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' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTS ONE AND TWO

Defendants, the United States Department of State ("Department") and John F. Kerry, Secretary of State, hereby oppose Plaintiff's Motion for Summary Judgment on Counts One and Two, ECF No. 20. For the reasons explained herein, Plaintiff is not entitled to judgment as a matter of law on its claims.[1]

SUMMARY

Through the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751 et seq., Congress has provided ample guidance to the Secretary of State in establishing fees for the registration of domestic manufacturers of defense articles, including weapons and munitions of military utility, and therefore has not impermissibly delegated the legislative power. Congress's regulation of arms exports in furtherance of world peace and U.S. national security appropriately extends to the

[1] Plaintiff's motion for summary judgment should also be denied because the Court lacks subject matter jurisdiction over its claims, as explained in Defendants' Motion to Dismiss, ECF No. 19 ("MTD"). Defendants' jurisdictional arguments are incorporated herein by reference and the Court is respectfully referred to that brief for discussion of the jurisdictional shortcomings of Plaintiff's Complaint.

monitoring of arms manufacturers in the United States, particularly those who, like Plaintiff, have a stated intent to engage in commercial sale of their wares, regardless of whether they intend to directly export their products and services. In so acting, Congress has constitutionally exercised its power under both the foreign and domestic prongs of the Commerce Clause. For these reasons, Plaintiff's motion for summary judgment on the claims in Counts One and Two should be denied.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

Defendants do not contest the *facts* cited by Plaintiff in support of its claims under Counts One and Two; however, in accordance with the representations of undersigned counsel at the status hearing on December 22, 2015, Defendants do contest certain legal conclusions that Plaintiff erroneously describes as "facts" in its "statement of undisputed facts." *See* Mot. for S.J., ECF No. 20, at 2-3. Defendants do not believe that any disputes identified herein are material to resolution of the legal questions presented in Plaintiff's motion, which should be denied in any event, but identifying these areas of disagreement will serve the interests of the parties and the Court in maintaining an accurate record.[2]

---

[2] Specifically, Defendants do not contest the following facts described in Plaintiff's Statement of Undisputed Facts: (1) Plaintiff is a Colorado Limited Liability Company and holder of a Federal Firearms License; (2) Plaintiff is in possession of several unique firearm designs it would like to market; (3) the registration fee pursuant to the AECA and the ITAR for non-exporting manufacturers is $2,250; (4) even a single instance of manufacturing may trigger the AECA's registration requirement; (5) Category 1 of the United States Munitions List enumerates firearms that constitute "defense articles"; (6) Plaintiff submitted a firearm design to Defendants as a "Commodities Jurisdiction" Request; (7) Defendants concluded that Plaintiff's design is properly classified as a defense article; (8) Defendants sent two separate letters to Plaintiff (attached as Exhibits 2 and 3 to Plaintiff's Complaint); (9) Plaintiff repeatedly called the phone number appearing in those letters and received no response; (10) Plaintiff has never manufactured a firearm; and (11) Plaintiff wishes to manufacture the design covered by the CJ request. For the purposes of this motion, but not Defendants' Motion to Dismiss, Defendants also do not contest that "failure to register under ITAR carries both criminal and civil penalties, which have thus far

First, although Plaintiff is correct that "even a single instance of manufacturing . . . triggers the [AECA's] registration requirement," the question of whether "the creation of a pre-production prototype" qualifies as such an instance requires a legal conclusion. *See* Mot. for S.J., at 3. The United States Munitions List ("USML"), which enumerates the defense articles subject to the AECA's system of arms export regulations, contains several exemptions, including, *inter alia*, an exemption for "[p]ersons who engage in the fabrication of articles solely for experimental or scientific purposes, including research and development." *See* 22 C.F.R. § 122.1(b).

Second, while Defendants do not contest that the Directorate of Defense Trade Controls ("DDTC") sent Plaintiff two letters stating the AECA's registration requirements, Defendants dispute Plaintiff's characterization of those letters as containing legal "demand[s]." Mot. for S.J., at 3. The Court is respectfully referred to Exhibits 2 and 3 attached to Plaintiff's Complaint, which Defendants acknowledge are copies of DDTC's letters, for a complete and accurate statement of the contents of those documents.

Third, Defendants dispute that Plaintiff "has no intention of exporting any firearms or other defense articles," which asserts a legal conclusion rather than an uncontested fact. *See* 1 Wayne LaFave, Subst. Crim. L. § 5.2 (2d ed. 2003) (analyzing the maxim that a person is "presumed to intend the natural and probable consequences of his acts"); *United States v. Bishop*, 740 F.3d 927, 932-33 (4th Cir. 2014) (discussing question of intent under the AECA). Finally, the last sentence of Plaintiff's Statement of Undisputed Facts also states conclusions of law, such as the "basis" on which "the Court [may] declare the rights of the parties." Mot. for S.J., at 3. Defendants disagree that such conclusions constitute facts for the purposes of this action or otherwise.

---

deterred Plaintiff from engaging in otherwise-lawful activities." Mot. for S.J. at 3.

STATUTORY AND REGULATORY BACKGROUND

The AECA 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). As one of its elements, the AECA requires that all who "engage[] in the business of manufacturing, exporting, or importing any defense articles" must register "with the United States Government agency charged with the administration of this section, and pay a registration fee which shall be prescribed by [] regulations." *Id.* § 2778(b)(1)(A)(i). The President has delegated the authority to designate defense articles to the Secretary of State and the Department of State, *see* Exec. Order 13637(n)(iii), who have promulgated the International Traffic in Arms Regulations ("ITAR"), administered by DDTC. Pursuant to this authority, DDTC has set the registration fee at $2,250.[3] *See* Executive Order 13637(n)(iii); 22 C.F.R. §§ 120-130.

The ITAR explains that 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." *Id.* § 122.1(c). Consistent with the AECA, 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). As noted above, "engaging in such a business" does not require any more than "one occasion of manufacturing … a defense article." The ITAR provides several exemptions from the registration requirement, including "(1) Officers and employees of the U.S. Government acting in an official capacity; (2) Persons whose pertinent business activity is confined to the production of unclassified technical data only; (3)

[3] *See* 73 Fed. Reg. 43653 (July 28, 2008) (notice of rulemaking); 73 Fed. Reg. 55439 (Sept. 25, 2008) (final rule).

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).

ARGUMENT

I. THE AECA IS A PERMISSIBLE DELEGATION OF LEGISLATIVE POWER.

Congress has constitutionally granted authority to the Executive Branch to set the registration fee for manufacturers of defense articles and has provided legally sufficient guidance in doing so. It is well established that Congress may enact valid statutes delegating authority to other branches of the government, "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.'" *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Notwithstanding the "separation of powers that underlies our tripartite system of Government," *id.*, the distinctions among executive and legislative powers are not absolute, so the "intelligible principle" standard is not a strict one: as the Tenth Circuit has recently stated, "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). To survive a nondelegation challenge, Congress must only "delineate[] [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).[4] Broad deference is owed to congressional delegations because

[4] 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

"in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372.

In over two centuries of judicial review, the Supreme Court has "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.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing the two cases on which Plaintiff relies, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) & *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). Even in the area of domestic policy, Plaintiff would thus face an uphill struggle to establish that this Court should override Congress's delegation. *See Loving v. United States*, 517 U.S. 748, 773 (1996) (observing that "we have since [1935], upheld, without exception, delegations under standards phrased in sweeping terms." But Plaintiff's challenge faces an even higher hurdle, because "[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); *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("Congress - in giving the Executive authority over matters of foreign affairs - must of necessity paint with a brush broader than it customarily wields in domestic areas"); *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

---

(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.").

"authoriz[ing] the executive to exercise the power . . . for the best interests of the country" provide a sufficient, intelligible principle for congressional delegation).

In this context, the AECA provides an intelligible principle to guide its delegation, consistent with the constitutional standards, specifically, to control the export of defense articles or services and to provide foreign policy guidance to manufacturers and exporters "[i]n furtherance of world peace and the security and foreign policy of the United States." *Id.* § 2778(a)(1).[5] The Supreme Court has routinely "countenanced as intelligible" similar principles. *In re National Security Agency*, 671 F.3d 881, 896 (9th Cir. 2011). For example, in *National Broadcasting Co. v. United States*, the Supreme Court affirmed against a nondelegation challenge regulations issued by the Federal Communications Commission guided by congressional direction to act in "the public interest, convenience, or necessity." 319 U.S. 190, 193-94 (1943). The Court found that this "touchstone provided by Congress" was "as concrete as the complicated factors for judgment in such a field of delegated authority permit" and did not "set[] up a standard so indefinite as to confer an unlimited power." *Id.* at 216; *see also Avent v. United States*, 266 U.S. 127, 130 (1924) (requirement that Interstate Commerce Commission's rules "shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed").

Similarly, in *Yakus v. United States*, the Court affirmed a World War Two-era system of price controls which assigned to the Executive Branch the power to "fix[] . . . maximum prices of commodities and rents" based on the principle that "in his judgment [the prices] will be generally

[5] Congress has relatedly instructed that the delegated authority for "procedures governing the export, sale, and grant of defense articles and defense services . . . be administered" to further a policy of "free[ing]" the world from "the dangers and burdens of armaments," and "subordinat[ing] to the rule of law" armed conflicts and other uses of force. 22 U.S.C. §§ 2551, 2751.

fair and equitable and will effectuate the purposes of this Act." 321 U.S. 414, 420 (1944). In doing so, the Court concluded that it "could [not] say that there is an absence of standards for the guidance of the [official's] action." *Id.* at 426. And in *United States v. Curtiss-Wright*, the Supreme Court relied on the "Act of March 3, 1795." 329 U.S. 90, 104 (1946). In doing so, the Court implicitly affirmed the standard it described as appearing therein, giving "the President authority to permit the exportation of arms, cannon and military stores, the law prohibiting such exports to the contrary notwithstanding, the only prescribed guide for his action being that such exports should be in 'cases connected with the security of the commercial interest of the United States, and for public purposes only.'" 329 U.S. 90, 104 (1946)); *see also Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946) (affirming the delegation of regulatory power to the SEC to "act to ensure" that corporate structures are not "unduly or unnecessarily complicate[d].").
Reviewing permissible delegations such as these, the Supreme Court in *American Trucking* repeated Justice Scalia's earlier observation that courts "have '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.'" 531 U.S. 474 (quoting *Mistretta*, 488 U.S. 416 (dissent of Scalia, J.)).

Contrary to Plaintiff's suggestion, the delegation of the setting of the fee for the manufacturers of defense articles need not meet a higher standard merely because it involves "an agency setting the rates of fees or taxes." Mot. for S.J., at 5; *see id.* at 6 ("*National Cable Television* and *Skinner* serve as the perfect negative examples to guide the Court's decision"). Rather, as the Court explained in *American Trucking*:

> the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators' . . . it must provide substantial guidance on setting air standards that

> affect the entire national economy. But even in sweeping regulatory schemes we have never demanded . . . that statutes provide a determinate criterion.

531 U.S. 475. Here, Plaintiff has challenged the delegation only of a narrow power: the setting of a registration fee for manufacturers of defense articles. This is far short of the power to "affect the entire national economy," *id.*, particularly where Plaintiff "does not contest" the broader delegations of authority in the AECA "to promulgate regulations implementing the AECA, including [by] designation of 'defense articles.'" Compl. ¶ 15.

The recognition of these delegations as constitutional sheds light on the AECA's delegation of authority and confirms that it raises no constitutional problem. First, the AECA "delineates the general policy," *Nichols*, 775 F.3d at 1231, that the AECA's defense articles registration requirement is needed to "further[] world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1); *cf. Samora v. United States*, 406 F.2d 1095, 1098 (5th Cir. 1969) (holding that this standard, in AECA predecessor statute, conferred "standards sufficiently definite that the delegation" was consistent with the Constitution). Second, the President is the agent who must apply the preceding public policy. *See* 22 U.S.C. § 2778(a)(1)-(a)(3); *see* Exec. Order 13637(n)(iii) (delegating authority to State Department); *Nichols*, 775 F.3d at 1231. Third, Congress has provided "the boundaries of this delegated authority," which extend only to the setting of a registration fee limited to those "engage[d] in the business of manufacturing, exporting, or importing any defense articles." 22 U.S.C. § 2778(b)(1)(A)(i). 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. *See Owens*, 531 F.3d at 888 (confirming that Congress may constitutionally delegate fact-specific determinations for "Executive factfinding in an area in which he has considerable constitutional

authority—foreign affairs").[6] Plaintiff's request for judgment on Count One should therefore be denied.

II. THE AECA IS A LAWFUL EXERCISE OF CONGRESS'S AUTHORITY.

A. The AECA is an Appropriate Exercise of Congress's Authority Over Foreign Commerce.

The AECA's registration requirement is also a constitutional exercise of Congress's power to regulate foreign commerce. The Constitution grants Congress the power to "regulate Commerce with foreign Nations…." U.S. Const. art. I, § 8, cl. 3. It is well established that Congress has plenary authority "to regulate foreign commerce, and to delegate significant portions of this power to the Executive…." *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 59 (1974). Congress's broad authority to regulate foreign commerce is especially important to ensure that the U.S. acts "'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)). "In fact, the Supreme Court has never struck down an act of Congress as exceeding its powers to regulate foreign commerce." *United States v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006).

The AECA's direct regulation of the export of munitions falls comfortably within the

[6] Here, in delegating that fact-finding to DDTC, the President has further constrained the exercise of authority by requiring that "self-financing mechanisms," such as the registration fee challenged by Plaintiff, fund "up to 75 percent of [DDTC's] mission." *See* National Security Presidential Directive 56 ("NSPD-56"), attached as Exhibit 1 to Defendant's Motion to Dismiss. And Congress attached its imprimatur to this constraint by subsequent amendments to the AECA without removing the presidential limitation. *Cf. Ramsey v. Comm'r of Internal Revenue*, 66 F.2d 316, 318 (10th Cir. 1933) (finding that "Congress has ratified and approved [a regulatory] interpretation" where it "repeatedly amended the [] laws while [the] regulation was in full force and effect"); *Fletcher v. Warden, U.S. Penitentiary, Leavenworth, Kan.*, 641 F.2d 850, 854 (10th Cir. 1980) ("uniform administrative interpretation since enactment without objection by Congress is indicative of continuing congressional intent and is entitled to deference").

foreign commerce power. 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's arguments to the contrary are in error. As an initial matter, Plaintiff's claim that the power over foreign commerce stops at "the water's edge," and cannot extend to the regulation of "purely domestic commerce," Compl. ¶ 37, is contradicted by long-settled authority. The national border does not demarcate the limit of the foreign Commerce Clause, else "[i]t would be a very useless power." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) ("in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States"); *see also Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827) (reaffirming the principle from *Gibbons* that Congress's foreign commerce power is "complete in itself" and "cannot be stopped at the external boundary of a State, but must enter its interior"). Foreign commerce necessarily originates (or terminates) in domestic activity and, once in the stream of commerce, a defense article may ultimately become an export.[7] *See A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923). The ITAR itself reflects this common

[7] Relevantly, by exempting from its scope those "[p]ersons who engage in the fabrication of articles solely for experimental or scientific purposes, including research and development," 22 C.F.R. § 122.1(b), the ITAR is tailored to apply to defense articles in commerce.

sense proposition, 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"); *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."); *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.").

Plaintiff's reliance on the Supreme Court's 1846 pronouncement in *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), is also misplaced. In that case, the Supreme Court considered whether a Maine statute was in contravention of the Congress's tri-partite commerce power. *See id.* at 571. The statute assigned river navigation rights—for a river "situated entirely within the State of Maine"—to two individuals. *Id.* at 571-72. Veazie, a third party, built a steamboat, ran it upon the river, and was subsequently enjoined. *Id.* at 573. The Supreme Judicial Court of the State of Maine decreed a permanent injunction and awarded damages, and the Supreme Court affirmed. *Id.* at 573-75. In doing so, the Supreme Court articulated a narrow interpretation of Congress's power to regulate commerce under any prong of the Commerce Clause. *See id.* at 573-74. For example, the Court concluded that Congress could not rely on the domestic Commerce Clause to regulate "matters . . . which are essentially local in their nature and extent," including "turnpikes, canals, or railroads, or the clearing and deepening of watercourses exclusively within the States." *Id.* at 574. Similarly, the Court found that the foreign Commerce Clause "can never be applied to transactions wholly internal." *Id.*

The Supreme Court's subsequent Commerce Clause jurisprudence casts serious doubt on

the *Veazie* dicta, on which Plaintiff so heavily relies. Most notably, the Court's landmark decision in *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942), confirmed that Congress can properly regulate purely intrastate—in *Veazie*'s nomenclature, "essentially local"—matters under the domestic Commerce Clause. In light of Congress's power to regulate such commerce under modern jurisprudence, Plaintiff's attempt to apply to the AECA *Veazie*'s discussion of the Commerce Clause, under either the domestic or foreign prong, is meritless.

Nor is it the case that the regulation of domestic manufacturers under Congress's foreign Commerce Clause powers would convert the foreign Commerce Clause into a "general police power." *See* Mot. for S.J., at 8-12; *see also* Compl. ¶ 37. The minimal regulation, in the form of a registration requirement, imposed upon domestic manufacturers of articles implicating foreign relations and national security interests (*i.e.*, defense articles) by the AECA bears no resemblance to a "police power." Instead, Congress's regulation falls well within the settled scope of congressional authority over foreign commerce. By their nature, defense articles inherently implicate foreign relations and national security concerns, so they are already "the subjects of foreign [interest.]" *Compare Curtiss-Wright*, 299 U.S. at 322-24 (discussing various delegations of authority "in respect of subjects affecting foreign relations") *with Veazie*, 55 U.S. at 574 (enumerating products not presumed to be "subjects of foreign" interest). As Plaintiff acknowledges in its Complaint, the AECA lies at the intersection of Congress's Commerce Clause powers *and* the President's powers over foreign relations and national security. *See* Compl. ¶ 36; *see also Curtiss-Wright*, 299 U.S. at 319-20 ("It is important to bear in mind 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"). Indeed, Congress recognized the inherently executive nature of defining the scope of foreign affairs interest in defense articles by delegating to the executive branch the authority to determine *which* items should be included on the USML and subject to regulation in the foreign affairs interest.

Nor can Plaintiff succeed on its "police power" argument based on the scope of the foreign Commerce Clause. According to Plaintiff, "[b]ecause the foreign commerce power and foreign relations powers are broader than the interstate commerce power in substance, balance requires that the subject matter be confined *to actual foreign commerce*, not domestic activity whose connection to foreign commerce is entirely speculative." Mot. for S.J., at 11. But Plaintiff ignores the implications of the Necessary and Proper Clause, which allows Congress to legislate so long as doing so is "rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010). In this context, by imposing only a minimal registration requirement on Plaintiff—a putative manufacturer of a defense article subject to export controls—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, that is, ensuring the adequate regulation of the export of defense articles. *Cf. United States v. Edler Indus., Inc.*, 579 F.2d 516, 520 (9th Cir. 1978) ("As a necessary incident to the power to control arms export, the President is empowered to control the flow of information concerning the production and use of arms.").

Again the domestic Commerce Clause analogue is informative. Congress, when regulating interstate commerce, is not limited to regulating only those intrastate activities that substantially affect interstate commerce; rather, it may also regulate intrastate activities that do not have a substantial effect on interstate commerce where it is necessary to make a regulation of

interstate commerce effective. *See Gonzales v. Raich*, 545 U.S. 1, 34-35 (2005) (Scalia, J., concurring). It follows, then, that Congress, pursuant to the foreign Commerce Clause, may regulate domestic activity where it is necessary to make a regulation of foreign commerce effective. Congress has narrowly done so here, requiring only the registration of all manufacturers of defense articles that are subject to export controls.

B. Even Under the Standards Proposed by Plaintiff, Congress May Require Registration of Domestic Manufacturers of Defense Articles.

Plaintiff suggests that the registration of domestic manufacturers fails tests identified by various Courts of Appeals for examining the validity of foreign Commerce Clause claims. *See* Pl. Br. at 13 (citing *United States v. Pendleton*, 658 F.3d 299, 308 (3d Cir. 2011), *United States v. Bollinger*, 798 F.3d 201 (4th Cir. 2015), and *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006)). But even Plaintiff acknowledges that these cases are inapposite, and in any event they do not call into question the conclusion that the AECA's registration requirement is a valid exercise of Congress's foreign Commerce Clause power.

In *Pendleton* and *Bollinger*, two Courts of Appeals, considering the constitutionality of the PROTECT Act, drew on the three categories of permissible regulation of *domestic* commerce (described in *United States v. Lopez*) and attempted to apply them to the regulation of foreign commerce: "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce."[8] *Pendleton*, 658 F.3d at 306-08 (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)); *Bollinger*, 798 F.3d at 215 ("We agree that the *Lopez*

---

[8] As Plaintiff observes, both *Pendleton* and *Bollinger* examine the limits to Congress's authority to regulate the activity of Americans traveling abroad, specifically "whether Congress may prohibit individuals from engaging in non-commercial 'illicit sexual conduct'" while traveling in foreign commerce. *Bollinger*, 798 F.3d at 203; *see Pendleton*, 658 F.3d at 301.

categories provide a useful starting point in defining Congress's powers under the Foreign Commerce Clause."). Under the *Lopez* analysis, as long as a "rational basis exists for [] concluding" that an activity fits in one of these three categories, Congress may validly exercise its commerce authority to regulate that activity. *Gonzales v. Raich*, 545 U.S. 1, 2 (2005) (citing *Lopez,* 514 U.S. at 557).[9] Here, there is a straightforward, rational basis for recognizing that a registration requirement is necessary to fulfill the purpose of the AECA by ensuring that Defendants can track and regulate the export of defense articles. Thus, even if *Plaintiff's* activities are purely domestic, the AECA's purpose is advanced by requiring registration of all defense article manufacturers, and "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (citation omitted); *cf. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 2209, 162 L. Ed. 2d 1 (2005) ("That the regulation ensnares some purely intrastate activity is of no moment."); *accord Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (Congress may "prohibit[] a somewhat broader swath of conduct" in order "to deter" the proscribed conduct). Similarly, because regulation of the full array of manufacturers of defense articles is necessary to ensuring government oversight of arms exports, the AECA's registration requirement has a "constitutionally tenable nexus" with foreign commerce. *See*

---

[9] While courts have considered the *Lopez* categories in the context of the foreign Commerce Clause, they have not done so without hesitation or qualification. *See Bollinger*, 798 F.3d at 210 ("That assumption [that the Supreme Court's interstate jurisprudence should be wholly transposed into the foreign context] is belied by decades of Supreme Court cases that have consistently interpreted Congress's interstate authority against the backdrop of, and as constrained by, federalism concerns that are inapposite in the international arena."); *Pendleton*, 658 F.3d at 308 (acknowledging that "the Interstate Commerce Clause developed to address 'unique federalism concerns' that are absent in the foreign commerce context"); *Clark*, 435 F.3d at 1116 ("[T]he categories have never been deemed exclusive or mandatory, nor has the Supreme Court suggested their application in relation to the Foreign Commerce Clause. The categories are a guide, not a straightjacket." (citation omitted)).

Clark, 435 F.3d at 1114.[10]

C. The AECA is an Appropriate Exercise of Congress's Authority over Domestic Commerce.

The AECA's registration requirement is also a valid exercise of Congress's authority over interstate commerce. Plaintiff, without relying on any precedent, claims that the sole and exclusive authority of the AECA stems from Congress's foreign Commerce Clause power because, on the same day Congress passed the AECA, it also passed the Gun Control Act (Pub. L. 90-618, Oct. 22, 1968). Mot. for S.J., at 7. But this argument ultimately fails because the constitutionality of an action taken by Congress does not depend on the label it uses to exercise that power. *See National Federation of Independent Business v. Sebelius*, 132 S. Ct 2566, 2598 (2012) ("The 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). 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 Clause power. 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").

Plaintiff's related argument that the AECA may only regulate foreign commerce because

---

[10] Although relying on cases that seek guidance from *Lopez*, Plaintiff seeks to distinguish *Lopez* on the ground that Plaintiff is a producer, not a consumer, and therefore has a lesser effect on foreign commerce. Mot. for S.J., at 17. This distinction is immaterial. Plaintiff "wishes to bring [its products] to market," Compl. ¶ 9, and the AECA regulates the export of defense articles. These activities are "quintessentially economic . . . and thus fall[] within foreign trade and commerce." *Cf. Clark*, 435 F.3d at 1115 (quoting *Raich*, 545 U.S. at 26).

the Gun Control Act regulates interstate commerce is also without merit. *See* Mot. for S.J., at 7. The Gun Control Act makes numerous references to "importation" and "foreign commerce" and even contains prohibitions aimed solely at importing. *E.g.*, 18 U.S.C. § 922(a)(1)(B) (providing that it shall be unlawful for "any importer . . . to ship or transport in interstate or foreign commerce" any firearm to one who is not licensed). If the Gun Control Act may validly regulate both interstate and foreign commerce—a point which Plaintiff, based on its argument, appears to concede, *see* Compl. ¶¶ 8, 52—then the AECA may validly regulate both interstate and foreign commerce as well.

Plaintiff's motion for summary judgment on Count Two should therefore be denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be denied.

Respectfully submitted this 22nd day of February 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
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 February 22, 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