IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN RIGBY, ALAN KNIGHT, and FIREARMS POLICY COALITION, INC., Plaintiffs, v. JOHN CARNEY, Governor of Delaware; KATHY JENNINGS, Attorney General of Delaware, Defendants.	C.A. No. 1:21-cv-01523-MN

REPLY BRIEF IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY AND PERMANENT INJUNCTION

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Plaintiffs John Rigby ("Rigby"), Alan Knight ("Knight"), and Firearms Policy Coalition, Inc. ("FPC"), respectfully submit this Reply Brief in Further Support of their Motion for a Preliminary and Permanent Injunction.[1] For the reasons set forth herein and in Plaintiffs' Opening Brief (cited herein as "Pl. Op. Br." – D.I. 6), HB 125 is facially unconstitutional and, in the absence of injunctive relief, will cause irreparable harm to Plaintiffs.

ARGUMENT

I. Plaintiffs are Likely to Succeed on the Merits of their Second Amendment Claims

A. Defendants' Answering Brief Utterly Fails to Address the Fact that NFOs and SMFs are Protected Components and Arms in Common Use

As demonstrated in Plaintiffs' Opening Brief and in the accompanying Declarations of Rigby (D.I. 7) and Knight (D.I. 8), and unrebutted by Defendants in their Answering Brief, self-manufactured firearms ("SMFs") and their predecessor materials, non-firearm objects ("NFOs"), are typically possessed and commonly owned by law-abiding citizens for lawful purposes such as self-defense, are therefore not unusual, and are thus protected by the Second Amendment. Pl. Op. Br. at 5-8; *see also District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (the Second Amendment right necessarily encompasses firearms and firearms components "typically possessed by law-abiding citizens for lawful purposes . . . ."); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring) ("A weapon may not be banned unless it is *both* dangerous *and* unusual.") (emphasis in original). In other words, "the sorts of weapons protected [a]re those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Ownership of SMFs, and firearms predecessor materials used by individuals to make SMFs, are not new—law-abiding citizens have commonly owned SMFs and

[1] Defendants submitted an Answering Brief dated November 16, 2021 (cited herein as "Def. Br." – D.I. 11).

predecessor materials for lawful purposes, including self-defense, *throughout* American history. Indeed, as historian James Whisker wrote:

> [g]un crafting was one of several ways Americans expressed their unrestrained democratic impulses at the time of the adoption of the Bill of Rights . . . . The climate of opinion was clearly such that it would have supported a broad distribution of this right to the people over and against government. Anything else would have been inconceivable.

JAMES B. WHISKER, THE GUNSMITH'S TRADE 5, 92 (1992).

In their Answering Brief, Defendants do not address this dispositive point, thereby conceding that NFOs and SMFs are commonly owned. Accordingly, for this reason alone—that NFOs and SMFs are commonly owned and not unusual—and because self-manufacturing of firearms has been legal and commonplace since the time of Founding, the NFO Ban and the SMF Ban are categorically unconstitutional and should be enjoined as such, without resort to tiered scrutiny analysis. *See Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (citing *Heller*, 554 U.S. at 629) ("It's appropriate to strike down such 'total bans[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right.").

B. Alternatively, the NFO Ban and the SMF Ban Fail Any Level of Tiered Scrutiny Analysis

1. The NFO Ban and the SMF Ban Burden Plaintiffs' Second Amendment Right

Defendants argue that HB 125 "does not burden Second Amendment protected conduct" because "[s]erialization dates to the same time period as *Heller's* examples and should also be considered a longstanding and presumptively valid measure." Def. Br. at 8. The *Heller* Court deemed certain firearm regulations longstanding and thus presumptively lawful, such as "prohibitions on the possession of firearms by felons and the mentally ill, or law forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualification on the

commercial sale of arms." *Heller*, 554 U.S at 626-627 (emphasis added). Although this list was not exhaustive, the Court indicated that the key question in determining whether a regulation is presumptively lawful is that it must be, at a minimum, "longstanding"—which the Court reiterated in 2010. *See McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

However, as observed by author Joseph Greenlee, Defendants are simply incorrect in their assertion that regulations requiring serialization of *self-built* firearms are longstanding.

> In fact, there were no restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries. All such restrictions have been enacted in the last decade.

JOSEPH G.S. GREENLEE, *The American Tradition of Self-Made Arms*, 37 (Nov. 10, 2021), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3960566.

A few colonial laws[2] and one during the Revolutionary War[3] required gunsmiths to repair militia arms prior to resuming work for private customers. But even these laws did not prohibit the self-manufacturing of firearms or impede citizens from exercising their freedom to defend themselves with arms of their choice.

Today, it remains legal to self-manufacture firearms under federal law. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *What is ATF doing in regards to people making their own firearms*, (May 14, 2015), https://www.atf.gov/firearms/qa/what-atf-doing-regards-people-making-their-own-firearms ("An individual may generally make a firearm for personal

[2] Maryland in 1661 required "[t]hat all Smiths which have tooles be forced to fix armes for the Soldiers." 3 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COUNCIL OF MARYLAND 1636-1667, at 531 (William Hand Brown ed., 1883). Connecticut in 1665 allowed authorities, "upon just complaint of any souldier or inhabitant in this Colony, to . . . order and require [Gunsmiths] . . . forthwith to doe what is requisite to be done for fitting the Armes sent to them." THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM 1665 TO 1678; WITH THE JOURNAL OF THE COUNCIL OF WAR, 1675 TO 1678, at 19 (J. Hammond Trumbull ed., 1852).

[3] PENNSYLVANIA ARCHIVES, second ser. 299 (William H. Egle ed., 1887) ("Resolved, That in the case any of the gun-smiths, in the county of Lancaster . . . shall refuse to go to work and make their proportion of the firelocks and bayonets required of this county . . . the tools of the said gun-smiths so refusing shall be taken from them, and moreover the said gun-smiths shall not be permitted to carry on their trades until they shall engage to go to work as aforesaid . . . .").

use.”). To the extent federal laws apply to SMFs, such laws do not specifically target SMFs, but rather are related to firearms generally. *See e.g.*, 18 U.S.C. § 922(p)(1)(A) (forbidding, *inter alia*, manufacture of any firearm if “after removal of grips, stocks, and magazines, [it] is not detectable as the Security Exemplar, by walk-through metal detectors . . . .”); 18 U.S.C. § 922(p)(1)(B) (forbidding, *inter alia*, manufacture of firearms which contain “any major component . . . when subjected to inspection by the type of X-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component.”); 18 U.S.C. § 922(r) (forbidding assembly of semiautomatic rifles or shotguns prohibited from importation using imported parts).

Although, in addition to Delaware, a tiny minority of states [California (2016),[4] Connecticut (2019),[5] Hawaii (2020),[6] New Jersey (2018),[7] New York (2021),[8] Nevada (2021),[9] Rhode Island (2020),[10] and the District of Columbia (2020)[11]] have enacted anomalous laws regulating self-manufacturing of firearms, none are longstanding. Moreover, California and Connecticut do not outright prohibit SMFs—rather, these laws require individuals to obtain serial numbers for their SMFs from state authorities. Elsewhere in the United States, and at the federal level, there are no specific laws or regulations targeting SMFs built by law-abiding citizens for lawful purposes, including but not limited to self-defense. Even if, *arguendo*, serialization were

[4] Cal. Penal Code § 29180(b).

[5] Conn. Pub. Act No. 19-6.

[6] 2019 Hi. HB 2744.

[7] N.J. Stat. § 2C:39-9.

[8] N.Y. Legislation S.13A/A.2666A; S.14A/A.613A

[9] 2021 NV. AB 286, amending Title 15, Chapter 202.

[10] 2020 R.I. HB 7102.

[11] D.C. Code § 7-2502.02(a)(8).

longstanding (and it is not), HB 125 doesn't facilitate serialization of SMFs and NFOs, and therefore effectively bans them. There is absolutely no longstanding precedent for that.

Defendants offer a second (and equally unavailing) argument as to why the NFO Ban and the SMF Ban purportedly do not burden conduct protected by the Second Amendment—they assert that since HB 125 only regulates unserialized firearms and components, individuals can still acquire and use serialized firearms and thus exercise their right to keep and bear arms. Def. Br. at 8-9. Defendants further claim that there is no "evidence that self-assembling from unserialized components is necessary or superior for home defense." *Id*. at 8. These arguments badly distort the Supreme Court's holding in *Heller*. Under *Heller*, the legality of firearms is not determined by their necessity or their superiority to other firearms. The only relevant question is whether the firearms are commonly owned. *Miller v. Bonta*, 2021 U.S. Dist. LEXIS 105640, at *16 (S.D. Cal. June 4, 2021) ("*Heller* asks whether a law bans a firearm that is commonly owned by law-abiding citizens for lawful purposes. It is a hardware test."). Indeed, the *Heller* test is a hardware test—not a necessity test or a superiority test. Plaintiffs are not required to show that NFOs or SMFS are necessary or superior to serialized self-defense options. This is an imaginary (and unconstitutional) burden fabricated from whole cloth by Defendants.

Finally, Defendants offer the specious argument that under HB 125, "individual Plaintiffs are not stripped of an opportunity to self-manufacture and assemble firearms and constituent parts so long as they are serialized and traceable." Def. Br. at 9. This claim is nonsensical because HB 125 does not contain any provision for law-abiding citizens to obtain a serial number for their SMFs from the State of Delaware. This contrasts sharply with California, where a person can (and is required to) "[a]pply to the Department of Justice for a unique serial number or other mark of identification" prior to constructing a firearm. Cal. Penal Code § 29180(b)(1). Before the

Department issues the serial number to an applicant, it conducts a background check. Cal. Penal Code § 29182(b)(1). If the applicant is not disqualified, the Department "shall grant" such an application "in the form of serial numbers to . . . persons who wish to manufacture or assemble firearms pursuant . . . ." Cal. Penal Code § 29182(a)(1).

Similarly, in Connecticut,

> [n]ot later than thirty days after a person completes the manufacture of a firearm . . . such person shall notify the [Department of Emergency Services and Public Protection] of such manufacture and provide any identifying information . . . . Upon receiving a properly submitted request for a unique serial number or other mark of identification from a person who completes manufacture of a firearm, the department shall determine if such person is prohibited from purchasing a firearm and if not, shall issue to such person a unique serial number or other mark of identification immediately and in no instance more than three business days after the department receives such request.

Conn. Pub. Act No. 19-6(b). The NFO Ban and the SMF Ban plainly burden Plaintiffs' Second Amendment right to keep and bear arms, thus necessitating examination of Defendants' heightened scrutiny arguments.

2. The NFO Ban and SMF Ban Are Neither Reasonably Fitted Nor Narrowly Tailored

Defendants argue that even if HB 125 does burden Plaintiffs' Second Amendment right to keep and bear arms, that the law survives heightened scrutiny, whether intermediate or strict. Def. Br. at 9-11. Defendants claim an important government interest in banning SMFs (and NFOs used to assemble SMFs) on the basis that SMFs are purportedly "threats to public safety because they circumvent background checks and cannot be traced through law enforcement databases." Def. Br. at 10. They cite to the ATF's notice of proposed rulemaking that would expand the definition of "firearm" in order to subject unfinished receiver kits to background checks and unfinished receivers to serialization. *Id*. at 4 (citing Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. at 27722). Defendants conclude, therefore, that under intermediate

scrutiny, HB 125 "is a reasonable fit for achieving the State's objectives" of protecting public safety, and that under strict scrutiny, HB 125 is narrowly tailored. Def. Br. at 10-11. However, in so arguing, Defendants inadvertently augment one of the main points made in Plaintiffs' Opening Brief—HB 125 is not narrowly tailored, and in fact, Delaware could have addressed the purported threat posed by SMFs and NFOs by any number of far less restrictive means short of outright bans. However, unlike California and Connecticut, Delaware provides no options other than destruction or dispossession of the forbidden items, or prosecution for possession of same.

The lack of meaningful tailoring in this broad prohibition renders the NFO Ban and the SMF Ban unconstitutional even under intermediate scrutiny, because that test requires at least "a means narrowly tailored to achieve the desired objective." *Bd. of Trs .v. Fox*, 492 U.S. 469, 480 (1989). Here, the NFO Ban and the SMF Ban show no evidence of *any* tailoring, which alone is fatal under intermediate scrutiny. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016). Delaware must show, at the least, "that it considered different methods that other jurisdictions have found effective," such as California's or Connecticut's approach. *McCullen v. Coakley*, 573 U.S. 464, 494 (2014); *see also Drummond v. Robinson Twp*., 9 F.4th 217 (3d Cir. 2021).

With respect to strict scrutiny, the analysis is similar and the outcome the same. There must be an effort to tailor the law in question to minimize imposing unnecessary or overly broad restraints. *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Since Delaware simply bans all conduct and possession *in toto*, the NFO Ban and SMF Ban also fail under strict scrutiny.

II. Plaintiffs are Likely to Succeed on the Merits of their Fifth and Fourteenth Amendment Claims

Defendants argue, *inter alia*, that they need not compensate Plaintiffs for the taking of their NFOs and SMFs because HB 125 is a "valid exercise of the State's police power . . . ." Def. Br. at 12-13. This argument stretches the police power well past its limits. "[T]he police power, broad

as it is, cannot justify the passage of a law . . . which runs counter to the limitations of the federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917). There is no exception when the regulatory object is property. *Id.* The Supreme Court has repeatedly held that a state has a constitutional duty to compensate owners for the property it takes, even when it uses its police power to take the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

To be sure, public safety provisions like nuisance laws may be part of "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," *Lucas*, 505 U.S. at 1027, and in certain circumstances this may mean that banning certain types of property will not implicate the Takings Clause. But this is only when the provisions in question *predate acquisition*: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029; *cf. Mugler v. Kansas*, 123 U.S. 623, 672 (1887). No citizen, therefore, may be dispossessed of property that is entirely lawful under legal principles existing at the time of acquisition.

III. Plaintiffs are Likely to Succeed on the Merits of their First Amendment Claims

A. The Instructions Ban is a Content-Based Speech Restriction

Defendants argue that the Instructions Ban is content-neutral because "[t]he files at issue are essentially blueprints that can be used with a three-dimensional printer to automatically generate firearms and firearms components." Def. Br. at 13. They continue: "[t]he computer files subject to the Instructions Ban function to automatically produce such weapons or their counterparts." *Id.* Defendants conclude, therefore, that "[w]hatever expressive value may exist in the theory of these files, they function to create a firearm." *Id.*

This argument strains credulity. Defendants appear to suggest that the computer files themselves are simply "blueprints" that automatically generate firearms and firearms components, and therefore that they have no *bona fide* expressive value simply because they help individuals assemble a firearm. Under this logic, the government could ban *any* computer files relating to *any* subject, simply because the files in question serve as an aid to create an end product. In addition, even if the Court were to accept this deeply troubling argument, the process of assembling or self-manufacturing a firearm involves various levels of individual choice and customization, and application of individual skill, and is thus expressive. *See generally* accompanying Reply Declaration of Rigby.[12] Indeed, individuals who assemble or self-manufacture firearms do not merely follow blueprints in automatic fashion; rather, they use computer files as a guide for designing and implementing their own expressive ideas to the 3D-printed base products.[13] *Id.* Thus, despite Defendants' tortured logic, the fact of the matter is that the Instructions Ban *does* punish the *idea* intended to be communicated or conveyed—information relating to creation of a firearm, as Defendants concede, and is thus content-based. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry*, 485 U.S. 312, 320-21 (1988).

B. The Instructions Ban is Overbroad

As Defendants concede, where the law in question is "so broad that it is incapable of any permissible application, courts may allow a party to bring a facial challenge to a statute because it threatens others not before the court." Def. Br. at 16 (citing *N.Y. State Club Ass'n v. City of New*

[12] *See also* the Declaration of John Walker, an industry expert in computer-assisted design, attached as Exhibit 1 to the Declaration of Bradley P. Lehman being submitted contemporaneously herewith. Mr. Walker's declaration was originally submitted in support of the plaintiffs' motion for a preliminary injunction in *Defense Distributed, et al. v. Grewal*, No. 3:19-cv-04753-AET-TJB (D.N.J.).

[13] Moreover, even if individuals were merely following "blueprints," it would not lessen the expressive content of the blueprints, which are entitled to copyright protection as "pictorial, graphic, and sculptural works" under the United States Copyright Act of 1976. *See, e.g.*, 17 U.S.C. § 101, 102, and 113.

York, 487 U.S. 1, 14 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 613). That is precisely the case here. Defendants fail to explain how the Instructions Ban is anything other than a broadside attack against the free speech rights of *all* Delaware citizens who would engage in the forbidden expression (distribution of firearms blueprints) but for the Instructions Ban, including Plaintiff Rigby. Where an overbroad law—in this case, the Instructions Ban—"may deter constitutionally protected speech," the fact that it violates the rights of individuals other than one of the plaintiffs properly gives rise to an overbreadth challenge. *See United States v. Stevens*, 559 U.S. 460, 484 (2010).

C. The Instructions Ban is a Prior Restraint

Defendants attempt to portray the Instructions Ban solely as a punishment *after* the fact and thus not a prior restraint. Def. Br. at 15. Even if the punishment (criminal prosecution) occurs after the prohibited act (distribution of firearms blueprints), the Instructions Ban is still a prior restraint because it requires—in advance, and upon pain of criminal sanction—that Rigby and similarly situated Delaware citizens *never* distribute digital firearms information.

IV. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

Defendants have offered nothing concrete in their Answering Brief to meaningfully refute the fact that Plaintiffs face an ongoing deprivation of multiple constitutional rights, which constitutes irreparable harm. *See, e.g., K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013).

V. The Balance of the Equities Favors the Grant of Preliminary Injunctive Relief

It is well-settled that "the enforcement of an unconstitutional law vindicates no public interest." *K.A. ex rel. Ayers*, 710 F.3d at 114. Delaware's heavy-handed Bans are not needed to ensure public safety, particularly where less restrictive alternatives were and are available.

Respectfully submitted,

Dated: December 8, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN RIGBY, ALAN KNIGHT, and FIREARMS POLICY COALITION, INC. Plaintiffs, v. JOHN CARNEY, Governor of Delaware; KATHY JENNINGS, Attorney General of Delaware; Defendants.	C.A. No. 1:21-cv-01523-MN

DECLARATION OF JOHN RIGBY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY AND PERMANENT INJUNCTION

1. I, John Rigby, am a Plaintiff in the above-titled action. I am over the age of 18, have personal knowledge of the facts and events referred to in this Declaration, and am fully competent to testify as to the matters stated below.

2. I submit this Declaration, together with the accompanying Reply Brief, in further support of Plaintiffs' motion for preliminary and permanent injunctive relief.

3. I am a resident and citizen of the State of Delaware, residing in Sussex County, Delaware.

4. I am a member of the Plaintiff Firearms Policy Coalition, Inc.

5. I hereby incorporate by reference all of my previous statements in my original Declaration dated November 1, 2021 (D.I. 7), as if fully set forth herein.

6. I legally own a self-manufactured firearm ("SMF")—a Glock-compatible[1] handgun, which I completed from a Polymer80[2] kit, and which consists of firearms predecessor materials and non-firearm objects acquired before the enactment of HB 125 by the State of Delaware. Glock-compatible handguns are commonly owned.

7. I have removed my SMF to a location outside of Delaware in a legal manner due to my reasonable fear of criminal sanction under HB 125.

8. Additionally, I own and possess a 3D Printer in Delaware, am familiar with the assembly and/or self-manufacturing of firearms, and am familiar with the process of 3D printing. However, I have not yet been able to use my 3D Printer for the purpose of assembly and/or self-manufacture of firearms due to Delaware's enactment of HB 125.

9. I have legally modified in excess of ten firearms, have legally repaired in excess of twenty firearms, and I have legally assembled numerous AR-15-style rifles.

10. Irrespective of the method used, the process of assembling or self-manufacturing firearms involves elements of aesthetic and design choices, as well as specialized knowledge and skill.

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[1] *See, e.g.*, https://www.polymer80.com/PF940v2-80-Full-Size-Frame-Kit-_2 ("The PF940v2™ is compatible with components for 3-pin 9mm [Glock®] G17, 34, 17L; .40S&W G22, 35, 24; and .357Sig G31.") (last accessed Dec. 8, 2021). These Glock-platform handguns are some of the most common in the United States, and *Heller*'s "hardware test" is not limited to the original designer or a specific manufacturer.

[2] "About Polymer80," online at https://www.polymer80.com/about-us: "Polymer80, Inc. designs and develops innovative firearms and after-market accessories that provide ways for our customer to participate in the build process, while expressing their right to bear arms. This provides a fun learning experience and a greater sense of pride in their completed firearm, strengthening our brand loyalty. We summarize this with our motto of 'Engage Your Freedom.'" (last accessed Dec. 8, 2021). Polymer80, Inc., is presently located in Dayton, Nevada.

11. Indeed, some individuals who self-manufacture firearms, including myself, do not just follow "blueprints " (as Defendants refer to them) in automatic fashion, but, rather, we use (and would use) the content of the forbidden computer files as a guide for designing and implementing our own expressive ideas to the 3D-printed base products.

12. For multiple reasons, the process of assembling or self-manufacturing a firearm using a 3D Printer is *not* a straightforward matter of reading blueprints, pushing a button, and ending up with a completed firearm, as Defendants attempt to argue.

13. First, the 3D printing process is generally not used to assemble or manufacture *fully functional* firearms capable of actually discharging rounds and with a reasonable level of safety for the operator. Rather, the 3D printing process is only used to create *parts* of fully functional and safely operated firearms, typically using plastic. An individual may use a 3D Printer to create one or more components of a firearm and must then complete assembly or manufacture of the firearm using other components purchased separately or as part of a kit. For example, even if an individual were to create an AR-15 lower receiver using a 3D Printer, the individual would still have to separately acquire parts for the lower receiver, an upper receiver and parts for the upper receiver, a barrel, and numerous other components that either cannot be created using a 3D Printer or would not be reasonably safe for use if created using a 3D Printer. This process necessarily involves varying levels of individual choice and customization, and application of individual skill, and therefore individual expression.

14. Second, even to the extent an individual uses a 3D Printer to create a component of a fully functional firearm, the individual may modify the computer instructions being used to create that component if the instructions are not to the individual's satisfaction. For example, if I found in computer-based instructions for the assembly of a particular firearm that the grip angle of the

firearm was not to my specifications, I would modify the instructions before inputting those instructions into my 3D Printer. Again, this also involves individual choice and customization, and application of individual skill, and therefore individual expression.

15. Third, even after one has completed assembly or manufacture of a fully functional firearm, there are additional design choices that the individual can make, including modification of the firearm's texture and/or the firearm's finish to serve practical or perhaps purely decorative purposes.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States.

John Rigby

December 8, 2021
DATE

IN THE UNITED STATES DISTRICT COURT
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JOHN RIGBY, ALAN KNIGHT, and FIREARMS POLICY COALITION, INC. Plaintiffs, v. JOHN CARNEY, Governor of Delaware; KATHY JENNINGS, Attorney General of Delaware; Defendants.	C.A. No. 1:21-cv-01523-MN

DECLARATION OF BRADLEY P. LEHMAN IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY AND PERMANENT INJUNCTION

Bradley P. Lehman, under penalty of perjury, states:

1. I have personal knowledge of the facts set forth in this Declaration; I am competent to testify as to all matters stated in this Declaration; and, I am not under any legal disability that would preclude me from so testifying. If called upon to do so, I would testify to the facts set forth in this Declaration.

2. I am an attorney with Gellert, Scali, Busenkell & Brown, LLC, counsel for the Plaintiffs in this action. I make this Declaration in connection with Plaintiffs' Motion for a Preliminary and Permanent Injunction.

3. Attached to this Declaration as Exhibit 1 is a true and correct copy of the Declaration of John Walker as originally submitted under penalty of perjury to the United States District Court for the District of New Jersey on February 20, 2019, in *Defense Distributed, et al. v. Grewal*, No. 3:19-cv-04753-AET-TJB (D.N.J.).

Dated: December 8, 2021

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EXHIBIT 1

DECLARATION OF JOHN WALKER

I, John Walker, pursuant to 28 U.S.C. § 1746 hereby declare and say as follows:

1. I was a co-founder of Autodesk, Inc. (ADSK:NASDAQ), developer of the AutoCAD® computer-aided design software. I was president, chairman, and chief executive officer from the incorporation of the company in April 1982 until November 1986, more than a year after its initial public stock offering in June 1985. I continued to serve as chairman of the board of directors until April 1988, after which I concentrated on software development.

2. Autodesk is the developer of the AutoCAD® software, one of the most widely-used computer-aided design and drafting software packages in the world. AutoCAD allows creation of two- and three-dimensional models of designs and, with third-party products, their analysis and fabrication.

3. During the start-up phase of Autodesk, I was one of the three principal software developers of AutoCAD and wrote around one third of the source code of the initial release of the program.

4. Subsequently, I contributed to the development of three-dimensional extensions of the original AutoCAD drafting system, was lead developer on AutoShade[tm], which produced realistic renderings of three-dimensional models, and developed the prototype of integration of constructive solid geometry into AutoCAD, which was subsequently marketed as the AutoCAD Advanced Modeling Extension (AME).

5. I retired from Autodesk in 1994 and since have had no connection with the company other than as a shareholder with less than 5% ownership of the company's common stock.

Design Versus Fabrication

6. From my experience at Autodesk, I became aware of the distinction between the design of an object and the fabrication of that object from the design. For example, the patent drawings and written description in firearms patents provide sufficient information "as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention" [35 U.S.C. § 112 (a)]. But this is in no way a mechanical process. One must interpret the design, choose materials suitable for each component, and then decide which manufacturing process (milling, stamping, turning, casting, etc.) is best to

produce it, including steps such as heat-treating and the application of coatings. This process is called "production planning", and it is a human skill that is required to turn a design, published in a patent description or elsewhere, into a physical realisation of the object described by that design.

7. A three-dimensional model of an object specifies its geometry but does not specify the materials from which it is fabricated, how the fabrication is done, or any special steps required (for example, annealing or other heat treating, coatings, etc.) before the component is assembled into the design.

8. Three-dimensional models of physical objects have many other applications than computer-aided manufacturing. Three-dimensional models are built to permit analysis of designs including structural strength and heat flow via the finite element method. Models permit rendering of realistic graphic images for product visualisation, illustration, and the production of training and service documentation. Models can be used in simulations to study the properties and operation of designs prior to physically manufacturing them. Models for finite element analysis have been built since the 1960s, decades before the first additive manufacturing machines were demonstrated in the 1980s.

9. Some three-dimensional models contain information which goes well beyond a geometric description of an object for manufacturing. For example, it is common to produce "parametric" models which describe a family of objects which can be generated by varying a set of inputs ("parameters"). For example, a three-dimensional model of a shoe could be parameterised to generate left and right shoes of various sizes and widths, with information within the model automatically adjusting the dimensions of the components of the shoe accordingly. The model is thus not the rote expression of a particular manufactured object but rather a description of a potentially unlimited number of objects where the intent of the human designer, in setting the parameters, determines the precise geometry of an object built from the model.

10. A three-dimensional model often expresses relationships among components of the model which facilitate analysis and parametric design. Such a model can be thought of like a spreadsheet, in which the value of cells are determined by their mathematical relationships to other cells, as opposed to a static table of numbers printed on paper.

Additive Manufacturing ("3D Printing")

11. Additive manufacturing (often called, confusingly, "3D [for three-dimensional] printing") is a technology by which objects are built to the specifications of a three-dimensional computer model by a device which fabricates the object by adding material according to

the design. Most existing additive manufacturing devices can only use a single material in a production run, which limits the complexity of objects they can fabricate.

12. Additive manufacturing, thus, builds up a part by adding material, while subtractive manufacturing (for example, milling, turning, and drilling) starts with a block of solid material and cuts away until the desired part is left. Many machine shops have tools of both kinds, and these tools may be computer controlled.

13. Additive manufacturing is an alternative to traditional kinds of manufacturing such as milling, turning, and cutting. With few exceptions, any object which can be produced by additive manufacturing can be produced, from paper drawings or their electronic equivalent, with machine tools that date from the 19th century. Additive manufacturing is simply another machine tool, and the choice of whether to use it or other tools is a matter of economics and the properties of the part being manufactured.

14. Over time, machine tools have become easier to use. The introduction of computer numerical control (CNC) machine tools has dramatically reduced the manual labour required to manufacture parts from a design. The computer-aided design industry, of which Autodesk is a part, has, over the last half-century, reduced the cost of going from concept to manufactured part, increasing the productivity and competitiveness of firms which adopt it and decreasing the cost of products they make. Additive manufacturing is one of a variety of CNC machine tools in use today.

15. It is in no sense true that additive manufacturing allows the production of functional objects such as firearms from design files without human intervention. Just as a human trying to fabricate a firearm from its description in a patent filing (available in electronic form, like the additive manufacturing model), one must choose the proper material, its treatment, and how it is assembled into the completed product. Thus, an additive manufacturing file describing the geometry of a component of a firearm is no more an actual firearm than a patent drawing of a firearm (published worldwide in electronic form by the U.S. Patent and Trademark Office) is a firearm.

Computer Code and Speech

16. Computer programs and data files are indistinguishable from speech A computer file, including a three-dimensional model for additive manufacturing, can be expressed as text which one can print in a newspaper or pamphlet, declaim from a soapbox, or distribute via other media. It may be boring to those unacquainted with its idioms, but it is speech nonetheless. There is no basis on which to claim that computer code is not subject to the same protections as verbal speech or

printed material.

17. For example, the following is the definition of a unit cube in the STL language used to to express models for many additive manufacturing devices.

```
solid cube_corner
  facet normal 0.0 -1.0 0.0
    outer loop
      vertex 0.0 0.0 0.0
      vertex 1.0 0.0 0.0
      vertex 0.0 0.0 1.0
    endloop
  endfacet
endsolid
```

This text can be written, read, and understood by a human familiar with the technology as well as by a computer. It is entirely equivalent to a description of a unit cube written in English or another human language. When read by a computer, it can be used for structural analysis, image rendering, simulation, and other applications as well as additive manufacturing. The fact that the STL language can be read by a computer in no way changes the fact that it is text, and thus, speech.

18. As an additional example, the following is an AutoCAD DXF[tm] file describing a two-dimensional line between the points (0, 0) and (1, 1), placed on layer 0 of a model.

```
0
SECTION
  2
ENTITIES
  0
LINE
  8
0
 10
0.0
20
0.0
11
1.0
21
1.0
  0
ENDSEC
  0
EOF
```

Again, while perhaps not as easy to read as the STL file until a human has learned the structure of the file, this is clearly text, and thus speech.

19. It is common in computer programming and computer-aided design to consider computer code and data files written in textual form as simultaneously communicating to

humans and computers. Donald E. Knuth, professor emeritus of computer science at Stanford University and author of "The Art of Computer Programming", advised programmers:

> "Instead of imagining that our main task is to instruct a computer what to do, let us concentrate rather on explaining to human beings what we want a computer to do."[Knuth 1992]

A design file, such as those illustrated above in paragraphs 17 and 18 is, similarly, a description of a design to a human as well as to a computer. If it is a description of a physical object, a human machinist could use it to manufacture the object just as the object could be fabricated from the verbal description and drawings in a patent.

20. Computer code has long been considered text indistinguishable from any other form of speech in written form. Many books, consisting in substantial part of computer code, have been published and are treated for the purpose of copyright and other intellectual property law like any other literary work. For example the "Numerical Recipes"[Press] series of books presents computer code in a variety of programming languages which implements fundamental algorithms for numerical computation.

Conclusions

21. There is a clear distinction between the design of an artefact, whether expressed in paper drawings, a written description, or a digital geometric model, and an object manufactured from that design.

22. Manufacturing an artefact from a design, however expressed, is a process involving human judgement in selecting materials and the tools used to fabricate parts from it.

23. Additive manufacturing ("3D printing") is one of a variety of tools which can be used to fabricate parts. It is in no way qualitatively different from alternative tools such as milling machines, lathes, drills, saws, etc., all of which can be computer controlled.

24. A digital geometric model of an object is one form of description which can guide its fabrication. As such, it is entirely equivalent to, for example, a dimensioned drawing (blueprint) from which a machinist works.

25. Digital geometric models of objects can be expressed as text which can be printed on paper or read aloud as well as stored and transmitted electronically. Thus they are speech.

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Pascal	978-0-521-37516-0

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 22, 2018.

John Walker