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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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| LEO COMBAT LLC<br>*A Colorado Limited Liability Company*<br><br>v.<br><br>UNITED STATES DEPARTMENT OF STATE<br>*An Executive Agency of the United States of America*<br><br>*and*<br><br>JOHN FORBES KERRY<br>*Secretary of State of the United States of America, in his official capacity* | Civ. No. 1:15-cv-2323<br><br>PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS |

The Court should deny Defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). First, Plaintiff has standing to assert each of the counts alleged in the Complaint. Second, each of the counts adequately states a claim for relief.

**STANDARD OF REVIEW**

Granting a motion to dismiss "is a harsh remedy which much be cautiously studied, not only to effectuate the liberal rules of pleading but also to protect the interests of justice." *Diaz v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "When evaluating a plaintiff's standing at the stage of a motion to dismiss on the pleadings, 'both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Similarly, "[t]o resolve a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court "accept[s] as true all well-pleaded factual allegations in a complaint and view[s] these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The court "may consider not only the complaint itself, but also the attached exhibits." *Id*.

**SUMMARY OF ARGUMENT**

The Arms Export Control Act ("AECA"), 22 U.S.C. § 2751 *et seq*., by its literal terms, permits the President of the United States to impose a tax of any amount on any person or company that manufactures or deals in goods or provides services within the borders of the United States. The government's position is that this power is entirely consistent with the Constitution. Plaintiff disagrees.

In this lawsuit, Plaintiff challenges three separate aspects of the AECA. In Count 1, Plaintiff alleges that the registration fee imposed on manufacturers of "defense articles" is facially void because it constitutes excessive delegation of the legislative power. In Count 2, Plaintiff contends that the registration requirement promulgated pursuant to the Foreign Commerce Clause is invalid as applied to non-exporting manufacturers given the lack of any foreign commerce. Finally, in Count 3, Plaintiff contests the amount of the registration fee as an

undue burden on the exercise of Second Amendment rights.

The Court should deny Defendants' Motion to Dismiss in its entirety. Plaintiff has standing to bring each of these claims because Defendants' unconstitutional demands for both registration and payment of a fee, coupled with a reasonable fear of enforcement, is an actionable injury that can be fully redressed by the injunctive relief sought by Plaintiff. Furthermore, Plaintiff has standing to assert its Second Amendment claims both on its own behalf and on behalf of its prospective customers.

Count 1 adequately pleads the excessive delegation pertaining to the fee requirement. Defendants do not—and cannot—point to any intelligible principle set forth in the AECA to allow the President to determine how to set the fee. As for Count 2, Supreme Court precedent forecloses the argument that any law applying to purely domestic activity is a permissible exercise of the Foreign Commerce Clause. Nor can the Interstate Commerce Clause salvage the registration requirement—both because it is not "fairly possible" to read the AECA as regulating interstate commerce, as required by Supreme Court precedent, and because, even if it were possible, the AECA would be unconstitutional on its face under the interstate commerce power. Finally, the Court should not resolve Count 3 by motion to dismiss because the validity of the amount of the fee under the Second Amendment requires further factual development through discovery.

Throughout its Motion to Dismiss, Defendants muddle and conflate these allegations, treating the registration and fee requirements as fungible. Defendants appear to believe the requirements stand and fall together, and that a constitutional justification for one requirement must apply to the other. The Court should reject Defendants' obfuscatory tactics and examine

each requirement separately under the theory alleged in the applicable count

## ARGUMENT

### I. Plaintiff Has Standing to Assert Each Count of the Complaint.

Standing under Article III comprises three components:

> First, a plaintiff must demonstrate an injury in fact, which is concrete, distinct and palpable, and actual or imminent. Second, a plaintiff must establish a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of some third party not before the court. Third, a plaintiff must show the substantial likelihood that the requested relief will remedy the alleged injury in fact.

*McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 225-26 (2003) (internal citations, quotation marks, and alterations omitted).

Plaintiff's allegations in this case are straightforward. Plaintiff is in possession of unique firearms designs and is licensed to manufacture firearms. Compl. (ECF No. 1) ¶¶ 8-9. Defendants have formally determined that one of Plaintiff's firearm designs qualifies as a "defense article," and Defendants' agents have sent letters to Plaintiff demanding that it register under the AECA and International Traffic in Arms Regulations ("ITAR"). *Id*. ¶¶ 17-18. These letters state: "Failure to register with this Office constitutes a violation of the AECA and the ITAR and *could result in civil and/or criminal penalties*." *Id*. Exs. 2-3 (emphasis added). Therefore, "Plaintiff is unable to engage in the business of manufacturing . . . firearms." *Id*. ¶ 20. Paragraph 22 summarizes Plaintiff's standing: "Due to Defendants' unconstitutional conduct, Plaintiff is suffering a real, immediate, and cognizable injury *by being restrained from otherwise-legal business activities*." *Id*. ¶ 22 (emphasis added). Plaintiff incorporated this allegation into every count of the Complaint. *See id*. ¶¶ 24, 20, 41.

Plaintiff's injury is concrete, distinct, and actual: Plaintiff is unable to engage in

otherwise-legal manufacturing and distribution of firearms due to the threat of enforcement action if it does not register under the AECA. This injury is traceable to the actions of Defendants, who have determined that Plaintiff's proposed activities require registration and made explicit written threats of enforcement action. Finally, the requested relief in paragraph 4 of the prayer for relief is for an injunction barring Defendants from taking this enforcement action, which would fully remedy the injury. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) (finding standing where the challenged action injured intervenor Monsanto by preventing it from marketing a product to prospective customers, and Monsanto would be redressed by a favorable ruling setting aside the challenged action).

**A. Plaintiff Has Standing for Its Nondelegation Claim Because Its Injury Arises from the Existence of the Fee Itself, Not from Any Speculative Fee Increase.**

Defendants' arguments concerning Plaintiff's standing to bring Count 1 rests on a fundamental mischaracterization of the Complaint. Defendants assert that "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." Defs.' Mot. to Dismiss (ECF No. 19) at 5 (quoting Compl. ¶ 28).

Here, Plaintiff's injury does not stem from the risk of future fee increases; those are merely offered as an illustration of the lack of statutory standards limiting Defendants' discretion in violation of the non-delegation doctrine. *See* Compl. ¶ 29. Rather, Plaintiff asserts that because the fee provision of the AECA constitutes unlawful delegation of the legislative power, that provision is void on its face. *See id*. ¶¶ 26, 29. Therefore, the imposition of *any fee of any*

*amount* constitutes an injury to all manufacturers of defense articles, and Defendants' present-day written demands that Plaintiff pay the unlawful fee or be subject to criminal and civil penalties are sufficient to establish standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("[A] plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." (internal quotation marks omitted)).

Defendants also request that the Court find in the alternative that Plaintiff's claims are unripe. *See* Mot. to Dismiss at 7 n.3. However, even assuming, *arguendo*, that Defendants' demands for payment and threats of prosecution were insufficient to constitute an injury, the only action remaining to further perfect standing is to manufacture a firearm without registering, and then submit to indictment or civil suit, raising the constitutional defects as a defense. It is well established that a plaintiff need not actually expose itself to legal action in order to challenge a statute. "[W]here the plaintiff faces a credible threat of enforcement," it "should not be required to await and undergo enforcement as the sole means of seeking relief." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 907 (10th Cir. 2012) (internal quotes and citations omitted). Rather, "the existence of a statute implies the threat of its enforcement," and therefore an aggrieved party is "entitled to bring a pre-enforcement challenge based on the probability of future injury." *Id*. at 902.

*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is on all fours with Plaintiff's case. A group of drug manufacturers sought injunctive and declaratory relief to prevent enforcement of new FDA regulations requiring that the generic name of a drug appear next to the brand name

on any labeling materials. *Id*. at 138-39. Even though the FDA had not yet enforced the regulations, the Supreme Court concluded that "the impact of the regulations upon the [manufacturers] is sufficiently direct and immediate to render the issue appropriate for judicial review at this stage." *Id*. at 152. According to the Court, "there is no question in the present case that [the manufacturers] have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." *Id*. at 154.

Here, similarly, although the State Department has not enforced the registration and fee requirement against Plaintiff, failure to register and pay the fee before manufacturing a firearm would expose Plaintiff to criminal or civil penalties, as evidenced by the two menacing letters sent to Plaintiff. *See* Compl. Exs. 1-2; *accord United States v. Nathan*, 188 F.3d 190, 194 (3d Cir. 1999) (noting criminal conviction for failing to register); *United States v. Durrani*, 835 F.2d 410, 413 (2d Cir. 1987) (same). Defendants here do not disavow any intent to enforce these penalties. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010) ("The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do."). As in *Abbott Laboratories*, Plaintiff has suffered a direct and immediate injury—not a future, speculative one—that the Court can redress by invalidating the fee requirement and enjoining any further efforts by Defendants to enforce it. Plaintiff therefore has standing to challenge the fee requirement under Count 1.

### B. Plaintiff Has Standing for Its Foreign Commerce Clause Claim Because It Has Suffered an Injury That Is Redressable.

Plaintiff also has standing to challenge the AECA's registration requirement under

Count 2. As discussed above, Plaintiff's injury consists of unconstitutional restraint of lawful business activities by threat of civil and criminal penalties, and the remedy consists of an injunction preventing enforcement action against Plaintiff. Just as with Count 1, Plaintiff can do nothing more to "ripen" this case than actually risk civil and criminal liability by intentionally violating the law, which is not required in order to generate standing.

Defendants assert, however, that Plaintiff lacks standing because its injury cannot be redressed by a favorable decision. *See* Mot. to Dismiss at 8. According to Defendants, because the Court could find that the registration requirement is permissible under the Interstate Commerce Clause, Plaintiff cannot obtain any relief from the Court other than a "purely academic" advisory opinion. *See id*. at 8-9. Defendants' argument may be summarized as follows: Plaintiff should lose on the merits; therefore the Court cannot redress Plaintiffs' injury, therefore Plaintiff lacks standing. Defendants are thus "put[ting] the merits cart before the standing horse" by requiring Plaintiff to prevail on the merits before it can establish standing. *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006). Not surprisingly, courts at all levels have repudiated this specious reasoning.

As the Tenth Circuit has explained, "[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing." *Id.* at 1092. Because "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *Warth*, 422 U.S. at 500, "[f]or purposes of standing, [the Court] must assume the Plaintiff['s] claim has legal validity," *Walker*, 450 F.3d at 1093; *see also Bovino v. MacMillan*, 28 F. Supp. 3d 1170, 1175 (D. Colo. 2014) (noting that "*Walker* mandates that we

assume, during the evaluation of the plaintiff's standing, that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law.").

Redressability therefore does not depend on whether Defendants prevail in their argument that the registration requirement is permitted under an alternative constitutional provision. "An injury is redressable if it is likely to be redressed by a favorable decision." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 914 (10th Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). If the Court grants Plaintiff the injunction it seeks, Plaintiff's injury will be redressed because it will no longer face criminal and civil penalties and will be free to engage in the lawful manufacturing of its designs. *See King*, 678 F.3d at 906 (noting that "[s]o long as the plaintiff faces a credible threat of enforcement, redressability is generally not an obstacle" to standing).

"Courts have concluded that plaintiffs fail to establish redressability only when an unchallenged legal obstacle is enforceable separately and distinctly from the challenged provision." *Bishop v. Smith*, 760 F.3d 1070, 1078 (10th Cir. 2014). Here, Defendants do not point to any unchallenged legal obstacle that would prevent Plaintiff from manufacturing his designs distinct from the challenged registration requirement. Rather, Defendants merely point to a basis for salvaging the *same* requirement Plaintiff challenges. Defendants' argument that Plaintiff's injury is unredressable is therefore unavailing.

The three elements of standing are concrete injury, a causal connection between the defendant and that injury, and the ability of a court to redress the injury. *McConnell*, 540 U.S. at 225-26. Likelihood of success on the merits is not one of the elements. Because Defendants have threatened penalties for Plaintiff's failure to register, which the Court can redress by

granting the relief sought, Plaintiff has standing to challenge the registration requirement under Count 2 regardless of whether Plaintiff ultimately prevails on this claim.

### C. Plaintiff Has Standing as a Corporation to Assert an Injury under the Second Amendment.

Defendants argue that Plaintiff lacks standing under Count 3 because corporations lack any legally protected interest under the Second Amendment. There is no controlling authority so holding, and indeed there can be no doubt that at least some corporate entities—those which may call themselves "militias"—do possess rights under the Second Amendment. There are good reasons to believe that a corporation possesses Second Amendment rights, just as they possess numerous other constitutional rights. Even if the Court finds that such rights do not exist, Plaintiff still has standing to vindicate the Second Amendment rights of its potential customers.

There is no categorical rule barring corporations from enforcing constitutional guarantees. For example, corporations have constitutional rights under the Contracts Clause[1], the Equal Protection Clause[2], the Due Process Clause[3], the Free Speech Clause[4], the Double Jeopardy Clause[5], the Takings Clause[6], and the Search and Seizure Clause[7]. The Supreme Court has also held that corporations have the right of free exercise of religion, albeit in a statutory

[1] *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 630 (1819).
[2] *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).
[3] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932) ("Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistently with the Fourteenth Amendment.").
[4] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) ("The Court has recognized that First Amendment protection extends to corporations.").
[5] *United States v. Martin Linen Supply Co*., 430 U.S. 564, 567 (1977).
[6] *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931).
[7] *Marshall v. Barlow's, Inc*., 436 U.S. 307, 309 (1978).

context[8]. Defendants rely on dicta in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), to argue that the Second Amendment is a "purely personal" guarantee that does not extend to protect corporations. *See* Mot. to Dismiss at 10. Defendants assert that the leading case in Second Amendment jurisprudence, *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." Mot. to Dismiss at 10. Defendants disingenuously support this conclusion with a quote from *Heller* that "'the Second Amendment confer[s] an *individual* right to keep and bear arms.'" *Id*. (quoting *Heller*, 554 U.S. at 595). Notably, the emphasis on "individual" was added by Defendants, not the Supreme Court. Defendants imply that the *Heller* Court meant that "individual" should be interpreted to mean "natural person," in contrast to juridical persons such as corporations and LLCs. That usage is indeed found in some statutes, such as the tax code. But *Heller* simply does not address the question of whether a juridical person such as Plaintiff has Second Amendment rights—and for good reason. No corporation was before the court in *Heller*, and as Defendants are well aware, federal courts do not render advisory opinions. *See* Mot. to Dismiss at 9. Rather, the question before the *Heller* Court was whether the Second Amendment confers an individual right or a collective right "that may be exercised only through participation in some corporate body" such as a militia. 554 U.S. at 579. Because the sole plaintiff, Dick Anthony Heller, was not a corporate entity, the Court's holding that individuals have Second Amendment rights does not stand for the proposition that corporations have no Second Amendment rights.

Defendants attach talismanic significance to the word "individual" in *Heller*, yet the

[8] *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2768 (2014).

Supreme Court has described some of the same constitutional protections enjoyed by corporations as "individual" rights. *See, e.g.*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (noting that the Bill of Rights "guards the *individual's* right to speak his own mind" (emphasis added)); *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (noting that the "Fourth Amendment protects the *individual's* privacy in a variety of settings," and that its "very core" is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (emphasis added) (internal quotation marks omitted)); *United States v. Cruikshank*, 92 U.S. 542, 554 (1876) (describing the Due Process Clause of the Fourteenth Amendment as "secur[ing] the *individual* from the arbitrary exercise of powers of the government (emphasis added) (internal quotation marks omitted)). Consequently, whether a right is described as "individual" does not dictate whether it is "purely personal" within the meaning of the dicta in *Bellotti*.

It makes sense to extend these "individual" rights to corporations, which consist of individual owners and employees. In *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2768 (2014), the Supreme Court rejected the Third Circuit's reasoning that corporations should not enjoy free exercise rights because they cannot pray or worship, since "[c]orporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all." *Id*. (internal quotation marks omitted). Rather, "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control these companies." *Id*. The Court in *Bellotti* also rejected the notion that corporations lack free speech rights, "find[ing] no support in the First or Fourteenth Amendment, or in this decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First

Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784.

Extending the Second Amendment to corporations protects the rights of their constituents to keep and bear arms as recognized in *Heller*. Although Defendants argue that the Second Amendment does not protect the *manufacture* of arms, *see* Mot. to Dismiss at 24-25[9], the right to engage in commerce in the service of protected rights is well established. For instance, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), upheld the right of corporations to expend money to promote a political point of view. *Id*. at 318-19. Similarly, the Supreme Court held that taxation of paper and ink purchased by a newspaper company infringed the First Amendment's guarantee of freedom of the press. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983); *see also Grosjean v. Am. Press Co*., 297 U.S. 233, 251 (1936) (holding that taxation of gross receipts by newspaper corporations, mostly from the sale of advertising, was an unconstitutional restraint on freedom of the press). Thus, the First Amendment guarantees not merely the right of natural persons to literally speak, but also the right of corporations to engage in commercial transactions incidental to the exercise of constitutional rights, including expending money on advertising to promote their viewpoints, accepting money for advertising services, and purchasing paper and ink to manufacture newspapers.

The Supreme Court has also recognized standing of those who provide services that are constitutionally protected. Few rights could be said to be more "personal" than that to terminate a pregnancy, yet providers of abortion have standing to challenge the constitutionality of laws

[9] Defendants cite District Court cases that infer an absence of a right from *Heller*'s silence on the right to manufacture arms. But because there was no manufacturer of arms before the Court in *Heller*, there *could not have been* any ruling on the question of a right to manufacture arms.

regulating abortion—even when those providers are corporations or men, neither of whom can become pregnant.[10] *See, e.g.*, *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 62 (1976) ("We agree with the District Court that the physician-appellants clearly have standing."), *overruled in part on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Doe v. Bolton*, 410 U.S. 179, 188 (1971). The rationale for extending standing to such providers is simple: "A woman cannot safely secure an abortion without the aid of a physician." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (holding that abortion providers had standing to challenge Medicaid's refusal to pay for abortions). Since a patient would lack standing to challenge a law that acts directly upon a provider, if the provider were not permitted to assert the right, then a constitutional violation would go unchecked.

Here, the average American citizen[11] cannot procure a firearm by means other than buying it from a manufacturer. The right to keep and bear arms, absent the right of manufacturers to produce and sell them, is as nonsensical as the "right" of a woman to an abortion without a doctor to perform it. Recognizing that an overly narrow reading of a right renders it meaningless, several Courts of Appeals have found that possession of magazines and ammunition, as well as the right to train in safe operation of firearms, are all protected by the Second Amendment because the right to keep and bear arms would be nugatory in the absence of the components and skills necessary to do so. *See Kolbe v. Hogan*, No. 14-1495 (4th Cir. Feb. 4, 2016), slip op. at 23 (holding that the Second Amendment applies to detachable magazines because "without the ability to actually fire a gun, citizens cannot effectively exercise the right to

[10] Plaintiffs in the *Danforth* case were Planned Parenthood of Central Missouri, a non-profit corporation, and physicians David Hall and Michael Freiman. 428 U.S. at 56.

[11] Plaintiff does not claim any constitutional right to export firearms, as it seems unlikely that foreign citizens resident in foreign countries can claim rights under the Second Amendment.

bear arms"); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (holding that a person had a legally protected interest in purchasing hollow-point ammunition and therefore had standing to challenge a ban on such ammunition); *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (holding that firing ranges are protected under the Second Amendment because the "right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use"). The right to "keep and bear arms," therefore, is recognized not as the right to assert a possessory interest in, or physically carry, particular mechanical artifacts, but the right to own functional weapons *and to use them* for their intended purpose. Because the manufacture and sale of firearms is essential to that right, Plaintiff has standing to challenge the fee requirement under the Second Amendment.

Furthermore, it is well established that a party may have standing to assert the constitutional rights of others. As the Supreme Court has explained, when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist." *Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). For example, in *Craig v. Boren*, the Supreme Court held that a licensed vendor of 3.2% beer had standing to raise an equal-protection challenge to a law restricting the sale of such beer to males under 21 and females under 18 because "vendors and those in like position have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." 429 U.S. at 195; *see also Eisenstadt v. Baird*, 405 U.S. 438, 444-46 (1972) (holding that a distributor of contraceptives had standing to assert the equal-protection

rights of unmarried persons who were "potential distributees"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (permitting private schools to challenge a law requiring that parents send their children to public schools because these corporations "are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools").

Indeed, the Seventh Circuit has recognized that corporations have standing to assert Second Amendment rights on behalf of third parties seeking access to their services. In *Ezell v. City of Chicago*, Plaintiff Action Target, Inc. wished to build a firing range in Chicago, which had prohibited such ranges. 651 F.3d at 692. Although the district court had held that an organization such as Action Target lacked standing to challenge the ban under the Second Amendment, the Seventh Circuit held that "[t]his was error" because "Action Target, as a supplier of firing-range facilities, is harmed by the firing range ban and is also permitted to 'act[] as [an] advocate[] of the rights of third parties who seek access' to its services." *Id*. at 696 (quoting *Craig*, 429 U.S. at 195). The Tenth Circuit has cited *Ezell* with approval for the proposition that "an inhibition on a person's ability to perform work constitutes an injury-in-fact" for standing purposes. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1163 (10th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 2927 (2015).

This Court should adopt the reasoning of *Ezell* and find that Plaintiff has standing to bring a claim under the Second Amendment, both directly and on behalf of third parties. While Defendants are correct that another judge in this Court expressed "some doubt" that firearms businesses have standing to bring a Second Amendment challenge, that pronouncement relied on unpublished opinions from other jurisdictions and curiously did not even mention *Ezell*. *Colo.*

*Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1062 & n.12 (D. Colo. 2014), *appeal filed*, July 28, 2014. Moreover, the Court also held that the plaintiff businesses lacked any injury-in-fact because they were not subject to the ban on high-capacity magazines being challenged. *See id*. Here, by contrast, Defendants are clearly seeking to enforce the registration and fee requirement against Plaintiff, causing an injury-in-fact. Plaintiff further seeks to assert the Second Amendment rights of customers seeking access to its products, who lack standing to challenge the AECA's regulation of firearms manufacturers, and Defendants do not contest whether Plaintiff has third-party standing to do so. *See Wilderness Soc'y v. Kane Cnty*., 632 F.3d 1162, 1168 & n.1, 1171-72 (10th Cir. 2011) (noting that third-party standing is a prudential consideration, not a jurisdictional one, and therefore can be waived if not raised).

## II. Count 1 States a Plausible Claim for Relief Because Defendants Cannot Point to Any Intelligible Principle for the Executive Branch to Set the Registration Fee.

To show that the fee provision of the AECA is not an unconstitutional delegation of the legislative power, Defendants need only provide a citation to that section of the law in which Congress provides an "intelligible principle" by which the amount of the fee is to be determined. *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Such a citation is both necessary and sufficient for Defendants to prevail. Tellingly, in six pages of argument in their motion, such a citation is nowhere to be found. This is not due to a lack of diligence on the part of Defendants' counsel; rather, it is because no such section exists. The fee provision is therefore void.

Plaintiff has no quarrel with Defendants' detailed discussion of the wide extent of the foreign commerce power and the plenary nature of the President's foreign relations power. Mot. to Dismiss at 13-17. Those powers are indeed considerably wider than the interstate commerce

power and the President's domestic authority, and Plaintiff does not dispute that "the AECA's registration requirements are a constitutional delegation of authority," *id.* at 17 (initial capitals omitted), at least as long as they are applied only to actual participants in foreign commerce. None of this extended discussion, however, has any relevance to Count 1.[12]

Count 1 asserts that Congress' instruction that the Executive branch charge "a fee" for registration, prescribed by regulation, does not provide adequate guidance as to the amount of the fee to be charged. Compl. ¶ 29. By the terms of the AECA, a fee of $5 charged for a registration valid for fifty years would be equally acceptable as a fee of $5 million for a single year. Hence, there is simply no way to determine whether or not the "will of Congress has been obeyed." *See Mistretta v. United States*, 488 U.S. 361, 379 (1989)

A fee is subject to the same nondelegation analysis as any other regulation. It is not exempt merely because it is charged as part of a larger regulatory scheme, which may itself be a proper delegation of power. *See Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Skinner v. Mid-America Pipeline Co*., 490 U.S. 212 (1989). Both of these cases involved regulation that went well beyond the fee, but in neither case did the existence of that extra regulation render the fee immune from challenge. Rather, in both cases, the fees were upheld because of statutory standards cited and quoted by the Court *pertaining to the fees themselves*. Therefore, the Court must consider only the Congressional guidance *vel non* regarding the *amount of the fee*; the fact that the larger statute may be constitutional cannot salvage the fee.

[12] It is implausible to suggest that a fee or tax charged by the government of the United States to manufacturers found within its borders "might involve delicate foreign policy and national defense concerns." Mot. to Dismiss at 17. Such a domestic fee is of no more interest to the allies or enemies of the United States than the price of admission to U.S. national parks. The mere fact that the Directorate of Defense Trade Controls is located within the State Department does not make its fee-setting activity "foreign relations," immune from judicial scrutiny.

Here, Defendants point to *Presidential* guidance constraining the Secretary of State's discretion in fee setting, Mot. to Dismiss at 17 n.10, but cannot point to any *Congressional* guidance, which is the only kind that matters for purposes of the nondelegation doctrine. *See Mistretta*, 488 U.S. at 371 ("So long as *Congress* 'shall lay down by *legislative act* an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'") (emphasis added). Because there is no "legislative act" setting forth an intelligible principle for the Secretary of State to determine how to set the registration fee, it is void as an unconstitutional delegation of the legislative power.

In the absence of any statutory standard constraining Executive discretion, the fee provision violates the Constitution's insistence that all legislative power be vested in Congress. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). The fee provision is therefore void, and no fee of any amount may be charged for registration under the AECA.

## III. Count 2 States a Claim for Relief Because the AECA Is an Exercise of the Foreign Commerce Power Exclusively, and the Foreign Commerce Power Cannot Be Used to Regulate Domestic Activity.

Defendants justify the requirement that non-exporting firearm manufacturers be compelled to register under export-control laws on two grounds: First, because domestic production might be exported at some indeterminate future point, unfettered Congressional control of domestic industry is permissible under the Foreign Commerce Clause. Second, Congress could have enacted the AECA under the Interstate Commerce Clause, and therefore any argument related to the Foreign Commerce Clause is merely academic. Neither of these

contentions has merit.

The first of these justifications runs afoul of the Supreme Court's conclusion in *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), supported by modern Interstate Commerce Clause jurisprudence, that such a justification would essentially grant a general police power to Congress. Indeed, there is no need for an *Interstate* Commerce Clause at all, if the mere hypothetical future export of any domestically produced product is sufficient to justify Congressional regulation of domestic industry under the Foreign Commerce Clause.

The second justification relies upon Defendants' artful elision in two areas. First, Defendants misapply *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). *NFIB* does not require, as Defendants assert, 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." Mot. to Dismiss at 8. Rather, in the Court's own words, "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." *Id.* at 2593. The Court's actual holding calls for an analysis of the true nature of a Congressional enactment and the application of the proper enumerated power, not Defendants' proposed *post hoc* effort to locate a constitutional rationalization. Here, because the function of the AECA is to regulate the import and export of goods and services, any regulation of a non-importing, non-exporting manufacturer thereunder runs afoul of the Foreign Commerce Clause.

Second, Defendants mischaracterize the AECA in arguing that "the sale of firearms—even on an intrastate basis—is well within Congress's authority under the Commerce Clause." Mot. to Dismiss at 21. The AECA does not regulate the sale of firearms; rather, it gives the

President unfettered discretion to cherry-pick industries for regulation. Defendants contend that this power to arbitrarily impose regulation by the stroke of a pen is constitutional because of the President's inherent foreign relations power and Congress' guidance related to foreign policy and national security. *Id*. at 13-17. However, applied domestically through the Interstate Commerce Clause, such unbounded power is void on its face under the nondelegation doctrine. Defendant's attempted "saving construction" is more constitutionally infirm than Plaintiff's interpetation.

### A. The Foreign Commerce Power May Not Be Used to Compel Registration of a Domestic Manufacturer Simply Because Its Products May Eventually End Up Abroad.

As discussed in Plaintiff's Motion for Summary Judgment, the foreign commerce power does not extend to the regulation of purely domestic industry, but rather permits Congress to regulate only actual commerce with foreign nations.[13] Pl.'s Mot. for Summ. J. (ECF No. 20), at 8-18. Defendants counter by pointing out that under 22 C.F.R. § 120.17, "export" may include domestic transfer to foreign persons. Mot. to Dismiss at 20. Given that unelected State Department functionaries cannot expand or contract Congress' Article I, Section 8 powers by regulation, ITAR's definition of "export" has nothing to teach us about "the broad scope of authority provided by the Constitution over foreign commerce." *Id*.

However, even assuming that sale to foreign persons within the territory of the United States could be considered "foreign commerce," it does not follow that by selling an item domestically to another U.S. national, a U.S. manufacturer subjects itself to any and all regulations pertaining to foreign commerce. According to the Supreme Court, merely "because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately

[13] The detailed arguments presented in that brief will not be repeated here, but nonetheless apply.

become the subjects of foreign commerce," does not render them "legitimately within the import of the phrase foreign commerce." *Veazie*, 55 U.S. at 574. On the contrary, the foreign commerce power "can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community." *Id*. at 573-74. Rather, "[c]ommerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be *extraterritorial*." *Id*. at 574 (emphasis added).

The broad application of the foreign commerce power urged by Defendants would be tantamount to a general police power, permitting Congress to control "the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce." *Id*. Congress, however, was not intended to have a general police power. *United States v. Lopez*, 514 U.S. 549, 566 (1995) (noting that the Constitution "withhold[s] from Congress a general plenary police power that would authorize the enactment of every type of legislation"). Consequently, that a domestically manufactured "defense article" might someday become an object of foreign commerce does not permit Congress to regulate its manufacturer under the Foreign Commerce Clause.

### B. Defendants Misread *NFIB* as Requiring Courts to Root Around for Any *Post Hoc* Constitutional Justification to Save a Statute.

The Supreme Court's decision in *NFIB* certainly generated extensive controversy. Critics of the decision were eager to characterize the decision as an essentially cynical one: Chief Justice Roberts had concocted a weak rationalization to uphold the Affordable Care Act because

he feared the political fallout from striking down the health-insurance mandate. Defendants have latched onto this superficial—and inaccurate—interpretation of the opinion and urge this Court to do exactly what these commentators accused the *NFIB* majority of doing: to scour the Constitution for any possible reason to uphold the constitutionality of a law.

Defendants' characterization of the majority's holding in *NFIB* is directly contrary to the decision itself as well as precedents cited therein. It is true that the decision found that the individual health-insurance mandate "penalty" (as Congress named it) could not be upheld under the Interstate Commerce Clause, but could be upheld under the taxing power. *NFIB*, 132 S. Ct. at 2601. However, the majority did not announce a novel general principle, as urged by Defendants, that "a court reviewing the claim that a statute exceeds one of Congress's enumerated powers [must] consider whether the statute falls within one of Congress's other enumerated powers." Mot. to Dismiss at 8. Rather, it reiterated the longstanding rule that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *NFIB*, 132 S. Ct. at 2594 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). The Court then proceeded to analyze in depth the precise nature of the ACA's individual health insurance mandate, "'[d]isregarding the designation of the exaction, and viewing its substance and application'" to determine whether it was a tax or a penalty. *Id*. at 2595 (quoting *United States v. Constantine*, 296 U.S. 287, 294 (1935)).

The Court cited numerous historical examples of precisely this sort of analysis. In none of these cases, however, did the Court simply seek excuses for upholding legislation as Defendants urge. Instead, each time it inquired as to the *correct* interpretation of a statute, and then considered whether that interpretation was constitutional. The *NFIB* Court conceded that it

was unnecessary to adopt the most "natural interpretation"—but also held that any interpretation adopted must be "fairly possible." *Id*. at 2651 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (internal quotation marks omitted)). In other words, courts must adopt a "functional approach" to interpreting challenged statutes. *Id*. at 2595.

*Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), flatly contradicts Defendants' claim that courts must consider whether the challenged statute falls within *any* of Congress's enumerated powers and uphold it if it does. In *Drexel Furniture*, Congress had enacted a law imposing what it referred to as a "tax" on certain businesses employing children. 259 U.S. at 35. The Court reached the identical conclusion as that reached in *NFIB*: while Congress' taxing power was undoubted, it lacked the power under the Interstate Commerce Clause to impose a penalty on the employment of child labor. *Id* at 36-38. However, the Court did not then save the "tax" under the taxing power; it concluded that the "tax" was *un*constitutional because it was functionally a penalty that was beyond Congress' proper commerce power. *Id*. at 44. *Drexel Furniture* has not been overturned; on the contrary, the *NFIB* majority relied on it. *See NFIB*, 132 S. Ct. at 2595-96. Had the *Drexel Furniture* Court adopted Defendants' facile approach, it would have upheld the child labor "tax" based on the taxing power.

Neither *NFIB* nor any other precedent demands that courts cast about for *any* enumerated power under which a law might plausibly be upheld and declare it constitutional if one can be found. Rather, numerous Supreme Court decisions instruct courts to consider the law in its entirety, determine the true nature of the enactment (as distinct from the names or labels Congress has used), and then ask whether, in light of that true nature, it is within the appropriate enumerated power. We must therefore ask if, taking the "functional approach" required by

*NFIB*, the AECA is a statute enacted under the Interstate Commerce Clause or the Foreign Commerce Clause, or perhaps both. If a "saving construction" is "fairly possible," we must adopt that construction.

The words of the statute itself provide a good starting point: "In 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." 22 U.S.C. § 2778(a)(1) (emphasis added). The AECA does not authorize the President to control the interstate transport of defense articles. "[N]o defense articles or defense services…may be *exported* or *imported* without a license for such export or import…" *Id*. at (b)(2) (emphasis added). The manufacture and domestic sale of such articles may, by contrast, proceed without a license under the AECA.

Neighboring sections also refer exclusively to international sales. *See, e.g.*, *id*. § 2773 (sales to sub-Saharan Africa); *id*. § 2775 (sales to countries misdirecting aid); *id*. § 2778(i) (mandatory reports by licensees showing port of exit and destination country); *id*. § 2776(a)(4) (reports by President to Congress regarding exports). The prefatory sections of the AECA also deal exclusively in foreign commerce. *See id*. §§ 2751-56. They stress "the need for international defense cooperation," requiring Congress to authorize "sales by the United States Government to friendly countries"—subject, of course, to the condition that such sales are "consistent with the foreign policy interests of the United States," and noting in passing that "particular attention should be paid to controlling the flow of conventional arms to the nations of the developing world." *Id*. § 2751. These goals are achieved, in part, by ensuring that "[n]o defense article or defense service shall be sold or leased by the United States Government under this chapter to any country or international organization" unless "the country or international

organization shall have agreed not to transfer title to" any undesirable parties, and also by the "coordination among representatives of the United States Government in each country, under the leadership of the Chief of the United States Diplomatic Mission." *Id*. §§ 2752-53.

Absent from either the vague policy statements or the specific statutory requirements of the AECA is any mention whatsoever of *interstate* commerce. This is why the implementing regulations found at 22 C.F.R. Chapter I, Subchapter M are known as the "*International* Traffic in Arms Regulations" (emphasis added) and pertain to foreign rather than domestic commerce. *See* 22 C.F.R § 120.1(a) ("Section 38 of the Arms Export Control Act (22 U.S.C. 2778), as amended, authorizes the President to control the *export* and *import* of defense articles and defense services." (emphasis added)).

By contrast, consider the Gun Control Act and its implementing regulations. As discussed in Plaintiff's Motion for Summary Judgment, this act became law on literally the same day as the AECA. The Gun Control Act is explicit that "only through adequate Federal control over *interstate* and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them" could crime be reduced. 18 U.S.C. § 921, Notes (emphasis added). Nor is this mere lip service, for the Gun Control Act forbids anyone who is not in possession of a Federal Firearms License ("FFL") to "ship or transport" a firearm in interstate or foreign commerce, for FFL holders to "ship or transport" firearms to non-licensees, for any non-licensee to obtain a firearm from outside of his home state, for non-licensees to sell to residents of other states and for FFL holders to sell to unlicensed residents of states other than the state containing the licensed premises. *Id*. § 921(a)-(b). Thus, in drafting the Gun Control Act, not only did Congress explicitly declare its intention to regulate interstate

commerce in firearms, but in the first few paragraphs of the section entitled "prohibited acts," erected numerous barriers to the sale and transportation of firearms across state lines.

The same Congress passed both the Gun Control Act and the AECA in the same year. One statute, codified in Title 18 ("Crimes and Criminal Procedure"), concerns itself with the creation of numerous new crimes related to the interstate transport of firearms; the other, codified in Title 22 ("Foreign Relations and Intercourse"), makes no mention of interstate commerce at all but does discuss at length the need to control exports, imports, and international arms traffic. This is not a matter of mere labels, but of the actual requirements which the AECA imposes on both the Executive Branch and citizens, all of which relate to foreign commerce. The "functional approach" of *NFIB* compels a conclusion that the Arms *Export* Control Act is passed under the Foreign Commerce Clause, because it is not "fairly possible" to read it as regulating interstate commerce. *NFIB*, 132 S. Ct. at 2594. The AECA therefore enjoys both the benefits of greater substantive power and the strictures of narrower subject matter of that clause—subject matter which does not include non-exporting domestic manufacturing, as discussed both *supra* and in Plaintiff's Motion for Summary Judgment.

### C. The AECA Could Not Have Been Enacted Under the Interstate Commerce Clause, Because It Would Grant the President the Unchecked Ability to Demand Payments from Domestic Industry at Will.

Having argued that *NFIB* compels this Court to search for a constitutional justification permitting the application of the AECA's registration requirement to non-exporting manufacturers, Defendants then claim to have unearthed one: "the sale of firearms—even on an intrastate basis—is well within Congress's authority under the [Interstate] Commerce Clause." Mot. to Dismiss at 21. However, Defendants' proposed "saving construction" makes the AECA

*more* constitutionally infirm, not less. Rather than being unconstitutional as applied to non-exporters, as Plaintiff argues, if the AECA is considered a form of interstate commerce regulation, it becomes void on its face under the nondelegation doctrine, because it literally permits the President to target *any domestic business at all* and impose a tax of *any amount* on that business.

While Defendants are correct that Congress can regulate the sale of firearms, the AECA does not regulate, or even mention, the sale of firearms. Rather, the challenged section instructs that "every person . . . who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) shall register" with the State department. 22 U.S.C. § 2778(b)(1). The law does not, on its face, apply to either firearms or to domestic sales of any kind, but rather to the manufacturing and foreign commerce in "defense articles" as designated by the President. Thus Congress, rather than listing firearms or any other item subject to the registration requirement, has delegated to the President the decision of which items to regulate. Such a delegation is of course unproblematic under the Interstate Commerce Clause as long as Congress has provided an intelligible principle to cabin the President's discretion. *Hampton*, 276 U.S. at 409.

What then, are these "defense articles" that Congress wishes the President to regulate? "'[D]efense articles and defense services' means, with respect to commercial exports subject to the provisions of section 2778 of this title, those items designated by the President pursuant to subsection (a)(1) of such section." 22 U.S.C. § 2794(7). Subsection 2778(a)(1), in turn, simply provides that the "President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate

regulations for the import and export of such articles and services."

The "intelligible principle" Congress provides is delightfully circular. Congress provides in § 2778 that the President shall designate "defense articles," whose manufacturers are subject to a registration requirement. These articles are defined in § 2794—with explicit reference to § 2778—as "whatever the President says," without any further guidance from Congress. The President is not literally empowered to walk into a factory, hold out one hand, and demand a payment of an arbitrary amount of money—but he *is* quite literally empowered to prescribe regulations which require that any company owning a factory making *any product at all* pay *whatever amount of money* the regulations prescribe. There is, astonishingly, less guidance for the President in the AECA than in the National Industrial Recovery Act, which was invalidated as excessive delegation of the legislative interstate commerce power. *See A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538-39 (1935) ( finding excessive delegation where the statute permitted the President to "approve a code or codes of fair competition" proposed by trade groups if the President made specific findings that the groups did not impose "inequitable restrictions on membership," were "truly representative," and were not "designed to promote monopolies").

Such an extraordinary degree of dictatorial power may be acceptable when applied to *foreign* commerce. Plaintiff does not dispute that the foreign commerce power is much greater than the interstate commerce power, and the President's foreign relations power has been called "plenary." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Furthermore, Plaintiff and Defendants agree that delegations of authority in the foreign relations context are subject to less judicial scrutiny than in domestic contexts. In any case, Plaintiff does

not challenge this delegation of power in the context of *actual*, rather than hypothetical, exports. However, applied domestically, the power to impose a fee (of any amount, unbounded by any guiding principle) upon the manufacturer of any product (with no limit on the President's discretion as to which products) is a plain violation of the nondelegation doctrine. *See Schechter Poultry*, 295 U.S. 495, 521-22, 551.

Defendants are correct when they assert that Congress has the power to regulate the domestic sale of firearms under the Interstate Commerce Clause. However, Congress does not have to power under that clause to delegate to the President the ability to arbitrarily select industries for regulation with no Congressional guidance whatsoever. Since the AECA cannot be a valid exercise of the interstate commerce power, Defendants' efforts to save the statute's constitutionality by reference to that power are unavailing.

## IV. Count Three States a Claim for Relief Because the AECA Burdens Protected Rights, and the Government Must Produce Factual Evidence to "Demonstrate" That the Burden Imposed Is Not Undue.

As discussed in Section I.C., *supra*, the Court should find that corporations have Second Amendment rights, including the right to manufacture firearms for American citizens. A fee charged by the government to gun makers burdens this right by making it more expensive to exercise it. Plaintiff alleges in the Complaint that the fee currently in force greatly exceeds the legitimate costs incurred by the government in administering and enforcing the registration scheme against non-exporting manufacturers. Compl. ¶ 55. These allegations must be taken as true in considering a motion to dismiss. To refute them, Defendants must offer factual evidence, not legal argument, to show that the fee and the costs are reasonably related to one another. Discovery will therefore be necessary.

### A. Corporations Should Be Found to Have Second Amendment Rights.

Defendants argue that there is no constitutional right to manufacture firearms, and therefore no need to consider the burdens imposed by the AECA and ITAR upon manufacturers.[14] As discussed at length regarding Plaintiff's standing to sue, there are no controlling cases so holding. There are, on the other hand, numerous cases finding that the right to free press includes the right of corporations to buy newsprint and to sell advertising, the right to free speech includes the right of corporations to buy advertising, the right to procure an abortion includes the right of a physician to perform it, and the right to keep and bear arms includes the right to acquire magazines and ammunition as well as the right to train in the safe use of firearms. *See supra*, Section I.C. Ordinary handguns such as those carried by the court security offers in every Federal courthouse experience pressures in the tens of thousands of pounds per square inch when fired, and typically have mechanical tolerances of one hundredth of an inch or less. Malfunctions can mean dismemberment or death. Just as a "woman cannot safely secure an abortion without the aid of a physician," *Singleton*, 428 U.S. at 117, the average American citizen cannot obtain a safe and functional firearm except from a manufacturer with the appropriate tools and skills. To find there is no right to manufacture guns is to render the

[14] Defendants also drop a footnote to allege that because Plaintiff's designs have not yet been marketed, they are not in "common use," and therefore are outside the protection of *Heller*. Mot. to Dismiss at 25 n.12. This is incorrect both legally and factually. Legally, it is incorrect because *Heller* did not parcel out constitutional protection by make and model, but found rather generically that "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." 554 U.S. at 629. (Long guns were not before the Court). Factually, it is incorrect because the design submitted under the Commodities Jurisdiction request was a variant of Browning's "1911" pistol, which is literally history's most popular handgun, with tens of millions of units sold by thousands of mass manufacturers and boutique gunsmiths in more than 100 years of continuous production. To the extent that this fact matters (and Plaintiff does not concede that it does), Plaintiff asks for leave to amend the complaint to include it.

Second Amendment meaningless.

**B. The AECA as Applied Targets Protected Rights.**

Defendants argue that the AECA is, essentially, a general economic regulation that is not intentionally aimed at the right to keep and bear arms, and therefore any burdens imposed on that right are permissible as incidental to the otherwise legitimate purpose of the statute. Mot. to Dismiss at 26-27. Bafflingly, Defendants assert that "[t]he 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 the right] cannot be enough to invalidate it." *Id*. at 27 (quoting *Casey*, 505 U.S. at 874). However, the very next sentence of *Casey* reads: "Only where state regulation imposes an *undue burden*" is such regulation constitutionally problematic. 505 U.S. at 874 (emphasis added). Here, Plaintiff has alleged an "undue burden" on Second Amendment rights, and therefore states a claim based on the very case cited by Defendants. Compl. ¶ 57.

Although they do not make the analogy explicitly, Defendants seem to be arguing that the AECA is roughly equivalent to a sales tax that encompasses books or newspapers as well as other consumer goods. Such a tax is constitutional despite the incidental burden it may impose on the First Amendment. *Minneapolis Star*, 460 U.S. at 581. Hence, the argument goes, the impairment of Second Amendment rights is acceptable as long as whatever means used for regulation are also applied to other, non-protected activities. However, to be valid, the statute must apply to those other activities *by its own terms*. The AECA applies to only those industries selected by the President, acting with unfettered discretion, and thus is not "generally applicable."

It cannot be denied that the AECA, on its face, does not specifically target firearms. Indeed, as discussed in Section III.C., *supra*, the AECA imposes a registration and fee requirements on whatever product or service happens to strike Presidential fancy. That is, in some sense, a form of exceedingly broad economic regulation, potentially covering the entire economy. However, Count 3 does not challenge the statute on its face. Rather, it is the application of the statute through the regulations promulgated by the State Department that is in issue. It would be difficult to argue, for instance, that an annual registration fee of $1 imposed an undue burden on the right to manufacture firearms; the specific amount of the fee as set by regulation is central to Claim 3—as is the decision to regulate firearms at all.

If AECA's text does not specifically target firearms, the text of the implementing regulations does target them in unequivocal terms. 22 C.F.R. § 121.1 ("The United States Munitions List" or "USML"), Category I, is entitled "Firearms, Close Assault Weapons and Combat Shotguns," and paragraph (a) reads: "Nonautomatic and semi-automatic firearms to caliber .50 inclusive (12.7 mm)." This category embraces virtually all rifles and handguns manufactured or imported for sale to private citizens in the United States since the invention of breech loading in the 19th century. The regulations, therefore, very specifically and very narrowly target the manufacture of firearms whose ownership is unquestionably protected by the Second Amendment. Defendants are correct that the United States Munitions List is not a regulation "based on a [unprotected] activity [that] has the inevitable effect of singling out those engaged in [protected] activity." Mot. to Dismiss at 26 (internal quotation marks omitted). Quite the contrary: the USML is a regulation that is *explicitly and intentionally aimed at a protected activity*. Its "inevitable effect" is the intended and openly declared effect. It is

therefore subject to the same searching scrutiny as would be a regulation directed specifically and intentionally at, for instance, newspapers. *See, e.g.*, *Grosjean*, 297 U.S. 233.

The fact that the regulations also target other industries has no significance. The sorts of laws that have been upheld as mere incidental burdens on the First Amendment include antitrust laws, labor laws, and laws aimed at enforcement of subpoenas. *See Minneapolis Star*, 460 U.S. at 581 (citing cases). The laws in question are valid because of the "general applicability of the challenged regulation to *all* businesses." *Id*. at 583 (emphasis added). They have not involved an Executive (or even Legislative) decision to target the press by name, but rather sweeping regulation of all forms of business based on criteria (such as number of employees) having nothing to do with the nature of the business. Newspaper companies are treated no differently than any other company in such a scheme. This equal treatment means "there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it *must* impose *the same burden* on the rest of its constituency." *Id*. at 585.

By contrast, the AECA permits the President to target specific industries at will, adding or removing them from the USML as quickly as the Federal Register can be published. The government need not "impose the same burden" on the rest of the economy, but can pick and choose. The USML is therefore not a *general* economic regulation like labor laws or a sales tax, but rather a collection of tightly targeted regulations that happen to be organized together within the Code of Federal Regulations for convenience. "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Id.* at 583. Given the power to impose financial burdens on the firearms industry that need not be

imposed on any other, "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively" to drive gun makers out of business, and thus prevent citizens from exercising their Second Amendment rights. *Id.* at 585.

This disturbing power of differential taxation and the evils associated with it are not mitigated merely because it happens to be exercised over multiple industries simultaneously at this moment. There is no statutory requirement that any particular industry be targeted, nor any statutory rule that the fee be uniform across all categories in the USML, nor any requirement that constitutionally protected products such as firearms be treated either the same or differently than unprotected ones (*e.g.*, spacecraft, chemical weapons). The power of differential treatment does not, by itself, render the AECA invalid, but the Supreme Court has said it "cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id*. at 585.

The AECA is not a "generally applicable" economic regulation. It is a regulation that applies only the specific industries that the President designates.[15] While this does not automatically render the regulations unconstitutional, the designation of constitutionally protected industries such as firearms manufacturers must be subject to critical examination to ensure that the underlying rights are not unduly burdened.

### C. The Factual Question of Undue Burden Cannot Be Resolved on a Motion to Dismiss.

The Court does not yet have enough information to reach a decision on the question of

[15] Since "defense articles and services" are literally anything the President says they are, *see* 22 U.S.C. §§ 2778, 2794(7), there is no statutory obstacle to the regulation of newspapers, abortion providers, or criminal-defense law firms under the AECA.

undue burden. Defendants provide statutory citations regarding the various ways in which the fee charged under the AECA is authorized to be used.[16] Mot. to Dismiss at 23-24. However, to show that the burden imposed is not an undue one, Defendants will need to show that the fee is *in fact* used in appropriate ways. Plaintiff must be allowed to review the books of the Directorate of Defense Trade Controls to determine whether the fee revenues are being diverted to purposes unrelated to administration and enforcement of the registration requirement.

Defendants claim that "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." *Id*. at 23. It is true that Plaintiff did not use those exact words. Plaintiff did, however, allege that while the Bureau of Alcohol, Tobacco, Firearms, and Explosives conducts inspections of gun manufacturers and dealers to ensure compliance with gun laws, Defendants do not engage in similar enforcement activities against non-exporting manufacturers to ensure compliance with export laws. Compl. ¶¶ 53-54. In other words, Plaintiff alleges that the fee does not defray the cost of enforcement against non-exporting manufacturers because *there are no such enforcement costs*. Rather, Defendants are collecting a huge fee far in excess of the direct costs imposed by non-exporting manufacturers (who are placed in a database and then ignored), and using that fee for such purposes as processing license applications from actual exporters (whose fees are correspondingly lower than the costs they impose on Defendants). However, to the extent that the Complaint is inartfully pleaded, Plaintiff requests that the Court grant leave to amend it by adding explicit allegations that the registration

[16] It is noteworthy that all three of the authorized uses cited by Defendants explicitly mention export licenses or post-export monitoring, but none mention enforcement in any domestic context. 22 U.S.C. § 2717.

fee is not, in fact, used for acceptable purposes.

Plaintiff does not dispute that the objective of preventing the export of arms to enemy nations or terrorist groups is an important—indeed, a compelling—state interest. However, "the government has the burden of *demonstrating* . . . that its objective is advanced by means substantially related to that objective." Mot. to Dismiss at 25 (*quoting United States v. Reese*, 627 F.3d 792 (10th Cir. 2010)) (emphasis added). There is no way to "demonstrate," in a motion to dismiss, that the means are substantially (or even rationally) related to the government's interest. [17] Because all of Plaintiff's allegations must be taken as true, any demonstration requires evidence that is not available at this stage. Defendants assert without evidence that registration and fees "allow the Government a means to better track the movement and source of defense articles." *Id*. Yet Plaintiff has alleged that the Defendants do not engage in any enforcement activity that would permit them to accomplish this goal. Compl. ¶ 54. And even if there is some non-zero quantity of enforcement activity, if the costs of it are only a fraction of the registration fee, then the fee is not "substantially related" to the objective. Absent actual cost information, the Court cannot make an informed decision.

The Defendants once again conflate the registration requirement and the fee, arguing that "the ITAR regulatory scheme reasonably fits the Government's compelling interests in national security and foreign policy, the registration regulations survive intermediate scrutiny." Mot. to Dismiss at 26. Plaintiff does not suggest in Count 3 that mere registration, or even the imposition of an appropriately chosen fee, causes an undue burden on protected conduct. Rather, Plaintiff alleges that the fee as currently set by regulation is excessive, in that it both burdens

[17] Plaintiff does not concede that intermediate scrutiny is the appropriate level to be applied. However, the necessity of factual evidence is the same regardless of the level of scrutiny.

protected conduct (namely, the manufacture of arms for sale to American citizens) and greatly exceeds the administrative and enforcement costs of the Defendants related to the registration of non-exporting manufacturers. Compl. ¶¶ 51-55. Defendants are striking at a straw man. The registration of manufacturers may be "substantially related" to the government's interest in limiting unauthorized exports—and some kind of fee to defray appropriate expenses is probably acceptable as well. But that does not mean that *any fee at all* may be charged, and it is the government's burden to show that the relationship is appropriate.

Only factual evidence can reveal whether or not the government can meet its burden. Attorney arguments are not evidence. See *10th Cir. Pattern Jury Instruction* 1.06 ¶ 3. Count 3 cannot be dismissed before discovery.

**CONCLUSION**

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

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Respectfully submitted,

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