questions.

### A. The First Amendment Protects Data

As a general matter, electronic communications are considered speech for purposes of the First Amendment.<sup>4</sup> The Supreme Court has found that a broad species of electronic communications, dubbed “information,” was “speech within the meaning of the First Amendment.”<sup>5</sup> For example, *Brown v. Entertainment Merchants Ass’n* held that “video games qualify for First Amendment protection.”<sup>6</sup> Like “protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).”<sup>7</sup> These attributes “suffice[] to confer First Amendment protection.”<sup>8</sup> The Supreme Court stressed that “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”<sup>9</sup> The lower courts have also consistently held that computer code is protected by the First Amendment.<sup>10</sup>

Moreover, the Supreme Court has long affirmed that the First Amendment is not a one-sided right. The freedom of speech does not only protect the rights of the speaker. The First Amendment also protects also the right of the public to receive information.<sup>11</sup> *Red Lion Broadcasting Co. v. FCC* recognized that the First Amendment protects “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.”<sup>12</sup> *Martin v. City of Struthers* declared unconstitutional a law that banned door-to-door

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4. See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (“Taken together, these tools constitute a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the [i]nternet.”).

5. *Sorrell*, 564 U.S. at 670.

6. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

7. *Id.*

8. *Id.*

9. *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

10. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449–50 (2d Cir. 2001) (“[C]omputer code conveying information is ‘speech’ within the meaning of the First Amendment . . .”); see also *Junger v. Daily*, 209 F.3d 481, 485 (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.”); *Bernstein v. Dep’t of State*, 176 F.3d 1132, 1141 (9th Cir. 1999) (“[E]ncryption software . . . must be viewed as expressive for First Amendment purposes, and thus is entitled to the protections of the prior restraint doctrine.”).

11. See *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (“The advertisement . . . did more than simply propose a commercial transaction. It contained factual material of clear ‘public interest.’”); see also Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 730 (1993) (“This ‘informational function’ is central to the Court’s approval of commercial expression as a form of protected speech.”) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980)).

12. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

solicitations to hand out literature.<sup>13</sup> The First Amendment “embrace[d] the right [of the solicitor] to distribute literature” and also “necessarily protect[ed] the right [of the public] to receive it.”<sup>14</sup> *Stanley v. Georgia* rejected a ban on the “right to receive information and ideas, regardless of their social worth.”<sup>15</sup> *Time, Inc. v. Hill* stressed the importance of access to information regarding matters of public interest.<sup>16</sup> “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.”<sup>17</sup> *Lamont v. Postmaster General* recognized a First Amendment right to receive uncensored mail.<sup>18</sup> *New York Times v. Sullivan* found that the First Amendment promotes an “uninhibited, robust, and wide-open” public debate.<sup>19</sup>

Recent cases have reaffirmed the First Amendment right to access information on the internet and other electronic mediums. *Reno v. ACLU* extended the broad protections of the First Amendment to communications on the internet, addressing both the right to express and to access information: “In order to deny minors access to potentially harmful speech, the [Communications Decency Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”<sup>20</sup> *Sable Communications of California v. FCC* recognized that a ban on adults receiving indecent speech over a “dial-a-porn” service “far exceeds that which is necessary to limit the access of minors to such messages.”<sup>21</sup> These principles were most clearly articulated in *Sorrell v. IMS Health*, which found that “[t]he creation and dissemination of information are speech within the meaning of the First Amendment.”<sup>22</sup>

The First Amendment should be viewed in terms of a constitutional right to create and access information. This dual-faceted approach to the freedom of speech accounts for the two key incidents of any First Amendment inquiry—the individual right to express information and the right of individuals in society to learn and consume that information.

## B. Expressive CAD Files Are Speech within the Scope of the First Amendment

3D printers work like desktop printers; they “employ an additive process, which involves squirting molten plastic, targeting a laser to harden layers of powder or liquid resin, or shaping other materials such as metal, cake frosting, or

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13. *Martin v. City of Struthers*, 319 U.S. 141, 146–49 (1943).

14. *Id.* at 143 (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

15. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

16. *Time, Inc. v. Hill*, 385 U.S. 374, 388–89 (1967).

17. *Id.* at 388.

18. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305–07 (1965).

19. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

20. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

21. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

22. *Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011) (emphasis added) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)).

living cells, to make an object.”<sup>23</sup> Through this process, “raw material is set into two-dimensional patterns on a platform that is gradually raised to let each layer stack on top of the next until the item is complete.”<sup>24</sup> The designs for these 3D objects are controlled by CAD files. These files use code, much like other object-oriented programming languages, to define the shapes, sizes, and positions of 3D objects.

3D CAD files of guns are nothing more than information—pictures of guns defined in lines of source code, rather than graphic visuals. Anyone trained in the language of CAD can understand how this information expresses the ideas. This information explains the shape, size, and dimensions of various types of objects, and offers instructions on how people can modify or recreate a similar object for their own personal use.

But merely possessing a CAD file does not allow you to print a firearm part. The CAD file does not include any instructions that could command a 3D-printer. The CAD file is “only half-way [to] a 3D printable file.”<sup>25</sup> In order to actually print the part, you must “slice” the file into very thin layers.<sup>26</sup> An application can automate this process, but the end user must calculate the correct settings.<sup>27</sup> The “[p]roper 3D slicer settings can mean the difference between a successful print, and a failed print.”<sup>28</sup> In other words, 3D CAD files cannot be used “mechanically” and “without the intercession of the mind or the will of the recipient.”<sup>29</sup>

To be sure, 3D CAD files might be used to facilitate crime, but that much is true of virtually all protected speech. “The prospect of crime . . . by itself does not justify laws suppressing protected speech.”<sup>30</sup> 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.”<sup>31</sup> Rather, the state can only prohibit speech to

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23. Deven R. Desai & Gerard N. Magliocca, *Patents, Meet Napster: 3D Printing and the Digitization of Things*, 102 GEO. L.J. 1691, 1695 (2014); see also Bill Bumgarner, *Getting Started with a 3D Printer*, MAKE, Winter 2013, at 12 (There are three approaches to additive manufacturing in common use: *photopolymerization* (using light to cure a liquid material into solids of the desired shape), *granular materials binding* (using lasers, hot air, or other energy sources to fuse layers of powder into the desired shape), and the focus of this article, *molten polymer deposition* (MPD; extruding molten material in layers to build up the desired shape)).

24. Desai & Magliocca, *supra* note 23, at 1695–96.

25. BEGINNER’S GUIDE TO 3D PRINTING, 3D INSIDER, <https://3dinsider.com/3d-printing-guide> [<https://perma.cc/42Q3-VGRT>].

26. *Id.*

27. *Id.*

28. *3D Slicer Settings for Beginners: 8 Things You Need to Know*, ALL3DP: TIPS AND TRICKS (Feb. 16, 2016), <https://all3dp.com/3d-slicer-settings-beginners-8-things-need> [<https://perma.cc/ZQ3F-Y7E8>].

29. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 449 (2d Cir. 2001) (quoting CFTC v. Vartuli, 228 F.3d 94, 111 (2d Cir. 2000)).

30. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).

31. Bartnicki v. Vopper, 532 U.S. 514, 529–30 (2001).

prevent illegal conduct when the speech is “*integral* to criminal conduct.”<sup>32</sup> Indeed, speech cannot be “integral to criminal conduct” if it has only a “contingent and indirect” relationship to that conduct.<sup>33</sup> It is not enough for the Government to allege that there is “some unquantified potential for subsequent criminal acts.”<sup>34</sup> The mere potential for criminal activity does not justify outlawing an entire category of lawful speech. Invariably, “[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.”<sup>35</sup>

Finally, Americans have the right to share information with other Americans in public forums. And in the process, this information may incidentally be viewed by foreigners. This conduct, by itself, does not materially support criminal activity.<sup>36</sup> Such a prosecution would run afoul of the First Amendment.<sup>37</sup>

### III

#### DEFENSE DISTRIBUTED, THE DEPARTMENT OF STATE, AND EXPORT CONTROL LAW

In 2012, Cody Wilson made international headlines. He created the first firearm that could be created with a 3D-printer. He called it *The Liberator*. Merely creating the *Liberator*, as designed, did not run afoul of any federal law. However, Wilson took the additional step of posting the files on the internet. The State Department subsequently sent him a takedown notice. This Part provides a brief history of Defense Distributed, Wilson’s firm, and explains the contours of the federal export prohibition on “technical data.”

##### A. The Liberator’s Upload, Download, and Takedown

In 2012, Cody Wilson developed the first handgun manufactured entirely from parts created by a 3D printer.<sup>38</sup> It was aptly named *The Liberator*. The Liberator consists of twelve separate parts of “acrylonitrile butadiene styrene thermoplastic polymer,” with a single metal part—the firing pin.<sup>39</sup> Wilson also founded the organization Defense Distributed.<sup>40</sup> On May 5, 2013, Wilson posted

32. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (emphasis added) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

33. *Free Speech Coal.*, 535 U.S. at 250.

34. *Id.*

35. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313–14 (2016).

36. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (“[W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.”).

37. *Id.*

38. Andy Greenberg, *Meet the “Liberator”: Test-Firing the World’s First Fully 3D-Printed Gun*, FORBES (May 5, 2013), <http://www.forbes.com/sites/andygreenberg/2013/05/05/meet-the-liberator-test-firing-the-worlds-first-fully-3d-printed-gun> [<https://perma.cc/XB2G-VHFC>].

39. Brian Doherty, *The Unstoppable Plastic Gun*, REASON.COM (Nov. 12, 2013), <http://reason.com/archives/2013/11/12/the-unstoppable-plastic-gun/print> [<https://perma.cc/A6RS-82CJ>].

40. *Id.*

the CAD files for the Liberator on the Defense Distributed Website.<sup>41</sup> They would remain online for a few days.<sup>42</sup> The Liberator 3D CAD files became the focus of national media attention, with coverage by Forbes, CNN, NBC News, the Wall Street Journal, and even The Colbert Report.<sup>43</sup> These files have proven artistic value, and have been displayed in museum and art galleries.<sup>44</sup> The files also made an important political statement.<sup>45</sup>

Three days later, the State Department sent Wilson a letter. It asserted that the CAD files were regulated by export control laws, which prohibited the transmission of “technical data” about munitions to foreign nationals:

[The Directorate of Defense Trade Control] is conducting a review of technical data made publicly available by Defense Distributed through its 3D printing website, DEFCAD.org, the majority of which appear to be related to items in Category I of the [United States Munitions List]. Defense Distributed may have released ITAR-controlled technical data without the required prior authorization from the Directorate of Defense Trade Controls (DDTC), a violation of the ITAR. . . . [A]ll such data should be removed from public access immediately.<sup>46</sup>

After receiving the letter, Defense Distributed immediately removed links to the files on its websites and posted a notice to inform users that the files were subject to International Traffic in Arms Regulations (ITAR) control. Defense Distributed then removed all of the Published Files from its servers. By that point, more than 100,000 people had downloaded the blueprint.<sup>47</sup>

To this day, the files remain readily available on the internet. I hesitate to include a citation, or even provide instructions of how to find the files. Doing so in this public forum could violate state and federal laws. Of course, I think these restrictions are unconstitutional; hence the five years of litigation.

## B. Federal Export Control and “Technical Data”

There is no federal law that expressly prohibits posting files on the internet that can be used to 3D-print a firearm. Rather, the State Department’s takedown

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41. *Id.*

42. *Id.*

43. *See, e.g.*, Greenberg, *supra* note 38; Doug Gross, *Video Shows Test Firing of 3-D Printed Handgun*, CNN (May 6, 2013), <https://www.cnn.com/2013/05/06/tech/innovation/3d-gun-video/index.html> [<https://perma.cc/86UA-B7H7>].

44. *See, e.g.*, Paola Antonelli, *Design and Violence Debate I: Open Source*, MOMA (Mar. 27, 2014), <http://designandviolence.moma.org/design-and-violence-debate-i-open-source>; Andy Greenberg, *3D-Printed Guns As Art: London Design Museum Buys Two ‘Liberator’ Printed Pistols*, FORBES (Sept. 15, 2013), [www.forbes.com/sites/andygreenberg/2013/09/15/3d-printed-guns-as-art-london-design-museum-buys-two-liberator-printed-pistols](http://www.forbes.com/sites/andygreenberg/2013/09/15/3d-printed-guns-as-art-london-design-museum-buys-two-liberator-printed-pistols); Mark Wilson, *Artist Warps 3-D Printed Gun Blueprints, Protests Gun Violence*, FAST CO. (Apr. 15, 2014), <http://www.fastcodesign.com/3028300/infographic-of-the-day/artist-warps-3-d-printed-gun-blueprints-protests-gun-violence> [<https://perma.cc/4JZ7-TP7Q>].

45. *See, e.g.*, Evgeny Morozov, *Opinion, Open and Closed*, N.Y. TIMES (Mar. 16, 2013), <https://www.nytimes.com/2013/03/17/opinion/sunday/morozov-open-and-closed.html> [<https://perma.cc/CEH9-8DKL>]; *The 15 Most Dangerous People in the World*, WIRED (Dec. 19, 2012), <https://www.wired.com/2012/12/most-dangerous-people/> [<https://perma.cc/UU2J-WK3Y>].

46. Letter from Glenn Smith, Chief DDTC Enf’t Div., to Def. Distributed (May 8, 2013), [https://en.wikisource.org/wiki/Letter\\_from\\_Department\\_of\\_State](https://en.wikisource.org/wiki/Letter_from_Department_of_State) [<https://perma.cc/ZF8G-969E>].

47. Doherty, *supra* note 39.

notice relied on an unconventional source of authority: the Arms Export Control Act of 1976. It provides that “[i]n furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services . . . .”<sup>48</sup> The State Department implements this Act through the ITAR.<sup>49</sup> Congress has not defined the term “export” within this statutory scheme. Rather, the regulations in effect at the time interpreted “export” to include “[d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.”<sup>50</sup> The term also encompassed “[r]eleasing or otherwise transferring technical data to a foreign person in the United States (a ‘deemed export’).”<sup>51</sup>

The ITAR contains the United States Munitions List (USML). The USML—yes, another acronym—specifies certain items that are controlled as “defense articles” and “defense services.”<sup>52</sup> The USML prohibits the export of so-called “technical data.”<sup>53</sup> This broad category includes “information in the form of blueprints, drawings, photographs, plans, instructions or documentation” and “software . . . directly related to defense articles.”<sup>54</sup> However, it excludes “general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain . . . .”<sup>55</sup>

The Federal Government has erected a complicated process to determine whether information is controlled by ITAR. Specifically, if “doubt exists as to whether an article or service is covered by the [USML],” the DDTC may provide a “commodity jurisdiction” determination.<sup>56</sup> Moreover, to export “technical data,” one must obtain approval from the Department of Defense Office of Prepublication and Security Review (DOPSR).<sup>57</sup> However, no rule or law establishes a timeline for decision, standard of review, or an appeals process for DOPSR public release determinations. It is a federal crime to export such items without authorization; penalties include up to twenty years in prison and fines of up to \$1,000,000.<sup>58</sup>

This process looks very similar to a prepublication review requirement. Taken together, this framework could make it a crime for Americans to speak about scientific or technical information in venues open to foreigners—that is, unlawfully “exporting” “technical data.” The Federal Government has long recognized that this regime poses serious risks of censorship. Beginning in 1978,

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48. 22 U.S.C. § 2278(a)(1) (2018).

49. 22 C.F.R. §§ 120–30 (2020).

50. *Id.* § 120.17(a)(4) (2013).

51. *Id.* § 120.17(a)(2) (2020).

52. *Id.* §§ 121.1(a)(1), (4).

53. *Id.* § 120.10(a).

54. *Id.*

55. *Id.* § 120.10(b).

56. *Id.* § 120.4(a).

57. *See* 22 U.S.C. § 2778(b)(2) (2014).

58. *Id.* § 2778(c).



the Office of Legal Counsel (OLC) issued a series of opinions advising that the ITAR would violate the First Amendment if it operated as a prior restraint on the dissemination of privately generated, unclassified information.<sup>59</sup> And in 1980, the State Department issued official guidance providing that “[a]pproval is not required for publication of data within the United States.”<sup>60</sup> In other words, ITAR did not “establish a prepublication review requirement.”<sup>61</sup> Finally, in 1984, the State Department modified its regulations to address First Amendment concerns.<sup>62</sup>

The Ninth Circuit considered the constitutionality of this regime in *United States v. Edler Industries, Inc.*<sup>63</sup> However, the court avoided the First Amendment issue by reading a scienter requirement into the regulatory scheme: “[i]f the information could have both peaceful and military applications . . . the defendant must know or have reason to know that its information is intended for the prohibited use.”<sup>64</sup> The court observed that, “[s]o confined, the statute and regulations are not overbroad.”<sup>65</sup> Therefore, “the licensing provisions of the Act are not an unconstitutional prior restraint on speech.”<sup>66</sup>

After *Edler*, the OLC warned the State Department of “serious constitutional questions” if ITAR were used to restrict the transmission of “technical data” absent scienter.<sup>67</sup> The opinion added, “[f]or obvious reasons, the best legal solution for the overbreadth problem is for the Department of State, not the courts, to narrow the regulations.”<sup>68</sup> Subsequently, the Department of Justice (DOJ) reiterated these concerns to Congress. DOJ counseled that Congress could not impose prior restraints against internet publication of potentially dangerous information, unless the statute requires a knowing intent; absent such a scienter requirement, the statute would violate the First Amendment.<sup>69</sup> The State Department seems to agree. The agency has told federal courts that it does not regulate the placement of scientific and technical information into the public

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59. Appellants’ Record Excerpts at 41–59, *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016) (No. 15-50759), <https://bit.ly/2Y8XqxB>.

60. *Id.* at 45.

61. *Id.*

62. See Revision of the International Traffic in Arms Regulation, 49 Fed. Reg. 47,682, 47,683 (Dec. 6, 1984) (“Concerns were expressed, for example, on licensing requirements as they relate to the First Amendment to the Constitution. The revision seeks to reflect these concerns . . .”).

63. 579 F.2d 516 (9th Cir. 1978).

64. *Id.* at 521.

65. *Id.*

66. *Id.*

67. Constitutionality of the Proposed Revision of the Int’l Traffic in Arms Regulations, 5 Op. O.L.C. 202, 206 (1981).

68. *Id.* at 214.

69. U.S. DEP’T OF JUST., 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, <https://www.webharvest.gov/peth04/20041026201550/http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html> [<https://perma.cc/SNC6-Z5T4>].

domain.<sup>70</sup> In fact, the State Department rejected the notion that ITAR imposes a prior restraint. Such a reading, the agency said, “is by far the most un-reasonable interpretation of the provision, one that people of ordinary intelligence are least likely to assume is the case.”<sup>71</sup>

For a quarter century after OLC’s first opinion, the State Department had never enforced its regime with respect to privately generated, unclassified information—until the Government sent the takedown notice to Defense Distributed.

## IV

### ROUND I: DEFENSE DISTRIBUTED V. DEPARTMENT OF STATE

In May 2015, our legal team filed suit in the U.S. District Court for the Western District of Texas on behalf of Defense Distributed, the Second Amendment Foundation, and Conn Williamson.<sup>72</sup> We contended that the State Department’s use of ITAR to restrict the sharing of CAD files violated the First Amendment.<sup>73</sup> Specifically, the Government’s broad definition of “technical data,” which includes all public, unclassified speech, is unconstitutionally overbroad. Moreover, the preapproval process amounted to an unconstitutional prior restraint of speech. We sought a preliminary injunction against the enforcement of the ITAR regime.

#### A. U.S. District Court for the Western District of Texas

The District Court “ha[d] little trouble concluding Plaintiffs [had] shown they face[d] a substantial threat of irreparable injury.”<sup>74</sup> But it found that the importance of protecting constitutional rights was outweighed by national security concerns. The court suggested that the Government’s “authority . . . in matters of foreign policy and export” are “largely immune” from judicial review.<sup>75</sup> In this case, the Government “clearly believed” that posting files to the internet was an “export.” Therefore, the court held, Defense Distributed did not prove that posting such information would serve the public interest.<sup>76</sup> “Nonetheless, in an abundance of caution,” the district court addressed Defense

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70. Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment and in Further Support of Defendants’ Motion for Summary Judgment, *Bernstein v. U.S. Dep’t of State*, No. C-95-0582, 1997 U.S. Dist. LEXIS 13146 (N.D. Cal. Aug. 25, 1997), <https://bit.ly/2RZB4um>.

71. *Id.* at 25.

72. For simplicity’s sake, we will refer to the Plaintiffs, collectively, as Defense Distributed. All of the court filings from the Western District of Texas, the Fifth Circuit, and the Supreme Court can be found in this folder: <https://bit.ly/3ax00Qq>.

73. Defense Distributed also raised claims based on the Second Amendment, the Fifth Amendment, and contended that the executive action was *ultra vires*. This Article is limited to our arguments premised on the First Amendment.

74. *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680, 689 (W.D. Tex. 2015).

75. *Id.* (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

76. *Id.* at 690.

Distributed’s likelihood of success on the merits.<sup>77</sup> The court concluded that the Government was authorized to bar speech as an “export,” even though the files were protected by the First Amendment.<sup>78</sup> ITAR “unquestionably regulates speech concerning a specific topic.”<sup>79</sup> However, the regime “does not regulate disclosure of technical data based on the message it is communicating.”<sup>80</sup> The court “conclude[d] the regulation [was] content-neutral and thus subject to intermediate scrutiny.”<sup>81</sup> Ultimately, the court found that Defense Distributed had other means of distributing its speech domestically, presumably by screening listeners’ citizenship.<sup>82</sup> Therefore, the ITAR regime was valid.

## B. Fifth Circuit Court of Appeals

A divided Fifth Circuit panel affirmed the denial of the preliminary injunction, but “decline[d] to address the merits.”<sup>83</sup> The majority contended that Defense Distributed “failed to give *any* weight to the public interest in national defense and national security.”<sup>84</sup> The majority thus “[found] it most helpful to focus on the balance of harm requirement . . . .”<sup>85</sup> Ultimately, the panel “decline[d] to reach the question of whether [Defense Distributed] demonstrated a substantial likelihood of success on the merits.”<sup>86</sup> The majority offered that “[e]ven a First Amendment violation does not necessarily trump the [G]overnment’s interest in national defense.”<sup>87</sup>

Judge Jones dissented. She wrote that the panel majority “fail[ed] to treat the issues raised . . . with the seriousness that direct abridgements of free speech demand.”<sup>88</sup> The dissent emphasized the common nature of Defense Distributed’s speech: “This case poses starkly the question of the [N]ational [G]overnment’s power to impose a prior restraint on the publication of lawful, unclassified, not-otherwise-restricted technical data to the internet under the guise of regulating the ‘export’ of ‘defense articles.’”<sup>89</sup> CAD files can be used to print firearms. But “[n]one of the published information was illegal, classified for national security purposes, or subject to contractual or other distribution restrictions. In these

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77. *Id.*

78. *Id.* at 692.

79. *Id.* at 694.

80. *Id.*

81. *Id.*

82. *Id.* at 695.

83. *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 458 (5th Cir. 2016), *cert denied*, 138 S. Ct. 638 (2018).

84. *Id.*

85. *Id.* at 459.

86. *Id.* at 460.

87. *Id.* at n.12.

88. *Id.* at 461 (Jones, J., dissenting).

89. *Id.*

respects the information was no different from technical data available through multiple internet sources from widely diverse publishers.”<sup>90</sup>

The dissent also criticized the Government’s departure from decades of policy disclaiming ITAR’s use as a prior restraint. This new policy imposed an expansive prior restraint: “In a nearly forty-year history of munitions ‘export’ controls, the State Department had never sought enforcement against the posting of any kind of files on the internet.”<sup>91</sup> Judge Jones worried that there is “little certainty that the [G]overnment will confine its censorship to internet publication.”<sup>92</sup> “Undoubtedly, the denial of a temporary injunction in this case will encourage the State Department to threaten and harass publishers of similar non-classified information.”<sup>93</sup>

Judge Jones chided the majority for “overlook[ing]” the serious threat to free speech.<sup>94</sup> The panel merely offered “a rote incantation of national security, an incantation belied by the facts here and nearly forty years of contrary Executive Branch pronouncements.”<sup>95</sup> Judge Jones added, “[t]his preliminary injunction request deserved our utmost care and attention.”<sup>96</sup> “Since the majority are close to missing in action, and for the benefit of the district court on remand,”<sup>97</sup> the dissent offered a careful First Amendment analysis.

Judge Jones noted that the State Department’s process “is a content-based restriction on the petitioners’ domestic speech ‘because of the topic discussed.’”<sup>98</sup> “The State Department,” she wrote, “barely disputes that computer-related files and other technical data are speech protected by the First Amendment.”<sup>99</sup> There is only one reason why “the [G]overnment purport[ed] to require prepublication approval or licensing”: “because Defense Distributed posted technical data referring to firearms covered generically by the USML.”<sup>100</sup> Judge Jones wrote that “[t]his [classification] is pure content-based regulation.”<sup>101</sup> Judge Jones faulted the State Department for imposing an unconstitutional content-based prior restraint on speech. “To the extent it embraces publication of non-classified, non-transactional, lawful technical data on the internet, the Government’s scheme vests broad, unbridled discretion to make licensing decisions and lacks the requisite procedural protections.”<sup>102</sup> The “regulations’ virtually unbounded coverage . . . combined with the State Department’s

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90. *Id.*

91. *Id.* at 462.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 463.

98. *Id.* at 469 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 473.

deliberate ambiguity in what constitutes the ‘public domain,’ renders application of ITAR regulations anything but ‘narrow, objective, and definite.’”<sup>103</sup>

The dissent also rejected the claim that the regulation is aimed at secondary effects. She likewise rejected the claim that the prior restraint is not content-based because it targets “functional” speech. This argument, Judge Jones wrote, was “flawed factually and legally.”<sup>104</sup> The dissent would have reviewed the regime with strict scrutiny, rather than intermediate scrutiny. Judge Jones credited the Government’s compelling interest in arms control, but found the prior restraint “significantly overinclusive.”<sup>105</sup> “In sum, it is not at all clear that the State Department has *any* concern for the First Amendment rights of the American public and press.”<sup>106</sup>

Finally, the dissent rejected the majority’s balancing paradigm. “[T]he Executive’s mere incantation of ‘national security’ and ‘foreign affairs’ interests do not suffice to override constitutional rights.”<sup>107</sup> “Inflicting domestic speech censorship in pursuit of globalist foreign relations concerns (absent specific findings and prohibitions as in *Humanitarian Law Project*) is dangerous and unprecedented.”<sup>108</sup>

Indeed, Judge Jones doubted the Government’s “sincerity . . . based on the determined ambiguity of its litigating position.”<sup>109</sup> She questioned how the Government could simultaneously claim national security concerns over Defense Distributed’s speech, but at the same suggest that this information could be “freely circulated within the U.S. at conferences, meetings, trade shows, in domestic print publications and at libraries”<sup>110</sup>—so long as no foreigner accesses it. “After all, if a foreign national were to attend a meeting or trade show, or visit the library and read a book with such information in it, under the Government’s theory, the technical data would have been ‘exported’ just like the internet posts . . . .”<sup>111</sup>

The Fifth Circuit voted nine to five against rehearing the case en banc.<sup>112</sup> Judge Elrod dissented, joined by three of her colleagues. “The panel opinion’s flawed preliminary injunction analysis,” she wrote, “permits perhaps the most egregious deprivation of First Amendment rights possible: a content-based prior restraint.”<sup>113</sup> “A court that ignores the merits of a constitutional claim cannot meaningfully analyze the public interest, which, by definition, favors the vigorous

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103. *Id.*

104. *Id.* at 470.

105. *Id.*

106. *Id.* at 472.

107. *Id.* at 474.

108. *Id.* at 475 n.17.

109. *Id.* at 476.

110. *Id.*

111. *Id.*

112. *Def. Distributed v. U.S. Dep’t of State*, 865 F.3d 211 (5th Cir. 2017) (denying petition for rehearing en banc).

113. *Id.* at 212 (Elrod, J., dissenting).

protection of First Amendment rights.”<sup>114</sup> “[T]he mere assertion of a national security interest” is also insufficient.<sup>115</sup> “Certainly there is a strong public interest in national security. But there is a paramount public interest in the exercise of constitutional rights, particularly those guaranteed by the First Amendment . . .”<sup>116</sup> “Allowing such a paltry assertion of national security interests to justify a grave deprivation of First Amendment rights treats the words ‘national security’ as a magic spell, the mere invocation of which makes free speech instantly disappear.”<sup>117</sup> Judge Elrod also took issue with the panel majority’s minimization of Defense Distributed’s harm as “temporary.”<sup>118</sup> Even short deprivations of First Amendment rights are understood to impose irreparable harm. “We have been warned that the ‘word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.’ Unfortunately, that is exactly what the panel opinion has done.”<sup>119</sup>

Defense Distributed petitioned for a writ of certiorari.<sup>120</sup> The Supreme Court denied review in January 2018.<sup>121</sup> The case was then remanded to the District Court for summary judgment proceedings—this interlocutory appeal was based on the denial of the motion for a preliminary injunction.

### C. Settlement After Remand

In recent years, the State Department has shifted jurisdiction over exports to the Commerce Department. Critically, the Commerce Department does not require a license to export “technical data” that has been placed in the public domain.<sup>122</sup> In May 2018, the State Department published a proposed rule, indicating that “technical data”—including the files at issue in our case—would indeed be moved over to the Commerce Department.<sup>123</sup>

After the Supreme Court denied review, the District Court urged the parties to consider a settlement.<sup>124</sup> Those efforts were successful. And we were not surprised. It would not make sense for the State Department to require Defense Distributed to obtain a license that *no one else* would need. Indeed, according to

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114. *Id.* at 213.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 214.

119. *Id.* (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring)).

120. Petition for Writ of Certiorari, *Def. Distributed v. U.S. Dep’t of State*, 138 S. Ct. 638 (2018) (No. 17-190), <https://bit.ly/2VTQcL1> [<https://perma.cc/453H-J3XH>].

121. *Def. Distributed v. Dep’t of State*, 138 S. Ct. 638 (2018), *denying cert. to Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016).

122. 15 C.F.R. § 734.7(a) (2020).

123. International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. 24,198 (May 24, 2018).

124. Scheduling Order at 1, *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015) (No. 15-CV-00372-RP), <https://bit.ly/3cGERVn>.

the State Department, the DOJ advised that the Government “would have likely lost this case in court, based on First Amendment grounds.”<sup>125</sup>

The agreement settling this dispute was memorialized by the “Settlement Agreement”—a contract that all sides executed on June 29, 2018.<sup>126</sup> The Settlement Agreement obligated the State Department to perform four tasks.

First, the State Department was required “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 USML Category I to exclude” the files.<sup>127</sup> Second, the Settlement Agreement required the State Department “to announce[], while the above-referenced final rule is in development, [] a temporary modification, consistent with the [ITAR], 22 C.F.R. § 126.2, of USML Category I to exclude the [Defense Distributed Files]” and to publish the announcement on the DDTC website on or before July 27, 2018.<sup>128</sup> This temporary modification would allow Defense Distributed, and anyone else, to immediately publish the files while the rulemaking is ongoing. Third, the Settlement Agreement required the State Department to issue a license to Defense Distributed, on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, “advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13).”<sup>129</sup> This license would apply to the Plaintiffs in the litigation. Fourth, the Settlement Agreement required the State Department “to acknowledg[e] and agree[] that the temporary modification of USML Category I permits any United States person, to include [Defense Distributed]’s customers and The Second Amendment Foundation’s (SAF’s) members, to access, discuss, use, reproduce, or otherwise benefit from the [Defense Distributed Files],”<sup>130</sup> and that the license issued to the Plaintiffs “permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files.”<sup>131</sup>

With the Settlement Agreement finalized, the parties proceeded to wind down the litigation. On July 27, 2018, we filed a Rule 41(a)(1)(A) stipulation of dismissal.<sup>132</sup> In this filing, the parties did not pursue the option of making the

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125. Deirdre Shesgreen & Josh Hafner, *Courts in Three States Bar Release of 3D-Printable Gun Blueprints*, USA TODAY (Jul. 31, 2018), <https://www.usatoday.com/story/news/politics/2018/07/31/3-d-printable-guns-donald-trump/870557002/> [<https://perma.cc/AB3S-EZ8K>].

126. Settlement Agreement, *Def. Distributed v. U.S. Dep’t of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), <https://bit.ly/2xSrdQ3>.

127. *Id.*

128. *Id.* at 1–2.

129. *Id.* at 2.

130. *Id.*

131. *Id.*

132. Stipulation of Dismissal with Prejudice, *Def. Distributed v. U.S. Dep’t of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), <https://bit.ly/2VPvMCX>.

Settlement Agreement a part of the judgment; the stipulation involved only a bare-bones dismissal. After the stipulation was filed, the Government started the process of complying with the settlement agreement in part, at least for a short period. The rulemaking began, the temporary modification was issued, the license was issued, and the acknowledgement occurred.

We signed the settlement on June 29, 2018,<sup>133</sup> and announced it on July 10, 2018.<sup>134</sup> Defense Distributed announced that it would begin publishing the files on August 1, 2018. Or, at least that was the plan.

## V

### ROUND II: THE STATES V. DEFENSE DISTRIBUTED

In the span of a week, nearly two-dozen states, as well as leading gun control groups, launched an offensive blitz against Defense Distributed. We were able to block three motions for TROs, but were defeated on the fourth. During this time, however, Defense Distributed posted the files on the internet, where they were downloaded thousands of times. They remain available to this day.

#### A. Gun Control Groups

On the afternoon of Tuesday, July 24, 2018, our legal team received a letter from counsel for the Brady Center for Gun Violence, Everytown for Gun Safety, and Giffords Law Center to Prevent Gun Violence.<sup>135</sup> The groups informed the Western District of Texas that they would file an emergency motion to intervene, in an attempt to block the settlement agreement. At 11:30 P.M. on Wednesday, July 25, 2018—after most of my team went to sleep (not me)—the gun control groups filed a motion to intervene,<sup>136</sup> a motion for a TRO,<sup>137</sup> and a motion for a hearing.<sup>138</sup>

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133. Settlement Agreement, *supra* note 126.

134. Josh Blackman, *DOJ, Second Amendment Foundation Reach Settlement in Defense Distributed Lawsuit*, JOSH BLACKMAN'S BLOG (Jul. 10, 2018), <http://joshblackman.com/blog/2018/07/10/doj-second-amendment-foundation-reach-settlement-in-defense-distributed-lawsuit> [<https://perma.cc/BS92-J4XM>].

135. Letter from J. David Cabello & John D. Kimball, Counsel for the Brady Ctr., Everytown for Gun Safety & the Giffords Law Ctr., to the Honorable Robert L. Pitman, U.S. Dist. Judge for the W. Dist. of Tex. (Jul. 24, 2018), <https://bit.ly/2VskfKC>.

136. Joint Emergency Motion for Leave to Intervene by Intervenors The Brady Campaign to Prevent Gun Violence, Everytown for Gun Safety Action Fund, Inc., and Giffords Law Center, Def. Distributed v. U.S. Dep't of State, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 96, <https://bit.ly/3bwKHZk>.

137. Joint Emergency Motion for Temporary Restraining Order and for Preliminary Injunction by Proposed Intervenors The Brady Campaign to Prevent Gun Violence, Everytown for Gun Safety Action Fund, Inc. & Giffords Law Center, Def. Distributed v. U.S. Dep't of State, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 97, <https://bit.ly/2wZHRXd>.

138. Intervenors' Request for an Emergency Hearing for Temporary Restraining Order, Def. Distributed v. U.S. Dep't of State, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 98, <https://bit.ly/2KE42fr> [<https://perma.cc/VZ6Q-XV83>].



The next morning, Thursday, July 26, 2018, at 10:30 A.M., the court scheduled an emergency telephonic hearing for 2:30 P.M., later that day.<sup>139</sup> Our team only had a few hours to review the lengthy pleadings, and research whether the parties had standing to intervene at the last minute and block the settlement. I prepared to make the oral argument on (what I then thought) was a hasty timeline. During the proceeding, the court asked whether we would be willing to postpone the settlement one week in order to give him more time to resolve the case. The answer was no. We had been litigating this case for three years, and we would not consent to a delay that could scuttle the entire deal. The judge then ordered oral arguments for the following day, Friday, July 27, 2018 at 2:00 P.M. The Government agreed that it would not issue the license to Cody until the close of business—presumably, we would have a ruling by the end of the day, one way or the other.

Immediately after the call concluded, my colleague Matt Goldstein (an export control guru from Arizona) and I agreed that we would travel to Austin to make the argument. In about nine hours, I drafted the Motion in Opposition to the Motion to Intervene. In the same timeframe, Matt drafted the Motion in Opposition to the Motion for a TRO. Matt got about an hour of sleep before he boarded a 5:00 A.M. flight to Dallas-Ft. Worth, which would connect to Austin. He was scheduled to arrive around 11:30 A.M. But due to delays, he didn't land until noon—only two hours before the hearing. Fortunately, my trip to Austin was much shorter: I boarded an 8:00 A.M. flight and arrived around 9:00 A.M. However, moments after I landed—roughly five hours before the hearing—the proposed intervenors filed a supplemental motion.<sup>140</sup> It introduced new standing arguments that were not advanced in the original briefing, as well as supporting declarations that bolstered those new arguments.

At that point we had not yet filed our motion. We had planned to proofread our work product, and file around 11:00 A.M. (Our co-counsel Alan Gura, who did not make the trip to Austin, was standing by for edits.) I immediately started drafting a motion to strike the supplemental motion and portions of the affidavit: those documents were novel, and everything could have been included in the original pleadings. It was fundamentally unfair to ambush the Plaintiffs—already

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139. Order, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 101, <https://bit.ly/2yBrxD3>.

140. Proposed Intervenors' Supplemental Briefing in Support of Motion for Leave to Intervene, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 103, <https://bit.ly/2x1mtHv>; Declaration of Alison Damaskos in Support of the Proposed Intervenor Joint Emergency Motion to Intervene, for Temporary Restraining Order and for Preliminary Injunction, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 103-2, <https://bit.ly/2VSZXSz>; Declaration of Nicholas Suplina in Support of the Proposed Intervenors Joint Emergency Motion to Intervene, for Temporary Restraining Order and for Preliminary Injunction, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 103-1, <https://bit.ly/2W4vWGL>; Declaration of Joshua Scharff in Support of the Proposed Intervenor Joint Emergency Motion to Intervene, for Temporary Restraining Order and for Preliminary Injunction, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 103-3, <https://bit.ly/3bvCDYT>.

faced with a TRO—with novel standing arguments hours before the hearing. Over the next five hours, we frantically edited and finalized the Motion in Opposition to the Motion to Intervene,<sup>141</sup> the Motion in Opposition to the Motion for a TRO,<sup>142</sup> as well as the Motion to Strike.<sup>143</sup> We submitted the final pleading around 1:30 P.M. and arrived at the court at 1:45 P.M. The hearing before Judge Pitman began promptly at 2:00 P.M.

At the outset of the hearing, I renewed my Motion to Strike.<sup>144</sup> The court took it under advisement. The attorney for the Brady Campaign presented his argument first. He contended that the court must intervene to block the settlement, and prevent Defense Distributed from posting the files to the internet. Otherwise, he argued, there would be irreparable injuries to public safety. At several junctures, the attorney attempted to introduce several exhibits, which I had not seen, and without any foundation. I made hearsay objections, one of which was sustained.<sup>145</sup> He also made several statements about export control law that were simply wrong: I made a foundation objection, asking for a citation to relevant law.<sup>146</sup>

My oral argument was fairly straightforward: the parties had no standing to intervene, because they could not show any injury. The court afforded me twenty minutes to speak, but after three minutes, I sensed that the court fully understood my position. Judge Pitman did not ask any questions during my opening statement. Confident with the direction of the hearing, I asked the court if there were any further questions. There were none. I sat down, and yielded the balance of my time. My colleague Matt Goldstein then provided a thorough summary of export control law, and explained why licensing decisions—such as our settlement—were not subject to judicial review.<sup>147</sup> Then, the attorney for the DOJ presented his oral argument. It was a surreal experience. For more than three years, we had been on the opposite side of the case. Now, we were pursuing a common cause: executing the settlement. Later, I gave a brief rebuttal:

We've been here long enough. The Government sent Mr. Wilson his letter in 2013. We were in your court, Your Honor, in 2015 arguing this. We've been to the 5th Circuit and to the Supreme Court, back down here, and we've reached a settlement. Let's draw it

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141. Plaintiffs' Memorandum of Points and Authorities in Opposition to Joint Emergency Motion to Intervene, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 107, <https://bit.ly/2xHIpbe>.

142. Plaintiffs' Memorandum of Points and Authorities in Opposition to Joint Emergency Motion for Temporary Restraining Order, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 108, <https://bit.ly/2Y9COVZ>.

143. Motion to Strike Part B of Supplemental Motion for Leave to Intervene and Specific Paragraphs of Declarations of Nicholas Suplina, Alison Damaskos, and Joshua Scharff, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 106, <https://bit.ly/2KqD2jp>.

144. Transcript of Motions Hearing Proceedings Before the Honorable Robert Pitman on Friday July 27, 2018 at 6–10, *Def. Distributed v. U.S. Dep't of State*, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 108, <https://bit.ly/2VNLcaE>.

145. *Id.* at 22, 28, 30, 49.

146. *Id.* at 29.

147. *Id.* at 38–45.

to a close. The Government's prepared to keep their end of the bargain, so are we. Let this matter close today and let us get on with our lives. Thank you, Your Honor.<sup>148</sup>

Little did I know that the legal battle was only beginning.

At the end of the hearing, Judge Pitman announced that he would make a ruling from the bench: the Motions for Intervention and TROs were denied.<sup>149</sup> The Brady Campaign lawyer asked the court to stay the judgment to permit an emergency appeal to the Fifth Circuit.<sup>150</sup> I objected: "If they want to seek mandamus in the 5th Circuit, let them do it but let us move on with our lives."<sup>151</sup> Judge Pitman agreed. The Motion to Stay was denied.<sup>152</sup> Then I asked the court whether the Government could execute the settlement immediately, even before the written order was issued. Judge Pitman said we could proceed.<sup>153</sup> I half-jokingly told Stuart Robinson, the DOJ lawyer, "If you are listening, we are ready" to get our license.<sup>154</sup> Court was adjourned around 3:30 P.M.<sup>155</sup>

Within the next ninety minutes, the Government filed the Stipulation of Dismissal,<sup>156</sup> issued Cody a license to export certain files,<sup>157</sup> and announced a temporary modification to export control law to permit "any U.S. person"—not just Cody—to share these files.<sup>158</sup> By 5:00 P.M., we had everything we needed. At that point, Cody began to upload ten files to the internet: nine CAD files and one 3D-Printing file. Only the latter could actually be used to print a firearm; in this case, the original Liberator. All of those files had been available on the internet for years. We submitted an exhibit to the court showing the alternate means to obtain the files.<sup>159</sup> However, Cody would be the first person to publicly share them pursuant to a license from the Federal Government. And he uploaded the files the evening of Friday, July 28, three days in advance of the advertised date, Wednesday August 1. By making the first move, Cody preempted any argument about irreparable harm—or at least we thought. Those files would remain online for five days.

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148. *Id.* at 57.

149. *Id.* at 58–59. *See* Washington v. U.S. Dep't of State, 2020 U.S. Dist. LEXIS 39608 (W. D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 23, <https://bit.ly/2XXAqBf>.

150. Transcript of Motions Hearing Proceedings, *supra* note 144, at 59.

151. *Id.* at 60.

152. *Id.*

153. *Id.*

154. *Id.* at 60–61.

155. *Id.* at 61.

156. Stipulation of Dismissal with Prejudice, *supra* note 132.

157. Letter from the Acting Deputy Assistant Sec'y for the Directorate of Defense Trade Controls, U.S. Dep't of State, on Approval of Certain Files for Public Release to Cody Wilson, Def. Distributed & Second Amendment Found., Inc. (July 27, 2018), <https://bit.ly/2VWzlay>.

158. Announcement by the Directorate of Defense Trade Controls, U.S. Dep't of State, on Temporary Modifications of Category I of the United States Munitions List (July 27, 2018), <https://bit.ly/2S0drSC>.

159. Exhibits, Def. Distributed v. U.S. Dep't of State, 122 F. Supp. 3d (W.D. Tex. 2015) (No. 15-CV-00372-RP), Doc. 106, <https://bit.ly/2VvBLxG>.

## B. Going on Offense Against New Jersey

That evening, after the downloads began, we planned the next phase of litigation. Earlier that summer, the New Jersey Attorney General issued Cody a cease-and-desist letter.<sup>160</sup> Why? The Attorney General claimed that posting files on the internet violated New Jersey nuisance law. We expected a lawsuit from New Jersey on Monday. Likewise, the Los Angeles City Attorney had sought to intervene alongside the Brady Campaign.<sup>161</sup> We expected litigation there as well. Rather than sitting on defense, we would go on offense. I suggested we preemptively file a Section 1983 action in the Western District of Texas by Sunday, naming the New Jersey Attorney General and the L.A. City Attorney as defendants. We did not know quite what would happen, but being the first-to-file would provide benefits for any future venue transfers. That would be our beachhead—all states that threatened to violate Cody's rights could be added as parties. As a preemptive matter, Cody blocked all computers with New Jersey or Los Angeles IP addresses from accessing the files.

Late Friday night, I drafted a proposed complaint, and circulated it to the team. On Saturday morning, I flew to New York to attend a wedding. I left shortly after the ceremony, and finished drafting the complaint early Sunday morning. In addition to the 1983 claims based on the First and Second Amendment, I quickly developed two new arguments. The first argument was premised on the Dormant Commerce Clause: one state cannot bar internet commerce in another state. The second argument was based on the Supremacy Clause: export control law trumps state nuisance law. We continued working on the brief through Sunday, and planned to file around 5:00 P.M. But soon, the second fire drill of the week began.

## C. Pennsylvania Strikes Next

Around 3:00 P.M. on Sunday, the Pennsylvania Governor, Attorney General, and State Police filed for a TRO in the Eastern District of Pennsylvania.<sup>162</sup> They asked the court to prevent Cody from posting the files on August 1. I called the Deputy Attorney General and told him that the files were *already* online. He had no idea. I told him to withdraw his motion because there was no longer any irreparable harm. (I would make this argument many times over the next 72 hours). He refused. I asked him to place our emails in the record; and they

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160. Cease and Desist Letter from the Office of the Att'y Gen. of N.J. to Def. Distributed (Jul. 26, 2018), <https://bit.ly/3bwrYgt>.

161. Letter from Michael N. Feuer, L.A. City Att'y, to the Honorable Robert L. Pitman, U.S. Dist. Judge for the W. Dist. of Tex. (Jul. 27, 2018), <https://bit.ly/3eGz9o9>.

162. Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, *Pennsylvania v. Def. Distributed*, No. 2:18-CV-03208-PD (E.D. Pa. 2018), Doc. 2, <https://bit.ly/3cxIbSG> [<https://perma.cc/28U9-3CH6>]. All of the filings from *Pennsylvania v. Defense Distributed* can be found in this folder: <https://bit.ly/3eTiePw>.

were.<sup>163</sup> About twenty minutes later, we filed our complaint in the Western District of Texas.<sup>164</sup>

Judge Diamond scheduled an emergency telephonic hearing for 5:15 P.M. Pennsylvania argued that posting files violated various state laws. There was no time to prepare any pleadings. Fortunately the arguments I had developed for the New Jersey case also applied to the Pennsylvania case: in addition to the First and Second Amendments, the state law claims were preempted by federal export control law, and ran afoul of the Dormant Commerce Clause. Shortly before I left the hotel, I quickly recorded an interview by Skype with Mike Sacks, a reporter for *Fox 5 News* in New York.<sup>165</sup> That segment was later picked up by the *Fox News Channel*.<sup>166</sup>

My flight was scheduled to leave that evening around 6:30 P.M. Boarding started at 6:05 P.M. I then rushed to LaGuardia Airport, and arrived to the United lounge around 4:50 P.M. The United Lounge at LaGuardia was somewhat unique because it was outside security. The hearing did not begin until 5:30 P.M. due to some telephonic problems.<sup>167</sup> At the last minute, Pennsylvania indicated that it planned to put on four witnesses. I moved to strike for lack of notice. Fortunately, the hearing began on an auspicious note. Judge Diamond immediately asked about jurisdiction. He noted that the Plaintiffs did not identify any federal question in their Complaint, and failed to assert the minimum amount in controversy to establish diversity jurisdiction. The court ordered the Plaintiffs to file an amended complaint. I would later describe Pennsylvania's motion in an interview as an "ambush."<sup>168</sup>

I was prepared to make arguments about the First Amendment and the Dormant Commerce Clause, but shifted to a different, more conciliatory approach: I proffered that Defense Distributed would block access to the files from Pennsylvania IP addresses, and not post any new files until the Court had the chance to resolve the instant motion. We had no problem blocking access in certain states in the short term to forestall a global injunction. The Court accepted that representation, and denied the Motion for a TRO as moot.<sup>169</sup> That ruling was the second TRO that I had defeated in three days. The Pennsylvania

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163. Emails Exchanged with Deputy Attorney General Jonathan Scott Goldman, *Pennsylvania v. Def. Distributed*, No. 2:18-CV-03208-PD (E.D. Pa. 2018), Doc. 3, <https://bit.ly/3cNsaIt>.

164. Complaint, *Def. Distributed v. Grewal*, 364 F. Supp. 3d 681 (W.D. Tex. 2019) (No. 1:18-CV-00637-RP) (W.D. Tex. 2018), Doc. 1.

165. Josh Blackman, *Interview on Fox 5 New York to Discuss Defense Distributed Suit*, YOUTUBE (Jul. 30, 2018), <https://www.youtube.com/watch?v=jxqfTs7TEzY> [<https://perma.cc/6BPN-NUR4>].

166. Josh Blackman, *Special Report with Bret Baier - Discussing Defense Distributed*, YOUTUBE (Aug. 1, 2018), <https://www.youtube.com/watch?v=EF64zMAJtrQ&t> [<https://perma.cc/5E8Y-QKRV>].

167. Transcript of Telephone Hearing Regarding Application for Temporary Restraining Order Before the Honorable Paul S. Diamond, *Pennsylvania v. Def. Distributed*, No. 2:18-CV-03208-PD (E.D. Pa. 2018), <https://bit.ly/2XZVTtn>.

168. Josh Blackman, *CBS News Philadelphia on Defense Distributed*, YOUTUBE (Aug. 1, 2018), <https://www.youtube.com/watch?v=UPelTocnVxw> [<https://perma.cc/LQD6-HKDL>].

169. Order, *Pennsylvania v. Def. Distributed*, No. 2:18-CV-03208-PD (E.D. Pa. 2018), Doc. 4, <https://bit.ly/2VT2EKV>.

Attorney General tried to spin this decision as a victory. It wasn't. He was denied the global prior restraint he wanted. I hustled to the gate, and made my flight by a few minutes. I landed back in Houston late that evening. I had a very busy week ahead of me.

#### D. New Jersey and Washington Enter the Fray

Monday morning came and went, with no further pleadings. We suspected that the Attorneys General were taken somewhat off guard by our preemptive suit in Austin, and had to amend their pleadings. We were right. At 3:46 P.M., the New Jersey Attorney General filed an Application for Temporary Restraints in Superior Court of New Jersey, Chancery Division: Essex County.<sup>170</sup> The Attorney General asserted that posting files on the internet violated New Jersey nuisance law, and constituted negligence.<sup>171</sup> The complaint sought *ex parte* relief to prevent Defense Distributed from posting the files before August 1.<sup>172</sup> (Again, the files were already online.) Fortunately, the court denied the requested *ex parte* relief, and scheduled a hearing for the following day at 2:00 P.M.

Around the same time, I received a phone call from the Washington Attorney General's Office. The lawyer asked if I represented Cody Wilson. I said yes. He said he was about to seek a TRO against us in the Western District of Washington. I asked what relief he was seeking. He refused to tell me. About an hour later a Complaint<sup>173</sup> and Motion for TRO<sup>174</sup> were filed by the Washington Attorney General, joined by the Attorneys General of Connecticut, Maryland, New Jersey, New York, Oregon, Massachusetts, Pennsylvania, and the District of Columbia. (Ultimately nineteen states and the District of Columbia joined the case.) We were now being sued by New Jersey and Pennsylvania, for identical relief, in two different forums.

The complaint alleged that, by entering into the Settlement Agreement and carrying out its obligations, the State Department had "violated the Administrative Procedure Act and the Tenth Amendment of the U.S. Constitution."<sup>175</sup> The suit sought a nationwide injunction to bar the State Department from performing its obligations under the Settlement Agreement.<sup>176</sup> Defense Distributed opposed the States' injunction request and defended the

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170. Verified Complaint from the Office of the Attorney General of New Jersey to Superior Court of New Jersey on July 30, 2018, *Grewal v. Def. Distributed*, No. ESX-C-131-18 (N.J. Super. Ct. Ch. Div. 2018), <https://bit.ly/2VzDUbu>. All of the filings in *Grewal v. Defense Distributed* can be found at this link: <https://bit.ly/2XYTteu>.

171. *Id.* at 21.

172. *Id.* at 3-4.

173. Complaint for Declaratory and Injunctive Relief, *Washington v. U.S. Dep't of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 1, <https://bit.ly/2Y2XBU6>. All of the filings in *Washington v. Defense Distributed* can be found at this link: <https://bit.ly/3cFLmYz>.

174. Emergency Motion for Temporary Restraining Order, *Washington v. U.S. Dep't of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 2, <https://bit.ly/2zsgZqb>.

175. Complaint for Declaratory and Injunctive Relief, *supra* note 173, at 7.

176. *Id.* at 48.

Settlement Agreement's obligations as perfectly lawful.<sup>177</sup> Likewise, the State Department defended the Settlement Agreement and opposed the request for a nationwide injunction.<sup>178</sup>

The State Department pointed out the States' request was unprecedented and extraordinary. The Federal Government explained that the States "ask the Court to suspend and enjoin enforcement of *actions already taken* by the Government pursuant to its obligations under the Settlement Agreement."<sup>179</sup> The State Department also argued that the States lacked standing, were wrong on the merits, and had failed to demonstrate an injunction's other prerequisites such as irreparable harm.

The states asked for a hearing the following day. Unlike the earlier suits, the Washington case challenged the Federal Government's settlement with us. They sought to enjoin it to prevent us from posting the files by August 1.<sup>180</sup> Again, the files were already online. Once again, we were on the same side as the Federal Government; a strange spot.

At that point, we were forced to prepare emergency pleadings overnight in two separate forums. I immediately began writing a letter to the Western District of Washington that explained why the blockage of the settlement would reimpose the Government's prior restraint for all Americans:

[T]he prior restraints in this case would not be restricted to the named defendants: nine Attorneys General seek to infringe the liberties of *all* Americans. The settlement under siege expressly protects the rights of "*any* United States person" to "access, discuss, use, reproduce, or otherwise benefit from the technical data." *Any* means *all*. Granting the proposed injunctive relief would not only silence the three named Defendants, but it would immediately censor over three hundred million Americans. Today, the validity of nationwide injunctions is subject to a robust debate. But never before has any court entertained a global injunction on the freedom of speech of *all* Americans.<sup>181</sup>

At the same time, my colleague Matt Goldstein drafted another portion of the brief that explained why the federal courts lacked jurisdiction to review licensing decisions. Once I finished drafting the letter, I turned to the New Jersey matter. I had absolutely zero experience with New Jersey practice, but had to learn quickly. Daniel Schmutter, an attorney in Ridgewood, New Jersey agreed to serve as local counsel on virtually zero notice. He sent me templates for New Jersey courts, including a Certification, (basically a fact section), and a letter brief. I spent the rest of the evening preparing a filing to demonstrate why the

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177. Defense Distributed's Brief in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order, Washington v. U.S. Dep't of State, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), <https://bit.ly/2Ku6hlp>.

178. Federal Defendants' Brief in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order, Washington v. U.S. Dep't of State, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 16, <https://bit.ly/34ZOifO>.

179. *Id.* at 9 (emphasis added).

180. Defense Distributed's Brief in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order, Washington v. U.S. Dep't of State, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), <https://bit.ly/2Ku6hlp>.

181. Letter from Josh Blackman to Judge Lasnik, Jul. 31, 2018, Washington v. U.S. Dep't of State, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 8, <https://bit.ly/2S5mvW>.

court should deny the temporary restraints. Once again, I raised the First Amendment and the preemption issues. I also contended that a state court of limited jurisdiction could not issue a nationwide, let alone a global injunction. In addition, we noted that the New Jersey Attorney General engaged in forum shopping. Our case in Austin was filed first, and the Washington case could offer better relief. There were several reasons, under New Jersey law, why the Chancery Court should not take jurisdiction.

Complicating my job, of course, was @realDonaldTrump. Early Tuesday morning, the President tweeted, “I am looking into 3-D Plastic Guns being sold to the public. Already spoke to NRA, doesn’t seem to make much sense!”<sup>182</sup> This tweet was irrelevant and incoherent. No one was selling plastic guns. And the President’s own State Department had authorized the settlement. Why would he talk to the NRA? No, it didn’t make sense. And Cody spoke to a prominent person within NRA; she had not heard from the President. I immediately knew how the President’s lawyers must feel when the Solitary Executive tweets something counterproductive on the eve of oral arguments.<sup>183</sup>

I also worried that the President would take steps to intervene in the proceedings. I told the *New York Times*, “I don’t care what the president tweets. I will be in court tonight defending the rights of my clients and of all Americans facing [G]overnment censorship.”<sup>184</sup> We plowed forward. In the next few hours, Matt and I folded together my letter and his brief to form a single pleading in the Western District of Washington. Joel Ard, our local counsel in Seattle, provided timely and insightful edits, and submitted the brief around 9:00 A.M.<sup>185</sup> New Jersey does not have any electronic filing, so Dan scheduled a messenger to pick up the papers. Fortunately, the court agreed to accept the certification<sup>186</sup> and letter brief by email.<sup>187</sup> My motion to appear telephonically was submitted by fax. We were on file around 1:00 P.M.

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182. Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 31, 2018, 8:03 AM), <https://twitter.com/realDonaldTrump/status/1024264286418489345> [<https://perma.cc/6W7N-35A8>].

183. See Josh Blackman, *The Solitary Executive*, FOREIGN POL’Y (Aug. 18, 2017), <https://foreignpolicy.com/2017/08/18/the-solitary-executive-trump-cabinet-white-house/> [<https://perma.cc/SE5V-ZSU2>] (arguing that President Trump’s conflicting public statements have led him to be increasingly isolated within his own administration); see also Josh Blackman, *All The President’s Tweets*, LAWFARE (Jun. 5, 2017), <https://www.lawfareblog.com/all-presidents-tweets> (discussing the challenges presented by President Trump’s tweets concerning pending cases).

184. Michael D. Shear, Tiffany Hsu & Kirk Johnson, *Judge Blocks Attempt to Post Blueprints for 3-D Guns*, N.Y. TIMES (Jul. 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/3d-guns-trump.html> [<https://perma.cc/26L3-MG2L>].

185. Opposition to Emergency Motion for Temporary Restraining Order, *Washington v. U.S. Dep’t of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 11, <https://bit.ly/2Ku6hlp>.

186. Certification of Josh Blackman in Opposition to Temporary Restraints and In Support of Cross-Motion for Stay, *Grewal v. Defense Distributed*, No. ESX-C-131-18 (N.J. Super. Ct. Ch. Div. 2018), <https://bit.ly/3bAn8yM>.

187. Letter Brief of Defendants Defense Distributed and Cody R. Wilson in Opposition to Plaintiff’s Application for Temporary Restraints and in Support of Cross-Motion for Stay, *Grewal v. Defense Distributed*, No. ESX-C-131-18, <https://bit.ly/2KrFw0V>.



Oral arguments in New Jersey would start at 3:00 P.M., and oral arguments in Seattle would begin at 5:00 P.M.

#### D. Oral Arguments in New Jersey

As I frantically prepared for both oral arguments, I fielded as many press calls as I could. That day, I was featured on a dozen TV and radio interviews,<sup>188</sup> plus many more print interviews. The *PBS News Hour* host noted that I declined going to the studio because I was too busy.<sup>189</sup> This matter was one of those rare, high profile cases that had to be litigated both inside and outside court. My goal was to raise as much attention about the case as possible, and correct three common misconceptions. First, the states sought to enjoin posting the files, even though they were already online. Second, this case was not about printing firearms, but about sharing design information. Third, the “shouting fire falsely in a crowded theater” test is no longer good law<sup>190</sup>—I chastised a dozen reporters for asking me this *same* question, and asked what they were learning about the First Amendment in J-School. I repeated a single line, nearly verbatim, in each interview: “The Attorney General of one state cannot censor the speech and commerce of a citizen in another state, especially when that commerce is licensed by the Federal Government.”

Shortly before the New Jersey proceeding began, the Attorney General filed an affidavit indicating that the files could still be accessed on mobile phones in New Jersey.<sup>191</sup> I immediately called Cody. He explained that there really was no way to block access to every device in a state. Generally, only totalitarian countries (China or North Korea) impose blockages. Not individual states. Cody quickly discovered that often cell phone companies like Verizon route packets throughout multiple states. In other words, a person who accesses his phone in Newark, New Jersey, may actually connect to a Manhattan cell phone tower. To address this problem, we decided to simply block access to all mobile devices. Users would be directed to a landing page that displayed Error #451—an homage to *Fahrenheit 451*. Also, we updated the Terms of Service: users who spoofed IPs or accessed the page through a Virtual Private Network would violate the Terms of Service. We were trying to take as many steps as technologically possible to block access in Pennsylvania and New Jersey. I joked that we should call it the Great Blue Wall: Democratic Attorneys General were walling off their own citizens from the internet. By the end of the day, I expected most of the Eastern seaboard would be behind our wall. Cody would create a graphical rendition of

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188. Josh Blackman (@JoshMBlackman), TWITTER (Aug. 1, 2018, 2:41 PM), <https://twitter.com/JoshMBlackman/status/1024726838613028864> [<https://perma.cc/W9XU-SGBU>].

189. Josh Blackman, *Interviewed on PBS News Hour about Defense Distributed (7/31/18)*, YOUTUBE (Aug. 1, 2018), <https://www.youtube.com/watch?v=9SIYhxcmiOY> [<https://perma.cc/P4NU-72E9>].

190. See Trevor Timm, *It's Time to Stop Using the 'Fire in a Crowded Theater' Quote*, ATLANTIC (Nov. 2, 2012), <https://www.theatlantic.com/national/archive/2012/11/its-time-to-stop-using-the-fire-in-a-crowded-theater-quote/264449/> [<https://perma.cc/C7JF-EABF>].

191. Certification of Chief Information Security Officer Michael T. Geraghty, *Grewal v. Def. Distributed*, No. ESX-C-131-18 (N.J. Super. Ct. Ch. Div. 2018), <https://bit.ly/2Y0AfFr>.

the Great Blue Wall.<sup>192</sup> The page included the message, “Your masters say you can’t be trusted with this information. Sorry, little lamb.” Cody added a animated gif of a little lamb, crying.

At 3:00 P.M., the telephonic hearing began before Judge Koprowski in New Jersey Superior Court.<sup>193</sup> After the court admitted me pro hac vice, the Attorney General’s lawyer presented her argument. She insisted that the court must grant immediate injunctive relief to prevent Cody from posting the files the following day, August 1. Again, by that point, the files had already been online four days, and were downloaded thousands of times. The lawyer did not even address the fact that the nuisance laws violated the First Amendment. She also didn’t mention federal preemption.

Next, I participated in my third TRO hearing in four days. I carefully walked through the four factors required to issue an injunction—the New Jersey standard is somewhat modified from the federal standard. I stressed that a court of chancery lacked jurisdiction to issue a global injunction, especially one that imposes a prior restraint of speech. I offered Judge Koprowski the same proffer I gave Judge Diamond: we would block all New Jersey IP addresses, as well as access on mobile devices, and not post any new files until the injunction was resolved. The lawyer for New Jersey asked if I would take down the Liberator file. I refused; I would not consent to that form of censorship. I would only maintain the status quo.

After an hour-long hearing, Judge Koprowski recessed to his chambers. Twenty minutes later, he returned and read a judgment from the bench. He carefully considered each of the four factors. Two of the factors favored the Plaintiffs, and two favored Defendants. However, he stressed that because of the important First Amendment issues, and possible preemption issues, he would accept my proffer. In the end, he denied the Attorney General’s request for a global TRO. Instead, he accepted my proffer that we would block all New Jersey IP addresses, and those of mobile devices, and promise not to post new files. The New Jersey Attorney General tried to spin this ruling as a victory. It was not. He was denied the global prior restraint he wanted.

#### E. Global Injunction from Seattle

I had about an hour before the hearing in Washington began. I turned the ringer on my phone off—reporters were blowing it up—and snuck in a fifteen minute nap. I had barely slept the past few days. At 5:00 P.M., oral arguments began before Judge Lasnik.<sup>194</sup> This was my fourth TRO hearing in five days. Once again, I was arguing on the same side as the Federal Government. The Attorney

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192. *The Blue Wall*, DEFCAD, <https://defcad.com/bluewall/> [<https://perma.cc/YGX3-F4QK>].

193. Transcript of Oral Argument Regarding Order to Show Cause with Temporary Restraints, *Grewal v. Def. Distributed*, No. ESX-C-133-18 (N.J. Super. Ct. Ch. Div. 2018), <https://bit.ly/2S5spXc>.

194. Verbatim Report of Proceedings Before the Honorable Robert S. Lasnik, *Washington v. U.S. Dep’t of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), <https://bit.ly/2Kwa4i8>.

General for Washington presented his argument. At several junctures, he warned that MS-13 gang members could smuggle 3D-printed guns across the Canadian border. He did not mention the First Amendment implications of the suit. Judge Lasnik asked very few questions.

Next, the Government presented its arguments. The DOJ argued there was no standing, and the settlement was not subject to judicial review. Again, the court posed very few questions. Judge Lasnik made a comment about the “deep state,” referred to my client several times as an “anarchist,” and referred to the President’s tweet. He suggested that DOJ should go back and check with the President about what position to take. For nearly two years, I had been writing about how the judiciary reviewed the President’s tweets.<sup>195</sup> It was surreal to witness it first-hand.

Finally, I presented my argument. Here, Washington was not seeking to directly enjoin Cody’s speech, as were the Attorneys General of Pennsylvania and New Jersey. However, an injunction to halt the settlement would result in the re-imposition of the prior restraint under the old State Department regime. And, that change would not only stop Cody from sharing the information, but would also limit the free speech rights of all Americans. I reiterated that the files were already online, and had been online for days. I also made the same proffer that I gave to Judges Diamond and Koprowski: I would block access in all of the Plaintiffs’ states—I inadvertently referred to it as the “Great Blue Wall” during the hearing. During my argument, the court asked very few questions.

At the end of the hour-long hearing, Judge Lasnik announced that he would issue a judgment from the bench: he was going to grant the TRO. Judge Lasnik accepted the argument the First Amendment was implicated by the decision, but found that the risk of irreparable harm was too great. In no uncertain terms, the restraining order enjoined the State Department from fulfilling its obligations under the settlement agreement:

For all the foregoing reasons, plaintiffs’ motion for temporary restraining order is GRANTED. The [F]ederal [G]overnment 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.<sup>196</sup>

The court was about to close session and I asked to be heard. “Are you issuing an order for my client to take down his website immediately?” Judge Lasnik replied, “That’s not the relief that the plaintiffs requested.”<sup>197</sup> He added, “Your client is not ordered to take down his website immediately, no.” I responded,

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195. Josh Blackman, *All the President’s Tweets*, LAWFARE (June 5, 2017) <https://www.lawfareblog.com/all-presidents-tweets> [<https://perma.cc/8W5E-XDS7>].

196. Temporary Restraining Order at 7, *Washington v. U.S. Dep’t of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 23, <https://bit.ly/2S0m8Mn>.

197. Verbatim Report of Proceedings Before the Honorable Robert S. Lasnik, *supra* note 194, at 44–45. Judge Lasnik’s quotations in this paragraph come from these pages of the transcript.

“But the effect of your order is to render my client’s actions now illegal under federal law, just to be clear?” Judge Lasnik answered:

That’s right, which anarchists do all the time. So if that’s the path he wants to take, knowing the consequences, that’s fair. But I’m not being asked to enjoin your client directly. I’m being asked to enjoin the federal defendants from putting on the OK list the production of these weapons.

In other words, anarchists break the law all the time. I was shocked by this comment from the bench. I interjected, “Your honor, I note my client, though an anarchist, complies with all court orders, and he has for years.” Judge Lasnik interjected, “I’m using shorthand, Mr. Blackman. You understand.” I tried to interject, but the court said “Sorry, we’re adjourned.” A legal reporter from a wire services called me later, and said she was shocked by the judge’s comments.

#### F. The Shutdown

Immediately after the hearing, I called Cody, and told him to begin the shutdown process. It was a somber moment. The past week had been an emotional rollercoaster. I shed a few tears, but quickly composed myself. We had to move swiftly. We didn’t have a written order from the court yet, but I wasn’t willing to take any risks. The wind-down process was fairly complicated. Cody had built in a lot of redundancies to prevent hack attempts. (Earlier in the day, the web site was subject to a Distributed Denial of Service Attack.) We barely had a moment to soak in what happened. Shortly thereafter, Cody told me the site was down. We were now in compliance with the court’s order.

I quickly recorded a live interview with Charles Payne on the *Fox Business Network*.<sup>198</sup> My immediate reaction to the case was visceral but measured: the court had approved of the re-imposition of a prior restraint that would censor the speech of all Americans. The published order made no reference to the First Amendment.<sup>199</sup> Because of the near-universal opposition to 3D-printed guns, this global injunction on free speech barely made a blip. Civil libertarians who would usually be appalled by such an order were silent.

#### G. The Governor Called

I barely had a chance to catch my breath when my phone rang. It was a restricted number. I expected that another Attorney General was threatening to sue Cody. This call would be very different. (The following quotations are paraphrases based on my recollection, written down shortly after the call.) “Hello, this is Governor Andrew Cuomo.” At first I thought it was a prank. I said, “hello, Governor.” He replied, “are you the lawyer for the gun guy.” I said, “yes, I represent Cody Wilson.” He replied, “you tell him to stop sending his gun stuff to New York.” I asked if the Governor meant the “Ghost Gunner,” which

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198. Josh Blackman, *Guest on Fox Business Network – Making Money with Charles Payne to Discuss Defense Distributed*, YOUTUBE (Aug. 1, 2018), <https://www.youtube.com/watch?v=ugOIDC0DisA> [<https://perma.cc/79QJ-T7GQ>].

199. Temporary Restraining Order, *supra* note 196.

is used to manufacture firearms, or the 3D-Printed Gun files. Cuomo had no idea what he was asking “the gun guy” to stop doing. I said “could you have your lawyer send me a letter?” He replied he would have his counsel send something. Then I added, “governor, are you aware that 15 minutes ago, a federal judge in Washington entered a nationwide injunction, barring us from sharing the files online.” He had no idea. I said, “your Attorney General sued us.” Then the conversation took a turn for the bizarre.

He stated “in New York we have an independent Attorney General.” He complained, “[S]he doesn’t work for me.” (At the time, Barbara Underwood was the acting Attorney General.) I replied, “I know, I’m from New York.” He asked, “where are you from?” “Staten Island.” “And where are you now?” “Houston, Texas.” “Don’t you miss New York—greatest place in the world.” I said, “I love Texas, but I miss my family.” “Are your parents still in New York.” “Yes, still in Staten Island.” I added, “Today is their anniversary.” He beamed, “You tell your parents that Governor Cuomo wished them a happy anniversary.” Then it got weirder. He said, “are you parents going to vote for me?” (Cuomo was up for re-election the following November.) I replied that my parents would. A conversation that began as a vague cease-and-desist order from the Governor of the Empire State turned into a campaign pitch. We were on the phone for nearly 10 minutes! I never did get a letter from New York. After the Governor hung up, I called my parents to wish them a happy anniversary. I had been so busy all day, I hadn’t had a chance to call. My parents, both lifelong New York Democrats, were thrilled with the Governor’s greeting. Over the next few hours, I fielded many calls from print reporters, and gave the same, stock line: we were disappointed with the court’s ruling, and were considering our next options.

Subsequently, the States moved for a preliminary injunction based on essentially the same argument as before.<sup>200</sup> On August 27, 2018, the Western District of Washington issued a preliminary injunction.<sup>201</sup> Just like the TRO, it enjoins the State Department from “implementing or enforcing” the Settlement Agreement’s two key components—the temporary modification and the licensing letter:

For all of the foregoing reasons, plaintiffs’ motion for a preliminary injunction is GRANTED. The federal defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the “Temporary Modification of Category I of the United States Munitions List” and the letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo *ex ante* as if the modification had not occurred and the letter had not been issued until further order of the Court.<sup>202</sup>

The decision took effect immediately.

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200. Plaintiff States’ Motion for a Preliminary Injunction, *Washington v. U.S. Dep’t of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 43, <https://bit.ly/2Y2jGZG>.

201. Preliminary Injunction, *Washington v. U.S. Dep’t of State*, 2020 U.S. Dist. LEXIS 39608 (W.D. Wash. 2018) (No. 18-CV-01115-RSL), Doc. 95, <https://bit.ly/2Y2jGZG>.

202. *Id.* at 25.

As of the date of this Article's publication, the cases filed in Texas and New Jersey are currently on appeal. The Pennsylvania case has been stayed.

## VI

### CONCLUSION

Five days, four TROs, three lawyers, two Amendments, and, alas, one prior restraint. This experience was all the more surreal, because before Thursday, July 26, 2018, I had never presented any oral argument, in any court, of any jurisdiction. Before this experience, my legal practice was limited to writing a handful of merit and amicus briefs, always as co-counsel. I had not made an evidentiary objection, of any sort, since trial advocacy during 2L. (Several of mine were granted!) It was a crash course in law, with very little time to prepare. In the end, I billed 90 hours in five days. I am honored to have had this opportunity to zealously represent Cody, Defense Distributed, and the Second Amendment Foundation during this legal blitz.