

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; et al.,

Plaintiffs-Appellees,

v.

No. 20-35391

U.S. DEPARTMENT OF STATE; et al.,

Defendants-Appellants,

CONSENT MOTION TO ISSUE THE MANDATE

Pursuant to Federal Rules of Appellate Procedure 27 and 41(b), the U.S. Department of State and the other federal defendants-appellants respectfully move this Court to issue the mandate in this case immediately. Counsel for the plaintiff-appellee States have informed us that they do not intend to seek further review and that they consent to immediate issuance of the mandate.

1. This case involves a challenge to two rules promulgated by the Department of State and the Department of Commerce. These rules modified the regulatory regime for controlling the export of non-automatic and semi-automatic firearms up to .50 caliber, and the related technical data for those firearms. 85 Fed. Reg. 3819 (Jan. 23, 2020); 85 Fed. Reg. 4136 (Jan. 23, 2020). Under the revisions in the rules, those firearms and their related technical data would no longer be regulated

as part of the Department of State's U.S. Munitions List, but would instead be regulated under the Department of Commerce's Commerce Control List.

2. Washington and several other States sued to enjoin the rules, alleging that the rules violated the Administrative Procedure Act. The district court granted a preliminary injunction that enjoined the State Department's rule "insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment." *Washington v. U.S. Department of State*, 443 F. Supp. 3d 1245, 1262-63 (W.D. Wash. 2020).

3. The federal defendants appealed, and this Court held that "Congress expressly precluded review of the relevant agency actions here" in 22 U.S.C. § 2778(h) and 50 U.S.C. § 4821(a). *Washington v. U.S. Department of State*, --- F.3d ---, 2021 WL 1621320, at *2 (9th Cir. April 27, 2021). Because the "district court erred in reviewing" the final rules, *id.* at *9, the Court "vacate[d] the injunction and remand[ed] with instructions to dismiss," *id.* at *2.

4. This Court's decision—vacating the preliminary injunction in part and instructing the district court to dismiss—will not take effect until this Court issues its mandate. The mandate would ordinarily issue on the later of seven days after the time to file a petition for rehearing expires, or seven days after the denial of a timely petition for rehearing. *See* Fed. R. App. P. 41(a); *see also* Fed. R. App. P. 40(a)(1)(C) (time for filing petition for rehearing is 45 days after entry of judgment where the

parties include the United States or any of its officers, employees, or agencies). Thus, the mandate would ordinarily not issue until at least 52 days after the Court's decision, *i.e.*, June 18, 2021, and the district court's preliminary injunction would remain in place during that time.

5. This Court is authorized to shorten the time for issuing the mandate. Fed. R. App. P. 41(b). In this case, given that plaintiffs-appellees do not intend to seek further review, there is no reason for the preliminary injunction to remain in place while awaiting issuance of the mandate in the ordinary course. As the Commerce Department has recently explained, it will be in a clear position to act under its final rule and control the export of 3D-printing software and technology for firearms, or firearm frames or receivers. *See* U.S. Dep't of Commerce, *FAQs for the Commerce Categories I-III (final rule)* at 17-23 (May 7, 2021), <https://go.usa.gov/xH6w2>. This Court should issue the mandate immediately so that the State Department can remove those items from the U.S. Munitions List.

6. Brendan Selby, counsel for the plaintiff State of Washington, indicated that the plaintiffs-appellees consent to the immediate issuance of the mandate.

CONCLUSION

For the foregoing reasons, this Court should immediately issue the mandate in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the page limitations of Circuit Rule 27-1(1)(d) because it is less than 20 pages.

/s/ Daniel Aguilar

Daniel Aguilar