No. 19-50723

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEFENSE DISTRIBUTED, *et al.*,

Plaintiffs-Appellants,

v.

GURBIR S. GREWAL, ATTORNEY GENERAL OF NEW JERSEY,

Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division; No. 1:18-cv-637

OPPOSITION TO APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

Appellants' motion seeks an injunction pending appeal of a New Jersey state statute they never challenged in their operative complaint, and that the Legislature adopted months after issuance of the cease-and-desist letter underlying this Court's jurisdictional ruling. And they do so even though the New Jersey Attorney General ("NJAG") agrees the mandate from this Court should issue forthwith, thus allowing the district court to promptly assess the myriad issues—including those that require fact development and those that turn on state law—presented by these requests for injunctive relief. There is an appropriate and expeditious way to resolve Appellants' demands, but it is not a motion filed in this Court challenging a distinct state statute, filed over one year after the appeal was initiated, where the defendant agrees that the mandate should issue and the challenge can promptly proceed in the district court.

In its recent decision, this Court reversed a district court's order granting the NJAG's motion to dismiss for lack of jurisdiction, allowing Appellants' challenge to the enforcement of New Jersey public nuisance law to proceed in Texas. The panel found jurisdiction based on allegations regarding the NJAG's cease-and-desist letter warning of such enforcement, which the panel stressed was the NJAG's sole contact with Texas. Having obtained that ruling, Appellants ask for an injunction unmoored from the allegations of their complaint, against an *entirely different New Jersey law* that played no role in the forum contacts on which this Court relied. Indeed, the

statute Appellants seek to enjoin, N.J. Stat. Ann. § 2C:39-9(*l*)(2), is not mentioned in the NJAG's letter or Appellants' Amended Complaint—and did not even exist at the time the pleading was filed. But it is black letter law that plaintiffs are not entitled to injunctive relief against laws they did not challenge in their operative complaint. And it is equally well established that personal jurisdiction over one claim does not ensure jurisdiction over a challenge to another law, especially when the Legislature's later adoption of § 2C:39-9(*l*)(2) has no jurisdictional ties to Texas at all.

But that is not even the most unusual feature of Appellants' request. Although the NJAG has withdrawn his Petition for Rehearing *En Banc* and has agreed that the mandate can and should issue forthwith—merely one day after it would have issued had he never filed a Petition—Appellants continue to demand an injunction pending appeal *without a pending appeal*. Instead, at this posture of the case, there is a simple and appropriate resolution: to return the case to the district court for a thorough and prompt assessment of the factual, procedural, and state law questions presented by Appellants' preliminary injunction motion, and allow for the proper development of the record that would typically be required. There is no basis for this Court to rule on these questions in the first instance when the appeal has ended, and when all the appropriate proceedings in the district court can begin immediately.

Aside from these clear procedural defects, Appellants' motion must be denied based on their inability to demonstrate entitlement to injunctive relief. Specifically,

and as the Third Circuit already held in litigation between these parties, Appellants' claims of irreparable harm are belied by their own conduct and by the fact that an injunction would have no impact on the status quo. Given what this Court has already recognized are the permanent harms that would be done to public safety if this injunctive relief were granted, the balance of equities overwhelmingly weighs against granting relief. And the myriad factual and state law questions—which require factual development in which only a district court can effectively engage—call for allowing this case to proceed quickly on remand in the first instance. The Court should deny this motion and require Appellants to seek preliminary injunctive relief in the normal course.

STATEMENT OF FACTS AND OF THE CASE

The underlying appeal in this matter stems from Appellants' claims related to a July 26, 2018 cease-and-desist letter that the NJAG sent to Defense Distributed, warning that its dissemination of printable gun files for use by New Jersey residents would violate New Jersey's public nuisance law. ROA.138, 178. Appellants alleged that the enforcement action threatened by the NJAG's letter, in conjunction with the NJAG's participation in a multistate action in the Western District of Washington, violated a number of state and federal provisions. ROA.145. After the district court dismissed the claims for lack of jurisdiction, a panel of this Court reversed, finding that it had jurisdiction over the Amended Complaint based upon the NJAG's July

26, 2018 cease-and-desist letter. *Defense Distributed v. Grewal*, __ F.3d __, 2020 WL 4815839 (5th Cir. Aug. 19, 2020).

This motion for an injunction pending appeal concerns something different. Appellants seek an order enjoining enforcement of N.J. Stat. Ann. § 2C:39-9(*l*)(2), a statute adopted by the New Jersey Legislature that makes it a crime to distribute certain files capable of producing firearms using a 3D printer "to a person in New Jersey" who is not a licensed manufacturer. This statute was enacted on November 8, 2018—months after the NJAG's cease-and-desist letter was sent (and thus is not mentioned anywhere in the letter). ROA.178. The law was also enacted months after Appellants filed their Amended Complaint, and thus was not challenged in that complaint. *See* ROA.123. Appellants did not see fit to amend their complaint to add any challenge to that distinct statute, nor did they file a motion for an injunction of this law for the first *thirteen months* after filing the instant appeal. *See* ROA.1808 (filing appeal in 2019, without seeking expedited review or injunction pending appeal).

Instead, Appellants chose to litigate whether their Amended Complaint could have been dismissed in light of the NJAG's letter. Indeed, the panel's finding that a prima facie case of personal jurisdiction exists was based entirely on the cease-and-desist letter and related allegations in the Amended Complaint, none of which relate to the provisions the New Jersey Legislature later adopted in § 2C:39-9(*l*)(2). *See*

Defense Distributed v. Grewal, 2020 WL 4815839, at *1-2. The panel was not faced with, and did not consider, whether there is a basis to exercise jurisdiction over the NJAG to enjoin enforcement of § 2C:39-9(*l*)(2). The panel further expressly found that statements made at a New Jersey press conference announcing the enactment of § 2C:39-9(*l*)(2) were *not* contacts with Texas. *Id.* at *4. In short, neither the district court nor the panel of this Court have addressed whether jurisdiction exists over the NJAG to enjoin enforcement of § 2C:39-9(*l*)(2).

On top of that, Appellants have intentionally foregone alternative avenues for seeking immediate relief. Days after the Texas district court dismissed this action, Appellants filed a lawsuit asserting the same claims against the NJAG in the District of New Jersey. *See Defense Distributed v. Att'y General of New Jersey*, __ F.3d __, 2020 WL 5001608, at *2 (3d Cir. Aug. 25, 2020). That lawsuit expressly seeks an order enjoining enforcement of § 2C:39-9(*l*)(2)—the same relief the instant motion seeks. *Id.* Instead of abandoning the Texas action to obtain immediate relief in New Jersey, for more than a year-and-a-half Appellants have insisted on simultaneously litigating the same claims against the NJAG in both venues. Thus on March 7, 2019, the District of New Jersey applied the first-filed rule and stayed that case until the Texas action was resolved. *Id.* At a March 7 hearing, Appellants' counsel suggested that if a stay were granted, they would likely "let the [Texas] case go and disclaim any appeal immediately so as to proceed here in New Jersey. So we will be back

almost immediately." No. 19-1729, Document 003113216267 at App. 1001 (3d Cir. Apr. 18, 2019). All agreed that would have allowed Appellants to proceed with their challenge on the merits almost eighteen months ago.

Appellants then did the opposite, filing this appeal and weeks later appealing the March 7 stay order to the Third Circuit. *Defense Distributed v. Att'y General of New Jersey*, 2020 WL 5001608, at *2-3. In dismissing that separate appeal for lack of jurisdiction, the Third Circuit stressed Appellants' wait-and-see effort to secure a favorable forum for their claims is the only thing standing in the way of their ability to seek immediate relief against § 2C:39-9(*l*)(2). *Id.* at *5. Appellants filed a petition for *en banc* review of that decision on September 9, 2020.

On September 2, 2020, the NJAG filed a petition for rehearing *en banc* of the panel's decision. Docket 19-50723, Document No. 00515551266. On September 11, 2020, the NJAG moved to withdraw that petition and asked to have the mandate issue forthwith—just one day after the mandate would have issued had that petition not been filed—so that Appellants can immediately pursue the relief they seek before the district court. Docket 19-50723, Document No. 00515561583.

ARGUMENT

I. Appellants' Motion Fails On Procedural And Jurisdictional Grounds.

Appellants urge this Court to enjoin the NJAG from enforcing a state statute and New Jersey's public nuisance common law against them. Appellants assert that

"the Court has already held that" there is "personal jurisdiction over Grewal" for the purposes of the motion for injunction pending appeal, Br. 7, but they are incorrect. Instead, Appellants' latest request presents procedural and jurisdictional flaws never addressed by this Court, each of which foreclose any injunctive relief.

At the outset, this motion must be denied because Appellants cannot satisfy Federal Rule of Appellate Procedure 8(a)(2)(A), which requires a party moving for an injunction pending appeal to "show that moving first in the district court would be impracticable." Under the Rule, motions "must first be presented to the district court 'unless it clearly appears that further arguments in support of the [injunction] would be pointless in the district court.'" *Whole Woman's Health v. Paxton*, __ F.3d __, 2020 WL 4998233, at *2 (5th Cir. Aug. 21, 2020); *see also id.* at *3 ("State's failure to show the impracticability of moving first in the district court is sufficient grounds to deny its motion."). Because the NJAG moved to withdraw his petition for rehearing *en banc* and to have the mandate issue forthwith, Appellants can seek relief immediately in the district court and cannot seek it here first. Indeed, the only reason the mandate would not issue would be because *Appellants* oppose it, a self-created dilemma that hardly establishes impracticability. Nor is there anything unfair about that result: this would allow Appellants to seek relief from the district court a mere one day later than they could have had no petition ever been filed.

While Rule 8's procedural bar is dispositive, there are three additional, distinct defects with this motion. First, Appellants fundamentally alter the relief they seek, asking this Court to enjoin New Jersey from enforcing a state statute that was never mentioned in their operative complaint, in the NJAG's cease-and-desist letter, or in this Court's opinion. In the operative complaint, Appellants challenged enforcement of New Jersey's public nuisance common law against them, and did not mention this statute. ROA.123, 178. That is no surprise—the Legislature enacted § 2C:39-9(*l*)(2) over three months after the NJAG sent the cease-and-desist to Appellants, and two months after Appellants filed the operative Amended Complaint in this action. But rather than amend the Complaint to include a challenge to the statute, they simply pressed forward, focusing only on the injuries that they alleged arose out of a cease-and-desist letter. And when this Court assessed jurisdiction for purposes of the complaint, it unsurprisingly focused its analysis on that letter too.

While Appellants are free to make that choice, their decision not to plead any challenge to § 2C:39-9(*l*)(2) means that there is no basis to grant relief enjoining its enforcement as part of this case. *See, e.g., Colvin v. Caruso*, 605 F.3d 282, 299-300 (6th Cir. 2010) (noting the plaintiff "had no grounds to seek an injunction pertaining to allegedly impermissible conduct not mentioned in his original complaint"); *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015) ("When a plaintiff seeks injunctive relief based on claims not pled in the complaint,

the court does not have the authority to issue an injunction."); *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (same); *Bucklew v. St. Clair*, No. 18-2117, 2019 WL 2251109 (N.D. Tex. May 15, 2019) (confirming "district courts within this circuit have found that a request for preliminary injunction must also be based on allegations related to the claims in the complaint"). If Appellants wish to enjoin the enforcement of § 2C:39-9(*l*)(2), they must plead their case.[1]

Even if Appellants had pled a challenge to § 2C:39-9(*l*)(2), there would be no jurisdiction over that claim. As a threshold matter, jurisdiction must be evaluated on a claim-by-claim basis, *Seiferth v. Helicopteros Atuneros*, *Inc.,* 472 F.3d 266, 275 (5th Cir. 2006), meaning that even if a cease-and-desist letter established jurisdiction for the claims described therein, this Court must evaluate whether jurisdiction exists for a challenge to a state statute *not* mentioned in the letter, and that was not enacted until months after it was sent. Under this Court's reasoning, it is clear that there is no jurisdiction over a claim challenging this statute.

For one, the Court stressed personal jurisdiction was proper as applied to the claims in the Amended Complaint because the "claims are *based on* Grewal's cease-and-desist letter," which warned against violating New Jersey's nuisance law. Slip

[1] Indeed, to hold otherwise would have troubling implications for defendants across a range of contexts. If a plaintiff does not plead a claim in his complaint, a defendant cannot seek to dismiss it on jurisdictional or merits grounds. To then allow that same plaintiff to seek injunctive relief on the unpled ground would give plaintiffs a way to evade Rule 12's clear strictures.

Op., at 9 (emphasis added); *see id.* (distinguishing *Stroman* as being "more a product of Arizona's regulatory scheme than it was the cease-and-desist letter itself. Not so for the plaintiffs' claims here, many of which are based on injuries stemming solely and directly from Grewal's cease-and-desist letter."); *id.* at 16 n.10 (adding that "the plaintiffs' injuries are directly attributable to the cease-and-desist letter itself *also weighs heavily* in our analysis" (emphasis added)). But there is no sense in which a challenge to § 2C:39-9(*l*)(2) is "based on" a letter that never mentioned it and which did not even exist at the time the letter was sent. To the contrary, a request to enjoin the enforcement of § 2C:39-9(*l*)(2) is quite obviously "more a product of [New Jersey's] regulatory scheme than it was the cease-and-desist letter." *Id.* at 9.

For another, this Court stressed that based on Plaintiffs' allegations, the cease-and-desist sufficed for jurisdiction because the NJAG did "not cabin his request by commanding the plaintiffs to stop publishing materials to New Jersey residents." Slip Op., at 10. But whatever might be said about the letter's threatened enforcement of public nuisance law, § 2C:39-9(*l*)(2) is explicit as to its reach and only prohibits a person from distributing covered files "*to a person in New Jersey*." The New Jersey Legislature's decision to pass this statute in no way constitutes any form of contact with Texas. The law does not mention Texas, nor does it mention Appellants. And while, at the signing of this law, the NJAG briefly referenced Appellants' founder, this Court explicitly held this did not "represent direct contacts with Texas," because

"the broadcast event the plaintiffs reference took place in New Jersey." Slip Op., at 9. Under *Walden v. Fiore*, 571 U.S. 277 (2014), a statement in Trenton, at the signing of a New Jersey law, does not establish jurisdiction in Texas even if effects are felt there. And there is *nothing else* tying the Legislature's enactment of § 2C:39-9(*l*)(2) to Texas. The panel's opinion thus does not allow for jurisdiction over this latest and distinct challenge to that later-in-time statutory enactment.

Second, either request for relief—to enjoin enforcement of the statute or the public nuisance common law—faces an additional jurisdictional hurdle: the burden of proof. While this Court found that sufficient allegations of personal jurisdiction exist here for Appellants to survive a motion to dismiss, that is insufficient for an injunction. As this Court has explained, while "a plaintiff need only make a prima facie showing of jurisdiction in response to a motion to dismiss," "more is required" before the same "court may validly enter a preliminary injunction." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 471 (5th Cir. 1985). As a result, this Court has required courts to hold hearings and make findings of fact establishing their jurisdiction over the party to be enjoined. *Id.; Visual Sciences v. Integrated Commc'ns*, 660 F.2d 56, 59 (2d Cir. 1981) ("A prima facie showing will not suffice … where a plaintiff seeks preliminary injunctive relief.").

The grant of an injunction is not warranted because necessary jurisdictional fact-finding has not yet occurred. To the contrary, this Court recognized a dispute as

to the proper interpretation of the NJAG's cease-and-desist letter, which was key to the question of jurisdiction, and found "at this stage of the litigation, we are required to resolve all factual disputes in favor of the plaintiff." Slip Op., at 10 n.6; *see id.* at 18 n.1 (Higginson, J., concurring) (agreeing that "as the majority points out, we do not resolve the factual dispute of whether Grewal did indeed threaten to enforce New Jersey nuisance laws against residents of Texas distributing the online files to residents of states other than New Jersey"). While the Court offered impressions on the letter—noting the opening of the letter could perhaps "be interpreted as a limited instruction" to limit dissemination to New Jersey residents, but that the general tone and closing language appeared broader—it did not resolve this issue. *See* Slip Op., at 10 n.6; *see id.* at 18 n.1 (Higginson, J., concurring) (noting "[i]f, in fact, Grewal attempted to prevent the distribution of the files only within the state of New Jersey" there would be no personal jurisdiction, and leaving that fact dispute for the district court). Such fact-finding is needed before granting injunctive relief. Those findings should be made first by the District Court, after the parties have had an opportunity to be heard. *See Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551-52 (5th Cir. 1993); *White v. Carlucci*, 862 F.2d 1209, 1210 n.1 (5th Cir. 1989).

II. As This Court And The Third Circuit Have Found, The Traditional Factors Governing Injunctions Pending Appeals Require Denying This Request.

"A preliminary injunction is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion." *Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex.*, 905 F.2d 63, 65 (5th Cir. 1990). Appellants must prove "(1) a substantial likelihood that the movant will prevail on the merits; (2) [that] the movant will suffer irreparable injury unless the injunction issues; (3) [that] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) [that] the injunction, if it is issued, would not be adverse to the public interest." *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 502 (5th Cir. 1982). Here, there are two independently sufficient reasons to deny Appellants' motion. First, whatever this Court's view of the merits, the remaining preliminary injunction factors cut strongly against granting relief, as this Court previously found. Second, an assessment of the merits is premature because the District Court has not engaged in the necessary steps to assess key questions of fact and law. Crucially, Appellants will have occasion to move for preliminary injunctive relief before the district court if this Court grants the NJAG's motion to withdraw its *en banc* petition and issues the mandate. There is no reason for the Court to short-circuit that prompt process.

First, Appellants cannot demonstrate that this Court should grant an injunction pending appeal because their claims of irreparable harm are belied by their conduct and, in any event, are far outweighed by the harm to public interests that would be brought about by an injunction. Appellants did not move for an injunction pending appeal when they commenced this appeal, instead waiting more than a year to seek this relief. *See* ROA.1808 (Notice of Appeal on July 31, 2019). Nor did Appellants seek expedited review of this appeal. As the Third Circuit recently explained, in an appeal in Appellants' duplicative suit against the NJAG in New Jersey, Appellants' "failure to move for a preliminary injunction or expedite [this] appeal indicates that the underlying harm" is insufficient to show a need for relief. *Defense Distributed v. Att'y General of New Jersey*, 2020 WL 5001608, at *5 n.8.

Appellants' explanation that they "have been diligently pursuing that relief elsewhere" does not justify waiting a year to file this motion; rather, it underscores the fact that Appellants could have long ago sought injunctive relief in the District of New Jersey had they dismissed this action. But Appellants instead insist on litigating the same claims against the NJAG in two forums at the same time, which precludes them from seeking immediate relief in the district court. As the Third Circuit explained,

> If the Attorney General's actions harmed Plaintiffs and they needed immediate relief, they could have withdrawn their action in Texas and pursued the New Jersey action. They did not. Further, they chose to prolong litigation in Texas over personal

> jurisdiction, but even if they succeed in their appeal, it will not result in an injunction. Plaintiffs had a path to get the District Court here to decide the merits of their injunction request but did not take it. *Plaintiffs' litigation strategy thus represents 'a strong indication that the status quo can continue' and belies an assertion of irreparable harm*.

Id. (emphasis added). To hold otherwise in this posture would create a conflict with another circuit on a finding involving the same facts and same parties.

As the Third Circuit further explained, Appellants' claims of irreparable harm ring hollow for the independent reason that federal regulations prohibit Appellants from disseminating the printable gun files on the internet. *See Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 456 (5th Cir. 2016) (summarizing regulations that prohibit posting files on the internet). The Temporary Modification of the rules was vacated by the Western District of Washington, *Washington v. U.S. Dep't of State*, 420 F. Supp. 3d 1130, 1148 (W.D. Wash. 2019), and the U.S. government is enjoined from enforcing subsequent Final Rules, *Washington v. U.S. Dep't of State*, __ F. Supp. 3d __, No. 20-cv-00111-RAJ, 2020 WL 1083720, at *11 (W.D. Wash. Mar. 6, 2020) (finding the injunction maintains the "status quo" on restrictions on 3D gun files). As the Third Circuit thus concluded, "[t]hat means that under federal law, Defense Distributed cannot disseminate its files." *Defense Distributed v. Att'y General of New Jersey*, 2020 WL 5001608, at *5. Given that prohibition, granting this motion would have no impact on the status quo.

Appellants' efforts to avoid this inescapable fact fail. Appellants first contend that the Temporary Modification was actually "not legally necessary," because their First Amendment rights trump the federal regulations. Mot. at 20-21. But regardless of whether Appellants disagree with those regulations, the fact remains that federal law bars internet dissemination of printable gun files. Appellants next claim that an injunction could alter the status quo as to dissemination via the mail, which would not be barred by federal regulations. Mot. at 21. This is belied by the record, as Appellants specifically allege that Defense Distributed ceased disseminating its files to comply with orders entered by the Western District of Washington, not because of the NJAG's enforcement activity. ROA.136 ¶ 62. Further, there is not so much as an allegation that Appellants have disseminated or seek to disseminate these files by mail. Instead, their Amended Complaint states that they only post these files on the internet and at one public library in Texas. ROA.134, 136-37, 145, ¶¶ 53-55, 64-72, 119. The dissemination Appellants engage in is thus barred by federal regulations and orders entered by the Western District of Washington, and granting Appellants' motion will in no way change the status quo.

On the other side of the ledger, allowing Appellants to disseminate these files to New Jersey residents would pose serious risks to public safety—and would do so permanently, not briefly. This Court already explained the irreparable damage that would be done if Defense Distributed were granted interim relief:

> Plaintiffs-Appellants would legally be permitted to post on the internet as many 3D printing and CNC milling files as they wish, including the Ghost Gunner CNC milling files for producing AR-15 lower receivers and additional 3D-printed weapons and weapon parts. Even if Plaintiffs-Appellants eventually fail to obtain a permanent injunction, the files posted in the interim would remain online essentially forever, hosted by foreign websites such as the Pirate Bay and freely available worldwide. … [b]ecause those files would never go away, a preliminary injunction would function, in effect, as a permanent injunction as to all files released in the interim. Thus, the national defense and national security interest would be harmed forever.

Defense Distributed v. U.S. Dep't of State, 838 F.3d at 460 (affirming district court's denial of Appellants' requests for a preliminary injunction enjoining federal export regulations). Although that decision was hotly disputed in this circuit, it remains controlling law, and compels the conclusion that enjoining enforcement of § 2C:39-9(*l*)(2) would likewise gravely harm the public interest.

As this Court has already held, the balance of the equities thus cuts strongly against granting this motion. After all, if Appellants ultimately prevail on the merits, their "rights will have been violated in the meantime, but only temporarily," whereas the government's safety "interest would be harmed forever." *Id.* at 459, 460. This Court's conclusion that "the harm to the government is greater than the harm to [Defense Distributed]" applies with even more force here where Appellants cannot demonstrate harm, as they will continue to be enjoined from distributing their files on the internet even if any injunction is entered, and where the NJAG agrees the

mandate should issue such that the district court can proceed to assess their request for relief promptly.

While this Court has already held the above is sufficient to deny Appellants' motion, it is also premature to address the likelihood of success on the merits without the benefit of a record or findings of fact. This Court has repeatedly emphasized the importance of developing a factual record before ruling on motions for injunctive relief. *See Sierra Club v. F.D.I.C.*, 992 F.2d 545, 551-52 (5th Cir. 1993) (remanding because "further consideration by the district court, including factual findings and legal conclusions concerning the [preliminary injunction] factors, are necessary for our review of the propriety of the district court's preliminary injunction"); *White v. Carlucci*, 862 F.2d 1209, 1210 n. 1 (5th Cir. 1989) (noting that if a district court "has not entered findings or conclusions on the elements of an injunction, … the proper solution is to remand so that such findings and conclusions may be entered, to give us a basis for review"). The need for a robust factual record is especially great when the "legal issues are novel," *Sierra Club*, 992 F.2d at 552, or the "facts . . . are hotly disputed," *Davis v. United States*, 422 F.2d 1139, 1142 (5th Cir. 1970). Indeed, this Court will review a district court's decision on a preliminary injunction motion only "when the record is exceptionally clear and remand would serve no useful purpose." *Sierra Club*, 992 F.2d at 551.

Here, no such settled record exists. Indeed, a number of facts remain "hotly disputed," and the court has yet to address, let alone resolve, those questions of fact and state law, including (though by no means limited to) the following:

- The scope of § 2C:39-9(*l*)(2);
- Whether Defense Distributed could comply with § 2C:39-9(*l*)(2) by blocking access to their files to users with New Jersey IP addresses;
- Whether Defense Distributed could comply with the cease-and-desist letter—and, by extension, New Jersey's public nuisance law—by blocking access to their files to users with New Jersey IP addresses;
- Factual issues bearing on the First and Second Amendment claims, including how the files at issue operate (that is, whether they communicate directly with a printer or require human intervention), the ramifications of making the files accessible to all individuals, including felons, domestic abusers, and terrorists, the difficulty associated with tracing 3-D printed guns, and risks associated with the proliferation of undetectable 3-D printed guns; and
- Factual materials bearing on the harm that Defense Distributed suffers from the failure to grant injunctive relief, and the harm that Appellee would suffer from the decision to grant injunctive relief.

Resolution of these disputes is central to whether Defense Distributed is entitled to an injunction, and this Court should not attempt to resolve them without the benefit of a factual record developed by the district court. *See SEC v. Arcturus Corp.*, 928 F.3d 400, 422 (5th Cir. 2019) (noting factual questions "should be resolved in the first instance by the trial court"). Appellants will, in short order, be able to move for a preliminary injunction before the district court—a process they are now delaying by opposing issuance of the mandate. At that point, the district court will be able to

develop the factual record that this case requires. The prudent course for this Court is to allow that process to take shape—not to short-circuit it.

On top of the factual disputes, the legal issues in this case are on the cutting edge. As this Court observed in *Defense Distributed v. United States Department of State*, "[t]his case presents a number of novel legal questions, including whether the 3D printing and/or CNC milling files at issue here may constitute protected speech under the First Amendment, the level of scrutiny applicable to the statutory and regulatory scheme here," and whether applicable laws "establish an impermissible prior restraint scheme." 838 F.3d at 461. "These are difficult questions," the Court concluded, "and we take no position on the ultimate outcome other than to agree with the district court that it is not yet time to address the merits." *Id.* Those questions are no less complex here than they were in that case, and the factual record is just as thin now as it was then. This Court should decline to enter the requested injunction and allow the case to proceed expeditiously on remand.

CONCLUSION

This Court should deny Appellants' motion.

Respectfully submitted,

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Dated: September 11, 2020

/s/ Jeremy M. Feigenbaum
Jeremy M. Feigenbaum

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