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

DANIEL J. BERNSTEIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF COMMERCE, et al.,

Defendants.

C 95-00582 MHP

**PLAINTIFF'S MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

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 Export Administration Regulations (“EAR”), 15 C.F.R. §§730 *et*  
3 *seq.*, were modified to control the science of cryptography. There is a striking similarity between  
4 the Defendants’ arguments then and the Defendants’ arguments now.

5 **A. Standing**

6 Five years ago, the Defendants argued that Plaintiff Professor Daniel J. Bernstein  
7 (“Prof. Bernstein”) lacked standing because he had not “sought any determinations from  
8 Commerce as to whether specific activities are even subject to export control regulation at  
9 all.” Defendants’ Second Motion for Summary Judgment and Memorandum of Points and  
10 Authorities (docket no. 126) (April 25, 1997) (“Defs.’ 1997 Motion”), at 17:13 to 18:17.

11 Citing the same cases, the Defendants now argue that Prof. Bernstein lacks standing  
12 because he “has failed to even seek a determination as to whether the software he now puts at  
13 issue is subject to the export regulations at all.” Defendants’ Motion to Dismiss Plaintiff’s Sec-  
14 ond Supplemental Complaint or, in the Alternative, for Summary Judgment, and Memorandum  
15 of Points and Authorities (April 29, 2002) (“Defs.’ Motion”), at 1:18–20, 7:15 to 12:2.

16 The Defendants’ argument is without merit. EAR prohibits Prof. Bernstein’s desired  
17 activities. This prohibition, and standing, exist without the Defendants’ “determinations.”

18 **B. Utility**

19 Five years ago, the Defendants argued that EAR was content-neutral because the regu-  
20 lated instructions “can be used to maintain the secrecy of information.” Defs.’ 1997 Motion, at  
21 13:10 to 15:12. The Defendants now argue that EAR is content-neutral because the regulated  
22 instructions can be “used to encrypt data.” Defs.’ Motion, at 17:15 to 20:4.

23 The Defendants’ argument is patently incorrect. Utility is part of content; consequently,  
24 utility-based regulations are content-based.

25 **C. *Edler***

26 Five years ago, the Defendants argued that *United States v. Edler Indus., Inc.*, 579 F.2d  
27 516 (9th Cir. 1978), precluded a challenge to EAR’s censorship of “technical assistance.”  
28 Defs.’ 1997 Motion, at 18:23 to 19:8. The Defendants now argue that *Edler* precludes a

1 challenge to EAR’s censorship of “technical assistance.” Defs.’ Motion, at 23:1–19.

2 The irrelevance of *Edler* has already been pointed out several times by this Court; the  
3 Defendants’ *Edler* argument should be rejected once again. *See Bernstein v. Department of*  
4 *State et al.*, 922 F. Supp. 1426, 1437 (N.D. Cal. 1996) (“Bernstein I”); *Bernstein v. Department*  
5 *of State et al.*, 945 F. Supp. 1279, 1290–1292 (N.D. Cal. 1996) (“Bernstein II”); *Bernstein v.*  
6 *Department of State et al.*, 974 F. Supp. 1288, 1309 (N.D. Cal. 1997) (“Bernstein III”).

7 **D. Prior Restraint**

8 Five years ago, the Defendants argued that EAR was not a facially invalid prior restraint.  
9 Defs.’ 1997 Motion, at 6:18 to 11:6. The Defendants now argue that EAR is not a facially  
10 invalid prior restraint. Defs.’ Motion, at 12:3 to 16:17.

11 The Defendants’ prior-restraint argument has already been thoroughly analyzed by this  
12 Court and by the Ninth Circuit; it should be rejected once again. *See Bernstein III*, 974 F.  
13 Supp. at 1308; *Bernstein v. Department of Justice et al.*, 176 F.3d 1132, 1145 (9th Cir. 1999)  
14 (“Bernstein IV”), *reh’g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999).

15 **E. What Has Changed**

16 Prof. Bernstein recognizes, as he did in Plaintiff’s Memorandum of Points and Au-  
17 thorities in Support of Plaintiff’s Motion for Summary Judgment (“Pl.’s Motion”), that the  
18 Defendants added a major new exception to EAR two years ago. *See* 65 Fed. Reg. 2492  
19 (January 14, 2000); 15 C.F.R. §740.13(e); Pl.’s Motion, at 1:18–21, 3:14 to 4:13.

20 However, the exception did not eliminate the law. At issue are seven speech activities  
21 that do *not* fall within the exception. *See* Pl.’s Motion, at 5:20 to 13:12; Declaration of Daniel  
22 J. Bernstein in Support of Plaintiff’s Motion (“Bernstein Decl. in Support”), ¶¶113–162.

23 The Defendants are exaggerating when they assert that “the features of the old encryption  
24 regulations that gave rise to this litigation . . . have now fallen by the wayside,” and that “[t]he  
25 claims now before the Court are quite different from when the case began seven years ago.”  
26 *See* Defs.’ Motion, at 4:20 to 5:2, 1:5–6. Some of Prof. Bernstein’s claims, notably the Fourth  
27 Amendment claim, are new; but some of Prof. Bernstein’s claims, notably the prior-restraint  
28 claim, are the same.

1       **II.       CURRENT REGULATORY FRAMEWORK**

2           The Defendants recently issued lengthy revisions to their encryption regulations. 67  
3 Fed. Reg. 38855 (June 6, 2002). Unfortunately, most of the changes were superficial. All of  
4 Prof. Bernstein’s planned activities, as described in his Motion, are still prohibited by EAR.  
5 Prof. Bernstein will include an updated regulatory analysis in the next brief if necessary.

6       **III.       DISCUSSIONS BETWEEN THE PARTIES**

7           After the Defendants added 15 C.F.R. §740.13(e) to EAR, the parties exchanged four let-  
8 ters, dated January 16, 2000, February 18, 2000, March 10, 2000, and May 23, 2000, discussing  
9 Prof. Bernstein’s remaining concerns. *See* Bernstein Decl. in Support, ¶111; Declaration of  
10 Bernard Kritzer in Support of Defendants’ Motion (“Kritzer Decl.”), ¶3.

11           The parties then began confidential settlement talks and exchanged many detailed  
12 communications.<sup>1</sup> The Defendants have, without consulting Prof. Bernstein, revealed a letter  
13 from the Defendants dated November 16, 2001, which answered a few questions posed by  
14 Prof. Bernstein’s attorneys. *See* Kritzer Decl., ¶3. Settlement discussions broke down after  
15 that letter; Prof. Bernstein filed his Second Supplemental Complaint on January 7, 2002.

16           On March 1, 2002, Prof. Bernstein requested that the Defendants enter into a Court-  
17 ordered stipulation allowing Prof. Bernstein to communicate freely with his colleagues at  
18 conferences this year. Declaration of Daniel J. Bernstein in Opposition to Defendants’ Motion  
19 (“Bernstein Decl. in Opposition”), ¶¶8–9. The Defendants refused, saying they could not  
20 “exempt” Prof. Bernstein from EAR. *Id.*, ¶10. On May 16, 2002, Prof. Bernstein informed the  
21 Defendants that he understood their refusal as a specific threat of punishment under EAR. *Id.*,  
22 ¶11. Prof. Bernstein also requested that the Defendants enter into stipulations allowing all of  
23 the activities described in Bernstein Decl. in Support. *Id.* The Defendants have not responded.  
24 *Id.*, ¶12.

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25       <sup>1</sup> Bernstein Decl. in Support, ¶¶108–112. The Defendants have repeatedly pointed to the  
26 gap between a March, 2001, deadline set by the Court and an unopposed July, 2001,  
27 request from Prof. Bernstein’s attorneys for more time. *See, e.g.*, Defs.’ Motion, at  
28 3:13–17. The Defendants have consistently failed to mention that, throughout this gap,  
the parties were discussing settlement. *See* Bernstein Decl. in Support, ¶110.



1 **ARGUMENT**

2 **IV. THE PLAINTIFF HAS STANDING**

3 EAR regulates publication and other communication of various types of “encryption  
4 software” and “encryption technology.” *See* Pl.’s Motion, at 3:14 to 5:19.

5 Many of Prof. Bernstein’s planned activities are prohibited by EAR. Pl.’s Motion, at  
6 5:20 to 13:12. Prof. Bernstein discussed his concerns with the Defendants for nearly two years  
7 before filing his Second Supplemental Complaint. Bernstein Decl. in Support, ¶¶108–112.

8 This Court is already familiar with the long history of enforcement of the regulations at  
9 issue in this case.<sup>2</sup> The Defendants are, by their own admission, continuing to actively review  
10 and license “encryption items” under EAR.<sup>3</sup> Furthermore, in a press release dated February  
11 21, 2002, the Defendants stated that “[t]he U.S. Government can and will enforce its export  
12 controls on encryption products.” *See* Bernstein Decl. in Opposition, ¶¶2–3.

13 As in *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967), Prof. Bernstein is “in a  
14 dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate”: he must  
15 either comply with EAR, refraining from his desired activities, or violate EAR, risking serious  
16 penalties. In the words of *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), if declaratory relief  
17 were not available, Prof. Bernstein would have to “expose himself to actual arrest or prosecution  
18 to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.”

19 The Defendants nevertheless claim that there is no controversy between the par-  
20 ties: specifically, that Prof. Bernstein does not have standing, and that the case is not ripe.  
21 Defs.’ Motion, at 7:15 to 12:2.

22 The Defendants’ claim is without merit. This case easily meets the test for standing and  
23 ripeness presented in *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th  
24 Cir. 2000): “[W]e look to whether the plaintiffs have articulated a ‘concrete plan’ to violate  
25 the law in question, whether the prosecuting authorities have communicated a specific warning

26 <sup>2</sup> *See, e.g.*, Bernstein Decl. (1996); Demberger Decl. (1996); Zimmermann Decl. (1996).

27 <sup>3</sup> The Defendants’ web pages state that, last year, there were “license” requests for 341  
28 items; “classification” requests for 1405 items; and 241 “notifications.” *See* Bernstein  
Decl. in Opposition, ¶¶4–7.

1 or threat to initiate proceedings, and the history of past prosecution or enforcement under the  
2 challenged statute.”

3 **A. The Plaintiff Has Articulated a Concrete Plan to Violate EAR**

4 Prof. Bernstein has articulated several concrete plans to engage in activities prohibited  
5 by EAR. Prof. Bernstein has refrained from, and is continuing to refrain from, these activities,  
6 out of fear of EAR. *See* Pl.’s Motion, at 3:13 to 13:12.

7 For example, if Prof. Bernstein engages in his desired conference activities, he will be  
8 subject to civil fines, criminal fines, and imprisonment under EAR. Pl.’s Motion, at 5:20 to 8:7.  
9 Prof. Bernstein has already described a specific incident in which EAR forced him to refrain  
10 from working collaboratively with a colleague at a conference. Bernstein Decl. in Support,  
11 ¶¶122–127. As another example, Prof. Bernstein is refraining from his desired publication  
12 of “SPRAY” and other “EI” software written in “assembly language.” *Id.*, ¶¶144–148. EAR  
13 continues to require a license for such software. Pl.’s Motion, at 10:10 to 11:2.

14 In contrast, in the cases cited by the Defendants, none of the plaintiffs articulated a  
15 concrete plan to engage in unlawful activity. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972) (the  
16 plaintiffs alleged that government collection of information chilled their First Amendment  
17 rights; they did not plan to violate any law); *Los Angeles v. Lyons*, 461 U.S. 95, 105–106  
18 (1983) (the plaintiff sought an injunction against unlawful police chokeholds; he did not plan  
19 to violate any law); *O’Shea v. Littleton*, 414 U.S. 488, 496–497 (1974) (the plaintiffs sought  
20 an injunction against unlawful racial discrimination; they did not plan to violate any law);  
21 *Anchorage*, 220 F.3d at 1139 (the plaintiffs articulated a vague plan but were unable to specify  
22 “when, to whom, where, or under what circumstances”).

23 **B. The Defendants Have Threatened, Not Disavowed, Prosecution**

24 **i. Notification Requirements**

25 In their public letters to Prof. Bernstein, the Defendants have repeatedly emphasized  
26 their demand for copies of “EI” information.<sup>4</sup> The same demand appears several times in

27 <sup>4</sup> *See, e.g.*, Kritzer Decl., Attachment 5, at 1–2 (EAR permits certain publications “*pro-*  
28 *vided that . . . you have submitted . . . a copy*” to BXA) (emphasis in original).

1 Defs.’ Motion.<sup>5</sup> When Prof. Bernstein requested five months ago that the Defendants enter  
2 into a Court-ordered stipulation permitting Prof. Bernstein’s conference activities this year, the  
3 Defendants refused, saying that they could not “exempt” Prof. Bernstein from EAR. Bernstein  
4 Decl. in Opposition, ¶¶8–10.

5 These communications clearly qualify as a “specific warning or threat to initiate pro-  
6 ceedings.” As in *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979) and *Bland v.*  
7 *Fessler*, 88 F.3d 729, 737 (9th Cir. 1996), the Defendants certainly have not “disavowed any  
8 intention” of enforcing EAR’s notification requirements against Prof. Bernstein.

### 9 ii. Licensing Requirements

10 In their public letters to Prof. Bernstein, the Defendants have also repeatedly emphasized  
11 the §740.13(e) requirements that items be “encryption source code” or “object code” compiled  
12 from it, and that items be “publicly available.”<sup>6</sup> The addition of §740.13(e) to EAR had no effect  
13 for documents not meeting these requirements; such documents remain subject to licensing.  
14 Pl.’s Motion, at 10:10 to 13:12. The Defendants have ignored Prof. Bernstein’s May 16, 2002,  
15 request for a relevant stipulation. Bernstein Decl. in Opposition, ¶¶11–12.

16 As above, these communications qualify as a “specific warning or threat to initiate  
17 proceedings.” The Defendants certainly have not “disavowed any intention” of enforcing  
18 EAR’s licensing requirements against Prof. Bernstein.

19 The Defendants repeatedly observe that §740.13(e) removed licensing requirements  
20 in many situations. *See* Defs.’ Motion, at 4:5–8, 5:13–15, 6:2–4, 7:11–12, 10:1–3, 10:11–12,  
21 13:13–14. At issue, however, are the licensing requirements in four situations where §740.13(e)  
22 does *not* apply. *See* Pl.’s Motion, at 10:10 to 13:12.

### 23 iii. Disputed Requirements

24 The Defendants state, contrary to the plain meaning of EAR, that the prohibition upon  
25 “knowing” disclosures to Iran et al. in §740.13(e) is merely a prohibition upon “direct, knowing”

26 <sup>5</sup> *See, e.g.*, Defs.’ Motion, at 4:13 (“must notify”); *Id.*, at 7:12 (“notice requirement”).

27 <sup>6</sup> *See, e.g.*, Bernstein Decl. in Support, Exhibit G, at 1 (“Publicly available encryption  
28 source code”); Kritzer Decl., Attachment 5, at 1 (“publicly available”; “encryption  
source code”; “object code compiled from such source code”).

1 disclosures,<sup>7</sup> and that EAR’s notification requirements do not apply to “mirrors.”<sup>8</sup>

2 There is a stark contrast between these statements and a previous statement by the  
3 Defendants. In their letter to Prof. Bernstein dated February 18, 2000, the Defendants stated,  
4 contrary to the plain meaning of EAR at the time, that §740.13(e) allowed “export” of “[b]inary  
5 code which is compiled from TSU source code” under certain circumstances. *See* Bernstein  
6 Decl. in Support, ¶111. Several months later, the Defendants modified EAR, making the  
7 regulations consistent with that statement. 65 Fed. Reg. 62600 (October 19, 2000); 15 C.F.R.  
8 §740.13(e). The Defendants have not made similar modifications for “mirrors” and for Iran et  
9 al., despite Prof. Bernstein’s efforts.

10 As in *Bland*, 88 F.3d at 737, n.12, these incorrect statements from the Defendants are  
11 “far short of a disavowal of enforcement. There is little comfort in these words . . . .” A false  
12 statement that certain activities are not currently covered by EAR is not the same as a promise  
13 to avoid punishing those activities.

#### 14 C. “Determinations” by the Defendants Have No Relevance to Standing

15 Prof. Bernstein has described some specific documents that are subject to EAR. For  
16 example, Prof. Bernstein’s declaration includes a copy of “SPRAY.” Bernstein Decl. in Support,  
17 ¶86. SPRAY is “EI” software written in “assembly language”; consequently, EAR prohibits  
18 unlicensed publication of SPRAY. *Id.*, ¶86–87; Pl.’s Motion, at 10:10 to 11:2.

19 The Defendants observe that Prof. Bernstein did not “seek a determination [from the  
20 Defendants] as to whether the software he now puts at issue is subject to the export regulations  
21 at all.”<sup>9</sup> But the undisputed facts demonstrate that, for example, SPRAY is subject to the export

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22 <sup>7</sup> Defs.’ Motion, at 4:7, 11:15–22. Adding “direct” to EAR, along with a sufficiently  
23 narrow definition of “direct,” would allow Prof. Bernstein to post “EI” “source code”  
24 to the “sci.crypt” Internet newsgroup. *See* Bernstein Decl. in Support, ¶¶156–159;  
Pl.’s Motion, at 11:21 to 12:7.

25 <sup>8</sup> Defs.’ Motion, at 11:2–4; *see generally* Bernstein Decl. in Support, ¶¶26–29 (explaining  
26 what “mirrors” are). Removing EAR’s notification requirements for “mirrors” would  
27 reduce EAR’s impact upon Prof. Bernstein’s web pages. *See* Bernstein Decl. in Support,  
28 ¶141; Pl.’s Motion, at 9:8–11.

<sup>9</sup> Defs.’ Motion, at 1:18–20. The Defendants repeat this observation several times, with  
varying levels of rhetoric. *See Id.*, at 7:4–6, 7:17, 7:24–26, 8:14–15, 9:1–5. The  
Defendants neglect to mention that discovery was put, and remains, on hold.

1 regulations.<sup>10</sup> This is a finding to be made by the Court, not a “determination” to be made by  
2 the Defendants.

3 The Defendants claim that, because Prof. Bernstein did not submit SPRAY et al. to the  
4 Defendants, “he has not pled an injury sufficient for standing.” Defs.’ Motion, at 8:14–16. But  
5 the test for standing says no such thing. *See supra*.

6 **D. The Defendants’ Notion of “Academic Activity” Does Not Include the Ac-**  
7 **ivities at Issue**

8 In 1996, the Defendants stated, as one of their “two central points,” that the export  
9 regulations did not control “the publication of scientific ideas or the academic exchange of  
10 information.” Defs.’ Motion for Summary Judgment (docket no. 42) (July 26, 1996), at 1.

11 In response to undisputed evidence of censorship under the regulations, the Defendants  
12 stated that they were controlling “the export of software” rather than “technical lectures or the  
13 mere publication of scientific ideas”; that they did not require “that academics submit their  
14 ‘ideas’ for review before they can be ‘published’ or discussed in a classroom”; that they did  
15 not control “the mere exchange of ideas . . . in an academic setting”; and that “[t]he distinction  
16 at issue is between presenting scientific theories or principles concerning cryptography in an  
17 article or the classroom, and sending actual cryptographic source code out of the country.”  
18 Defs.’ Opposition to Plaintiff’s Motion for Summary Judgment (docket no. 71) (August 30,  
19 1996), at 31:8–11, 1:12–13, 34:14–15, 10:11–13. Shortly after switching their regulations from  
20 ITAR to EAR, the Defendants once again stated that the government did not control “[a]cademic  
21 teaching, publication, and discussion on cryptography.” Defs.’ 1997 Motion, at 17:8–10.

22 The Defendants now assert that EAR does not regulate “the teaching or discussion about  
23 encryption in an academic setting”; that EAR does not regulate “academic activities”; that EAR  
24 does not prevent “teaching or discussing encryption technology . . . in an academic setting”;  
25 and that “there has been no effort by the government to impose a licensing requirement on  
26 academic activities.” Defs.’ Motion, at 6:19–22, 9:7–9, 10:16–19, 22:10–12.

27 <sup>10</sup> Pl.’s Motion, at 10:10 to 11:20. The undisputed facts demonstrate more generally that,  
28 contrary to the Defendants’ suggestions, Prof. Bernstein is a cryptographer affected by  
EAR.

1 The Defendants have never explained exactly what they mean by “academic.” However,  
2 the Defendants’ 1996 memoranda make clear that the Defendants’ notion of “academic” does  
3 not include “sending actual cryptographic source code out of the country” or any of the other  
4 activities at issue in this case.

5 **V. NOTIFICATION IS A HEAVY BURDEN FOR SPONTANEOUS SPEECH**

6 The Defendants repeatedly characterize EAR’s notification requirements as a small  
7 burden. Defs.’ Motion, at 4:13 (“merely”), 7:12 (“minimal”), 1:9 (“simply”), 5:20.

8 Unfortunately, this “minimal” burden causes serious problems for Prof. Bernstein in  
9 several situations. First, when Prof. Bernstein collaborates in person with his foreign col-  
10 leagues at a scientific conference, EAR’s demand for contemporaneous copies of information  
11 is tantamount to an outright prohibition. Pl.’s Motion, at 5:20 to 8:7; *see also* Williams Decl.,  
12 ¶¶8–13. Second, when Prof. Bernstein sends private email, EAR’s demand for copies of in-  
13 formation is an invasion of Prof. Bernstein’s privacy. Pl.’s Motion, at 8:8–20. Third, when  
14 Prof. Bernstein publishes web pages, EAR’s demand for copies of information forces him to  
15 engage in a time-consuming review of those web pages. Pl.’s Motion, at 8:21 to 10:9.

16 One of these problems, the fact that spontaneous speech is effectively prohibited by  
17 contemporaneous notification requirements, has been recognized repeatedly by the Ninth Circuit  
18 and the Supreme Court. *See Rosen v. Port of Portland*, 641 F.2d 1243, 1247–1249 (9th Cir. 1981)  
19 (“We find the requirement of advance registration as a condition to peaceful pamphleteering,  
20 picketing, or communicating to the public to be unconstitutional. . . . Advance notice or  
21 registration requirements drastically burden free speech. They stifle spontaneous expression.  
22 They prevent speech that is intended to deal with immediate issues.”); *Watchtower Bible and*  
23 *Tract Soc’y, Inc. v. Village of Stratton*, 122 S. Ct. 2080, \_\_\_, 2002 U.S. LEXIS 4422, \*31 (2002)  
24 (“there is a significant amount of spontaneous speech that is effectively banned” by a prior-  
25 notification requirement); *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)  
26 (“By requiring advance notice, the government outlaws spontaneous expression”); *Grossman*  
27 *v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994); Pl.’s Motion, at 24:5–11 (discussing  
28 *Thomas v. Collins*, 323 U.S. 516 (1945)).

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

2 Prof. Bernstein has already provided a comprehensive analysis of (1) the Supreme  
3 Court’s distinction between content-based regulations and content-neutral regulations and (2)  
4 the two reasons that EAR is content-based. *See* Pl.’s Motion, at 14:1 to 17:4.

5 The Defendants argue that EAR is content-neutral. Sections VI.A, VI.B, and VI.C of  
6 this memorandum discuss three errors in the Defendants’ argument.

7 **A. A Regulation of Speech Is Content-Based If Its Burdens Are Determined**  
8 **by Content or Motivated by Content**

9 The Defendants assert that a regulation of speech is content-neutral if it has a content-  
10 neutral purpose, i.e., is not motivated by the content of the speech. Defs.’ Motion, at 18:7–17.

11 However, the Supreme Court’s test for content-neutrality actually has two elements. A  
12 regulation is content-neutral if it is facially content-neutral *and* has a content-neutral purpose;  
13 otherwise, it is content-based. Pl.’s Motion, at 14:2–28. As Professor Tribe has explained,  
14 in describing the difference between “track one” (content-based) regulations and “track two”  
15 (content-neutral) regulations:

16 Government may be deemed to have ‘abridged’ speech in the first sense,  
17 thus triggering track-one analysis, if *on its face* a governmental action is  
18 targeted at ideas or information that government seeks to suppress, or if  
19 a governmental action neutral on its face was *motivated* by (i.e., would  
20 not have occurred but for) an intent to single out constitutionally pro-  
21 tected speech for control or penalty. . . . Any inference that government’s  
22 aim is keeping people ignorant of ideas or information that it considers  
23 dangerous must normally be made in the first instance from the face of  
24 the statute.

25 *American Constitutional Law, 2d ed.*, at 794 (1988).

26 In each of the time-place-manner cases cited by the Defendants, the regulation was  
27 facially content-neutral, so the question of content-neutrality was a question of purpose. *See*  
28 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 290, 295 (1984) (upholding  
a prohibition of using certain parks for “living accommodation purposes such as sleeping  
activities”); *Ward v. Rock Against Racism*, 491 U.S. 781, 787 n.2, 791 (1989) (upholding a  
requirement that all “sound amplification” in Central Park be monitored by a government-

1 employed technician who controlled the volume of the sound to ensure “appropriate sound  
2 quality balanced with respect for nearby residential neighbors and the mayorally decreed  
3 quiet zone of Sheep Meadow”); *Hill v. Colorado*, 530 U.S. 703, 707, 714 (2000) (upholding  
4 a prohibition of approaching another person without consent, near a health-care facility, to  
5 engage in “oral protest, education, or counseling”). In the words of *Hill*, 530 U.S. at 722, the  
6 regulation in each case involved, on its face, at most a “cursory examination” of content.

7 **B. EAR Imposes Burdens Determined and Motivated by Content**

8 After quoting the phrase “purposes unrelated to the content of expression” and the  
9 phrase “justified without reference to the content of the regulated speech,” the Defendants fail  
10 to apply those phrases to EAR. *See* Defs.’ Motion, at 18:7 to 20:4.

11 As already discussed in Pl.’s Motion, EAR has a content-based purpose: it is motivated  
12 by the content of the speech. Pl.’s Motion, at 15:1 to 17:4. The government justifies its regulation  
13 of documents by referring to the content of those documents: specifically, the meaning of the  
14 instructions in those documents. Pl.’s Motion, at 15:21–28, 16:1–20. Consequently, EAR is  
15 content-based even under the Defendants’ oversimplified test.

16 **C. Utility-Based Regulations Are Content-Based**

17 **i. Utility Is Part of Content**

18 There is an obvious difference between *communicating* information and *using* that  
19 information: for example, between *publishing* instructions and *following* those instructions.  
20 However, when the government is sufficiently concerned with the *use* of certain types of  
21 information, it also tries to control the *communication* of those types of information.

22 As an extreme example, the government does not want other countries building hydrogen  
23 bombs, so it attempts to prevent the publication of instructions for building hydrogen bombs.  
24 *See United States v. Progressive*, 467 F. Supp. 990 (W.D. Wisc. 1979).

25 Regulations of this type—regulations of information for its “capacity” or “functionality”  
26 or “utility”—are content-based; utility is part of content. Pl.’s Motion, at 15:1 to 16:20.

27 There is, of course, a difference between “content-based” and “unconstitutional.” For  
28 example, the First Amendment allows the government to regulate communication of instructions



1 aiding criminal activity, if the communicator *intends* to aid criminal activity. These regulations  
2 are content-based, but they survive strict scrutiny.<sup>11</sup>

3 **ii. A Utility Exception Would Be Inconsistent with the Case Law**

4 The Defendants argue that utility-based regulations are content-neutral: in particular,  
5 that EAR is content-neutral, because the information regulated by EAR is selected for its  
6 “capacity.” Defs.’ Motion, at 18:18 to 19:19.

7 The Defendants’ utility theory, if accepted, would dramatically weaken First Amend-  
8 ment protection for sheet music, player-piano rolls, street maps, blueprints, cookbooks, car-  
9 repair manuals, and instructions generally. It would have trivialized the analysis in several  
10 previous cases, sometimes reversing their results.

11 For example, the defendants in *Linmark Assocs. v. Willingboro*, 431 U.S. 85 (1977),  
12 attempting to reduce house sales in their township, prohibited “For Sale” signs on houses.  
13 Under the Defendants’ utility theory, this ordinance would have been “content-neutral” and  
14 therefore easily upheld: the “For Sale” information was banned because of receivers’ *use* of the  
15 information. However, the Supreme Court specifically rejected this argument, and held that the  
16 ordinance was content-based. *See* Pl.’s Motion, at 16:6–13. The ordinance was struck down.

17 The defendants in *Progressive* wanted to publish an article explaining how to build a  
18 hydrogen bomb. The government attempted to censor the article. A district court, recognizing  
19 the difficulty of the case and positing a “basic confrontation between the First Amendment  
20 right to freedom of the press and national security,” eventually issued a preliminary injunction.  
21 *Progressive*, 467 F. Supp. at 995, 1000. In contrast, the utility theory would have swept aside all  
22 the difficulties; censoring instructions according to their *use* would have been “content-neutral”  
23 and therefore easily upheld.

24 The plaintiffs in *Winter v. G. P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991), became

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25 <sup>11</sup> Pl.’s Motion, at 17:22 to 20:4. The courts erred in *Universal City Studios, Inc. v. Corley*,  
26 273 F.3d 429 (2d Cir. 2001), and *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111  
27 (N.D. Cal. 2002), in holding that a regulation of communication of instructions for copy-  
28 right infringement was content-neutral. Both *Universal* and *Elcom* are distinguishable  
because, among other reasons, they concerned instructions for unlawful activity. *See*  
also Pl.’s Motion, at 16, n.24.

1 sick after eating mushrooms that, according to the defendant’s mushroom encyclopedia, were  
2 not poisonous. They sued under a strict-liability law. The Ninth Circuit held that the law,  
3 as applied to the publication of the encyclopedia, was unconstitutional. *Winter*, 938 F.2d at  
4 1036–1037. In contrast, under the utility theory, imposing liability upon information according  
5 to its *use* would have been “content-neutral” and therefore easily upheld.

6 The defendant in *Rice v. Paladin Enters. Inc.*, 128 F.3d 233 (4th Cir. 1997), published  
7 murder instructions, which were then followed by a murderer. The Fourth Circuit, relying on  
8 the defendant’s admitted intent to aid murder, held that the publication was not protected by  
9 the First Amendment. *See* Pl.’s Motion, at 18:13 to 19:11. In contrast, the utility theory would  
10 have swept aside the question of intent; censoring instructions according to their *use* would  
11 once again have been “content-neutral” and therefore easily upheld.

### 12 **iii. Freedom of Speech Is Broader Than Copyright Protection**

13 The Defendants, borrowing a distinction from copyright law, observe that instructions  
14 have “both functional and expressive elements.” Defs.’ Motion, at 1:24. Prof. Bernstein agrees  
15 that information is not protected by copyright to the extent that it is “utilitarian”; however,  
16 copyright protection is not a prerequisite for First Amendment protection.

17 For example, a *purely* functional Chunky Chili Dip recipe is not protected by copyright,  
18 *Publications Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996); “Alice’s Adventures in  
19 Wonderland” is no longer protected by copyright; and the phrase “Fuck the Draft” in *Cohen v.*  
20 *California*, 403 U.S. 15 (1971), has never had enough originality to be protected by copyright.  
21 The First Amendment nevertheless protects publication of these items. As this Court has  
22 commented, copyright law and First Amendment law “are by no means coextensive, and the  
23 analogy between the two should not be stretched too far.” *Bernstein I*, 922 F. Supp. at 1436.

### 24 **iv. Computers Do Not Affect the First Amendment Analysis**

25 On appeal to the Ninth Circuit, the Defendants appeared to recognize how much of  
26 the First Amendment would be destroyed by an exception for instructions and other useful  
27 information. They attempted to narrow the exception by drawing a line around information  
28 that *can be understood by a computer*. They drew a “basic distinction” between a recipe, which

1 “cannot be used to make a casserole or a cake unless it is read by a person who understands the  
2 information it contains and acts on the basis of that information,” and software, which “can be  
3 used to control the operation of a computer without conveying information to the user.”<sup>12</sup>

4 Nowhere have the Defendants explained *why* the computer, a mere tool for people to  
5 use, should have any effect on the First Amendment analysis.

6 Consider, for example, a book of tax-computation instructions. Under the Defendants’  
7 computer-utility theory, the publisher of this book is protected by First Amendment strict  
8 scrutiny—*unless* the instructions can be followed by a computer, in which case the publisher  
9 receives only the mild protection of intermediate scrutiny. The Defendants have not explained  
10 this bizarre distinction.

11 As another example, regulations of printed musical instructions—sheet music, player-  
12 piano rolls, etc.—receive only intermediate scrutiny under the Defendants’ theory, because  
13 machines can read and follow those instructions without a person reading and understanding  
14 the instructions. This Court has already commented, *Bernstein I*, 922 F. Supp. at 1435, that  
15 player-piano rolls are “no less protected for being wholly functional”; the Defendants’ theory  
16 produces the opposite conclusion.

17 Note that the Defendants’ goals in this case are not tied to computers. If a criminal  
18 encrypts his communications with the “one-time pad,” government eavesdroppers will be unable  
19 to decrypt those communications; it does not matter whether the encryption is carried out by  
20 hand or by a computer. *See* Schneier Decl., ¶¶3–13. The computer saves time, but it does not  
21 implicate new interests.

## 22 v. Computers Are Getting Smarter

23 There is another reason that the Defendants’ computer-utility exception must be rejected:  
24 it expands without limit as computers learn to understand more and more information.

25 For example, the Defendants’ theory would allow the government to ban matrioshka-

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26 <sup>12</sup> Brief for the Appellants (October 16, 1997), at 28:1–9; *see also* Defs.’ Motion, at  
27 19:8. In contrast, the utility exception in copyright law is not limited to software. *See*,  
28 *e.g.*, *Publications Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996) (analyzing  
copyrightability of cookbooks).

1 doll blueprints and double-fudge-chocolate-cake recipes, in a future world where robots can  
2 automatically read and follow the instructions in those documents. The government would not  
3 merely be able to prohibit *using* those robots, i.e., building a matrioshka doll or baking a double-  
4 fudge chocolate cake; it would be able to punish the authors and publishers of *instructions* for  
5 those activities. The presence of these robots would, according to the Defendants, dramatically  
6 change the First Amendment analysis, replacing strict scrutiny with intermediate scrutiny; the  
7 government could then meet intermediate scrutiny by pointing to the swallowing hazards of  
8 matrioshka dolls and the severe long-term health risks posed by double-fudge chocolate cake.

9 As the Ninth Circuit observed in affirming *Bernstein III*:

10 The distinction urged on us by the government would prove too much  
11 in this era of rapidly evolving computer capabilities. The fact that  
12 computers will soon be able to respond directly to spoken commands,  
13 for example, should not confer on the government the unfettered power  
to impose prior restraints on speech in an effort to control its “functional”  
aspects.

14 *Bernstein IV*, 176 F.3d at 1142; *see* Olson Decl., ¶5.

## 15 **VII. EAR DOES NOT AIM PRECISELY AT A COMPELLING INTEREST**

### 16 **A. Notice**

17 The Defendants assert that they have a “compelling interest” in “notice of the export  
18 of U.S. origin encryption.” Defs.’ Motion, at 20:19–20; *see also Id.*, at 22:2, 22:26–28. EAR,  
19 measured against this “interest,” fails strict scrutiny, for four independent reasons.

20 First, the government’s goal of “notice of the export of U.S. origin encryption” is not  
21 the government’s real interest; it is merely a summary of one portion of EAR. As in *Simon &*  
22 *Schuster v. Crime Victims Bd.*, 502 U.S. 105, 120 (1991), the Defendants have “taken the *effect*”  
23 of part of EAR and “posited that effect as the State’s interest.” If these circular “interests” were  
24 accepted, strict scrutiny would become meaningless. *See* Pl.’s Motion, at 20:23 to 21:6.

25 Second, even if the government’s goal of acquiring information were an “interest,” it  
26 would not be a compelling interest. Any other conclusion would allow the government to freely  
27 impose notification burdens upon public and private speech; but such burdens were rejected in,  
28 e.g., *Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981), and *Thomas v. Collins*,

1 323 U.S. 516 (1945).

2 Third, EAR is overinclusive; it is not narrowly tailored to serve the government’s goal  
3 of “notice.” For example, this goal does not justify EAR’s demand that notifications be sent  
4 “by the time of export”; notifications could equally well take place a week later. *See* 15 C.F.R.  
5 §740.13(e). As another example, this goal does not justify EAR’s license requirements upon  
6 “technical assistance,” and upon publications priced above the copying cost. *See* 15 C.F.R.  
7 §744.9(a); §734.7(b).

8 Fourth, EAR is underinclusive, because it makes an exception for printed materials.  
9 *See* 15 C.F.R. §734.3(b). If the government actually had a compelling interest in “notice of the  
10 export of U.S. origin encryption,” it would not permit “export” of exactly the same information  
11 in printed form *without* notice. As in *Bernstein III*, 974 F. Supp. at 1306, the “printed matter  
12 exception belies this rationale” for EAR.

13 **B. Spying**

14 The Defendants also assert that they have a “crucial task” of “dealing with encrypted  
15 communications of foreign intelligence interest,” i.e., in spying upon foreigners attempting to  
16 communicate in secret. Defs.’ Motion, at 5:2–4; *see also Id.*, at 7:13–14. EAR, measured  
17 against this goal, fails strict scrutiny, for four independent reasons.

18 First, the Defendants’ claim that EAR serves the government’s goal of spying<sup>13</sup> is  
19 contradicted by the facts. Prof. Bernstein has already introduced undisputable evidence that  
20 criminals have been capable of communicating in secret for years, and that unbreakable crypto-  
21 graphic systems, suitable for communication among small groups of people, have been widely  
22 known for years.<sup>14</sup> Knowledge of the details of a cryptographic system does not help the  
23 government spy upon foreigners when the government cannot break the system.

24 Second, the government’s goal of spying upon foreigners is not the government’s real  
25 interest, never mind a compelling one. The government’s declarant attempts to justify spying<sup>15</sup>

26 <sup>13</sup> *See* Defs.’ Motion, at 1:25–27, 5:2–4, 20:27 to 21:5.

27 <sup>14</sup> *See* Pl.’s Motion, at 1:13–17; Schneier Decl., ¶¶3–13.

28 <sup>15</sup> Declaration of Louis F. Giles III in Support of Defendants’ Motion, ¶17.

1 by referring to the government’s real interest in saving lives; the regulations must be measured  
2 for their remarkably speculative connection to that interest.

3 Third, EAR is overinclusive. It is not narrowly tailored to serve the goal of spying, for  
4 the same reasons that it is not narrowly tailored to serve the goal of “notice.”

5 Fourth, EAR is underinclusive, as shown once again by the printed-material exception.

## 6 **VIII. EAR IS UNCONSTITUTIONALLY OVERBROAD**

7 EAR, as applied to Prof. Bernstein’s desired activities, is an unconstitutional content-  
8 based regulation of speech. Pl.’s Motion, at 17:5 to 21:6. For the same reasons, EAR, on its  
9 face, is an unconstitutional content-based regulation of speech. Pl.’s Motion, at 21:7–22.

### 10 **A. An As-Applied Challenge Does Not Preclude a Facial Challenge**

11 The Defendants assert that an as-applied challenge should be considered before a  
12 facial challenge, and that overbreadth analysis “does not apply” if an as-applied challenge is  
13 successful. Defs.’ Motion, at 12:15–18, 16:22–24. In other words, the Defendants assert that  
14 Prof. Bernstein’s overbreadth claim is precluded by his as-applied claim.

15 These myths have already been dispelled in Pl.’s Motion. A substantially overbroad  
16 regulation may be challenged and invalidated on its face, whether or not the challenger’s  
17 activities are protected by the First Amendment. Pl.’s Motion, at 21:12–18.

### 18 **B. The Regulations At Issue Have No Legitimate Sweep**

19 The Defendants claim that 5D002 and 5E002 have “a plainly legitimate sweep as applied  
20 to the vast array of encryption software exports,” and therefore are not substantially overbroad.  
21 Defs.’ Motion, at 17:4–11.

22 This claim is without merit. Other authors and publishers of encryption software have  
23 the same First Amendment rights as Prof. Bernstein.

## 24 **IX. EAR IS AN UNCONSTITUTIONAL PRIOR RESTRAINT**

### 25 **A. *Lakewood***

26 Facial challenges to licensing schemes are permitted whenever the censor has “sub-  
27 stantial power to discriminate based on the content or viewpoint of speech by suppressing  
28 disfavored speech or disliked speakers”: in particular, when the licensing schemes target (1)

1 speech or (2) conduct commonly associated with speech. *Lakewood v. Plain Dealer Publishing*  
2 *Co.*, 486 U.S. 750, 760 (1988). Consequently, 5D002 and 5E002, when read in light of the  
3 remaining provisions of EAR, are subject to facial challenge. *See* Pl.’s Motion, at 23:9–12.

4 The Defendants argue that publication of computer-comprehensible instructions is “not  
5 so commonly associated with expression as to warrant a facial challenge.” Defs.’ Motion, at  
6 15:26 to 16:2. There are five independent errors in the Defendants’ argument.

7 First, the government’s “not so commonly associated” claim is, as a factual matter,  
8 simply not true. As the Ninth Circuit has already observed:

9 [T]he dissent asks whether the “conduct”—the exchange of crypto-  
10 graphic source code—is “commonly associated with expression.” This  
11 question the dissent answers in the negative; in other words, the dis-  
12 sent concludes that source code is not used expressively *often enough*.  
13 We find this conclusion somewhat perplexing, as there is nothing in the  
14 record to support it. Bernstein has introduced extensive expert evidence  
15 to support his contention that source code is frequently used for ex-  
16 pressive purposes. The government, however, has failed to introduce  
17 anything into the record to rebut this evidence.

18 *Bernstein IV*, 176 F.3d at 1143, n.18; *see* Olson Decl., ¶5.

19 Second, the Defendants are misquoting *Lakewood*. The Supreme Court asked whether  
20 an activity had a close enough nexus “to expression, or to conduct commonly associated with  
21 expression”; whether licensing was applied “to speech, or to conduct commonly associated  
22 with speech.” *Lakewood*, 486 U.S. at 760 (emphasis added). The activities at issue in this case  
23 are speech,<sup>16</sup> so it does not matter whether they are “commonly associated with speech.”

24 Third, the Supreme Court stated, as a clarifying example, that a law requiring building

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25 <sup>16</sup> Pl.’s Motion, at 13:14–26. The Defendants argue that EAR’s controls on “encryption  
26 software” and “encryption technology” are “part and parcel” of EAR’s “general controls  
27 on the export of encryption products”; that viewing them in “isolation” is “incorrect”; and  
28 that the broader controls are not “directed to communicative activity.” Defs.’ Motion,  
at 15:5–7, 15:23–24, 15:4–6. However, the central EAR provisions at issue, 5D002  
and 5E002, target pure communication. The Defendants’ decision to phrase 5D002 and  
5E002 as portions of a definition, rather than as separate license requirements, does not  
shield them from attack. As an analogy, suppose that the phrase “religious books” were  
added to the legal definition of “drugs” subject to discretionary government licensing.  
That phrase would be subject to facial attack under *Lakewood*, even if the government  
claimed that Koran censorship was “part and parcel” of the drug-licensing laws.

1 permits would not be subject to facial challenge, because it did not give the government  
2 the opportunity to inspect “ongoing expression or the words about to be spoken.” *Lakewood*,  
3 486 U.S. at 761. In contrast, the EAR licensing scheme gives the government ample opportunity  
4 to review the words about to be spoken.

5 Fourth, *Lakewood* concerned a content-neutral licensing scheme. Content-based licens-  
6 ing schemes are always subject to facial challenge. *See, e.g., Freedman v. Maryland*, 380 U.S. 51  
7 (1965). The EAR licensing scheme is content-based, and therefore subject to facial challenge.

8 Fifth, the EAR licensing scheme covers more than “software”; the Defendants are  
9 also censoring “technical assistance,” “technical data,” “technology,” etc. *See* 15 C.F.R. §774,  
10 Supplement 1, ECCN 5E002; §744.9(a). Unless the Defendants are willing to claim that  
11 providing “technical assistance” is not “conduct commonly associated with expression,” they  
12 must concede that a facial challenge is permitted even under their own test.

13 **B. *Thomas v. Chicago Park District***

14 In *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775 (2002), the Supreme  
15 Court upheld a content-neutral licensing system for events in a municipal park. The Supreme  
16 Court held that *Freedman v. Maryland*, 380 U.S. 51 (1965), was “inapposite because the  
17 licensing scheme at issue here is not subject-matter censorship but content-neutral time, place,  
18 and manner regulation of the use of a public forum.” *Thomas*, 122 S. Ct. at 779.

19 The Defendants claim that *Thomas* removed the *Freedman* requirements for every  
20 content-neutral regulation that “does not authorize a licensor to pass judgment on the content of  
21 speech.” Defs.’ Motion, at 14:19–20. The Defendants then claim that EAR does not authorize  
22 such judgment. Defs.’ Motion, at 14:22 to 16:7. The Defendants conclude that EAR is exempt  
23 from “the prior restraint doctrine.” Defs.’ Motion, at 16:7.

24 The Defendants’ argument has five independent errors. First, the Defendants are mis-  
25 reading *Thomas*. The Supreme Court limited its holding to “time, place, and manner regulation  
26 of the use of a public forum.” EAR is not a time-place-manner public-forum regulation.

27 Second, the Defendants’ characterization of the case law is inconsistent with *FW/PBS*,  
28 *Inc. v. Dallas*, 493 U.S. 215 (1990). The licensing scheme at issue in *FW/PBS* was content-



1 neutral, and did not involve a censor “passing judgment on the content of any protected speech,”  
2 but *FW/PBS* nevertheless applied some of the *Freedman* requirements. *FW/PBS*, 493 U.S. at  
3 229. Note that *Thomas* distinguished *FW/PBS*. *Thomas*, 122 S. Ct. at 780, n.2.

4 Third, the Defendants’ claim that EAR “does not authorize a licensor to pass judgment  
5 on the content of speech” is patently incorrect. The EAR licensing system allows censors  
6 to review documents and make licensing decisions for whatever reasons they want, with no  
7 judicial review. *Thomas* is readily distinguishable in this respect.

8 Fourth, being exempt from the *Freedman* requirements does *not* mean being exempt  
9 from facial challenge as a prior restraint. The Defendants say that it would be “bizarre” to  
10 permit a facial prior-restraint challenge to EAR when a facial prior-restraint challenge was not  
11 permitted in *Thomas*;<sup>17</sup> but a facial prior-restraint challenge *was* permitted in *Thomas*. The  
12 Supreme Court checked whether the licensing system contained adequate standards to render  
13 the official’s decision subject to effective judicial review. *Thomas*, 122 S. Ct. at 780; *see*  
14 *generally* Pl.’s Motion at 22:14 to 23:8 (explaining facial prior-restraint analysis).

15 Fifth, the Defendants’ assumption of content-neutrality is incorrect. *See supra*.

## 16 CONCLUSION

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

20  
21 Respectfully submitted,

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23 \_\_\_\_\_  
24 DANIEL J. BERNSTEIN

25 <sup>17</sup> Defs.’ Motion, at 16:14–17. The Defendants also state, *Id.*, that a facial prior-restraint  
26 challenge was not permitted in *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996). But  
27 the plaintiffs in *Roulette* did not bring a facial prior-restraint challenge. The regulation  
28 in *Roulette* was not a licensing scheme; it was a ban on sitting on sidewalks. *Roulette*,  
97 F.3d at 302. This Court has already pointed out how different this ban is from EAR’s  
censorship system. *Bernstein III*, 974 F. Supp. at 1305.