No. 15-50759

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED,

Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF STATE; JOHN F. KERRY, In His Official Capacity as the Secretary of the Department of State; DIRECTORATE OF DEFENSE TRADE CONTROLS, Department of State Bureau of Political Military Affairs; KENNETH B. HANDELMAN, Individually and in His Official Capacity as the Deputy Assistant Secretary of State for Defense Trade Controls in the Bureau of Political-Military Affairs; C. EDWARD PEARTREE, Individually and in His Official Capacity as the Director of the Office of Defense Trade Controls Policy Division; SARAH J. HEIDEMA, Individually and in Her Official Capacity as the Division Chief, Regulatory and Multilateral Affairs, Office of Defense Trade Controls Policy; GLENN SMITH, Individually and in His Official Capacity as the Senior Advisor, Office of Defense Trade Controls,

Defendants-Appellees

On Appeal from the United States District Court
for the Western District of Texas

OPPOSITION TO PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Defense Distributed v. U.S. Department of State, No. 15-50759.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-appellants:

Defense Distributed
Second Amendment Foundation, Inc.

Defendants-appellees:

United States Department of State
John F. Kerry, Secretary of State
Directorate of Defense Trade Controls
Kenneth B. Handelman, Deputy Assistant Secretary of State (individual capacity only)
Brian H. Nilsson, Deputy Assistant Secretary of State (official capacity only)*
C. Edward Peartree, Director, Office of Defense Trade Controls Policy
Sarah J. Heidema, Division Chief, Regulatory and Multilateral Affairs, Office of Defense Trade Controls Policy
Glenn Smith, Senior Advisor, Office of Defense Trade Controls

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Representative Brian Babin (Texas)
Representative K. Mike Conaway (Texas)
Representative Jeff Duncan (South Carolina)

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* Pursuant to Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c)(2), Mr. Nilsson has been automatically substituted for his predecessor for purposes of the official-capacity claims.

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Representative Paul Gosar (Arizona)
Representative Walter Jones (North Carolina)
Representative Mike Kelly (Pennsylvania)
Representative Steve King (Iowa)
Representative Raúl Labrador (Idaho)
Representative Jeff Miller (Florida)
Representative Bill Posey (Florida)
Representative Todd Rokita (Indiana)
Representative Daniel Webster (Florida)
Cato Institute
Electronic Frontier Foundation
Madison Society Foundation, Inc.
Reporters Committee for Freedom of the Press
Texas Public Policy Foundation
Thomas Jefferson Center for the Protection of Free Expression

Amicus for defendants-appellees:

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s/ Daniel Tenny
Daniel Tenny

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INTRODUCTION

This case concerns the online distribution to foreign nationals of computer files that enable anyone with a 3-D printer or related device to produce an operable firearm. The files allow the "largely automated" creation of plastic firearms that can be immune to detection by conventional security measures such as metal detectors, as well as "fully functional, unserialized, and untraceable metal AR-15 lower receivers." Op. 4.

The State Department concluded that its International Traffic in Arms Regulations prohibit the distribution of certain of these files to foreign nationals over the Internet. In this litigation, plaintiff Defense Distributed challenges that determination, asserting a constitutional right "to share all of its . . . files online, available without cost to anyone located anywhere in the world, free of regulatory restrictions." Op. 4. Given the clear and legitimate governmental interest in preventing the spread of firearms worldwide, the panel majority properly concluded that the district court did not abuse its discretion in declining to issue a preliminary injunction against the application of the regulations.

In their rehearing petition, plaintiffs do not dispute the legitimacy or strength of the government's interest, and properly do not contend that the factual conclusions of the panel majority are erroneous or warrant en banc review. Instead, plaintiffs suggest that the panel majority erred by resolving this appeal on the narrow ground that the district court did not abuse its discretion in concluding that the balance of

harms and the public interest counsel against granting a preliminary injunction, and that this Court instead was compelled to resolve the constitutional questions presented in this case. The panel majority acted well within its discretion when it declined to decide an unnecessary constitutional question. No further review is warranted.

STATEMENT

1. The Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the import and the export of defense articles and defense services." *Id.* § 2778(a)(1). "[T]he President is authorized . . . to promulgate regulations for the import and export of such services," and to designate items as defense articles and defense services by placing them on the "United States Munitions List." *Id.* With certain exceptions not relevant here, "no defense articles or defense services . . . may be exported or imported without a license for such export or import." *Id.* § 2778(b)(2). "Decisions on issuing export licenses . . . shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of an outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements." *Id.* § 2778(a)(2).

To implement this statute, the Department of State has promulgated the International Traffic in Arms Regulations. 22 C.F.R. §§ 120-130. Those regulations set out the U.S. Munitions List that defines items as defense articles and defense services. They also set out the requirements and procedures for determining whether particular items satisfy the regulatory definitions and, if so, whether a license should be issued to permit their export.

In addition to arms themselves, the U.S. Munitions List includes "[t]echnical data" related to items on the list. 22 C.F.R. § 120.6; *id.* § 121.1, Category I, item (i). "Technical data" includes, among other things, "[i]nformation . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles," including "information in the form of blueprints, drawings, photographs, plans, instructions or documentation." *Id.* § 120.10(a)(1).[1] The definition of technical data "does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities," nor does it include "information in the public domain." 22 C.F.R. § 120.10(b). Information in the "public domain," in turn, is defined as information "which is published and which is generally accessible or available to the public" in any of a number of forms and locations. *Id.* § 120.11(a).

[1] A separate definition applies to "software." *See* 22 C.F.R. §§ 120.10(a), 120.45(f). This case concerns data files that are not classified as software.

Under the "commodity jurisdiction procedure," on request, the State Department provides "a determination of whether a particular article or service is covered by the U.S. Munitions List." 22 C.F.R. § 120.4(a). Commodity-jurisdiction decisions are subject to an appeal procedure. *Id.* § 120.4(g).

The regulations define the "export" of technical data to include sharing such data with a foreign person, within the United States or abroad. 22 C.F.R. § 120.17(a)(1)-(2).[2] The government has thus long prohibited the dissemination of sensitive, but unclassified, information that is essential to the production of munitions.[3]

2. The particular items at issue in this case are computer files that are used for the three-dimensional "printing" (or the related process of "milling") of firearms and firearm components. The computer files enable someone who has a piece of hardware known as a "3-D printer" (or a related device in the context of milling) to

[2] Regulations on this topic were altered and recodified in various respects effective September 1, 2016, but the regulations have restricted transfers of technical data to foreign persons throughout the course of this litigation. *See* Interim Final Rule, 81 Fed. Reg. 35,611 (June 3, 2016).

[3] Although plaintiffs suggest that the Executive Branch has expressed concerns about the constitutionality of the regulations, those concerns related to genuine scientific exchanges. *See, e.g.*, Department of State, Munitions Control Newsletter (Feb. 1980) [ROA.332] (discussing "scientific exchanges of basic mathematical and engineering research data" related to cryptography); Constitutionality of the Proposed Revision of the International Traffic in Arms Regulations, 5 Op. O.L.C. 202, 212 (1981) [ROA.254] (discussing "communications of unclassified information by a technical lecturer at a university" or "the conversation of a United States engineer who meets with foreign friends at home to discuss matters of theoretical interest").

click a button and have the printer create, out of raw materials, a firearm or parts of a firearm. The files "allow virtually anyone with access to a 3D printer to produce, among other things," a "single-shot plastic pistol" and "fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." Op. 4.

The present dispute arose when the State Department sent a letter to Defense Distributed (the putative distributor of the computer files discussed above) identifying as potentially subject to the International Traffic in Arms Regulations some computer files that had been posted on the Internet. At the State Department's request, Defense Distributed submitted a commodity-jurisdiction request for these files and, subsequently, for other files of a similar nature. The State Department ultimately concluded that some, but not all, of the computer files at issue were subject to State Department jurisdiction. *See* Commodity Jurisdiction Determination (June 4, 2015) [ROA.500]. The agency's determination relied on the fact that the files in question had the functional capability to facilitate the manufacture of defense articles in a manner that was not previously available. Aguirre Decl. ¶ 29 [ROA.567-68].

3. In this lawsuit, Defense Distributed and the Second Amendment Foundation asserted that the government was acting ultra vires, that the government's actions violated the First, Second, and Fifth Amendments to the U.S. Constitution, and that the individual defendants were liable for damages because they engaged in practices that were contrary to clearly established law. *See* Compl. ¶¶ 41-59 [ROA.21-

24].[4] As relevant here, plaintiffs sought a preliminary injunction that would have prevented the government from enforcing the International Traffic in Arms Regulations as to either the files that Defense Distributed had submitted for commodity-jurisdiction review or any other files that Defense Distributed might create in the future. Proposed Order [ROA.82].

The district court denied the requested injunction. The court observed that while plaintiffs had asserted that they suffered irreparable injury in the form of a deprivation of constitutional rights, a determination whether a preliminary injunction is warranted also requires "weighing . . . the respective interests of the parties and the public." Order 6 [ROA.684]. Here, plaintiffs "fail[ed] to consider the public's keen interest in restricting the export of defense articles," and "the interest—and authority—of the President and Congress in matters of foreign policy and export." *Id.* [ROA.684]. The court concluded that plaintiffs had not "met their burden as to the final two prongs necessary for granting . . . a preliminary injunction." *Id.* at 7 [ROA.685]. But "in an abundance of caution," the court also addressed plaintiffs' likelihood of success on the merits, and ultimately concluded that their motion was lacking in that respect as well. *Id.* at 7-9 [ROA.685-87].

[4] This appeal involves only claims against the government agencies and the official-capacity defendants, and this brief is filed on their behalf only. Claims for damages against the individual-capacity defendants are still pending in the district court.

4. This Court affirmed the denial of the preliminary injunction. The panel majority agreed with the district court that plaintiffs "failed to give *any* weight to the public interest in national defense and national security." Op. 9 (emphasis in original). While "[o]rdinarily, of course, the protection of constitutional rights would be the highest public interest at issue in a case," here, "the State Department has asserted a very strong public interest in national defense and national security." *Id.* at 10 (emphasis omitted). "[T]he State Department's stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest." *Id.*

The Court observed that if a preliminary injunction were granted, plaintiffs "would legally be permitted to post on the internet as many . . . files as they wish," including files "for producing AR-15 lower receivers and additional 3D-printed weapons and weapon parts." Op. 12. The harm caused by such posting would be permanent: even if plaintiffs did not ultimately prevail, "the files posted in the interim would remain online essentially forever." *Id.* This concern "is not a far-fetched hypothetical," as the files initially posted by plaintiffs are still available on foreign websites, and plaintiffs "have indicated they will share additional, previously unreleased files as soon as they are permitted to do so." *Id.* Because those files, once released, would remain available forever, "the national defense and national security

interest would be harmed forever." *Id.* at 12-13. Any harm to plaintiffs' interests from the denial of a preliminary injunction, in contrast, would be temporary. *Id.*

Judge Jones dissented, stating that she would have concluded that plaintiffs had a likelihood of success on the merits of their First Amendment claim.

ARGUMENT

A. Plaintiffs cannot establish that they are entitled to a preliminary injunction.

The district court applied the familiar four-factor test for assessing whether a preliminary injunction should be entered, assessing (1) whether plaintiffs have a substantial likelihood of success on the merits; (2) whether plaintiffs would suffer irreparable harm in the absence of an injunction; (3) whether plaintiffs' threatened injury outweighs the threatened harm to the government; and (4) whether granting a preliminary injunction would disserve the public interest. *See PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). The district court concluded that if plaintiffs' First Amendment claim were meritorious, they would have established that they would suffer irreparable harm, but the court determined that the harm to plaintiffs would not outweigh the harm to the government from a preliminary injunction, and a preliminary injunction would not be in the public interest. The district court then determined that plaintiffs did not have a likelihood of success on the merits in any event.

In affirming the district court's judgment, this Court likewise adhered to the longstanding four-part test for determining whether a preliminary injunction is warranted. This Court agreed with the district court that the balance of harms and the public interest favored the government and that a preliminary injunction was therefore not warranted, regardless of whether plaintiffs could establish a likelihood of success on the merits (and thereby establish irreparable harm in the form of a deprivation of constitutional rights).

This Court's analysis was correct. The government plainly has a legitimate interest in preventing the dissemination of computer files that would allow the overseas production of "fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." Op. 4. This Court properly concluded that the government's stated interest in this case "lies squarely within" the government's interest in "national defense and national security." *Id.* at 10.

On the other side of the ledger, plaintiffs' rehearing petition does not attempt to identify any practical problems that would arise from awaiting final resolution of the litigation before posting more files on the Internet. Instead, they rest solely on the abstract proposition that the curtailment of constitutional rights constitutes irreparable harm. In the absence of a showing by plaintiffs that some concrete, practical harm would befall them in the absence of a preliminary injunction, plaintiffs have no basis for suggesting that the district court abused its discretion when it determined that the balance of harms did not favor the plaintiffs. Moreover, plaintiffs

do not dispute that they remain free to share their files domestically with fellow Americans and to engage in scientific and technical discussions about 3-D printing.

Plaintiffs emphasize that their constitutional claim, if ultimately vindicated, would support their claim of irreparable harm. But neither the district court nor this Court suggested otherwise. *See* Op. 8-9 (noting that district court had properly held that plaintiffs would satisfy irreparable-harm requirement if their constitutional rights were violated). "The district court's decision was based not on discounting Plaintiffs-Appellants' interest but rather on finding that the public interest in national defense and national security is stronger here, and the harm to the government is greater than the harm to Plaintiffs-Appellants." *Id.* at 11-12.

Plaintiffs misinterpret the recognition by this Court and others that "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quotation marks omitted). The fact that there is a public interest supporting plaintiffs does not mean that there are no countervailing public interests, or that the fourth preliminary-injunction factor always favors the plaintiff. In the context of assessing the propriety of stays of deportation, the Supreme Court has recognized that "[o]f course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). But the Court noted that there would also be countervailing factors relevant to the public interest, such that a court is required to assess the public interest

in each individual case, rather than merely presuming that it favors the party seeking the stay. *See id.*

Here, the panel properly performed a case-specific analysis of the balance of harms, and concluded that the district court did not abuse its discretion. No further review of that fact-specific determination is warranted. Rather, the case should proceed to judgment in the district court, and the constitutional question can be resolved, if necessary, on a full record.

B. The panel was not compelled to determine the likelihood of success on the merits.

Plaintiffs do not even attempt to demonstrate in their petition that the balance of harms would favor them if they were able to establish a likelihood on the merits, or that they have a likelihood of success on the merits in this case (much less to establish that either question warrants review by the full Court at this time). Instead, they assert that the full Court should rehear this case merely because the panel declined to resolve whether plaintiffs were likely to succeed on the merits.

Plaintiffs rightly appear to stop short of insisting that a finding that they had a likelihood of success on the merits would, in itself, entitle them to a preliminary injunction. The Supreme Court has made clear that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). There is nothing novel about the proposition that courts are "not mechanically obligated to

grant an injunction for every violation of law"; to the contrary, factors other than likelihood of success on the merits are "commonplace considerations," and evaluating those factors is "a practice with a background of several hundred years of history." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quotation marks omitted).

Thus, plaintiffs cannot establish that assessment of likelihood of success on the merits, even if resolved favorably to them, would alter the outcome of this appeal. For the reasons given above, the panel properly concluded that plaintiffs were not entitled to a preliminary injunction. Having reached that conclusion, the panel reasonably declined to issue an unnecessary constitutional ruling, instead leaving it to the district court to resolve the merits of the case on a more complete record. Plaintiffs' suggestion that the panel was compelled to resolve the constitutional issue cannot be reconciled with "the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable." *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (quotation marks and ellipsis omitted); *see also PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment) (noting "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more").

Plaintiffs turn this principle on its head by insisting on a categorical rule that, regardless of the circumstances, a court must resolve the likelihood of success on the merits in every First Amendment case involving review of a motion for a preliminary

injunction. Plaintiffs highlight the breadth of their proposed methodological requirement by relying on cases involving other constitutional rights, thus apparently suggesting that likelihood of success on the merits must be assessed in every constitutional case on any subject. *See* Pet. 14 (citing *Jackson Women's Health Org.*, 760 F.3d at 458 & n.9 (Fourteenth Amendment); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (Fifth Amendment)). Courts have authority to exercise their equitable discretion as appropriate in each individual case, and there is no basis for establishing a broad rule cabining that discretion in large categories of cases. In some circumstances, as here, declining to resolve a constitutional issue is the prudent course, and plaintiffs provide no justification for depriving courts of that discretion, much less for review by the full Court on this subject. *See American Civil Liberties Union v. Clapper*, 804 F.3d 617, 626 (2d Cir. 2015) (denying a preliminary injunction while declining to "resolv[e] momentous Constitutional issues").

Plaintiffs correctly observe that in many instances the likelihood of success on the merits in First Amendment cases turns out to be dispositive, or to inform the analysis of the other preliminary-injunction factors. The panel majority did not suggest otherwise; to the contrary, it explicitly acknowledged that "[o]rdinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case." Op. 10 (emphasis in original). The Court merely acknowledged that the government's interest in this case was different from the interest asserted in other First Amendment cases. Plaintiffs offer no response.

Instead of grappling with this Court's analysis of the circumstances presented here, plaintiffs seek to analogize this case to other types of First Amendment cases in which the government's interest was essentially the flip side of plaintiffs' First Amendment interest: an interest in preventing a particular form of expression in which the plaintiff sought to engage. Even if likelihood of success on the merits would turn out to be the pivotal question in many such cases, in this case, the government's interest has little if anything to do with the suppression of expression or with a concern that a person will hear plaintiffs' message. Rather, the government's concern relates to the *functional* nature of the data files at issue. Plaintiffs do not dispute that dissemination of their data files on the Internet allows foreign nationals to create "fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." Op. 4. The government has a legitimate interest in preventing that automated production.

While the government has argued that, for this reason among others, the government's actions in this case do not contravene the First Amendment, for present purposes it suffices that the government has articulated a legitimate interest relevant to the preliminary-injunction analysis, which the district court and this Court were entitled to credit. And as this Court pointed out, plaintiffs "failed to give *any* weight to the public interest in national defense and national security." Op. 9 (emphasis in original). Plaintiffs have no basis for asking the full Court to set aside the balancing conducted by the district court and by this Court.

CONCLUSION

For the foregoing reasons, the rehearing petition should be denied.

Respectfully submitted,

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NOVEMBER 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
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