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

Brief of Appellee Gurbir S. Grewal, Attorney General of New Jersey

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the straightforward application of a controlling precedent from this Circuit—*Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), *cert. denied*, 555 U.S. 816 (2008). As a result, oral argument is not likely to benefit the Court. Contrary to Appellants' contention, there is nothing "extraordinary" about this case other than Appellants' misbegotten attempt at forum shopping. Appellants' complaint that New Jersey's effort to enforce its law violates their rights should be raised in the District of New Jersey, as the District Court below properly held.

JURISDICTIONAL STATEMENT

This is an appeal from a final order in the Western District of Texas dismissing Appellants' complaint against Gurbir S. Grewal, Attorney General of New Jersey ("NJAG"), and his codefendants for lack of personal jurisdiction. Appellants are challenging on appeal the dismissal against the NJAG only.[1] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The co-defendants in the Western District of Texas also included, in their official capacities: Michael Feuer, City Attorney for Los Angeles, California; Andrew Cuomo, Governor of New York; Matthew Denn, then-Attorney General of Delaware; Josh Shapiro, Attorney General of Pennsylvania; and Thomas Wolf, Governor of Pennsylvania.

QUESTIONS PRESENTED

1. Whether the District Court properly held that a federal court in Texas does not have personal jurisdiction over the NJAG for a lawsuit in which the NJAG's only conduct in Texas is the issuance of a cease-and-desist letter that was sent to a Texas resident.

2. Whether the District Court abused its discretion in declining to invoke the doctrine of judicial estoppel against the NJAG.

3. Whether the District Court abused its discretion in dismissing the case, rather than transferring it to the District of New Jersey.

STATEMENT OF FACTS AND OF THE CASE

This appeal stems from Appellant Defense Distributed's campaign to publish downloadable computer files that allow any recipient with access to 3D printers—including terrorists, felons, and domestic abusers—to produce untraceable and undetectable firearms. *See* ROA.129-30, ¶¶ 28-34; *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 455 (5th Cir. 2016). These printable-gun files, in conjunction with other equipment sold by Defense Distributed, enable users "to produce fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." *Defense Distributed*, 838 F.3d at 455.

In 2015, Defense Distributed filed a lawsuit against the federal government in the District Court for the Western District of Texas challenging a directive that

Defense Distributed remove printable-gun files from its website. ROA.130, 1738. The directive was an exercise of the federal government's authority to enforce export controls pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations (ITAR), which required that individuals obtain the government's prior authorization to publish these files. *Id.* The government initially opposed the 2015 litigation, but in June 2018 entered into a Settlement Agreement with Defense Distributed that granted the company essentially all the relief that the company was seeking. Among other things, the Settlement Agreement required the State Department to issue a license to Defense Distributed allowing it to freely publish the downloadable gun files on its website. ROA.921, 940-42. The State Department issued this license on July 27, 2018. ROA.133, 921. Defense Distributed alleges that from July 27-31, 2018, it published the files on its website and "at a public library in Texas," and that the files "were downloaded thousands of times." ROA.134.

The claims of Defense Distributed and SAF ("Appellants") relate to actions the NJAG took following the announcement of the Settlement Agreement. First, on July 26, 2018, the NJAG issued a cease-and-desist letter to Defense Distributed at its Texas business address, demanding that it cease-and-desist from publishing the downloadable gun files to New Jersey residents, because such action would violate New Jersey state law. ROA.138, 178. Appellants also allege that on July 30, 2018, the NJAG sent a letter to DreamHost, which provides internet security services to

Defense Distributed, advising that these plans to publish downloadable gun files in New Jersey violated New Jersey law and thus also violated DreamHost's Acceptable Use Policy. ROA.139, 181. The letter was sent to DreamHost in California and did not demand or request that DreamHost take any action. ROA.181. Appellants also allege that the NJAG sent a copy of the July 26, 2018 cease-and-desist letter to Cloudflare, Inc., ROA.140, a website security company headquartered in San Francisco, California. After Defense Distributed failed to comply with New Jersey law, the NJAG then sued in the District Court for the District of New Jersey to enjoin it from publishing the downloadable gun files to New Jersey residents. ROA.139.

Second, on July 30, 2018, the NJAG joined a group of State Attorneys General in filing suit in the District Court for the Western District of Washington to enjoin the U.S. State Department from performing the terms of the Settlement Agreement ("Washington Action"). ROA.135; *see State of Washington et al. v. U.S. Dep't of State et al*., No. 2:18-cv-1115-RSL (W.D. Wash.). Defense Distributed was named as a nominal defendant. The Western District of Washington issued a temporary restraining order on July 31, 2018, and then a nationwide preliminary injunction on August 27, 2018, barring the federal government from modifying the ITAR to allow Defense Distributed to publish downloadable gun files. 315 F. Supp. 3d 1202 (W.D. Wash. 2018); ROA.1739. Defense Distributed ceased publishing the downloadable gun files on its website in response to these rulings. ROA.136.

Appellants filed the action underlying this appeal in the District Court for the Western District of Texas on July 29, 2018, and on September 17, 2018, filed a First Amended Complaint against the NJAG and several other state and local officials. ROA.18, 123. Appellants generally allege that Defendants' actions in preventing Defense Distributed from publishing downloadable gun files violate Appellants' constitutional rights under the First, Second, and Fourteenth Amendments. ROA.145-154. Appellants also assert violations of the dormant Commerce Clause and the Supremacy Clause, and claims of tortious interference with the Settlement Agreement and with Defense Distributed's existing contracts. *Id.* Appellants seek an award of declaratory and injunctive relief, and attorneys' fees and costs. ROA.154-56. Appellants do not seek money damages, and the NJAG is being sued solely in his official capacity. ROA.127.

Before the NJAG responded to the First Amended Complaint, Appellants filed a motion for a temporary restraining order seeking to enjoin Section 3(*l*)(2) of New Jersey Senate Bill 2465, enacted by the State on November 8, 2018, on largely the same constitutional grounds. ROA.344; 2018 N.J. Sess. Law Serv. Ch. 138 (Senate 2465). As codified in N.J. Stat. Ann. § 2C:39-9(*l*)(2), this bill makes it a crime under New Jersey law for a person to

> distribute by any means, including the Internet, to a person in New Jersey who is not registered or licensed as a manufacturer [of firearms under New Jersey law], digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in

> electronic format as a digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.

The District Court denied Appellants' motion on November 13, 2018. ROA.423.

On November 21, 2018, the NJAG moved to dismiss for lack of personal jurisdiction. ROA.463. In opposing the motion, Defense Distributed argued that the NJAG should be judicially estopped from objecting to jurisdiction. ROA.1381-83. Appellants claimed that the NJAG's legal position on personal jurisdiction in Texas was inconsistent with arguments he allegedly made in the Washington Action that "this kind of controversy" may be litigated outside of New Jersey, and that Defense Distributed had the requisite minimum contacts with Washington. *Id.*

In a published opinion issued January 30, 2019, the District Court dismissed the claims for lack of personal jurisdiction. ROA.1737-1751. The District Court first rejected Appellants' claim that judicial estoppel had any application to this question. Although Appellants attempt to frame the issue as one involving where "this kind of controversy" can be litigated, the Court noted, the real issue is whether the NJAG had taken inconsistent legal positions on each party's respective minimum contacts with the forum state. ROA.1742. And the District Court concluded that the NJAG's "argument, in a different case, that Defense Distributed had minimum contacts with Washington, is in no way inconsistent with their argument here that they themselves have no minimum contacts with Texas." ROA.1742.

Next, the District Court determined that asserting personal jurisdiction would violate due process because the NJAG lacks minimum contacts with Texas. The District Court followed *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 486 (5th Cir. 2008), which held that an Arizona state official who had sent a cease-and-desist letter to a Texas business did not have minimum contacts with Texas. ROA.1744-45. The District Court reasoned that, as in *Stroman*, the NJAG did not "purposefully avail" himself "of the benefits of Texas law like someone actually 'doing business' in Texas." *Id.* The District Court rejected attempts to distinguish *Stroman* based on additional purported contacts here, finding that these were all either Appellants' own contacts with Texas, or were contacts not "expressly aimed at Texas." ROA.1747. The District Court also held that personal jurisdiction over the NJAG was not shown under the "effects test," *see Calder v. Jones*, 465 U.S. 783 (1984), highlighting that Appellants alleged only that they experienced the effects of the NJAG's enforcement activity in Texas, which is insufficient under *Calder*. ROA.1746.

SUMMARY OF ARGUMENT

I. The District Court properly dismissed the complaint against the NJAG for lack of personal jurisdiction in Texas.

A. The District Court's decision reflects the correct application of the due process clause and the attendant requirement that a defendant have minimum contacts with a forum before jurisdiction over him is proper. In *Stroman Realty, Inc.*

v. Wercinski, 513 F.3d 476 (2008), this Court held that an out-of-state government official lacks minimum contacts with a forum state if "the totality of [the] contacts with Texas involves a cease-and-desist order and correspondence with" the plaintiff. As the District Court recognized, *Stroman* controls here because Appellants also rely entirely on a cease-and-desist letter to a Texas resident from an out-of-state public official. None of the other contacts that Appellants mention overcome this hurdle, as these are all *Appellants'* connections to Texas, or are contacts with states other than Texas. This result makes good sense as a matter of principle too; forcing New Jersey to defend the validity of its own state law in Texas courts offends fundamental principles of state sovereignty. Nor does Appellants' request to overrule *Stroman* get them further; *Stroman* reflects a proper application of the Supreme Court's personal jurisdiction jurisprudence, including its "effects" test, which has only grown more restrictive since *Stroman* was decided.

B. The District Court's dismissal was also correct on an alternative basis not reached below. As strongly suggested in *Stroman*, Texas's long-arm statute does not confer jurisdiction over the NJAG when (as here) he is sued in his official capacity because the statute only sweeps in out-of-state individuals, not out-of-state government officials. Further, the NJAG's decision to send Appellants a cease-and-desist letter does not constitute "doing business" in Texas as required by the state's long-arm statute—a state official's faithful enforcement of his state's law does not

come within any of the enumerated meanings of that statutory phrase. The long-arm statute thus does not authorize personal jurisdiction either.

II. Appellants' alternative bases for reversal also lack merit. The District Court correctly rejected Appellants' judicial estoppel argument, which was based on a claimed inconsistency between the NJAG's personal jurisdiction defense and his supposed argument that Appellants have minimum contacts with Washington. Since, as the District Court recognized, those two positions are easily reconcilable, there can be no valid judicial estoppel claim. Judicial estoppel also does not apply because the NJAG did not argue, and the District Court in Washington did not actually reach, the issue of Appellants' contacts with Washington.

III. The District Court did not abuse its discretion in declining to grant a transfer to the District of New Jersey, since Appellants raised their request only in a footnote and made no attempt to satisfy their burden of proving that a transfer was warranted. In any event, Appellants' claim is now moot, since they filed a separate complaint raising the same issues in the District of New Jersey.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT IT LACKS PERSONAL JURISDICTION OVER THE NJAG.

The District Court properly applied this Court's analysis in *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), and held that it lacked personal

jurisdiction over the NJAG because the NJAG does not have the requisite minimum contacts with Texas to satisfy constitutional due process concerns and because it would be unreasonable to exercise personal jurisdiction over the NJAG in Texas. Moreover, dismissal was also proper because the Texas long-arm statute, by its own terms, does not confer jurisdiction over the NJAG. This Court can affirm the District Court's dismissal of this action for either of these two reasons.

A. The Constitution's Due Process Clause Does Not Permit Personal Jurisdiction Over The NJAG.

As this Court has previously explained, "[t]he constitutional requirement for specific jurisdiction is that the defendant has 'minimum contacts' with the forum state such that imposing a judgment would not 'offend traditional notions of fair play and substantial justice.'" *Stroman*, 513 F.3d at 484 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945)). That is dispositive for the reasons already given by this Court in *Stroman*: the NJAG does not have constitutionally sufficient "minimum contacts" with Texas, and exercising personal jurisdiction over him would certainly "offend traditional notions of fair play and substantial justice." There is no basis for a panel of this Court to deviate from, or to overrule, that well-reasoned decision.

1. *Stroman* compels the conclusion that the NJAG does not maintain minimum contacts with Texas, and that exercising jurisdiction over him would be unreasonable.

"The Due Process Clause of the Fourteenth Amendment prohibits the exercise of personal jurisdiction over a non-resident defendant unless the defendant has

meaningful 'contacts, ties, or relations' with the forum state." *Stroman*, 513 F.3d at 483-84 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945)). To be more precise, minimum contacts with Texas requires "some act whereby [the defendant] 'purposefully availed [him]self of the privilege of conducting activities there, thus invoking the benefits and protections of its laws.'" *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (brackets omitted). The NJAG's "conduct must show that [h]e 'reasonably anticipated being haled into court' in Texas." *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). As the District Court correctly held, jurisdiction does not exist over an out-of-state public official based on the actions alleged by Appellants here, a conclusion that is required by this Court's decision in *Stroman*, 513 F.3d at 484. *See* ROA.1744-47.

In *Stroman*, an Arizona state regulator sent a Texas-based timeshare reseller a cease-and-desist letter demanding that it cease all brokering activity involving Arizona real estate or citizens until it complied with Arizona's licensing laws. 513 F.3d at 481. The Texas-based reseller sued the Arizona state official in her official capacity in Texas federal court, alleging that Arizona's extraterritorial enforcement activity violated the Commerce Clause. *Id.* The district court dismissed the case, and this Court affirmed on the basis that Texas courts did not have personal jurisdiction over the Arizona official based on that series of events. *Id.* The Arizona official's conduct did not establish minimum contacts, this Court found, because the "totality"

of her contacts with Texas consisted of "a cease and desist order and correspondence with Stroman's attorneys." *Id.* This Court reasoned that she "was not engaged in commercial transactions to obtain a commercial benefit by acting in a governmental capacity to enforce Arizona law." *Id.* at 485. The official thus had not "'purposefully availed' herself of the benefits of Texas law like someone actually 'doing business' in Texas." *Id.* at 484. Even if the State of Arizona itself "derived a benefit from" this enforcement action, that benefit "does not run to those officials in their individual capacity, stripped of their sovereign immunity cloak. Stroman cannot have it both ways under the *Ex Parte Young* doctrine." *Id.* at 485.[2]

This Court rejected the plaintiff's argument that jurisdiction existed under the "effects test" because the defendant's conduct was "targeted to affect an in-state plaintiff." *Id.* Under the "effects" test, drawn from *Calder v. Jones*, 465 U.S. 783 (1984), an act done outside the forum that has "consequences or effects within the

[2] This Court reiterated this holding in *Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008) ("*Stroman II*"), *cert. denied*, 555 U.S. 970 (2008). In *Stroman II*, the same timeshare broker filed suit in Texas against California and Florida state officials to enjoin enforcement of those states' real-estate licensing requirements against it. This Court held that *Stroman* was controlling and precluded the exercise of jurisdiction over these out-of-state public officials. *Id.* at 386. The Court found that a letter the California defendants sent to a Texas state agency forwarding their cease-and-desist letter did not change the analysis, as the letter "did not request any action on the part of" the Texas agency. *Id.* Likewise, the fact that the defendants filed an open-records request in Texas did not establish purposeful availment, because the plaintiff's cause of action did not arise out of that records request. *Id.* at 387.

forum" supports personal jurisdiction "if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct. Such jurisdiction is rare." *Id.* at 486 (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 314 (5th Cir. 2007)).[3] But this Court rejected the comparison to *Calder*, reasoning that while the "effects" of the Arizona official's enforcement activity were felt in Texas, she was "not expressly aiming her actions at Texas." 513 F.3d at 485-86. Rather, the state official was "essentially asserting nationwide authority over any real estate transactions involving Arizona residents or property," meaning that "the only jurisdictional basis [was] the alleged harm to a Texas resident." *Id.* Said another way, the nexus to Texas was "based entirely on the unilateral actions of [plaintiff], not [defendant]," since "it was [plaintiff] who chose to market Arizona properties and transact business with Arizona residents" from Texas. *Id.* That was insufficient under the "effects" test, because "the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* (quoting *Hanson*, 357 U.S. at 253).

[3] In *Calder*, a California actress filed a libel suit in California against two Florida employees of a tabloid magazine who published an article about the plaintiff's activities in California. *Calder* upheld the California court's exercise of personal jurisdiction over the Florida defendants because the "effects" of the alleged libel were "expressly aimed" at California and the plaintiff suffered the "brunt of that harm" in California. 465 U.S. at 788-89.

Stroman further cautioned that allowing "effects" jurisdiction based on such attenuated contacts would undermine state sovereignty. *Id.* This Court noted that Arizona's only purpose in reaching the plaintiff in Texas was "to uniformly apply its laws." *Id.* To find "effects" jurisdiction on those facts would mean that "any state official seeking to enforce her state's laws…could potentially be subjected to suit in any state where the validity of her state's laws were in question." *Id.* This Court declined "to establish such a broad principle." *Id.* at 487.

This case is on all fours with *Stroman*. As in *Stroman*, the "totality of the [NJAG's] contacts with Texas involves a cease and desist order and correspondence with" plaintiff Defense Distributed. 513 F.3d at 484. The NJAG's sole purpose in issuing the cease-and-desist letter was to enforce New Jersey state law, as Defense Distributed's publishing printable-gun computer files to New Jersey residents "violates New Jersey's public nuisance and negligence laws." *See* ROA.178 (cease-and-desist letter). The NJAG was sued solely in his official capacity and did not derive a commercial benefit from performing his governmental function. Thus, the NJAG has not "purposefully availed [himself] of the benefits of Texas law like someone actually doing business in Texas." 513 F.3d at 484.

Appellants seek to distinguish *Stroman* on the basis that the cease-and-desist letter there "focused on activities occurring *outside of Texas*," whereas the NJAG's

letter here "focused on activities occurring *within Texas*." Appellants Br. at 41. But *Stroman* rejected any such distinction:

> *Although it may be true that the Commissioner's action against Stroman is based upon conduct which occurred entirely in Texas*, we cannot find, as Stroman urges, that the Commissioner has purposefully directed her conduct at Texas. Stroman more accurately recognizes that the Commissioner, by proceeding with the cease and desist order, is essentially asserting nationwide authority over any real estate transactions involving Arizona residents or property.

513 F.3d at 485-86 (emphasis added). Thus, *Stroman* recognized that the personal jurisdictional inquiry turns on whether an out-of-state official was "expressly aiming her actions at Texas." *Id*. at 486 (quoting *Calder*, 465 U.S. at 789). In the same way, the NJAG's letter asserts a nationwide authority to enforce state law against any publication of printable-gun files to New Jersey residents. ROA.178-79. It is of no consequence to the NJAG whether that publication was initiated in Texas or any other state. If Defense Distributed had published the files from Arizona, but still to New Jersey residents, the NJAG would have followed the same course of conduct, and would not have created any contacts with Texas.

Appellants' attempt to distinguish *Stroman* by conjuring up additional Texas contacts also fails, as these are *Appellants'* contacts with Texas. Appellants allege that Defense Distributed publishes its website and maintains computer servers at its Austin, Texas place of business, and that it also published digital information "at a brick-and-mortar public library" in Texas. Appellants Br. at 32; ROA.126-28. This

is just another way of saying that the effects of the challenged enforcement action are felt in Texas, which *Stroman* rejected as a basis for jurisdiction. 513 F.3d at 486; *see also Walden*, 571 U.S. at 290 ("mere injury to a forum resident is not a sufficient connection to the forum."). Moreover, these connections are once again attributable to the actions of Defense Distributed, which chose to store and publish materials in Texas. *See, e.g., Walden*, 571 U.S. at 284 (the "defendant-focused minimum contacts inquiry" cannot be satisfied by contacts between the plaintiff and the forum).

Appellants' reliance on other acts by the NJAG is also unavailing, as none of these actions represents contacts with Texas. Appellants point to a letter the NJAG sent to DreamHost, a company that provides internet security services for Defense Distributed, advising that the latter planned to publish printable-gun computer files on its website in violation of New Jersey law, which would constitute a violation of DreamHost's Acceptable Use Policy. *See* ROA.180-82. The letter does not request any action by DreamHost. Since this letter was mailed to DreamHost in Los Angeles, California, it not a contact with Texas. Appellants also cite the NJAG's statements at a bill signing ceremony for New Jersey Senate Bill 2465, which briefly referenced Defense Distributed's founder by name. Appellants Br. at 34; ROA.384, 396-97. But this ceremony took place in Trenton, New Jersey, and in making those statements, the NJAG certainly did not avail himself of Texas as a forum. Moreover, Appellants' claims also do not "arise out of" these statements. *See Stroman*, 513 F.3d at 487

(noting the claims "must arise out of the defendant's contacts with the forum"). And, in any event, merely mentioning Appellant's founder as an example of the dangers of printable weapons hardly demonstrates that the NJAG chose to avail himself of the benefits of Texas law like someone doing business in Texas.

This result also makes good sense as a matter of principle. In addition to its holding on minimum contacts, *Stroman* explained that any assertion of jurisdiction in Texas over an out-of-state public official that sends a Texas resident a cease-and-desist letter would be "unreasonable" and offend "traditional notions of fair play and substantial justice," the other component of the constitutional analysis. In conducting that test, courts look to "(1) the burden upon the nonresident defendant to litigate in that forum; (2) the forum state's interests in the matter; (3) the plaintiff's interest in securing relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the several states' shared interest in furthering substantive social policies." *Id. Stroman* held that the first factor weighed against asserting jurisdiction, because "Arizona, as a sovereign, has a strong interest in not having an out-of-state court evaluate the validity of its laws." *Id.* The second likewise cut against jurisdiction, as a Texas court has "little interest in adjudicating disputes over other states' statutes." *Id.* While the third factor supported jurisdiction, *Stroman* found that the "interstate judicial system" factor undermined a finding of

jurisdiction, as subjecting Arizona to suit in Texas "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue." *Id.* at 487-88.

Finally, the "most significant" factor supporting the Arizona state official was the "shared interest of the several states," which ultimately tipped the scales against asserting jurisdiction. *Id.* at 488. This Court explained that due process constraints on personal jurisdiction prevent state courts from "reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* This serves to protect the states' sovereignty, as the "sovereignty of each State … implies a limitation on the sovereignty of all of its sister States." *Id.* "In that way, due process acts as an instrument of interstate federalism." *Id.* Allowing jurisdiction over the Arizona official on the facts of *Stroman* "would create an avenue for challenging the validity of one state's laws in courts located in another state. This practice would greatly diminish the independence of the states." *Id.*

For the same reasons, the exercise of jurisdiction over the NJAG would be unreasonable. In particular, the "shared interest of the several states" factor weighs against asserting jurisdiction, because New Jersey's state sovereignty has little meaning if it can be compelled to litigate challenges to the validity of its laws in any state where a plaintiff happens to live. That erosion of state sovereignty would impact all states, and thus by the same rule, Texas could be haled into other states' courts to litigate constitutional challenges to Texas's laws. Just as in *Stroman*, the

reasonableness factors unequivocally demonstrate that asserting jurisdiction over the NJAG in Texas would be unreasonable.

In sum, this case boils down to a single contact with Texas—the NJAG's cease-and-desist letter to Defense Distributed. Because this is the same jurisdictional basis that this Court rejected in *Stroman*, the District Court correctly held that the NJAG lacks the requisite minimum contacts with Texas.

2. This Panel May Not Overrule Its *Stroman* Decision.

Recognizing the difficulty of distinguishing *Stroman* on its facts, Appellants also ask this Court to overrule *Stroman* based on their claim that it conflicts with the "effects" test as applied in *Calder* and *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999). This argument fails: these cases predate *Stroman*, and the "effects" test for personal jurisdiction has been only further curtailed since *Stroman*.

The Supreme Court's most recent discussion of the "effects" test, in *Walden v. Fiore*, 571 U.S. 277 (2014), disposes of Appellants' argument. In *Walden*, Nevada plaintiffs sued an out-of-state law enforcement officer in Nevada for conducting an allegedly unlawful seizure in Georgia as the plaintiffs were about to board a plane to Nevada. The Court held that Nevada courts *lacked* personal jurisdiction over the out-of-state defendant, because his "relevant conduct occurred entirely in Georgia" and defendant's own actions did not connect him to Nevada "in a meaningful way." *Id.* at 290-91. The "mere fact that [defendant's] conduct affected plaintiffs with

connections to" Nevada did not suffice, because "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.* at 291.

Walden's discussion of *Calder* makes clear that a *plaintiff's* contacts with the defendant and forum cannot drive the jurisdictional analysis. *Walden* distinguished *Calder* by noting that "the 'effects' caused by the defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California*, not just to a plaintiff who lived there." *Id.* at 288. By contrast, the defendant in *Walden* "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." *Id.* at 289. The plaintiffs' forum connections, no matter how strong, do "not evince a connection between [defendant] and Nevada," as "[s]uch reasoning improperly attributes a plaintiff's forum connections to the defendant." *Id.* at 289-90. *Walden* repeatedly returned to that theme, explaining that the plaintiffs lacked access to the seized funds "in Nevada not because anything independently occurred there, but because Nevada is where [plaintiffs] chose to be at a time when they" used the funds. *Id.* at 290.

Walden thus went further than simply distinguishing the facts of *Calder*; it refined the "effects" test by de-emphasizing effects felt by the plaintiff in the forum and placing greater importance on "whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* Although *Calder* is still good law under this test, there is little doubt that it is more difficult to establish "effects" jurisdiction after

Walden. *See* William V. Dorsaneo, III, *Pennoyer Strikes Back: Personal Jurisdiction In A Global Age*, 3 TEX. A & M L. REV. 1, 22 (2015) ("[I]n *Walden v. Fiore* … a unanimous Supreme Court restrictively interpreted the 'effects test' and its earlier opinion in *Calder v. Jones*."); John T. Parry, *Rethinking Personal Jurisdiction After Bauman And Walden*, 19 LEWIS & CLARK L. REV. 607, 622 (2015) ("*Walden* reins in expansive uses of *Calder* by the lower courts, or at least by the Ninth Circuit. By stressing the California-focused nature of the defendant's activity in that state, the *Walden* Court read the earlier decision narrowly."). Therefore, there is no basis to argue that *Stroman*, which refused to find "effects" jurisdiction, should be overruled in light of *Walden*, since *Walden* only made it *more* difficult to find effects-based jurisdiction.[4] Appellants' claim that "*Walden*'s reconceptualization of *Calder* shows that *Stroman Realty*'s interpretation of *Calder* was incorrect" therefore completely misreads the Court's opinion. Appellants Br. at 42.

Likewise, Appellants' attempt to analogize this case to *Calder* misses the mark. Appellants Br. at 37. Appellants contend that, as in *Calder*, the "sources" of the NJAG's cease-and-desist letter are in Texas, the letter is "about the plaintiff's activities in Texas," the "censorship command was widely circulated in Texas (and nationwide)," and "the brunt of the injury was suffered in Texas." *Id.* But the cease-

[4] *Walden* even "suggested that the *Calder* effects test does not extend beyond the defamation context." *Old Republic Ins. Co. v. Continental Motors, Inc.*, 877 F.3d 895, 916 n.34 (10th Cir. 2017).

and-desist letter is unlike the article in *Calder*, since Appellants attribute their injury to the enforcement action itself, not to the impact of any statements within the letter. Further, the NJAG did not "widely circulate[]" his letter in Texas. The only person in Texas who directly received the letter was Defense Distributed. To the extent Appellants circulated it to others, this is "precisely the sort of unilateral activity" of the Appellants that does not satisfy minimum contacts. *Walden*, 571 U.S. at 291. Thus, neither of the two grounds for finding that the *Calder* defendants "expressly aimed" their conduct at California—"they knew the National Enquirer had its largest circulation in California, and that the article would have a potentially devastating impact there"—applies here. *Id.* at 288 n.7. That leaves only the similarity that Appellants felt the effects of the cease-and-desist letter in Texas, which *Calder* says is insufficient. *See id.* at 290 ("*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum.").

This Court's decision to continue following *Stroman*'s holding after *Walden* removes any doubt that *Stroman* was rightly decided and remains binding law. In a 2019 decision, this Court categorically held that "send[ing] a cease-and-desist letter threatening litigation to a potential defendant" alone does not constitute purposeful availment. *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 542 (5th Cir. 2019) (citing *Stroman Realty v. Grillo*, No. 05-2066, 2006 WL 492458, *4 (S.D. Tex. Feb. 28, 2006)). *Halliburton* also noted that "[m]any other

circuits" follow the same rule. *Id.* n.18; *see also Sangha v. Navig8 ShipManagement Private Ltd.*, 882 F.3d 96, 103-04 (5th Cir. 2018) (relying on *Walden* and holding that plaintiff's experiencing injury in the forum does not satisfy minimum contacts because this "is largely a consequence of *his* relationship with the forum, and not of any actions [defendant] took to establish contacts with the forum."). Moreover, in *Inmar Rx Solutions, Inc. v. Devos, Ltd.*, 786 F. App'x 445, 450 (5th Cir. 2019), this Court recently followed *Stroman* and held that sending a letter to a company in Texas demanding that it terminate a particular worker's employment did not satisfy the minimum contacts test. Like the other cases described above, *Inmar* reasoned that, under *Stroman*, minimum contacts are not satisfied where a nonresident defendant merely "attempt[s] to demand compliance with a restriction that would have applied no matter where the plaintiff was located across the country." *Id.* at 451.

Similarly, Appellants' argument that *Stroman* should be "revisited" in light of *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), Appellants Br. at 42, ignores that *Wien Air* predates *Stroman* and is easily distinguished. In *Wien Air*, a Texas-based corporation sued its German attorney alleging fraud, breach of contract, and breach of fiduciary duty in connection with several transactions over a nearly two-year period. Plaintiff's claims were based on a course of misleading statements by the attorney, which came in the form of "numerous calls, letters and faxes…made by [defendant] to [plaintiff] in Texas" and statements at an in-person meeting in

Texas. 195 F.3d at 212, 214. This Court held that the attorney had minimum contacts with Texas, because he "directed affirmative misrepresentations and omissions to the plaintiff in Texas" and the "actual content" of those communications gave rise to "intentional tort causes of action." *Id.* at 213.

Appellants cherry-pick one statement from *Wien Air* that they mistakenly say is dispositive: "When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." Appellants Br. at 39 (quoting 195 F.3d at 213). That rule clearly has no bearing here, as Appellants' claims are not based on the "actual content" of the cease-and-desist letter. The crux of Appellants' claims is simply that New Jersey's own state law is unconstitutional as applied to their publication of printable-gun files, and the injury they allege is their general inability to engage in that conduct. That theory does not rely on actionable statements within the letter itself. Since Appellants do not, and cannot, allege that the "actual content" of the letter constitutes an "intentional tort," the reasoning in *Wien Air* does not apply here.

Moreover, Appellants ignore glaring factual differences between *Wien Air* and this case. First, *Wien Air* arose out of a business dispute through which the defendant derived commercial benefits. In contrast, *Stroman* and this case involve a government official sued in his official capacity for faithfully enforcing state laws, from which the official received no personal benefit. Further, the claims in *Wien Air*

arose out of the defendant's "numerous" misrepresentations directed to the forum, which occurred in the course of an ongoing attorney-client relationship that spanned almost two years. Here and in *Stroman*, the claims are based on a single cease-and-desist letter to a forum resident. Given these factual distinctions, *Stroman* is easily reconciled with *Wien Air*, and *Wien Air* is inapposite.

In sum, *Stroman* is binding precedent and compels the conclusion that the NJAG does not have the requisite minimum contacts with Texas.

B. Texas's Long-Arm Statute Does Not Confer Personal Jurisdiction Over The NJAG.

The Constitution is not the only insurmountable obstacle for Appellants; they also cannot satisfy the requirements of Texas statutory law for exercising jurisdiction over an out-of-state defendant. While the District Court did not rely on this separate ground in dismissing the lawsuit, that is of no moment—this Court can affirm the District Court's decision on other grounds. *See, e.g.*, *Trinity Marine Products, Inc. v. United States*, 812 F.3d 481, 486 (5th Cir. 2016). Under the plain text of the Texas long-arm statute, and the analysis by *Stroman* and other courts, it is not proper for Texas courts to exercise jurisdiction over a state official sued in his official capacity regarding his decision to enforce his state's law.

Begin with the text of the statute. The Texas long-arm statute allows courts to exercise jurisdiction over a "nonresident" that "does business" in Texas if that non-resident "contracts by mail or otherwise with a Texas resident and either party is to

perform the contract in whole or in part in this state" or "commits a tort in whole or in part in this state." TEX. CIV. PRAC. & REM. CODE ANN. § 17.042. And the statute goes on to explain that the term "'nonresident' includes: (1) an individual who is not a resident of this state; and (2) a foreign corporation, joint-stock company, association, or partnership." *Id.* § 17.041. As this Court laid out in *Stroman*, there are two reasons why the plain text does not encompass an action against an official sued in her official capacity. *See, e.g.*, 513 F.3d at 483 (suggesting it would "twist[] the ordinary meaning" of the long-arm statute to confer jurisdiction over an Arizona regulator sued in her official capacity for enforcing Arizona law against Texas-based timeshare resellers).[5] First, the public official does not qualify as a "nonresident"; second, a state enforcement action does not constitute "doing business." Either basis is sufficient to find that personal jurisdiction is improper under Texas law.

First, as explained in *Stroman*, an out-of-state public official defendant is not a "nonresident." For one, officials do not come within the "individual" prong of the term's definition when they are sued in their official capacity under *Ex Parte Young*, 209 U.S. 123 (1908), in order to challenge the constitutionality of their state's law. *Id.* at 482. After all, "*Ex Parte Young* subjects a state employee acting in her official

[5] To be clear, *Stroman* did not decide the issue because the defendant there conceded the general applicability of the long-arm statute to her challenged conduct. *Id*. at 483. Here, the NJAG did not concede personal jurisdiction.

capacity to suits for prospective relief that avoid the Eleventh Amendment bar, but the employee's conduct remains state action under the Fourteenth Amendment." *Id.* Nor does the public official appear to come within the second prong of the statutory definition, which "includes business entities but not fellow states." *Id.* at 483. Thus, the statute "offers no obvious rationale for including nonresident individuals sued solely in their official capacity under *Ex Parte Young*." *Id.* at 482-83. A number of district courts have reached the same conclusion, relying on the plain text of the state law. *See, e.g.*, *Bulkley & Assocs., LLC v. Occupational Safety & Health Appeals Bd. of Cal.*, 2019 WL 2411544, at *4 (E.D. Tex. June 7, 2019) (dismissing claims against state agencies on the ground that they do not meet definition of "nonresidents" under the statute); *Sullivan v. Office of Tex. Att'y Gen.*, 2019 WL 1598222, at *6 (W.D. Tex. Apr. 15, 2019) (dismissing claims against state agency on the ground that it does not meet definition of "nonresidents"). That disposes of this case, because the NJAG was sued in his official capacity. *See* ROA.127, ¶ 14.

Second, *Stroman* questioned whether a state official's "faithful enforcement of allegedly unconstitutional [state] statutes" can qualify as "doing business" under Texas law. 513 F.3d at 483. The Court reasoned that that term "connects acts relevant to the long-arm statute with a 'business enterprise,'" and "regulatory activity in no way meets" the common usage of "business" as a "commercial enterprise carried on for profit." *Id.* at 483 n.6. The challenged official acts likewise did not meet the tort-

claim prong of "doing business," as the suit did not allege an abuse of power or other *individual* misconduct by the official, and the "faithful enforcement of allegedly unconstitutional" state laws cannot constitute an intentional tort. *Id.* at 483. That is also dispositive, because Appellants do not allege an abuse of power or individual misconduct by the NJAG, and instead challenge his enforcement of state law. This is the quintessential *Ex Parte Young* claim—in which Appellants seek injunctive relief and do not seek damages—and which *Stroman* suggested cannot qualify as a "tort" or as "doing business" in Texas.

To be sure, as *Stroman* explained, Texas's "long-arm statute is coextensive with the limits of procedural due process"—but only "*for those people and entities and activities that it describes*." *Id.* (emphasis added). The defendant must still be a nonresident, and the lawsuit must still challenge that nonresident's "doing business" in the State of Texas. In other words, while the long-arm statute certainly can extend jurisdiction as far as federal due process allows, as a threshold issue, the out-of-state defendant in a given case must come within the terms of the statute without rendering its words a nullity. *Id.* This Court has thus repeatedly enforced the plain language of the long-arm statute, even in commercial cases. *See, e.g.*, *Pervasive Software Inc. v. Lexware GmbH & Co. KG,* 688 F.3d 214, 229 (5th Cir. 2012) (no jurisdiction over tort claims arising out of business dispute absent allegation that tort was "committed,

in whole or in part, in Texas" as required by the statute). For the reasons given above, the statute does not reach a state official acting in his official capacity.

Texas's long-arm statute thus does not confer jurisdiction over the NJAG.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING APPELLANTS' JUDICIAL ESTOPPEL ARGUMENT.

Appellants urge this Court to find that judicial estoppel precludes the NJAG from asserting lack of personal jurisdiction. The District Court's decision to reject Appellants' request to invoke the doctrine of judicial estoppel is reviewed only for abuse of discretion. *Hopkins v. Cornerstone America*, 545 F.3d 338, 346-47 (5th Cir. 2008). The doctrine "applies only if the following elements are present: (1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Trinity Marine Prods., Inc. v. U.S.*, 812 F.3d 481, 490 (5th Cir. 2016). According to Appellants, the NJAG cannot now deny that personal jurisdiction is proper over him in Texas because the NJAG purportedly has argued that (1) "this kind of controversy" can be litigated outside of New Jersey, and (2) Appellant Defense Distributed has the requisite minimum contacts with the State of Washington to be subject to suit there. ROA.1741-42. The District Court correctly declined to apply estoppel—and clearly did not abuse its discretion—because neither argument is inconsistent with the NJAG's personal jurisdiction defense in this case and because neither argument was accepted by the Washington court.

This Court construes the "plain inconsistency" requirement narrowly, such that a litigant's two positions are not inconsistent if they involved distinct issues. In *Hopkins*, this Court held that there was "no legal inconsistency" between plaintiff's position that he was an employee under the Fair Labor Standards Act (FLSA) and his defense to a prior sexual harassment suit that he was an independent contractor and outside the scope of the relevant Texas statute. *Id.* at 347. The panel reasoned that the two positions could be reconciled since the FLSA uses a broader definition of "employee," such that it was possible to be an employee under the FLSA but not under the Texas statute. *Id.*; *see also, e.g., United States v. Apple, Inc.*, 791 F.3d 290, 337 (2d Cir. 2015) (explaining that even "facially inconsistent" statements do not meet the standard if, considering the contexts in which the arguments were made, there is no "direct and irreconcilable contradiction"); *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 318 (5th Cir. 2011) (finding no "genuine inconsistency" between two positions since they concerned distinct legal issues); *U.S. v. Supreme Court of N.M.*, 839 F.3d 888, 911 (10th Cir. 2016) ("If the statements can be reconciled there is no occasion to apply an estoppel.").[6]

[6] A textbook example of such irreconcilability is *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 398 (5th Cir. 2003), where this Court found that a plaintiff's assertion that the allegedly defective product was manufactured by GE was "clearly inconsistent" with his assertion in a prior lawsuit that "the only possible manufacturer" of the product was Woods Industries. The panel reasoned that the manufacturer "cannot be Woods in the first action but GE in the second." *Id.*

Here, the NJAG's objection to personal jurisdiction is not inconsistent with any position taken in the Washington action. As an initial matter, the District Court correctly rejected Appellants' framing of the jurisdictional issue as whether "this controversy" may be litigated outside of New Jersey. ROA.1742. The District Court rightly explained that "the minimum contacts inquiry focuses not on 'the kind of controversy' before the court, but on the defendant's contacts with the forum state." *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Walden v. Fiore*, 571 U.S. 277 (2014)). That is a straightforward application of the Supreme Court's rule that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State" sufficient for the exercise of jurisdiction to satisfy due process. 571 U.S. at 291. Thus, the District Court correctly compared the NJAG's position that he lacks minimum contacts with Texas to the "argument, in a different case, that Defense Distributed had minimum contacts with Washington." ROA.1742. Because these are distinct issues, there is nothing even facially inconsistent with arguing both that *Defense Distributed* has minimum contacts with *Washington* and that the *NJAG* lacks minimum contacts with *Texas*. For this reason alone, the District Court did not abuse its discretion in refusing to apply judicial estoppel.

In any event, Appellants' estoppel argument fails even if this Court concludes that the NJAG's positions are irreconcilable. For estoppel to apply, the NJAG would actually have had to assert, and then the federal district court in Washington would

have had to accept, the earlier inconsistent position. Notably, the NJAG did not ever take the position that Defense Distributed had minimum contacts with Washington because Defense Distributed never actually asserted lack of personal jurisdiction in that case.[7] Nor did the federal district court in Washington ever hold that Defense Distributed had minimum contacts with Washington, instead specifically noting that those defendants "have not challenged their susceptibility to service of process." *See* Case No. 2:18-cv-1115-RSL, Dkt. 130 at 5.[8] In other words, the prior court never "accepted the prior position," independently rendering estoppel inappropriate.

Given Appellants' failure to meet either prerequisite, the District Court did not abuse its discretion in declining to apply judicial estoppel.

[7] Defense Distributed challenged the Washington court's jurisdiction on other grounds, including that the challenged agency actions were non-reviewable. *See id.*, Dkt. 11 at 3-13. But Defense Distributed never asserted lack of personal jurisdiction, as reflected by several rulings rejecting its jurisdictional arguments without deciding whether Defense Distributed has the requisite minimum contacts with Washington. *See id.*, Dkt. 23 (granting plaintiffs' motion for temporary restraining order); 95 (granting plaintiffs' motion for preliminary injunction); 192 (granting in part plaintiffs' motion for summary judgment).

[8] In support of its judicial estoppel argument, Defense Distributed cites a brief that New Jersey joined in the Washington Action opposing Defense Distributed's motion for judgment on the pleadings. Appellants Br. at 29. But that brief argued only that Defense Distributed was a necessary party to that action and did not address personal jurisdiction. *See* Case No. 2:18-cv-1115-RSL, Dkt. 119 at 8-13.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO GRANT APPELLANTS' TRANSFER REQUEST.

In a footnote to their brief opposing the NJAG's motion to dismiss, Appellants requested, for the first time, that the District Court transfer the case should it decide it lacks personal jurisdiction over the Defendants. ROA.1387. In deciding whether to transfer venue, courts consider "a number of public and private interest factors," none of which alone have dispositive weight. *Action Indus., Inc. v. U.S. Fid & Guar. Co.*, 358 F.3d 337, 340 n.8 (5th Cir. 2004). A district court's decision on a motion to transfer is reviewed for abuse of discretion. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989). As the party seeking transfer, Appellants had the burden to demonstrate that a transfer was warranted. *See In re Volkswagen of America, Inc.*, 545 F.3d 304, 314-15 (5th Cir. 2008); *Frederick v. Advanced Fin. Solutions, Inc.*, 558 F. Supp. 2d 699, 703 (E.D. Tex. 2007).

Appellants did not satisfy their burden of showing that the "public and private interest factors" call for a transfer. Notably, Appellants did not make a formal motion to transfer or provide any analysis of why a transfer was justified. Instead, Appellants simply included a footnote requesting that the case be transferred "to an appropriate district ('New Jersey in the case of the NJAG or Delaware in the case of the DAG')." ROA.1387. And despite the fact that Appellants filed a motion to alter or amend the District Court's judgment of dismissal for lack of jurisdiction, they did not raise their request to transfer the case to New Jersey. ROA.1753-58. In other words, because

Appellants "made no attempt to show that the private and public interest factors weigh in favor of transfer" across multiple rounds of briefing, the District Court was not obligated to perform this analysis on its own and grant a transfer. *See Casas v. Northrop Grumman Ship Sys., Inc.*, 533 F. Supp. 2d 707, 717 (S.D. Tex. 2008) (granting motion to dismiss for lack of personal jurisdiction and denying plaintiff's transfer request raised in response to the motion to dismiss which "made no attempt to show" that a transfer was warranted). Simply put, no case law suggests that a court *abuses its discretion* in failing to grant a one-sentence, unsupported, and unreasoned request to transfer a case to another jurisdiction. *See Peteet*, 868 F.2d at 1436.

In any event, the issue is moot because Appellants have since filed a complaint in New Jersey. *See Defense Distributed v. Grewal*, N.J. Civ. No. 19-4753 (Dkt. No. 1). Although it is true that this action is currently stayed, that is because Appellants are choosing to litigate their claims against the NJAG in two federal judicial forums simultaneously. Indeed, the District Court of New Jersey's order explicitly granted the stay of that lawsuit only "until the action in the Western District of Texas (Civil Docket No. 18-637) is resolved and no other motions for relief and/or appeals are viable." *Id.* (Mar. 7, 2019 Order). If this Court properly affirms the dismissal for lack of personal jurisdiction, then there will be nothing to be gained by transferring this case, as Appellants' separate case in New Jersey will restart immediately. In other words, any delay in New Jersey is due solely to Appellants' decision to pursue their

remedies in the District of New Jersey and in the Fifth Circuit at the same time, and so a transfer once this litigation is resolved will not change anything.

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: January 30, 2020

Respectfully submitted,

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Certificate of Service

On January 30, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system and served upon all counsel via CM/ECF.

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Dated: January 30, 2020

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