IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02323-NYW

LEO COMBAT, LLC,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF STATE, and
JOHN FORBES KERRY, SECRETARY OF STATE

Defendants.

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), defendants hereby move to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

In this litigation, Plaintiff objects to a registration fee contained within the Arms Export Control Act ("AECA"), the United States' system of export controls for defense articles and defense services, including weapons, on the basis of novel and abstract constitutional theories. The AECA and its supporting regulations serve a vital, practical purpose in the real world of ensuring that articles useful for warfare or terrorism are not exported from the United States to other countries (or otherwise provided to foreign persons), where, beyond the reach of U.S. law, they could be used to threaten U.S. national security, foreign policy, or international peace and stability. Plaintiff fails to establish standing for each of his distinct constitutional claims, and in any event fails to state a valid claim on the merits.

First, Plaintiff's non-delegation claim rests on the theory that the Executive Branch might raise the AECA registration fee in the future, and such a speculative future injury is insufficient to

establish standing. Similarly, Plaintiff's challenge to authorization of this fee under the foreign commerce power does not give rise to a redressable injury sufficient for standing. Further, Plaintiff, as a corporation, does not have Second Amendment rights that could be injured by the AECA. For this reason, the Court lacks subject matter jurisdiction over Plaintiff's claims.

Even if Plaintiff could establish standing, moreover, it nevertheless has failed to state a claim under any of its constitutional theories. Plaintiff's non-delegation claim fails because Congress has provided adequate guidance to the Secretary in establishing such fees. Plaintiff's theory that Congress lacks power under the foreign commerce clause to require such a fee is clearly wrong, and the AECA's imposition of a registration fee on all manufacturers of defense articles, not just exporters, is a constitutionally permissible regulation of either foreign or domestic commerce. Finally, Plaintiff's assertion that the registration fee violates the Second Amendment is in error. The registration fee neither imposes an impermissible burden on Second Amendment rights nor singles out for treatment those that are engaged in activity that may be protected by the Second Amendment. The Court can therefore dismiss the Complaint for either lack of jurisdiction or for failure to state a claim.

BACKGROUND

The Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751 et seq., authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States" to "control the import and export of defense articles and defense services" and to promulgate regulations accordingly. 22 U.S.C. § 2778(a)(1).[1] The AECA also requires, "as prescribed in regulations issued under this section," every person who "engages in the business

[1] The AECA is a recent example of a series of controls on the export of arms that date to the earliest days of the United States. *See, e.g.*, 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, § 1098 (1906) (documenting the 1794 prohibition on "the exportation of munitions of war" enacted by President Washington).

of manufacturing, exporting, or importing any defense articles" to register "with the United States Government agency charged with the administration of this section, and [to] pay a registration fee which shall be prescribed by such regulations." *Id.* § 2778(b)(1)(A)(i).[2] The President has delegated his authority to designate defense articles to the Secretary of State and the Department of State ("Department"), *see* Exec. Order 13637(n)(iii), which has accordingly promulgated the International Traffic in Arms Regulations ("ITAR"), and which is administered by the Department's Directorate of Defense Trade Controls ("DDTC"). *See* Executive Order 13637(n)(iii); 22 C.F.R. §§ 120-130. At the heart of this system of regulation is the United States Munitions List ("USML"), an extensive listing of items that constitute "defense articles and defense services" under the AECA. 22 C.F.R. § 121.1. The USML encompasses numerous categories of military equipment useful to all areas of warfare; in addition to certain firearms and their components, the USML includes everything from battleships to bullets and software to sonar. *See id.*

The ITAR requires any person "who engages in the United States in the business of manufacturing … defense articles" to register with the DDTC. 22 C.F.R. § 122.1(a). This provision specifies that "engaging in such a business requires only one occasion of manufacturing … a defense article," thus triggering the registration requirement. *Id.* The purpose of the registration requirement, the ITAR explains, "is primarily a means to provide the U.S. Government with necessary information on who is involved in certain manufacturing and exporting activities." *Id.* § 122.1(c). The ITAR does provide several exemptions from the registration requirement, including "(1) Officers and employees of the U.S. Government acting

[2] In 2008, the State Department issued a notice of rulemaking and then a final rule setting this fee for non-exporting manufacturers at $2,250. *See* 73 Fed. Reg. 43653 (July 28, 2008); 73 Fed. Reg. 55439 (Sept. 25, 2008).

in an official capacity; (2) Persons whose pertinent business activity is confined to the production of unclassified technical data only; (3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended; or (4) Persons who engage in the fabrication of articles solely for experimental or scientific purposes, including research and development." *Id.* § 122.1(b).

Plaintiff is a limited liability company that has allegedly developed "several unique firearms designs." Complaint, ECF No. 1, at ¶¶ 1, 8 ("Compl."). On April 6, 2015, it submitted one of these designs, for "an aluminum receiver for a 1911-style handgun, with a steel insert to reinforce critical areas subject to damage" to DDTC and requested a determination of whether the design describes a defense article subject to the ITAR. Compl. at Ex. 1. On May 15, 2015, DDTC responded, designating the item as a "defense article," *see id.*, and Plaintiff concedes that DDTC's classification is proper under the "USML currently in force." Compl. ¶ 17. As of the filing of the complaint, Plaintiff had not yet "manufactured any firearms, either as prototypes or for sale." Compl. ¶ 9.

LEGAL STANDARD

Rule 12(b)(1) provides for dismissal of a complaint whenever a court "lack[s] jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). As the Tenth Circuit has explained, a motion to dismiss for lack of subject-matter jurisdiction may take one of two forms:

> First, a facial attack on the complaint's allegations as to subject-matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true. Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject-matter jurisdiction depends. When reviewing a factual attack on subject-matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a

Rule 56 motion.

Holt v. U.S., 46 F.3d 1000, 1003 (10th Cir. 1995). In either circumstance, the party asserting jurisdiction bears the burden of demonstrating that subject matter jurisdiction exists. *See Basso v. Utah Power & Light Co*., 495 F.2d 906, 909 (10th Cir. 1974).

In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court should "accept all the well-pleaded allegations of the complaint as true" and "construe them in the light most favorable to the plaintiff." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). In doing so, the Court assesses "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *The Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007)). A plausible claim does not need to meet a fixed "probability requirement," but it asks for more than a "sheer possibility" that the alleged claim is valid. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and quotation marks omitted). In evaluating plausibility for any given claim, a court "need not accept conclusory allegations" without supporting statements of fact. *S. Disposal, Inc., v. Tex. Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998); *see Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions").

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFF DOES NOT HAVE STANDING.

The power of federal courts extends only to "Cases" and "Controversies," *see* U.S. Const. art. III, § 2, and a litigant's standing to sue is "an essential and unchanging part of the case-or-controversy requirement." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy this requirement, a plaintiff must demonstrate an "injury in fact," a "fairly traceable"

causal connection between the injury and defendant's conduct, and that the injury would be "redressable," *i.e.*, curable, by the relief sought from the court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). The standing inquiry must be "especially rigorous when," as here, "reaching the merits of the dispute would force [a court] to decide whether an action taken by [another] branch[ ] of the Federal Government was unconstitutional," *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997), and a plaintiff must demonstrate "standing to seek each form of relief in each claim." *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007) (citing *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006)).

Allegations of possible future injury do not suffice for standing; rather, "[a] threatened injury must be *certainly impending* to constitute injury in fact." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990) (emphasis added); *accord Lujan*, 504 U.S. at 564 n.2 (A plaintiff that "alleges only an injury at some indefinite future time" has not shown an injury in fact). The "underlying purpose of this imminence requirement . . . is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all.'" *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting *Lujan*, 504 U.S. at 564 n.2). As to redressability, this element of standing requires "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103. Standing will not be found, therefore, if it is "speculative whether the desired exercise of the court's remedial powers . . . would result" in the relief sought by a plaintiff. *Id*. at 43.

A. Plaintiff Has Not Alleged An Imminent Injury To Support Its Nondelegation Claim.

Plaintiff's challenge to the purportedly excessive delegation of authority by Congress fails to allege that "the threat of injury" from the alleged constitutional violation "is real and immediate,

not conjectural or hypothetical." *State of Utah v. Babbitt*, 137 F.3d 1193, 1212 (10th Cir. 1998). Instead, Plaintiff focuses not on any alleged burden resulting from the current fee but, rather, on the possibility that Defendants might begin "doubling the fee annually, or imposing whatever arbitrarily high fee might be desired," thereby highlighting the absence of an injury from the alleged constitutional violation until such time as Defendants (in Plaintiff's view) misuse the authority delegated by Congress.[3]

Plaintiff's allegations do not, however, provide any reason to believe that such purported "arbitrar[y]" actions by DDTC are likely, particularly when, as Plaintiff concedes, the fee has been increased only once since 2004. *See id.* at ¶ 27 (citing 73 Fed. Reg. 55439).[4] Indeed, Plaintiff offers no timetable in which it expects another change to the fee to occur, making its speculation even less concrete than circumstances where future injuries are routinely dismissed as too indefinite. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 226 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 130 S. Ct. 876 (2010) (where the time interval before the hypothetical injury is speculative, the asserted injury is "too remote temporally"). Thus, because "plaintiff alleges only an injury at some indefinite future time," its purported injury is insufficiently immediate to confer standing.[5] *Lujan*, 504 U.S. at 560.

---

[3] This aspect of standing is "particularly difficult to divorce" from the question of ripeness, and this Court could therefore conclude in the alternative that Plaintiff's claims are unripe. *See Morgan v. McCotter*, 365 F.3d 882, 887 (10th Cir. 2004). "Like standing, the ripeness inquiry asks whether the challenged harm has been sufficiently realized," and is partly "rooted in the 'cases and controversies' requirement of Article III.'" *Id*. at 890; *see Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) ("Just as the constitutional standing requirement for Article III jurisdiction bars disputes not involving injury-in-fact, the ripeness requirement excludes cases not involving present injury").

[4] Notably, the increase from $600 in 2004 to $2,250 at present represents an annual increase of less than 12%, far below a "doubling [of] the fee annually." Compl. ¶¶ 27-28.

[5] Nor is Plaintiff's subjective view that Congress has unconstitutionally delegated its authority a

B. Plaintiff's Foreign Commerce Clause Claim Is Not Redressable By The Court.

Plaintiff also has not demonstrated an injury that would confer standing for its claim that Congress has exceeded its constitutional authority under the Foreign Commerce Clause. Indeed, there appear to be no allegations of injury at all associated with this claim, *see* Compl. ¶¶ 30-40; Plaintiff simply asserts that the fee could not be authorized under the Foreign Commerce power. But even if Plaintiff has adequately alleged an Article III injury related to the purported burdens of the fee, such injury could not "be redressed by a favorable decision" as to this claim. *Lujan*, 504 U.S. at 560. This is because Plaintiff has not alleged that Congress entirely lacks the authority to register Plaintiff as a domestic manufacturer of defense articles -- only that Congress lacks such authority under the Foreign Commerce Clause, *see* Compl. ¶¶ 30-40, and it is well-established that the Court is not limited to considering whether a single provision of the Constitution serves as the basis for a lawful exercise of Congressional authority.

The Supreme Court has required that a court reviewing the claim that a statute exceeds one of Congress's enumerated powers consider whether the statute falls within one of Congress's *other* enumerated powers. *See Nat'l Federation of Independent Businesses* ("*NFIB*") *v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (upholding the Affordable Care Act as a "tax on those who do not buy" insurance because ""[t]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act'") (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (concurring opinion)). Plaintiff does not dispute that it "wishes to bring to market" its product, thereby engaging in commerce and subjecting it to regulation under the *domestic* Commerce

---

"concrete and particularized" injury, *Lujan*, 504 U.S. at 560., rather than an "abstract injury in [alleged] nonobservance of the Constitution." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974); *see Valley Forge Christian Coll v. Americans United for Separation of Church & State*, 454 U.S. 464, 483, 485-86 (1982).

Clause power. Compl. ¶ 9. As with the challenge rejected by the Court in *NFIB*, Plaintiff's claim here is that "the law must be struck down because Congress used the wrong labels." 132 S. Ct. 2597; *see* Compl. ¶¶ 31, 32, 35 (objecting to the registration requirement based on its title, the portion of the U.S. Code in which it is found, and the purposes stated in the prefatory section of the AECA). Thus, because "the Constitution permits Congress to do exactly what . . . this statute [does,] . . . labels should not control." *Id.*; *see Parsons v. Bedford*, 3 Pet. 433, 448–449, 7 L.Ed. 732 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution").

In short, Plaintiff's claim in Count Two seeks a purely academic pronouncement on the question of where to delineate the line between Congress's Foreign Commerce Clause power and its domestic Commerce power. "It is fundamental that federal courts do not render advisory opinions" such as this, where "specific relief through a decree of a conclusive character" is unavailable. *Norvell v. Sangro Cristo Development*, 519 F.2d 370, 375 (10th Cir. 1975). For this reason, as well as the absence of injury, Plaintiff's Foreign Commerce Clause claim should be dismissed.

C. As a Corporation, Plaintiff Cannot Assert an Injury Under the Second Amendment.

Plaintiff has also failed to demonstrate an injury sufficient to support Count Three, its Second Amendment claim, and so the Court also lacks subject matter jurisdiction over this claim. An Article III injury requires "an invasion of a *legally protected* interest." *Lujan*, 504 U.S. at 560 (emphasis added). Unless a plaintiff has established an invasion of an interest that is legally cognizable—in other words, that is protected by statute or is otherwise recognized by law—no injury-in-fact exists. *See Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1204 (11th Cir. 1991) ("If the plaintiff is prosecuting a constitutional claim, moreover, the injury must be the

deprivation of a constitutional right."). As a corporation, Plaintiff cannot establish an invasion of a cognizable Second Amendment interest.

As the Supreme Court has explained:

> Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (citing *United States v. White*, 322 U.S. 694, 698-701 (1944)); *see also* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. Pa. L. Rev. 95, 98 (2014) (describing *Bellotti* as "the closest the Court has come to" "explain[ing] why corporations have some constitutional rights and not others").

District of Columbia v. Heller, 554 U.S. 570 (2008), described the core right guaranteed by the Second Amendment as a personal right not subject to exercise by a corporation. In *Heller*, the Supreme Court explained that based on its "text and history, [] the Second Amendment confer[s] an *individual* right to keep and bear arms." *Heller*, 554 U.S. at 595. The Court elaborated that the core right and purpose advanced by the Second Amendment right is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635; *see also Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) ("[T]he Second Amendment right recognized by the Supreme Court is predicated on the right of self-defense."). In light of its "historic function," *Bellotti*, 435 U.S. 765, 778 n.14, the Second Amendment therefore does not extend to protect corporations.

Following this logic, this Court has already suggested that for purposes of standing, "rights granted under the Second Amendment are *individual* rights premised upon an inherent natural right of self-defense." *Colorado Outfitters Ass'n v. Hickenlooper* 24 F. Supp. 3d 1050, 1062 (D.

Colo. 2014) (Krieger, C.J.) (emphasis added). In *Colorado Outfitters*, licensed firearms dealers, a shooting range operator, and a manufacturer of magazines acted as plaintiffs in a Second Amendment challenge to a state statute regulating background checks. *Id.* at 1059. Considering these businesses' standing to pursue such a Second Amendment claim, this Court concluded that "it does not appear that [businesses such as these] are protected by the Second Amendment." *Id.* at 1062. Absent such a Second Amendment right, there can be no standing on the part of Plaintiff, a "Limited Liability Company," Compl. ¶ 1, to raise Second Amendment claims because there is no "legally protected interest" to be injured. *Lujan*, 504 U.S. at 560; *cf. Alabama v. U.S. EPA*, 871 F.2d 1548, 1554 (11th Cir. 1989) (because states are "not included among the entities protected by the due process clause of the fifth amendment," Alabama lacked standing to bring due process challenge (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966))). This Court therefore lacks subject matter jurisdiction over Plaintiff's Second Amendment claim.[6]

II. PLAINTIFF'S VARIOUS COUNTS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED ON THE MERITS.

A. The AECA's Registration Requirement is a Constitutional Delegation of Authority.

The AECA's grant of authority to the Executive Branch to set a registration fee for manufacturers does not constitute an unconstitutional delegation of legislative authority. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress

[6] Insofar as Count 3 seeks to raise a claim based on a non-Second Amendment theory that the current fee lacks a rational basis, Plaintiff has not separately pleaded the constitutional or statutory basis for such a claim, and in any event, the allegations would still fail to establish standing because plaintiff nowhere alleges or attempts to explain how the current fee restrains or burdens its business activities.

of the United States." U.S. Const. art. I, § 1. The non-delegation doctrine, which the Supreme Court derived from Article 1, § 1, provides "that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The "intelligible principle" standard is a low bar: "even statutes with broad or general standards provide a sufficiently intelligible principle." *United States v. Cotonuts*, No. 13-1539, 2016 WL 306188, at *4 (10th Cir. Jan. 26, 2016). An "intelligible principle exists so long as 'Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *United States v. Nichols*, 775 F.3d 1225, 1231 (10th Cir. 2014) (quoting *Mistretta*, 488 U.S. at 372-73).[7]

"Except for two decisions in 1935—*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)—the Supreme Court has never deployed the [nondelegation] doctrine to strike down a statute on the ground that it involves an excessive delegation of authority." *Cotonuts*, 2016 WL 306188 at *4.[8] "The

[7] Rooted in "common sense and the inherent necessities of the government co-ordination," this minimal requirement stems from the "practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. 372 (citations omitted); *see also Loving v. United States*, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.").

[8] One prominent commentator has noted that the non-delegation doctrine "has had one good year

Supreme Court has 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *In re National Security Agency*, 671 F.3d 881, 896 (9th Cir. 2011). Thus, the Supreme Court "has countenanced as intelligible seemingly vague principles in statutory text such as whether something would 'unduly or unnecessarily complicate,' [] be 'generally fair and equitable,' in the 'public interest,' . . . [or] authoriz[es] the recovery of excessive profits.'" *Id.* (citing cases). The Court has also upheld the exercise of delegated authority for the imposition of licensing fees on imports even where the delegating statute did not discuss the possibility of imposing such fees. *See Federal Energy Admin. v. Algonquin SNG*, 426 U.S. 548, 550, 558 (1976) (statute authorizing President to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives" to protect national security authorized President to impose and set licensing fees for oil importers).

Here, an intelligible principle supports the AECA's defense articles registration requirement. *Cf. Samora v. United States*, 406 F.2d 1095, 1098 (5th Cir. 1969) (holding that predecessor to AECA delegating to the President "the power 'to control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunition, and implements of war, including technical data relating thereto'" had "standards sufficiently definite that the delegation" under the statute was constitutional). First, the AECA clearly delineates the public policy at issue: its goals are (a) to control the import and export of defense articles or services; (b) to require registration, subject to a fee, of any person who

---

and [225] bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("[I]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'").

engages in the business of manufacturing, exporting, or importing any defense article, 22 U.S.C. § 2778(b)(1)(A)(i); and (c) to provide foreign policy guidance to United States persons involved in such activities "[i]n furtherance of world peace and the security and foreign policy of the United States." *Id.* § 2778(a)(1).

Second, the President is the agent who must apply the preceding public policy. The President has delegated that authority to the State Department, Executive Order 13637(n)(iii), which then promulgated regulations requiring a person who "engages in the business of manufacturing, exporting, or importing any defense articles" to register with and pay a registration fee to the Department. 22 U.S.C. § 2778(b)(1)(A)(i).

And third, a clear boundary exists for the authority delegated to the President: the AECA requires registration and a registration fee for activities involving "defense articles and services" only. There is no dispute here that Plaintiff's design is a "defense article" subject to the AECA's registration requirement. Plaintiff "agrees that ITAR and the USML currently in force require the classification of the disclosed design as a 'defense article.'" Compl. ¶ 17. Accordingly, the AECA provision at issue easily satisfies the *Mistretta* test.

Nevertheless, Plaintiff thinks that the AECA constitutes an improper delegation because it provides no guidance "on the appropriate level of the registration fee charged or its relationship to expenditures by any executive agency." *Id.* ¶ 26. But any such guidance is unnecessary. "A statute that delegates factfinding decisions to the President which rely on his foreign relations powers is less susceptible to attack on nondelegation grounds than one delegating a power over which the President has less or no inherent Constitutional authority." *Owens v. Republic of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008).[9]

[9] *See also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("Congress - in giving the Executive

The AECA is such a statute: it delegates authority to the President to designate what items will be defense articles and services comprising the USML. *See* 22 U.S.C. § 2778(a)(1). Based upon the USML, the AECA then directs the President to promulgate regulations to require registration, subject to a fee, of any person who manufactures a defense article or service. *Id.* § 2778(b)(1)(A)(i). Under the AECA, the overall goal of the President's fact-finding decisions is in "furtherance of world peace and the security and foreign policy of the United States…." *Id.* § 2778(a)(1). More broadly, Title 22, Chapter 39 (in which the AECA resides) sets forth guidance in the form of "the ultimate goal of the United States ," which it describes as "a world [] free from . . . the dangers and burdens of armaments [and] in which the use of force has been subordinated to the rule of law." 22 U.S.C. § 2551. Also, in furtherance of that goal, Congress has directed that its delegated authority for "procedures governing the export, sale, and grant of defense articles and defense services . . . be administered in a manner which will carry out this policy." 22 U.S.C. § 2751. In the context of this guidance, the judgment as to what level to set a fee in the AECA context is a fact specific determination well suited for the Executive Branch.

The Supreme Court's jurisprudence on foreign affairs delegations demonstrates that Congress's guidance in the AECA is sufficient. For example, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), Congress passed a joint resolution that gave the President discretion to prohibit arms sales to Bolivia and Paraguay, and provided for criminal penalties for violation of the proscription. *Id.* at 311. Individuals were convicted for violating

---

authority over matters of foreign affairs - must of necessity paint with a brush broader than it customarily wields in domestic areas"); *In re NSA*, 671 F.3d at 896-98 (rejecting non-delegation challenge to fact-finding by Attorney General as to when requirements of statutory basis for dismissal of surveillance claims have been met); *U.S. ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) (in the context of the Executive's foreign affairs power, instructions "authoriz[ing] the executive to exercise the power . . . for the best interests of the country" provide a sufficient, intelligible principle for congressional delegation).

the joint resolution, and they challenged their conviction, arguing, in part, that the joint resolution violated the non-delegation doctrine. *Id.* at 314-15. In upholding the joint resolution's broad delegation to the President, the Court made two particular observations. First, it noted that

> we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 319-20.

Second, the Court highlighted "the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day" of legislation that gave the President broad discretion in dealing with matters of external affairs. *Id.* at 322. Given those two principles, the Court concluded that "there [was] sufficient warrant for the broad discretion vested in the President to determine" the matters that the joint resolution left to his discretion. *Id.* at 329.

More recent decisions have upheld broad congressional delegations to the Executive Branch in matters dealing with foreign affairs. *Dist. No. 1, Pac. Coast Dist., Marine Engineers' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 39 (D.C. Cir. 2000), for example, dealt with the Shipping Act, which "prohibits the owner of a vessel from transferring its registry out of the United States without the approval of the Secretary of Transportation." *Id.* The Secretary delegated his authority to the Maritime Administration, which then promulgated implementing regulations. *See id.* In upholding Congress's delegation, the D.C. Circuit noted that the "transfer of a vessel's registry from the United States to a foreign nation involves considerations

and concerns similar to those operative in *Curtiss-Wright*. Little imagination is required to envision situations in which a request to transfer the registry of a vessel might involve delicate foreign policy and national defense concerns." *Id.* at 44.

Similarly, in *Owens*, the D.C. Circuit rejected a non-delegation challenge to a provision of the Foreign Sovereign Immunities Act, which stripped the immunity from federal-court jurisdiction of a foreign state that the Secretary of State deemed to be a state sponsor of terrorism. 531 F.3d at 888. Sudan objected to the Executive Branch's fact-finding, but the court upheld the delegation to the Secretary because the statute, like the joint resolution in *Curtiss-Wright*, "predicates its operation on an Executive factfinding in an area in which he has considerable constitutional authority—foreign affairs."[10] *Id.* at 892.

In sum, Plaintiff's non-delegation challenge fails to state a plausible claim. While the AECA does not provide the guidance that Plaintiff wants, that guidance is not required. For, "in the areas of foreign policy and national security … congressional silence is not to be equated with congressional disapproval." *Haig v. Agee*, 453 U.S. 280, 291 (1981). Plaintiff's nondelegation doctrine challenge should therefore be dismissed.

B. The AECA is a Constitutional Exercise of Congress's Authority Over Foreign Commerce and Domestic Commerce.

Plaintiff asserts that because Congress has given the challenged statutory scheme the title "Arms *Export* Control Act," Compl. ¶ 31 (emphasis therein), Plaintiff can place itself outside the

[10] Significantly, the President has engaged in fact-finding in conjunction with his delegation of registration authority to the Secretary of State, adding the further, limiting principle to the Secretary's fee-setting authority that it be administered so that "self-financing mechanisms" like the registration fee will fund "up to 75 percent of [DDTC's] mission." *See* National Security Presidential Directive 56 ("NSPD-56"), attached as Exhibit 1. The Court may take judicial notice of NSPD-56, which is in the public record. *See Matthews v. Wiley*, 744 F. Supp. 2d 1159, 1172 (D. Colo. 2010) (citing *Antonelli v. Ralston*, 609 F.2d 340, 341, n. 1 (8th Cir. 1979)) (taking judicial notice of Bureau of Prisons' policies); *Jones v. Wildgen*, 320 F. Supp. 2d 1116, 1120 (D. Kan. 2004) (taking judicial notice of portions of municipal code).

constitutional scope of the regulatory authority of both Congress and the Executive Branch by stating that it "does not . . . import or export . . . any defense article." Compl. ¶¶ 39-40. Plaintiff's constitutional theory is in error in two ways. "The federal government undeniably possesses the power to regulate the international arms traffic" through the ITAR and the AECA. *U.S. v. Edler Indus.*, 579 F.2d 516, 520 (9th Cir. 1978). In so doing, Congress can lawfully require registration by domestic manufacturers of munitions, particularly because Congress has "sweeping powers over foreign commerce," *U.S. v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006), which courts have consistently recognized "may be broader than when exercised as to interstate commerce." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. at 434, 448 (1979) ("[T]here is evidence that the Founders intended the scope of the foreign commerce power to be . . . greater" as compared with interstate commerce); *see U.S. v. Bollinger*, 798 F.3d 201, 213 (4th Cir. 2015) ("there is good reason to expansively construe Congress's legislative authority when it comes to matters that implicate the federal government's regulatory power over foreign commerce"). Second, as explained above, the Supreme Court has held that, before declaring a statute unconstitutional as exceeding *one* of Congress's enumerated powers, the judicial duty is to inquire as to whether that statute may be sustained under *any other* enumerated power. *See supra* Part I.B. Here, it is incontrovertible that Congress may lawfully exercise its authority over domestic commerce to require Plaintiff to register, and so Plaintiff's congressional authority claim should be dismissed in any event.[11]

[11] In Part I.B., Defendants explained why, absent a claim by Plaintiff that the AECA's registration requirement cannot be sustained under *any* constitutional authority, there is no standing even to bring the claim. By demonstrating that Congress may validly exercise its domestic commerce authority over Plaintiff, this discussion shows that there is no basis for Plaintiff to assert such a broader claim.

1. Foreign Commerce.

The Constitution bestows on Congress the power to "regulate Commerce with foreign Nations …." U.S. Const. art. I, § 8, cl. 3. "The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established." *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 59 (1974). "'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 311 (1994) (quoting *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933)). As the Ninth Circuit has observed, "the Supreme Court has never struck down an act of Congress as exceeding its powers to regulate foreign commerce." *Clark*, 435 F.3d at 1113.

There can be no serious question that the AECA's direct regulation of the export of munitions falls comfortably within this power, and Plaintiff does not attempt to do so. *See* Compl. ¶¶ 36-37 (accepting Foreign Commerce clause authority up to "the water's edge"); *Clark*, 435 F.3d 1110 (because "considerably different interests [such as] concern for state sovereignty and federalism" apply to create limits on domestic commerce authority, foreign commerce authority should construed more broadly). The AECA authorizes the President "to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services …." 22 U.S.C. § 2278(a)(1). To achieve this control of foreign commerce in an orderly fashion, Congress also required manufacturers, exporters, or importers of defense articles or services to register and to pay a fee. *Id.* § 2278(b)(1)(A)(i). As the Department explained in its implementing regulations, the registration requirement "is primarily a means to provide the U.S.

Government with necessary information on who is involved in certain manufacturing and exporting activities." 22 C.F.R. § 122.1(c).

Plaintiff does not challenge the fact that the AECA properly regulates foreign commerce in the form of exports or imports of defense articles under the Foreign Commerce Clause. *See* Compl. ¶ 36 (accepting Foreign Commerce Clause authority for the Department "to grant or refuse export licenses"). Indeed, while "concern for state sovereignty and federalism" creates limits on domestic commerce authority, "'[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.'" *Clark*, 435 F.3d at 1111 (quoting *Bd. of Trustees of Univ. of Ill.*, 289 U.S. at 57).

Plaintiff instead alleges that the power over foreign commerce stops at "the water's edge", and cannot extend to the regulation of "purely domestic commerce." *See* Compl. ¶ 37. But this claim is inconsistent with the broad scope of authority provided by the Constitution over foreign commerce, and fails to account for the fact that, once in the stream of commerce, a defense article may ultimately become an export, and "any determination" of where that process begins "may seem arbitrary." *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923); *see* Compl. ¶ 9 (alleging Plaintiff intends to bring "unique firearms designs . . . to market" domestically, *i.e.*, to put them into the stream of commerce within the United States). The ITAR has anticipated that very possibility, providing that an "export" under the AECA may occur by transferring a defense article, or providing a defense service, *within the United States* to a foreign government or individual *See, e.g.*, 22 C.F.R. § 120.17(a)(3) (export means "[t]ransferring *in the United States* . . . to an embassy, any agency or subdivision of a foreign government") (emphasis added); *id.* § 120.17(a)(4) (export means a "disclosure (including oral or visual disclosure) or transfer . . . to a foreign person, *whether in the United States or abroad*.") (emphasis added); *id.* § 120.17(a)(5)

(export means "[p]erforming a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.").

In sum, by imposing only a minimal registration requirement on Plaintiff — a putative manufacturer of a defense article — Congress appropriately exercised its authority in a way both necessary and proper to fulfilling the objectives it seeks to accomplish with its regulation of foreign commerce. Therefore, Plaintiff's Count Two fails to state a plausible claim and should be dismissed with prejudice.

2. Domestic Commerce Clause.

Even if the Foreign Commerce Clause power did not authorize Congress to register manufacturers of munitions, the domestic Commerce Clause power certainly does, and before invalidating the statute, this Court would need to consider whether the statute falls within Congress's domestic Commerce Clause power. *See NFIB*, 132 S. Ct. 2566, 2593. "'The rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (concurring opinion)).

Plaintiff's claim does not even present a close case under the Commerce Clause. Plaintiff has stated an intent to "bring to market" its "unique firearms designs," Compl. ¶ 8, and the sale of firearms – even on an intrastate basis – is well within Congress's authority under the Commerce Clause. *See Montana Shooting Sports v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013) (rejecting Commerce Clause challenge to restriction on firearms manufacture and sale); *see also U.S. v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995). Indeed, Plaintiff implicitly concedes that Congress has the power under the domestic Commerce Clause to impose such a registration requirement, because it does not challenge – and in fact, has complied without complaint with – the parallel

registration requirement imposed by the ATF on firearms manufacturers. See Compl. ¶¶ 8, 52. Here, there can be no question that Congress may validly impose the registration requirement on a manufacturer engaged in firearms commerce under its domestic Commerce Clause authority. *See Montana Shooting Sports*, 727 F.3d at 982; *U.S. v. Plotts*, 347 F.3d 873 (10th Cir. 2003). Thus, because "the Constitution permits Congress to do exactly what . . . this statute [does] . . . labels should not control" and the Court should dismiss Plaintiff's congressional-authority challenge.

C. The $2,250 Registration Fee for Manufacturers of Defense Articles and Furnishers of Defense Services is Not Unlawful.

In Count Three, Plaintiff seeks a declaratory judgment that the ITAR registration fee violates the Second Amendment, allegedly because the amount of the fee is disproportionate to the cost of including registration information in a database maintained by Defendants. Compl. ¶¶ 41-57. In *Heller*, while holding that the Second Amendment provides an individual right to handgun possession for the purpose of self-defense in the home, the Supreme Court nevertheless emphasized that this right "is not unlimited" and that some regulatory restrictions on firearms possession, including "laws imposing conditions and qualifications on the commercial sale of arms," do not violate the Constitution. *Heller*, 554 U.S. at 626-27, 635. Consistent with this recognition, the ITAR registration fee is lawful and permissible whether considered under the analytic framework adopted by the Tenth Circuit in *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) and *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013), or the approach adopted by other courts for Second Amendment challenges to registration fees.

1. The Registration Fee is Permissible under the Supreme Court's Fee Jurisprudence

Although the Tenth Circuit has not addressed a Second Amendment challenge to a registration fee, other courts have held that "First Amendment fee jurisprudence provides the

appropriate foundation for . . . fee claims under the Second Amendment." *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013); *see also Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015) ("*Heller III*"); *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011). Under these principles, an agency may impose fees that incidentally burden expressive activity if the fees "defray both administrative expenses (such as processing and licensing costs) and the cost of enforcing the regulations." *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1247 (10th Cir. 2004); *see Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

This standard makes clear the error in Plaintiff's challenge: the test for a permissible fee is not limited to direct costs, *see* Compl. ¶ 49, but rather extends to administrative and enforcement costs more generally. *See Mainstream Mktg. Servs.*, 358 F.3d at 1247; *cf. Kwong*, 723 F.3d at 166 n.10 ("[A] fee is not unconstitutional simply because the revenues derived therefrom are not limited solely to the costs of administrative activities, such as processing and issuing fees." (citation omitted)). Here, Plaintiff has not alleged that the registration fee is not designed to defray, or has not in fact defrayed, the general administrative and enforcement costs associated with ITAR registration. For this reason alone, Plaintiff's Second Amendment challenge to the registration fee should be rejected.

In addition, 22 U.S.C. § 2717 sets out administrative and enforcement expenses associated with the AECA's registration requirements, describing a broader set of expenses than those theorized by Plaintiff. In particular, registration fees may be used to pay for:

> (1) contract personnel to assist in the evaluation of defense trade controls license applications, reduction in processing time for license applications, and improved monitoring of compliance with the terms of licenses;
>
> (2) the automation of defense trade controls functions, including compliance and enforcement activities, and the processing of defense trade controls license applications, including the development, procurement, and utilization of computer equipment and related software; and

> (3) the enhancement of defense trade export compliance and enforcement activities, including compliance audits of United States and foreign parties, the conduct of administrative proceedings, monitoring of end-uses in cases of direct commercial arms sales or other transfers, and cooperation in proceedings for enforcement of criminal laws related to defense trade export controls.

22 U.S.C. § 2717. These costs, as enumerated, bear a rational relationship to the regulation of arms exports, including arms manufacturing, and show that Plaintiff's claim should be dismissed under the relevant fee precedents. *See McDevitt v. Disciplinary Bd. of the Supreme Court for the State of N.M.*, 108 F.3d 341 at *3 (table) (10th Cir. 1997) (affirming dismissal of fee challenge, and relying on legal advertising rule providing how fee will be used); *Second Amendment Arms v. City of Chicago*, --- F. Supp. 3d ---, No. 10-CV-4257, 2015 WL 5693724, at *17 (N.D. Ill. Sept. 28, 2015) (dismissing claim challenging registration fee requirement, where "there is no indication [] that the [fee] was intended for any other purpose") (citing *Town of Cicero*, 827 F. Supp. 2d at 842).

2. The Registration Fee is Also Permissible Under Second Amendment Precedent.

In *Reese* and *Peterson*, the Tenth Circuit adopted a two-step framework for analyzing the constitutionality of firearms-related regulations:

> First, we "ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." If the law does not impose a burden, it is constitutional. If it does, then the court "must evaluate the law under some form of means-end scrutiny."

Peterson, 707 F.3d at 1208 (quoting *Reese*, 627 F.3d at 800-01).

Here, the Court's inquiry can end at the first step because consideration of "the historical traditions" of the Second Amendment, *Peterson*, 707 F.3d at 1211, demonstrates that there is no burden on protected conduct. Plaintiff alleges it is burdened in its ability to "bring to market" several "unique firearm designs." Compl. ¶ 9. But the Second Amendment does not guarantee Plaintiff a right to manufacture firearms for commercial sale. *See Def. Distributed v. U.S. Dep't*

of State, No. 1-15-CV-372 RP, 2015 WL 4658921, at *13 (W.D. Tex. Aug. 4, 2015) ("The Court [] finds telling that in the Supreme Court's exhaustive historical analysis set forth in *Heller*, the discussion of the meaning of 'keep and bear arms' did not touch in any way on an individual's right to manufacture or create those arms."); *accord Hickenlooper*, 24 F. Supp. 3d at 1062 n.12 (citing cases). Here, because the ITAR "does not burden a right or conduct protected by the Second Amendment, [] the inquiry is over" at the first step of the *Peterson* framework. *Hickenlooper*, 24 F. Supp. 3d at 1065.[12]

Even if the law *did* burden activity protected by the Second Amendment, however, the ITAR's fee requirement should be upheld under intermediate scrutiny at the second step of the *Peterson* framework. *See Hickenlooper* at 1066, 1068-69 (applying intermediate scrutiny where the "core right" of self-defense was not severely burdened). Under intermediate scrutiny, "the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *Reese*, 627 F.3d at 802. Plaintiff cannot seriously dispute that the national security and foreign policy goals advanced by the AECA and ITAR are important and owed great deference by this Court. *See, e.g.*, *Haig*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). Further, the registration requirements are substantially related to those goals. As discussed above, the requirements not only allow the Government a means to better track the movement and source of defense articles, but also fund those activities through the imposition of an annual fee. *See supra* Part II.C.1. On the other side of the ledger, the registration requirements present no obstacle to Plaintiff's ability to own a gun, keep it at home, or

[12] *Hickenlooper* also highlights that Plaintiff's allegation that its designs have not yet been manufactured undercuts any contention that the firearms it seeks to manufacture are "widespread [or] commonly used for self-defense," a key parameter of the Second Amendment right. 24 F. Supp. 3d at 1068.

use it in self-defense, whatever that might mean in the context of a corporation's Second Amendment rights. Therefore, because the ITAR regulatory scheme reasonably fits the Government's compelling interests in national security and foreign policy, the registration regulations survive intermediate scrutiny. *See Kwong*, 723 F.3d at 167-68 (holding that firearm licensing fee requirement "easily survives intermediate scrutiny" in light of goals of licensing scheme).

Nor is it the case that the ITAR's registration fee is unconstitutional as a "specific[] burden [on] commercial activities related to the exercise of a protected right." Compl. ¶ 43. As an initial matter, Plaintiff's allegations appear to inaccurately characterize the First Amendment's application to "taxation specifically of ink and paper, license fees for door-to-door solicitors, or taxation on newspaper advertising." *Id.* For example, in *Cox*, the Supreme Court upheld imposition of a licensing fee for parades on public streets against a First Amendment challenge. *See* 312 U.S. at 577. And the Court has subsequently held that "the fact that a law singles out a certain medium, or even the press as a whole, is insufficient by itself to raise First Amendment concerns." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660 (1994).

Importantly, even if they have some incidental effect on activity protected by the Second Amendment, the AECA is not "a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."[13] *See Alexander v. United States*, 509 U.S. 544, 557 (1993) (citing *Mpls. Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983)). As outlined above, the AECA and ITAR regulate the exports of defense articles, including weapons, to prevent harms to national security from the use of such items. Plaintiff "does [not] contest the contents of the USML as it is currently written" and acknowledges that its design

[13] The same is true of the ITAR, as the implementing regulations for the AECA.

constitutes a "defense article." Compl. ¶¶ 15, 17. Moreover, the USML does not single out handguns or firearms, but instead, as noted above, applies to a broad array of goods and services useful for military purposes, including everything from submarines to spacecraft to software. *See* 22 C.F.R. § 121.1. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to [exercise that right] cannot be enough to invalidate it." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992); *see also Mainstream Mktg. Servs.*, 358 F.3d at 1247-48 (holding that do-not-call registry fees, capped at $7,375 per year, were constitutionally permissible).

Regardless of whether it concludes that Plaintiff's Second Amendment claim is properly considered under First Amendment fee principles or under the two-step *Peterson* framework, this Court should therefore conclude that Plaintiff has failed to state a Second Amendment claim.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed.

Respectfully submitted this 29th day of January 2016,

BENJAMIN C. MIZER
Principal Deputy Assistant
Attorney General

JOHN F. WALSH
United States Attorney

ANTHONY J. COPPOLINO
Deputy Director

/s/ *Eric J. Soskin*
ERIC J. SOSKIN
Senior Counsel (PA Bar No. 200663)
STUART J. ROBINSON
Trial Attorney (CA Bar No. 267183)
United States Department of Justice
20 Massachusetts Avenue NW
Washington, D.C. 20530
Telephone: (202) 353-0533
FAX: (202) 616-8470
Email: eric.soskin@usdoj.gov

/s/ Juan G. Villaseñor
JUAN G. VILLASEÑOR
Assistant United States Attorney
United States Attorney's Office

1225 Seventeenth St., Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
Email: juan.villasenor@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Eric J. Soskin
ERIC J. SOSKIN