No. 19-50723

In the United States Court of Appeals
For the Fifth Circuit

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED,

Plaintiffs - Appellants

v.

GURBIR S. GREWAL, Attorney General of New Jersey, in his official capacity,

Defendant - Appellee

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

Appellants' Motion for an Injunction Pending Appeal

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MOTION FOR AN INJUNCTION PENDING APPEAL

Plaintiffs/Appellants Defense Distributed and the Second Amendment Foundation, Inc. move for an injunction pending appeal against Defendant/Appellee New Jersey Attorney General Gurbir Grewal. *See* Fed. R. App. P. 8(a). The Court has ruled in the Appellants' favor, reversed the district court, and remanded the case so that the Plaintiffs can finally obtain a ruling on the merits of their motion for a preliminary injunction against Grewal's unprecedented censorship. But now Grewal has sought panel and *en banc* rehearing, tying up the appeal for an unknown number of additional weeks or even months. Though Grewal has the right to make that request, his wrongdoing is not immune from this Court's oversight in the meantime.

Plaintiffs did not seek an injunction pending appeal from this Court until now for good reason: They have been diligently pursing that relief elsewhere. While the instant appeal ran its course, Plaintiffs followed Judge Pitman's instruction to "pursue their claims in a court of proper jurisdiction," ROA.1751, and immediately sought preliminary injunctive relief against Grewal in the District of New Jersey. But that court refused to rule on the request *because the instant appeal before this Court was pending*; *and just last week, a 2-1 Third Circuit decision refused to afford relief as well*. *See Def. Distributed v. Attorney Gen. N.J.*, No. 19-1729, 2020 WL 5001608 (3d Cir. Aug. 25, 2020). That is, the Third Circuit majority held that interim injunctive relief against Grewal cannot be had in that Circuit "because

Defense Distributed and SAF are pursuing that same relief in Texas." *Id.* at *6. Though that decision is wrong, *see id.* at *6 (Phipps, J., dissenting), its result means that Defense Distributed and SAF have now exhausted every other option available to them. They proceeded reasonably and diligently, one court at a time, to no avail. This is now the only Court that can adjudicate Plaintiffs' request for interim relief.

Until the district court rules on the motion for a preliminary injunction below, the Court should enjoin Grewal from (1) enforcing New Jersey Statute § 2C:39-9(*l)*(2) against Defense Distributed and SAF, (2) directing Defense Distributed to stop publishing computer files with digital firearms information, and (3) directing Defense Distributed's communication service providers to stop publishing computer files with digital firearms information.

Plaintiffs informed Grewal's counsel of this motion. He presumably opposes.

REQUEST FOR EXPEDITED CONSIDERATION

Extraordinary circumstances warrant expedited consideration of this motion. *See* 5th Cir. R. 27.4. For almost two years, Grewal has been wielding a blatantly unconstitutional speech crime and civil prior restraints against Defense Distributed and SAF, violating irreparable constitutional rights with every passing day. This Court is the only one with the power to stop him. Time is of the essence.

Procedurally, the Court can order expedited consideration with the benefit of a complete appellate record, complete briefs, and a decisive panel opinion. The facts supporting the motion are therefore true and complete.

Appellants respectfully request that Grewal be directed to respond to this motion no later than September 10, 2020, and that Appellants be allowed to file a reply by September 15, 2020.

STATEMENT OF THE CASE

The Court's opinion states the case's facts and procedural posture correctly, as does the Brief of Appellants. "This appeal arises from the ongoing efforts of New Jersey's Attorney General Gurbir Grewal and several of his peers to hamstring the plaintiffs' distribution of materials related to the 3D printing of firearms." Op. at 1. "To defend against their efforts, the plaintiffs filed this lawsuit, alleging, *inter alia*, infringement of their First Amendment rights" and seeking a preliminary injunction. *Id.* "Grewal countered with a motion to dismiss for lack of personal jurisdiction." *Id.* The district court granted the motion to dismiss, but this Court reversed and remanded for further proceedings—namely, a determination of Plaintiffs' motion for a preliminary injunction on the merits. *Id.* at 1–2.

Grewal has now sought panel rehearing and rehearing *en banc* (and might also seek certiorari). This prevents the Plaintiffs from promptly proceeding on remand to have the district court rule on the merits of their preliminary injunction request. Having chosen to keep this Court in charge of the case indefinitely, Grewal cannot refuse to litigate Plaintiffs' request for interim injunctive relief here and now.

SUMMARY OF THE ARGUMENT

The State of New Jersey recently enacted Senate Bill 2465, a draconian new criminal law. Section (3(*l*)(2) of the legislation, now New Jersey Statute 2C:39-9(*l*)(2), criminalizes constitutionally protected speech that Plaintiffs would engage in now were it not for the imminent threat of enforcement posed by Attorney General Gurbir Grewal. Defense Distributed and SAF have been censored—their exercise of constitutional rights has been chilled—because of Grewal's promise to jail them and anyone else that speaks in violation of the Section (*l*)(2) speech crime.

Section (*l*)(2) does not criminalize conduct. It criminalizes speech: "digital instructions" that "may be used" to "produce a firearm" with a "three-dimensional printer." Section (*l*)(2) makes it a crime to "distribute" that speech "to a person in New Jersey" (except for manufacturers and wholesalers). The law provides a nearly limitless definition of "distribute": "to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute."

No medium escapes this new crime. Section (*l*)(2) outlaws speech delivered "by any means," including the sharing of information "via the Internet" and via standard postal "mail." *Id.* The crime also extends to rudimentary in-person interactions such as "display[ing]," "present[ing]," and "giv[ing]" information.

All kinds of digital firearms information are censored by this new speech crime. It covers both "computer-aided design files" *and* "other code or instructions stored and displayed in electronic format as a digital model." Moreover, information's actual use is irrelevant. The crime occurs if information "*may be used*" by a third party in certain activities, regardless of the speaker's intent.

This law is unconstitutional. It is an extreme act of content-based censorship that has no hope of satisfying strict scrutiny because it is overbroad, underinclusive, ineffective, and lacking a scienter element. It punishes speakers worldwide not because their speech itself does any harm, but because of speculation that their speech may sometimes bear a contingent and indirect relationship to bad acts.

Irreparable harm of the highest order will occur if the Grewal is allowed to enforce Section (*l*)(2) against Defense Distributed or SAF. And the harm is not just prospective. It is current. With every passing day, Section (*l*)(2) causes irreparable constitutional injuries by chilling protected speech and triggering self-censorship.

In this action, Plaintiffs are likely to succeed in having Section (*l*)(2) held unconstitutional and its enforcement permanently enjoined. This is true both as to the First Amendment claims and those brought under the Due Process Clause and Commerce Clause. Until then, the Court should preserve the status quo ante and prevent further irreparable harm by enjoining Grewal's enforcement of Section (*l*)(2) against Defense Distributed and SAF.

In addition to his new *criminal* law, Grewal has for months been acting to censor Defense Distributed and SAF under the color of state *civil* laws. These actions impose a prior restraint that is just as violative of the First Amendment as is Section (*l*)(2)'s new speech crime. They too are bound to be held unconstitutional. They too should be enjoined until a final judgment permanently ends this censorship.

ARGUMENT

Injunctions pending appeal warrant the same evaluation as stays pending appeal and preliminary injunctions. *See, e.g.*, *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. Unit B 1981). Factors to consider include the likelihood of success on the merits, irreparable harm, equities between the parties, and public interest. *See, e.g.*, *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). Restoration of the status quo is another consideration. *See, e.g.*, *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016). All considerations warrant relief here.[1]

I. There is a sufficient likelihood of success on the merits.

The question presented in this appeal is whether the district court has personal jurisdiction over Grewal. The Plaintiffs have a sufficient likelihood of success as to that because the Court has already held that they are correct.

[1] Federal Rule of Appellate Procedure 8 has been satisfied because this motion seeks the same kind of injunction that the district court refused to grant, ROA.1737, and returning to the district court at this juncture would be both impracticable and inequitable. *See Ruiz*, 650 F.2d at 567.

The ultimate question presented in this case is whether Grewal's use of state civil law and state criminal law to censor Defense Distributed and SAF violates the First Amendment, the Due Process Clause, the Commerce Clause, and other free speech protections. It does. Defense Distributed and SAF are likely to succeed in having the speech crime held unconstitutional and its enforcement permanently enjoined. They are also likely to succeed in having Grewal's parallel civil enforcement actions held unconstitutional and permanently enjoined.

A. Plaintiffs will likely succeed on the First Amendment claim.

Plaintiffs' complaint pleads that Grewal has violated and is threatening to violate 42 U.S.C. § 1983 by acting, under color of state law, to abridge the Plaintiffs' First Amendment freedoms. ROA.145-46. With respect to the enforcement of Section (l)(2), Plaintiffs are likely to succeed on the merits of the First Amendment claim for at least three independent reasons.

Before addressing those arguments, the Court should hold that the Plaintiffs' distribution of the digital firearms information at issue qualifies as First Amendment speech. Extensive proof shows that the computer files at issue meet the test under all applicable precedents. *Compare* ROA.124-30 (second amended complaint), ROA.914-17 (Declaration of the seminal industry expert), ROA.918-26 (Declaration of Defense Distributed's Director), ROA.1030-81 (industry publication explaining 3D printing processes), ROA.1082-99 (same), *and* ROA.1100-24 (same), *with*

Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."), *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) ("[G]iven that the purpose of [the delivery of a tape recording] is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of 'speech' that the First Amendment protects."), *Junger v. Daley*, 209 F.3d 481, 482 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."), *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) ("[C]omputer code, and computer programs constructed from code can merit First Amendment protection."), *and Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) ("source code is speech"). This is a speech case, and an extraordinarily important one at that.

1. Content-based censorship makes the speech crime unconstitutional.

Section (*l*)(2) is a content-based speech restriction. Facially, the law is content-based because it criminalizes "digital instructions" that "may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component." N.J. Stat 2C:39-9(*l*)(2); *see NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The law's justification also makes it content-based because its

enactors created the crime to punish the *idea* being conveyed—digital firearm information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

As a content-based speech restriction, the Constitution renders Section (*l*)(2) presumptively invalid; it is valid only if New Jersey "prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. That burden cannot be met for at least four reasons.

First, Section (*l*)(2) does not advance a compelling state interest because "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). "Without a significantly stronger, more direct connection" between the speech and a third party's criminal conduct, "the Government may not prohibit speech on the ground that it may encourage [third-parties] to engage in illegal conduct." *Id.* Yet that is precisely what New Jersey has done.

Second, Section (*l*)(2) does not meet the narrow tailing requirement because plausible, less restrictive alternatives exist. "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it," *Bartnicki*, 532 U.S. at 529, not on tangential, third-party speakers. But rather than opting for the former approach and banning the harmful *conduct* it fears, New Jersey has elected to target *speech* that is, at most, remotely and only sometimes associated with that conduct.

Third, Section (*l*)(2) is substantially underinclusive. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). While it criminalizes speech by normal people, Section (*l*)(2) does nothing about the speech of firearms manufacturers or wholesalers that can just as easily cause the harms New Jersey contemplates. While it criminalizes speech regarding "firearms," Section (*l*)(2) does nothing about speech regarding other dangerous instrumentalities such as poison or bombs. And most tellingly, while it criminalizes the "distribution" of digital firearms information, Section (*l*)(2) does nothing about the *possession* or *use* of that same information to, for example, produce an illegal or undetectable firearm—the primary evil that New Jersey means to combat.

Fourth, New Jersey cannot prove that Section (*l*)(2) actually advances the state's aims. In the First Amendment context, justifications backed by mere "anecdote and supposition" do not suffice, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000), and neither does "ambiguous proof," *Brown*, 564 U.S. at 800. Compelling "empirical support" of efficacy must be given. *Globe Newspaper Co. v. Sup. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 (1982). No proof of efficacy exists here. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016) ("Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.").

In particular, the Attorney General's effort to prove efficacy is bound to fail because the information he seeks to censor is already available across the internet. The digital firearms information that Defense Distributed already published was thereby committed to the internet's public domain, where independent republishers beyond New Jersey's control will make those files readily accessible on one website or another forever—regardless of whether New Jersey's Attorney General decides to exact vengeance on the publisher he most dislikes.

New Jersey has admitted as much in its own court filings, which take the position that "posting these codes is a bell that can never be un-rung." ROA.703. But overwhelming proof establishes that this "Pandora's box" has already been opened, and, by New Jersey's own admission, it "can never be closed." ROA.723; *see also* Br. of Appellants at 7–8. Post-hoc prosecution of Defense Distributed under Section (*l*)(2) certainly will not help.

2. Overbreadth makes the speech crime unconstitutional.

Plaintiffs are also likely to succeed on the merits of their First Amendment claim because Section (*l*)(2) is unconstitutionally overbroad. The overbreadth doctrine "prohibits the Government from banning unprotected speech" where "a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft*, 535 U.S. at 255. Section (*l*)(2) violates this doctrine in a litany of ways.

First, Section (*l*)(2) is overbroad because it criminalizes speech regardless of its relationship to illegal conduct. Constitutionally, the government may "suppress speech for advocating the use of force or a violation of law only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 253. A "contingent and indirect" relationship to criminal conduct will not suffice, nor will an allegation, like New Jersey's, that there is "some unquantified potential for subsequent criminal acts." *Id.* at 250.

Section (*l*)(2) does not target speech that is "directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action." *Ashcroft*, 535 U.S. at 253 (emphasis added). Instead, virtually all the speech it covers falls squarely on the protected side of the line, either because the expression's recipients commit no illegal act at all or because, if they did, the causal link is merely contingent and indirect. *Cf. Staples v. United States*, 511 U.S. 600, 610 (1994) ("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."). Yet Section (*l*)(2) still criminalizes every instance of "distribut[ion]" no matter what.

Second, Section (*l*)(2) is overbroad because it also criminalizes sharing information about any "firearm component." This covers a wide array of generic items—such as fasteners, nuts, bolts, and screws—that have unlimited potential uses and are not unique to firearms. Even if New Jersey could criminalize certain speech

about a completed "firearm," it could not possibly criminalize speech about mundane parts for available in any hardware store.

Third, Section (*l*)(2) is overbroad because it fails to distinguish between information that has, and has not, been committed to the public domain. As noted, digital firearms information is already freely circulating in the public domain, and "the Government may not . . . restrict individuals from disclosing information that lawfully comes into their hands in the absence of a state interest of the highest order." *United States v. Aguilar*, 515 U.S. 593, 605 (1995). Yet this statute draws no distinction between truly novel "instructions" and those that everyone with a smartphone or computer has been able to obtain with simple Google search.

3. A missing scienter element makes the speech crime unconstitutional.

The Plaintiffs' First Amendment claim is also likely to succeed because Section (*l*)(2) lacks a necessary scienter element. States cannot create speech crimes without including a stringent requirement of scienter—that is, knowledge of the fact that truly distinguishes innocent acts from guilty ones. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010); *New York v. Ferber*, 458 U.S. 747, 765 (1982); *Smith v. California*, 361 U.S. 147, 153–54 (1960). Section (*l*)(2) lacks the needed scienter element because it does not even require the speaker to *know* that instructions will "be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm

component"—let alone know that the recipient would use the information to engage in *illegal* production of a firearm. Hence, the requisite scienter requirement is missing. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 247-48 (4th Cir. 1997).

B. Plaintiffs will likely succeed on the Due Process Clause claim.

Plaintiffs are also likely to succeed on the merits of their claim that Section (*l*)(2) is void for vagueness under the Due Process Clause.[2] "A law may be vague in violation of the Due Process Clause for either of two reasons: 'First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.'" *Act Now*, 846 F.3d at (D.C. Cir. 2017). Section (*l*)(2) is unconstitutionally vague in both respects.

Specifically, Section (*l*)(2) is unconstitutionally vague because it criminalizes code or instructions "*that may be* used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component." N.J. Stat 2C:39-9(*l*)(2) (emphasis added). But it is impossible for a speaker to know what counts as "code . . . *that may be* used to" engage in such programming. In the same way that "(w)hat is contemptuous to one man may be a

[2] Pre-enforcement facial vagueness challenges are allowed to address the Due Process Clause's concern for "arbitrary and discriminatory enforcement," *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*, 846 F.3d 391, 410 (D.C. Cir. 2017), and also to the extent that they seek to halt the chilling of protected speech, *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1241 (11th Cir. 2015). Plaintiffs' claim implicates both concerns.

work of art to another," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), what "may be used" by one programmer can be totally useless to another. Speakers like Defense Distributed cannot tell in advance on which side of the line their speech will fall.

Because of indeterminacies like this, the statute both chills speech nationwide and encourages arbitrary and discriminatory enforcement. *See id.* ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections."). Indeed, this case proves the latter point especially: the statements made during Section (*l*)(2)'s signing ceremony show that Grewal wishes to prosecute Defense Distributed not because it poses some sort of unique threat, but because Grewal has a vehement political dislike for Defense Distributed and its founder. *See* Br. of Appellants at 11. Or as the Court has already put it, Grewal wants to deploy this speech crime because of "his intent to crush Defense Distributed's operations and not simply limit the dissemination of digital files in New Jersey." Op. at 10.

C. Plaintiffs will likely succeed on the Commerce Clause claim.

Plaintiffs are also likely to succeed on the claim that the Attorney General has subjected and is subjecting the Plaintiffs to an unconstitutional deprivation of the right to be free of commercial restraints that violate the dormant Commerce Clause. Under this doctrine, Section (*l*)(2) triggers strict scrutiny because it "regulat[es] conduct that takes place exclusively outside the state." *Backpage.com, LLC v.*

Hoffman, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at *11 (D.N.J. Aug. 20, 2013). Even though speakers like Defense Distributed operate their websites in a passive fashion from Texas, Section (*l*)(2) expressly projects New Jersey's law about what can and cannot be said on the internet throughout the entire Union. Because this extraterritorial application is a direct and substantial part of the statute, Section (*l*)(2) is unconstitutional per se, "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997).

D. The civil enforcement efforts are just as unconstitutional as the speech crime.

The Court should also issue an injunction pending appeal against Grewal's use of civil legal actions to censor the Plaintiffs. In every key respect, the same constitutional analysis that applies to the new speech crime applies to Grewal's use of civil legal methods to achieve the same ends. Indeed, the application of "public nuisance and negligence laws" to internet speech is orders-of-magnitude more overbroad, underinclusive, and vague than Section (*l*)(2).

Additionally, the Plaintiffs are likely to succeed on their Section 1983 action's First Amendment claim because Grewal's conduct violates the doctrine regarding unconstitutional prior restraints. Grewal's deployment of a cease-and-desist letter to Defense Distributed constitutes a prior restraint because it demands—in advance,

and upon pain of legal punishment—that Defense Distributed *never* publish "printable-gun computer files for use by New Jersey residents." ROA.615. So do civil actions like Grewal's effort to obtain an *ex parte* temporary restraining order against Defense Distributed. *See* ROA.617. As prior restraints, Grewal's civil censorship efforts bear a heavy presumption of unconstitutionality. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71–72 (1963); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 579 (5th Cir. 2005). But Grewal cannot overcome this burden. The same reasoning that prevents Section (*l*)(2) from surviving strict scrutiny also spells defeat for the civil censorship effort. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981).

Importantly, this constitutional violation encompasses both the action taken *directly* against the Plaintiffs and the *indirect* efforts to threaten, coerce, and intimidate internet service providers. *See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003); *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991). Both types of censorship should be enjoined.

II. Irreparable harm will occur without an injunction pending appeal.

A. Grewal's censorship causes the irreparable harm.

Grewal's enforcement of Section (*l*)(2) and civil censorship efforts cause irreparable harm currently, and unless enjoined, will do so to an even greater extent in the future. But for fear of being prosecuted under Grewal's new speech crime and civil prior restraints, Plaintiffs would engage in at least three distinct courses of constitutionally-protected conduct that Grewal now outlaws:

1. The publication of digital firearms information on the internet, *see, e.g.*, ROA.144-45; ROA.1326, which Section (*l*)(2) prohibits by making it a crime to "distribute" the banned "digital instructions" "by any means, including the Internet";

2. The publication of digital firearms information via the mail, *see, e.g.*, ROA.1324, which Section (*l*)(2) prohibits by defining "distribute" to mean "mail"; and

3. The offering and advertisement of digital firearms information, *see, e.g.*, ROA.1325, which Section (*l*)(2) prohibits by defining "distribute" to mean "offer" and "advertise."

The chilling of these constitutionally-protected activities itself constitutes irreparable harm, *see Dana's R.R. Supply v. Atty. Gen., Flo.*, 807 F.3d 1235, 1241 (11th Cir. 2015), and threatening to enforce the speech crime imposes an unconstitutional prior restraint. *See, e.g.*, *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009). If enforced as Grewal threatens, moreover, the speech crime would result in unconstitutional convictions. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458

U.S. 886, 932–33 (1982). All of these lost First Amendment freedoms constitute irreparable harms of the highest order.

B. The decision of the federal court in Washington does not lessen the need to stop Grewal's censorship.

All of these harms are directly attributable to Grewal's censorship. Grewal, however, says that the United States District Court for the Western District of Washington is the real culprit. According to Grewal, because of the Western District of Washington's orders preliminarily enjoining and then finally vacating the Temporary Modification and license, "Defense Distributed would have ceased its dissemination even if the NJAG had never sent his letter." Pet. for Rehearing En Banc at 14 n.5. But that attempt at shirking responsibility was wrong when Grewal tried it in the district court, *see* ROA.1322, 1378-80, and is still wrong today.

The Washington litigation is about two federal speech permissions: the State Department's Temporary Modification of a regulatory regime and the State Department's issuance of a license permitting Defense Distributed to publish certain digital firearms information. These two permissions are *practically sufficient but not legally necessary* to Defense Distributed and SAF's exercise of the constitutional rights at issue. They are practically *sufficient* because Grewal concedes that, if the Temporary Modification and license remained in force, they would legalize the publications at issue despite contrary state-law-based censorship efforts. But these two State Department permissions are not *legally necessary* because Defense

Distributed and SAF should not need any kind of executive branch preclearance whatsoever to engage in free speech. The Constitution guarantees Defense Distributed and SAF's right to publish the files at issue; and the Settlement Agreement (which the Washington case did not disrupt and remains perfectly valid) guarantees that the State Department will not say otherwise. *See* ROA.1322 n.3. This is why the record below points not the federal controversy in Washington, but to Grewal's state-law-based censorship as the illegal conduct causing Plaintiffs to forego their exercise of constitutional rights. *See* ROA.1323.

Furthermore, Grewal's censorship of computer files published *via the mail* deserves special emphasis here for the same reason that it was emphasized below. *See* ROA.1324. The Washington case, the Temporary Modification, and the license have nothing to do with Defense Distributed's publication via the mail. *Id.* That case and the federal permissions at issue in it are only about certain *internet* publications. *Id.* Indeed, in the Washington case itself, the State Department conceded that "'even if the Court were to grant [New Jersey and the other plaintiff states] every ounce of relief that they seek in this case, Defense Distributed could still mail every American citizen in the country the files that are at issue here.'" *Id.* And Grewal made the same concession: "At that same hearing, counsel for New Jersey's Attorney General agreed that, apart from internet publication, Defense

Distributed had a right to distribute digital firearms information via the mail or otherwise 'hand them around domestically' without violating any law." *Id.*

Thus, as to speech occurring via the mail and other methods not at issue in the Washington case, Grewal's state-law-based censorship is uniquely to blame for causing Plaintiffs to forego their exercise of constitutional rights. ROA.1325. These rights deserve just as much judicial protection as do the rights to publish openly on the internet. Grewal avoided this point below and avoids it here. He has no answer.

III. The balance of equities favors an injunction pending appeal.

The balance of equities favors an injunction. The risk of erroneously denying the injunction entails the "potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004). "The harm done from letting [an] injunction stand pending a trial on the merits, in contrast, will not be extensive," especially where, as here, "[n]o prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands." *Id.*

Plaintiffs have conducted this litigation reasonably and diligently. They did everything necessary to obtain a ruling on the merits of their preliminary injunction request below, were denied by the personal-jurisdiction ruling that has now been reversed, and then proceeded in courts of the Third Circuit with diligence as well. Despite having played everything by the book, after nearly two years of litigation, no court anywhere has ever ruled on the preliminary injunction request's merits.

Grewal, by contrast, has done everything possible to prevent a ruling on the injunction request's merits, exacerbating the irreparable injuries he himself inflicts. Grewal's position in the Third Circuit bears special emphasis. To oppose Defense Distributed and SAF's request to the Third Circuit for interim injunctive relief, Grewal told the Third Circuit that the Third Circuit "should stay its hand and allow the Fifth Circuit, in the first instance, to adjudicate the claims presented." Defendant-Appellees' Brief in Opposition to Petition for Rehearing En Banc, *Defense Distributed v. Grewal*, No. 19.1729, Doc. 97 at 10 (filed Jan. 9, 2020). This motion asks this Court to do what Grewal just told the Third Circuit is fully proper.

IV. The public interest favors an injunction pending appeal.

The final factor—whether the public interest favors an injunction—is easily met. Preserving constitutional rights always serves the public interest. *See, e.g.*, *O'Donnell v. Goodhart*, 900 F.3d 220, 232 (5th Cir. 2018).

CONCLUSION

The Court should direct Grewal to respond to this motion no later than September 10, 2020, and let Appellants file a reply by September 15, 2020. Then the Court should grant the motion.

September 3, 2020

Respectfully submitted,

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