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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 DANIEL J. BERNSTEIN,

11 Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT
14 OF COMMERCE, et al.,

15 Defendants.

C 95-00582 MHP

**PLAINTIFF'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN REPLY TO
DEFENDANTS' OPPOSITION**

Date: October 7, 2002

Time: 2:00 p.m.

Place: Courtroom 15, 18th Floor

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1 **I. INTRODUCTION**

2 Five years ago, the Defendants¹ repeatedly claimed that their regulations were much
3 less restrictive than Prof. Bernstein’s analysis revealed.² They take the same approach now.³

4 The Defendants’ claim did not, and does not, withstand scrutiny. There is actually no
5 serious dispute as to the meaning of the Export Administration Regulations (hereinafter “EAR”)
6 and the effect of those regulations upon Prof. Bernstein.⁴ There is no dispute that, for example,
7 when Prof. Bernstein shows “EI” documents to a foreigner, whether in private discussions or
8 in public web pages, the government demands copies of those documents.⁵

9 The Defendants attempted, and attempt, to bamboozle the Court by repeatedly citing
10 irrelevant exceptions in the regulations.⁶ As already discussed in Prof. Bernstein’s opening

11 ¹ Recent filings have not stated the complete list of defendants. Prof. Bernstein originally
12 sued State, ACDA, Defense, Commerce, NSA, and various individuals; he subsequently
13 added Justice, CIA, and Energy as defendants. *See* Complaint (1996) (docket no. 1);
14 First Supplemental Complaint (1997) (docket no. 118). The parties agreed to dismiss
15 the individuals; furthermore, this Court dismissed Justice, CIA, Energy, and State. *See*
16 *Stipulation Dismissing Claims* (1996) (docket no. 38); *Bernstein v. Department of State*,
17 974 F. Supp. 1288, 1309 (N.D. Cal. 1997). Evidently the current defendants are ACDA,
18 Defense, Commerce, and NSA. The Court’s reasoning would also justify dismissing
19 ACDA and Defense, leaving Commerce and NSA as the defendants.

20 ² *See, e.g.*, Defendants’ Opposition (1996) (docket no. 71), at 8:16–17 (“This is plaintiff’s
21 own theoretical speculation”); *Id.*, at 7:22–26 (“The government has never determined
22 that plaintiff must obtain a license before teaching a class on cryptography”); Defen-
23 dants’ Opposition (1997) (docket no. 132), at 7:13–14 (“Plaintiff’s construction of the
24 regulations is divorced from reality”).

25 ³ *See, e.g.*, Defendants’ Motion to Dismiss Plaintiff’s Second Supplemental Complaint or,
26 in the Alternative, for Summary Judgment, and Memorandum of Points and Authorities
27 (2002) (docket no. 190) (hereinafter “Defs.’ Motion”), at 11:11–12 (“both the governing
28 regulations and the authority responsible for enforcing them have explicitly advised him
to the contrary”); Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment
(2002) (docket no. 195) (hereinafter “Defs.’ Opp.”) at 3:20–22 (“based on his own
unsupported theories, not on how the governing authority applies its regulation”).

⁴ *See* Plaintiff’s Memorandum of Points and Authorities in Support of Plaintiff’s Motion
for Summary Judgment (2002) (docket no. 184) (hereinafter “Pl.’s Motion”), at 3:13 to
13:12 (analyzing impact of EAR).

⁵ *See, e.g.*, Defs.’ Motion, at 4:13–14 (“must notify the government” of publication); *Id.*,
at 22:26–28 (alleging an “even more compelling” interest in private communication);
Pl.’s Motion, at 5:20 to 10:9.

⁶ *See, e.g.*, Defendants’ Opposition (1997) (docket no. 132), at 7:8–10 (“mere teaching
or discussion about cryptography, including in an academic setting, is not sufficient to
establish” the §744.9(a) intent). Current examples are discussed later in this brief.

1 regulatory analysis, those exceptions simply *do not apply* to the activities at issue.⁷

2 For example, the Defendants observe that 15 C.F.R. §736.2(b)(1) applies only to items
3 of “U.S. origin,” not foreign-made items.⁸ This observation does not change Prof. Bernstein’s
4 regulatory analysis; it was already mentioned in Pl.’s Motion, at 6:18–20. The Defendants ignore
5 the undisputed facts of Prof. Bernstein’s October 2001 trip to Canada, in which Prof. Bernstein
6 refrained from disclosures of U.S.-origin “EI” software.⁹

7 As another example, the Defendants attempt to defend EAR’s preferential treatment
8 of “printed materials”¹⁰ by pointing out that various activities are now allowed by 15 C.F.R.
9 §740.13(e). *See* Defs.’ Opp., at 18:26–28. But the addition of §740.13(e) did not change the
10 fact that “printed materials” have preferential treatment.

11 The bottom line is that Prof. Bernstein wishes to engage in many activities prohibited
12 by EAR. Prof. Bernstein has refrained from those activities out of fear of EAR. He will be
13 forced to continue doing so until the regulations are changed or struck down.

14 **II. PROCEDURAL HISTORY**

15 The Ninth Circuit, affirming this Court, held that EAR was an unconstitutional prior
16 restraint. *Bernstein v. Department of Justice*, 176 F.3d 1132, 1145 (9th Cir. 1999), *reh’g en*
17 *banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999). Judge Nelson’s dissent
18 from the Ninth Circuit decision was based largely on a Northern District of Ohio opinion; that

19 ⁷ *See* Pl.’s Motion, at 3:13 to 13:12; Bernstein Decl. in Support, ¶¶113–162.

20 ⁸ *See* Defs.’ Motion, at 6:12–13 (“encryption software outside the United States”); *Id.*,
21 at 10:22–25. Note that there is no U.S.-origin requirement in 15 C.F.R. §744.9(a).
See Pl.’s Motion, at 5:26 to 6:16; *see also Id.*, at 11:9–17 (comparing §744.9(a) to
22 §736.2(b)(1)).

23 ⁹ *See* Pl.’s Motion, at 7:10–18; Bernstein Decl. in Support, ¶¶122–128. Of course, it
24 would have been possible for Prof. Bernstein to disclose SPRAY to the Defendants
before his trip, but this disclosure would not have covered the experimental variants of
25 SPRAY that Prof. Bernstein prepared on the way to Canada. *See* Bernstein Decl. in
Support, ¶123; *see generally Id.*, ¶22 (discussing timing of conference activities).

26 ¹⁰ *See* 15 C.F.R. §734.3(b). This treatment is relevant to, *inter alia*, the credibility of
27 the government’s allegations of “compelling interest.” *See* Pl.’s Motion, at 20:9–22;
28 Plaintiff’ Opposition to Defendants’ Motion for Summary Judgment (2002) (docket
no. 201) (“Pl.’s Opp.”) at 16:8–12; *Florida Star v. B. J. F.*, 491 U.S. 524, 540 (1989);
Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979); *First Nat. Bank of Boston*
v. Bellotti, 435 U.S. 765, 793 (1978); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

1 opinion was subsequently reversed by a unanimous Sixth Circuit panel. *See Junger v. Daley*,
2 209 F.3d 481 (6th Cir. 2000). The Ninth Circuit did not comment on the reasons for granting
3 rehearing. *See* 192 F.3d 1308 (9th Cir. 1999).

4 The Defendants complain that Prof. Bernstein “cites an appellate decision that no
5 longer exists.”¹¹ However, the Defendants have repeatedly cited Judge Nelson’s dissent. *See*
6 Defs.’ Motion, at 12:23–25 (asserting, without evidence, that Prof. Bernstein’s “emphasis on
7 facial challenges” contributed to the Ninth Circuit’s decision to grant rehearing); Defs.’ Opp.,
8 at 15:25–28. Even worse, the Defendants have failed to mention *Junger*.

9 **III. CURRENT REGULATORY FRAMEWORK AND IMPACT**

10 **A. Plaintiff’s Activities**

11 Cryptography is a large part of Prof. Bernstein’s work. *See* Bernstein Decl. in Support,
12 ¶¶10, 30–40, 49–51, 72–77, 78–87, 101–107. It would be an even larger part in the absence
13 of EAR. *See* Bernstein Decl. in Support, ¶108; Bernstein Decl. re Cryptography, ¶3. In the
14 absence of EAR, Prof. Bernstein would “export” a wide variety of “encryption items” without
15 government notification or licensing. *See* Bernstein Decl. in Support, ¶¶113–162; Bernstein
16 Decl. re Cryptography, ¶¶5–7.

17 For example, in the absence of EAR, Prof. Bernstein would post Snuffle to sci.crypt
18 for worldwide distribution, without contacting the government; he would place SPRAY on
19 his public web pages, without contacting the government; he would modify qmail to protect
20 messages against eavesdropping and forgery, and would place the modified version on his web
21 pages, again without contacting the government; he would have placed nistp224 on his public
22 web pages without contacting the government; and he would have engaged in collaborative
23 work based on SPRAY with an Irish colleague at the ECC 2001 conference in Canada. *See*
24 Bernstein Decl. in Support, ¶¶88–100, 83–87, 57–64, 136, 78–82, 122–127.

25 ¹¹ Defs.’ Opp., at 3:6–7. The Defendants also assert that Prof. Bernstein has cited the
26 panel opinion “as if it were circuit precedent.” Defs.’ Opp., at 3:12. That assertion is
27 incorrect. Prof. Bernstein has indicated the subsequent history in every full citation, as
28 required by the Bluebook. *See, e.g.,* Pl.’s Motion, at 3:6–8. The Defendants cannot
seriously believe that this Court is unaware of the status of the Ninth Circuit opinion.

1 All of these items are covered by 15 C.F.R. §774, Supplement 1, ECCN 5D002. *See*
2 Pl.’s Motion, at 4:19–25; Bernstein Decl. re Cryptography, ¶¶8–21. Prof. Bernstein will provide
3 many more examples of “EI” software if this case reaches trial.

4 The Defendants assert that SPRAY and nistp224 are not controlled under 5D002. *See*
5 Second Kritzer Decl., ¶¶6, 8. One possible interpretation of this assertion is that the Defendants
6 are using their power to “classify” particular items, specifically SPRAY and nistp224, as being
7 outside 5D002. Unfortunately, ad-hoc decisions do not solve Prof. Bernstein’s problem; SPRAY
8 and nistp224 are merely two examples out of many. *See* Bernstein Decl. re Cryptography, ¶5.

9 Another possible interpretation is that the Defendants are proposing a narrow construc-
10 tion of 5D002, so as to exclude documents such as SPRAY and nistp224, even though this
11 would be contrary to their stated encryption policy. *See* Bernstein Decl. re Cryptography,
12 ¶¶22–23. Prof. Bernstein would welcome this development. Unfortunately, the Defendants
13 have not articulated any such construction.

14 **B. Plaintiff’s Intent**

15 There are two notable effects of publishing and otherwise communicating instructions:
16 first, some receivers follow the instructions; second, some receivers improve the instructions.
17 *See* Bernstein Decl. re Instructions, ¶¶2–8.

18 The Defendants suggest that Prof. Bernstein is concerned solely with the second effect
19 (“scientists” or “programmers”) and is blithely ignoring the horrors of the first effect (“users”).
20 *See, e.g.*, Defs.’ Motion, at 19:14–16; Defs.’ Opp., at 18:2–5.

21 That suggestion is incorrect. Prof. Bernstein has, throughout this case, indicated his
22 desire for both of these effects: for his instructions to be improved, *and* for his instructions
23 to be followed. *See, e.g.*, Declaration of Daniel J. Bernstein (1996) (docket no. 63), ¶10 (“I
24 hope that my publication of Snuffle will help other people *protect their computers from attack*;
25 communicate my ideas to others who might find them interesting or important contributions to
26 the field; and subject Snuffle to outside review, testing, evaluation, and modification as part of
27 the normal interchange of scientific and technological ideas”) (emphasis added).

1 **C. The Current Encryption Licensing System**

2 According to the Defendants’ encryption policy, “most encryption products require a
3 one-time technical review and classification prior to export.” *See* Bernstein Decl. in Opposition,
4 ¶5 (quoting policy from web page); Bernstein Decl. re Government Policy, ¶¶2–4.

5 EAR currently has two licensing mechanisms for “EI” documents. One mechanism,
6 which EAR calls “classification,” allows documents to be published, after review and approval
7 by government censors.¹² Another mechanism, which EAR calls “licensing,” allows documents
8 to be sent to specific recipients, after review and approval by government censors.

9 The Defendants are, by their own admission, actively operating both mechanisms. *See*
10 Pl.’s Opp., at 4:27–28. The Defendants are misrepresenting the facts when they suggest that
11 the “EI” licensing mechanisms have disappeared. *See* Defs.’ Opp., at 6:3–4.

12 **D. Construction Notes**

13 Prof. Bernstein’s opening brief included a detailed regulatory analysis. *See* Pl.’s Motion,
14 at 3:13 to 13:12. There was also some discussion of EAR in his opening declaration: his fear
15 of prosecution is based on the plain meaning of EAR.¹³

16 There is, of course, a difference between a brief and a declaration. Prof. Bernstein was
17 careful to avoid legal analysis in his declaration: “My statements in this declaration about the
18 effects of [EAR] . . . are my descriptions of the literal meaning of EAR. They are not meant as
19 statements about the legal effect of EAR.” Bernstein Decl. in Support, ¶2.

20 The Defendants blatantly misquote this statement. They omit the crucial phrase “in this
21 declaration”; they pretend that the regulatory analysis in Pl.’s Motion was not meant to describe

22 ¹² *See* 15 C.F.R. §740.17(d); §740.17(a); §740.17(b)(2); §740.17(e). Documents can be
23 sent to certain countries, such as France, as soon as the government acknowledges
24 the classification request; acknowledgments are provided quickly and without review.
25 However, publishers must wait before sending documents to the Bahamas, Iceland,
Jamaica, Mexico, the Vatican, et al. Publishers can assume approval if they do not hear
anything for 30 days, but the censors are free to extend this time or deny the request.

26 ¹³ *See* Bernstein Decl. in Support, ¶¶113–162. Fear of prosecution is relevant to standing.
27 *See Babbitt v. Farm Workers*, 442 U.S. 289, 302 (1979) (standing because the plaintiffs
28 were “not without some reason in fearing prosecution”); *Bland v. Fessler*, 88 F.3d 729,
737 (9th Cir. 1996) (standing because of fear of enforcement); *Virginia v. American
Booksellers Assn., Inc.*, 484 U.S. 383, 392–393 (1988) (same).

1 the legal effect of EAR; they assert that this strawman “presents fundamental jurisdictional
2 concerns”; and they put these statements at the top of their brief. *See* Defs.’ Opp., at 1:5–15.
3 The Defendants later suggest that Prof. Bernstein’s regulatory analysis does not match “how
4 the governing authority applies its regulation.” *See* Defs.’ Opp., at 3:20–22.

5 Given these comments, one would expect to see the Defendants argue that the judicial
6 construction of EAR should differ in various identified ways from the plain meaning of EAR
7 (and, perhaps, to see them explain why the Executive Branch has not simply changed EAR to
8 match the desired construction). But Defs.’ Opp. does not articulate any such proposals.

9 **ARGUMENT**

10 **IV. THE PLAINTIFF HAS STANDING**

11 **A. The Plaintiff Has Standing to Challenge the Notification Requirements**

12 Prof. Bernstein’s basic standing argument is straightforward. EAR requires notification
13 for many of Prof. Bernstein’s planned activities.¹⁴ Prof. Bernstein plans to engage in these
14 activities without notification.¹⁵ Prof. Bernstein has a reasonable fear of prosecution: the
15 Defendants take notification seriously, and they certainly have not disavowed prosecution.¹⁶

16 ¹⁴ *See* Pl.’s Motion, at 5:20 to 10:9. Note that any post-Complaint actions that the De-
17 fendants take to reduce EAR’s effect are irrelevant to ripeness. Furthermore, such
18 actions do not produce mootness unless it is “ ‘absolutely clear that the allegedly
19 wrongful behavior could not reasonably be expected to recur’ ”; this is a “stringent”
20 standard. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,
21 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export*
22 *Assn., Inc.*, 393 U.S. 199, 203 (1968)); *see also City of Mesquite v. Aladdin’s Castle,*
23 *Inc.*, 455 U.S. 283, 289 (1982) (holding that repeal of a law does not moot a challenge to
24 the law). For the same reason, Prof. Bernstein’s earlier claims against ITAR and EAR
25 are not moot, despite the improvements that the Defendants have made since 1995. *See*
26 Bernstein Decl. re Government Policy, ¶¶5–10.

27 ¹⁵ *See* Bernstein Decl. re Cryptography, ¶¶2–7. The Defendants may argue that they have
28 already received adequate notification of Snuffle and other documents filed with the
Court, and that the Court cannot consider Prof. Bernstein’s plans involving documents
that have not been filed. This argument must be rejected: it would immunize notification
requirements against declaratory First Amendment challenges, contrary to the case law.
See Watchtower Bible and Tract Soc’y, Inc. v. Village of Stratton, 122 S. Ct. 2080, 2002
U.S. LEXIS 4422 (2002).

¹⁶ *See* Pl.’s Opp., at 4:2 to 9:4; *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that being
“threatened with prosecution” is not required for standing); *Chamber of Commerce v.*
Federal Election Comm’n, 69 F.3d 600 (D.C. Cir. 1995).

1 **i. Prohibition of Collaboration at Scientific Conferences**

2 Prof. Bernstein plans to engage in collaborative cryptographic work with his non-
3 American colleagues at scientific conferences: disclosing U.S.-origin “EI” software (and
4 foreign-built variants) to his colleagues outside the United States, helping his colleagues develop
5 “EI”-type software outside the United States, and transferring “EI” software to his colleagues
6 inside the United States, all without notifying the government. *See* Pl.’s Motion, at 5:20 to 8:7.
7 This plan violates 15 C.F.R. §736.2(b)(1), §736.2(b)(2), §744.9(a), and §764.2(e). *Id.*

8 The Defendants observe that—as already pointed out in Prof. Bernstein’s regulatory
9 analysis—EAR’s definition of “published information” includes information “released” at an
10 “open gathering,” and 15 C.F.R. §744.9(a) has an exception “if the U.S. person providing the
11 assistance” is “entitled to export” the software. *See* 15 C.F.R. §734.7(a)(4); Pl.’s Motion, at
12 12:13–17, 6:3–4; Defs.’ Opp., at 7:7–11, 7:16–17. This has no relevance to Prof. Bernstein’s
13 plan. One is not “entitled to export” “EI” software, even if the software is “published,” unless
14 a copy (or equivalent) has been sent to the government. *See* Pl.’s Motion, at 6:4–13.¹⁷

15 The Defendants also observe that—as already pointed out in Prof. Bernstein’s regula-
16 tory analysis—“the mere teaching or discussion of information about cryptography . . . would
17 not establish” the §744.9(a) intent. *See* Defs.’ Opp., at 7:11–15. This has no relevance to
18 Prof. Bernstein’s plan. Prof. Bernstein’s intent has already been established by other means.
19 *See* Bernstein Decl. in Support, ¶127; Pl.’s Motion, at 6:14–16.

20 The Defendants also state that “academic discussion” is not regulated. *See* Defs.’ Opp.,
21 at 7:26 to 8:2, 8:6–9. This has no relevance to Prof. Bernstein’s plan. The Defendants’ notion
22 of “academic” does not include the activities at issue. *See* Pl.’s Opp., at 8:6 to 9:4.

23 The Defendants also characterize the difficulty of contemporaneous notification as
24 “dubious.”¹⁸ Prof. Bernstein has, however, introduced undisputed evidence demonstrating this
25 difficulty. *See* Bernstein Decl. in Support, ¶¶113–118; Bernstein Decl. re Conferences, ¶¶2–8.

26 ¹⁷ Note that some work is never published. *See, e.g.*, Bernstein Decl. in Support, ¶133.

27 ¹⁸ Defs.’ Opp., at 7:21–23. Evidently the Defendants are alluding to the prudential ele-
28 ments of ripeness, particularly the “hardship to the parties of withholding court consid-
eration.” *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

1 **ii. Notification Requirement for Private Email**

2 Private email is closely analogous to in-person communication at scientific conferences.
3 The main difference is in Prof. Bernstein’s reason for refusing to contemporaneously notify the
4 government: viz., privacy, rather than practical impossibility. *See* Pl.’s Motion, at 8:8–20.

5 **iii. Notification Requirement for Web Publications**

6 Web publications are another closely analogous situation. The main difference is, again,
7 in Prof. Bernstein’s reason for refusing to notify the government: viz., the cost of determining
8 which of the changes to his web pages would require notification under EAR.¹⁹

9 **B. The Plaintiff Has Standing to Challenge the Licensing Requirements**

10 “In the area of freedom of expression, it is well established that one has standing to
11 challenge a statute on the ground that it delegates overly broad licensing discretion to an
12 administrative office, whether or not his conduct could be proscribed by a properly drawn
13 statute, and whether or not he applied for a license.” *Freedman v. Maryland*, 380 U.S. 51, 56
14 (1965).

15 Throughout this case, the Defendants have failed to understand this basic principle.
16 They have repeatedly mischaracterized Prof. Bernstein’s first Complaint as a challenge to a
17 specific censorship event, rather than a challenge to the power of the censor.²⁰ It is true

18 ¹⁹ The Defendants misstate the issue when they say that Prof. Bernstein is complaining
19 about sending “as many as three thousand notices per year.” *See* Defs.’ Opp., at 8:18
20 to 9:3. Relatively few documents require notice; the problem is the cost of identifying
21 those documents. *See* Pl.’s Motion, at 8:21 to 10:9.

22 ²⁰ *See, e.g.*, Defendants’ Memorandum (1995) (docket no. 17), at ____ (“Plaintiff challenges
23 these CJ determinations”); Defs.’ Motion, at 3:27 to 4:1 (“Plaintiff’s central . . . claim
24 was that these licensing requirements effectively prevented” publication); *Id.*, at 7:18–21
25 (“the central issue was whether [Snuffle] . . . was subject to export licensing requirements
26 Plaintiff . . . challenged a decision that it was subject to” regulation). The Defendants
27 are also continuing to cite cases in which courts refused to engage in due-process
28 reviews of the factual bases for specific export-control designations. *See United States*
v. Mandel, 914 F.2d 1215 (9th Cir. 1990); *United States v. Martinez*, 904 F.2d 601
(11th Cir. 1990); *United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th
Cir. 1988), *cert. denied*, 493 U.S. 809 (1989); *United States v. Helmy*, 712 F. Supp.
1423 (E.D. Cal. 1989); *United States v. Moller-Butcher*, 560 F. Supp. 550 (D. Mass.
1983). This Court has already explained in detail why those cases do not preclude
First Amendment challenges. *See Bernstein v. Department of State*, 922 F. Supp. 1426,
1431–1432 (N.D. Cal. 1996).

1 that a specific censorship event—in which NSA (through the Department of State) denied
2 Prof. Bernstein’s requests to publish Snuffle—led to Prof. Bernstein’s involvement in this
3 case,²¹ but Prof. Bernstein had standing to sue *before* he sent his requests to the government.

4 **i. Licensing for Answering Questions**

5 There is no dispute as to EAR’s licensing requirements for “technical assistance” and
6 “technology export.” The Defendants simply refer to the irrelevant exceptions discussed above.

7 **ii. Licensing for Postings to Sci.Crypt**

8 15 C.F.R. §740.13(e) does not allow one to “knowingly export or reexport source code,
9 corresponding object code or products developed with this source code to Cuba, Iran, Iraq,
10 Libya, North Korea, Sudan or Syria.”²² Prof. Bernstein plans to post various “EI” programs to
11 sci.crypt without applying for a license; this plan violates EAR, even if Prof. Bernstein sends
12 copies of his programs to the government. *See* Pl.’s Motion, at 11:21 to 12:7.

13 The Defendants observe that—as already pointed out in Prof. Bernstein’s regulatory
14 analysis—various forms of Internet publication do not “establish ‘knowledge’ of a prohibited
15 export.” *See* 15 C.F.R. §740.13(e)(6); Pl.’s Motion, at 12:3–5; Defs.’ Opp., at 10:17–18. This
16 exception is irrelevant: Prof. Bernstein’s knowledge has already been established by other
17 means. *See* Pl.’s Motion, at 12:1–7; Bernstein Decl. in Support, ¶157.

18 The Defendants have indicated that they are interested only in “direct, knowing” transfers
19 to Cuba, Iran, etc. *See* Kritzer Decl. (docket no. 192), Attachment 3, at 2. However, the
20 Defendants have not explained how to distinguish a “direct, knowing export” from other
21 “knowing exports,” nor have they made any relevant modifications to EAR.

22 An extreme construction of §740.13(e)(6) would replace “would not establish ‘knowl-
23 edge’ of a prohibited export” with “is exempt from §740.13(e)(4).” This construction would
24 permit Internet publication under §740.13(e) no matter how much the publisher knows about
25 Cuba, Iran, etc. However, the Defendants have said nothing to support this construction.

26 ²¹ *See, e.g.*, Bernstein Decl. in Support, ¶¶88–100; Declaration of Daniel J. Bernstein
27 (1996) (docket no. 63).

28 ²² 15 C.F.R. §740.13(e)(4). This is a limitation on the §740.13(e) exception to licensing;
it obviously cannot be construed as a prohibition extending beyond §740.13(e).

1 **iii. Licensing for Assembly-Language Programs**

2 The Defendants’ continuing censorship activities are aimed primarily at commercial
3 publishers. The Defendants use two tests to identify commercial publications. One of those
4 tests is the unavailability of what EAR calls “encryption source code.” *See* 15 C.F.R. §740.13(e).

5 Prof. Bernstein crosses this line when he writes “EI” programs in assembly language.
6 Assembly-language programs are not “compiled,” so they are unequivocally excluded from
7 EAR’s definition of “encryption source code,” and therefore from §740.13(e). *See* Pl.’s Motion,
8 at 10:10 to 11:2; 15 C.F.R. §772.1, definition of “encryption source code”; §740.13(e).

9 In his Second Supplemental Complaint, ¶102, Prof. Bernstein specifically averred that
10 assembly-language programs are not “compiled.” The Defendants admitted this fact in their
11 Answer. The Defendants now attempt to backpedal: they claim that §740.13(e) actually applies
12 to assembly-language programs, and that they never said anything different to Prof. Bernstein.
13 *See* Defs.’ Opp., at 10:6–11; Second Kritzer Decl., ¶10.

14 Whether or not this claim is procedurally proper, it lacks credibility. Construing
15 §740.13(e) to permit assembly language would, for all practical purposes, eliminate EAR’s
16 line between “encryption source code” and “encryption object code.” This change would be
17 welcomed by Prof. Bernstein—and by commercial publishers—but it is not consistent with the
18 Defendants’ stated encryption policy.

19 **iv. Licensing for Scientific Journals on the Internet**

20 As noted above, the Defendants use two tests to identify commercial publications
21 subject to licensing. The second test is price. EAR draws a line at the cost of “reproduction and
22 distribution,” so books, journals, and other items published by publishing houses are excluded
23 from EAR’s definition of “published.” *See* Pl.’s Motion, at 12:8 to 13:12.²³

24 The Defendants now claim that EAR actually allows the other costs of publishing:

25 ²³ The Defendants may argue that publications for private profit are not protected by the
26 First Amendment. “We cannot agree. That books, newspapers, and magazines are
27 published and sold for profit does not prevent them from being a form of expression
28 whose liberty is safeguarded by the First Amendment.” *Joseph Burstyn, Inc. v. Wilson*,
343 U.S. 495, 501 (1952).

1 specifically, author compensation, acquisition costs, editorial costs, illustration costs, design
2 costs, typesetting costs, promotion costs, and profit. *See* Defs.’ Opp., at 11:20, 11:27.

3 This claim has no support in EAR. The section cited by the Defendants—as already
4 pointed out in Prof. Bernstein’s regulatory analysis—specifically forbids charging for develop-
5 ment, design, and acquisition. *See* 15 C.F.R. §734, Supplement 1, Question G(2).

6 The Defendants then argue the opposite side, claiming that a price “30 times” the
7 reproduction and distribution cost is “clearly beyond any conceivable cost of publishing.” *See*
8 Defs.’ Opp., at 12:2–3 (emphasis in original); 15 C.F.R. §734, Supplement 1, Question A(5).
9 This claim flies in the face of the undisputed facts. *See* Declaration of Timothy O’Reilly, ¶8
10 (ratios of approximately 4, 9, and 100 for three books published by a publishing house).

11 **C. The Notification Requirements Cannot Be Severed from the Licensing** 12 **Requirements**

13 The above discussion conceptually separates EAR’s notification requirements from
14 EAR’s licensing requirements. However, these requirements are not separate in the text of
15 EAR; they are structured as exceptions to the same general prohibitions.

16 For example, EAR prohibits “export” to most destinations of “software” listed in 5D002.
17 There are exceptions for exporters who have obtained licenses and, under some circumstances,
18 for exporters who have provided notifications. *See* 15 C.F.R. §736.2(b)(1); §740.13(e).

19 Prof. Bernstein plans to violate this prohibition, as explained above. Therefore, he has
20 standing to challenge the prohibition. Activities that conceptually require notification are, for
21 purposes of this analysis, identical to activities that conceptually require licensing.

22 Note that, even if the Court limits the grounds for its decision that Prof. Bernstein has
23 standing to challenge 5D002 and 5E002, it does not have to make an analogous limitation
24 in its First Amendment analysis. The Court can reach facial challenges (for example, prior
25 restraint), considering various First Amendment rights of third parties, without asking whether
26 Prof. Bernstein has those rights. *See generally Secretary of State of Md. v. Joseph H. Munson*
27 *Co.*, 467 U.S. 947, 954–959 (1984) (discussing *jus tertii* and overbreadth; facial challenges are
28 allowed to “prevent the statute from chilling the First Amendment rights of other parties”).

1 **V. EAR IS CONTENT-BASED**

2 **A. The Distinction Between Communication and Use**

3 *Publishing* instructions is not the same as *following* instructions. Much of the confusion
4 in the Defendants’ briefs arises from their omission of the verb. *See, e.g.*, Defs.’ Motion, at
5 19:3–13; Defs.’ Opp., at 13:11–12, 16:21–24.

6 Consider, as a hypothetical example, a book that explains how to use a microwave oven.
7 The book says, in part, “Press button B; then press button 2; then press button 5; then press
8 Start.” A cook follows these instructions: he presses B, 2, 5, Start.

9 Following the instructions is not speech; but writing and publishing the instructions
10 is speech. The First Amendment poses no obstacle to a government regulation of *pressing*
11 buttons on microwave ovens; but a government regulation of *telling people* to press buttons on
12 microwave ovens would be content-based and therefore subject to strict scrutiny. Asking “Is a
13 button sequence fully protected speech?” would needlessly confuse the *publication* of a button
14 sequence with the *use* of a button sequence.

15 A closer inspection reveals that, when the cook presses buttons, he is actually talking
16 to a small computer inside his microwave oven. He is passing instructions (“B, 2, 5, Start”)
17 from the book author to the computer. But this technological detail has no relevance to the
18 First Amendment analysis. The author’s disclosure of information to the cook is fully protected
19 speech; the cook’s disclosure of information to his oven is a red herring.

20 The government could argue, exactly as it is arguing in this case, that “instructions to
21 a computer” are not protected by the First Amendment. It is true that *giving* instructions to a
22 computer inside a microwave oven is not protected by the First Amendment. But *publishing*
23 the same instructions, or disclosing the instructions to another person, is fully protected.

24 Consider, as another example mentioned by the Defendants, primitive computers that
25 are “programmed” by “manually re-wiring their circuitry.” *See* Defendants’ Opposition (1997)
26 (docket no. 132), at 4:17–18. A government regulation of re-wiring a machine would not trigger
27 any First Amendment scrutiny; a government regulation of *telling someone how to re-wire a*
28 *machine* would be subject to strict scrutiny.

1 **B. The Connection Between Communication and Use**

2 There is, of course, a connection between communicating information and using that
3 information: for example, between publishing instructions and following those instructions. As
4 stated in *American Booksellers Assn., Inc. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd*
5 *mem.*, 475 U.S. 1001, *reh'g denied*, 475 U.S. 1132 (1986):

6 Much speech is dangerous. Chemists whose work might help someone
7 build a bomb, political theorists whose papers might start political move-
8 ments that lead to riots, speakers whose ideas attract violent protesters,
9 all these and more leave loss in their wake.

10 Some established categories of content are so dangerous, or otherwise undesirable, that they
11 can be regulated; these regulations survive First Amendment strict scrutiny.²⁴ A large part of
12 First Amendment case law is devoted to analyzing the exact boundaries of these categories.²⁵

13 The Defendants repeatedly point to the connection between communication and use—
14 specifically, the utility of the Internet-security instructions at issue in this case—and leap to the
15 conclusion that EAR is content-neutral. This argument is fundamentally flawed. Yes, there is
16 a connection between content and its use; the courts evaluate this connection by *applying* strict
17 scrutiny, not by *skipping* it.

18 **C. The Test for Content-Neutrality**

19 A regulation is content-neutral if it is facially content-neutral *and* has a content-neutral
20 purpose; otherwise, it is content-based. Pl.'s Motion, at 14:2–28. This two-part test is perhaps
21 most clearly stated in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642–646 (1994),

22 ²⁴ See generally Pl.'s Motion, at 17:7–21 (discussing structure of First Amendment strict
23 scrutiny); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S.
24 105, 124 (1991) (Kennedy, J., concurring) (same).

25 ²⁵ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Brandenburg v.*
26 *Ohio*, 395 U.S. 444 (1969) (advocacy of violence); *Cohen v. California*, 403 U.S. 15
27 (1971) (offensive words); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir.
28 1987), *cert. denied*, 485 U.S. 959 (1988) (instructions for dangerous activity); *Hustler*
Magazine, Inc. v. Falwell, 486 U.S. 46 (1988) (infliction of emotional distress); *United*
States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (instructions for criminal activity);
Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515
(1998) (same); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 2002 U.S. LEXIS
2789 (2002) (pornography). Note that the instructions in *Mendelsohn* were actually
software; however, this fact did not change the First Amendment analysis.

1 but the idea can be traced back to *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972):

2 [A]bove all else, the First Amendment means that government has no
3 power to restrict expression because of its message, its ideas, its subject
4 matter, or its content. . . . Selective exclusions from a public forum *may*
5 *not be based on content alone, and may not be justified by reference to*
6 *content alone.*

7 *Mosley*, 408 U.S. at 95–96 (emphasis added).

8 As a hypothetical example, a statute outlawing “hard-to-understand books” would be
9 facially content-based, and therefore content-based, even if the government has a legitimate
10 goal of saving time for its citizens. The Defendants’ suggested tests for content-neutrality
11 would produce the opposite conclusion.²⁶

12 VI. EAR IS UNCONSTITUTIONALLY VAGUE

13 “Cryptographic function,” “encryption function,” and several other phrases in EAR
14 are unconstitutionally vague. *See* Pl.’s Motion, at 21:28 to 22:12; *see generally* *Bernstein v.*
15 *Department of State*, 945 F. Supp. 1279, 1292–93 (N.D. Cal. 1996) (analyzing ITAR vagueness).

16 The Defendants respond that encryption means turning a message into gibberish so that
17 it cannot be read by anyone except the intended recipient. *See* Defs.’ Motion, at 25:8–17.

18 Prof. Bernstein agrees that the concept of encrypted *messages* is clear. The concept of
19 encryption *functions* is nevertheless vague. Prof. Bernstein asked, for example, whether pseu-
20 dorandom number generators are “encryption functions,” and whether they are “cryptographic
21 functions”;²⁷ the answers to these questions are notably absent from Defs.’ Opp.

22 The main difficulty is that one function can have many different applications. Does

23 ²⁶ *See, e.g.*, Defs.’ Opp., at 17:1–2 (asserting content-neutrality whenever regulators do not
24 intend to suppress “specific substantive ideas”); *cf. Simon & Schuster, Inc. v. Members*
25 *of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting that test); *Hurley*
26 *v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569
27 (1995) (commenting that the “Jabberwocky verse of Lewis Carroll” is “unquestionably
28 shielded” even though it does not convey a “particularized message”).

²⁷ Pl.’s Motion, at 22:9–12; *see generally* Bernstein Decl. in Support, ¶¶83–85 (discussing
pseudorandom number generators). The Defendants assert that they need “as much un-
derstanding as possible of encryption products that may be used by foreign adversaries,”
Giles Decl. (docket no. 191), ¶16; if this is true, then they should be demanding to see all
pseudorandom number generators, including those designed solely for “authentication.”
See Bernstein Decl. in Support, ¶84; Bernstein Decl. re Cryptography, ¶¶22–23.

1 “encryption function” include all functions that have a substantial number of encryption applica-
2 tions, or merely functions that do not have a substantial number of non-encryption applications?
3 Does the answer depend on the publisher’s intent? EAR says nothing to clarify these issues.

4 The Defendants state that it “should be obvious, even to a layperson, that software which
5 functions solely to protect PIN numbers or passwords, in order to prevent tampering with a
6 transaction, is different from software that functions to scramble plaintext.” Defs.’ Opp., at
7 9:25–28. What is not obvious is the status of *components* (in programmer jargon, “libraries”)
8 shared between those two programs.²⁸ Does a pseudorandom number generator used by
9 both programs, and responsible for the cryptographic strength of both programs, constitute an
10 “encryption function”? What about a “cryptographic function”?

11 VII. EAR IS AN UNCONSTITUTIONAL SEARCH AND SEIZURE

12 The Defendants claim that government-compelled disclosures of private information
13 are neither a “search” nor a “seizure” under the Fourth Amendment. *See* Defs.’ Motion, at
14 25:27; Defs.’ Opp., at 20:8–9. That claim is erroneous. *See* Pl.’s Motion, at 25:1–5.

15 CONCLUSION

16 For the foregoing reasons, Defendants’ Motion to Dismiss Plaintiff’s Second Supple-
17 mental Complaint should be denied; Defendants’ Motion for Summary Judgment should be
18 denied; and Plaintiff’s Motion for Summary Judgment should be granted.

19
20 Respectfully submitted,

21
22 _____
23 DANIEL J. BERNSTEIN

24 ²⁸ Consider, as an analogy, a hypothetical law prohibiting disclosure of “seven-layer-
25 cake instructions.” Does this law prohibit publication of a recipe for chocolate frosting?
26 Chocolate frosting is a vital component of a seven-layer cake; but chocolate frosting also
27 has many other applications. What about general instructions for handling chocolate-
28 covered cakes without making a mess? What about a seven-layer-cake ingredient list
without the baking instructions? “Seven-layer cake” may be clear, but “seven-layer-cake
instructions” is not.