Nos. 20-35030 & 20-35064

In the United States Court of Appeals
for the Ninth Circuit

State of Washington, et al.
Plaintiffs - Appellees,
v.
Defense Distributed, Second Amendment Foundation, Inc.; Conn Williamson
Defendants - Appellants,
and
U.S. Department of State, et al.,
Defendants.

Appeal from the United States District Court for the
Western District of Washington; No. 2:18-cv-01115-RSL

Appellants' Petition for Rehearing En Banc

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Summary of the Argument

No panel can disregard *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), under which the "established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending [a] decision on the merits is to reverse or vacate the judgment below." *United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020). Yet this panel, in the face of briefs expressly invoking *Munsingwear*'s mandatory requirement, totally ignored the issue. It dismissed the appeal as moot *while silently and intentionally refusing to vacate the decision below*. The judgment this panel preserved as the law of the land is an odious departure from judicial norms that violates both Article III and the First Amendment.

In the district court, Judge Robert Lasnik let a gang of liberal States commandeer the State Department to impose an unconstitutional censorship regime of prior restraints upon their political enemies—Defense Distributed, the Second Amendment Foundation, Inc., and all citizens that dare to speak about the Second Amendment. The case should have been dismissed at day one because States lack Article III standing to hijack federal agencies for such vendettas. And it should have lost on the merits because the Administrative Procedure Act is not exempt from the First Amendment. But the States and Judge Lasnik kept this farcical case alive long enough, and kept Defense Distributed and SAF in this farcical case long enough, to yield the most obviously wrong free speech holding this Court may ever see.

The district court's lynchpin holding—in words Judge Lasnik chose with eyes wide open—is that the First Amendment can be "abridged" by APA technicalities so long as it is not "abrogated." ER56. Whatever that means, it is anathema to the Constitution of the United States of America. But so it was that, in the district court of their choice, the States succeeded in vacating the federal speech license and federal regulation protecting Defense Distributed and SAF's right to free expression.

Exposed on appeal, the States shifted positions to call the entire case moot. They would rather flee than defend the indefensible. In truth, the case is not moot. But if the case really *is* moot, the States get to retreat that way only by paying the price *Munsingwear* exacts. An analysis of whether to vacate the decision below must occur—it is not optional—and its result is crystal clear: If this case is moot, the Court has no choice but to vacate the district court's judgment.

Standing alone, the panel's inexcusable refusal to perform a *Munsingwear* analysis warrants correction via rehearing. But that is not the only one.

In addition, rehearing is warranted because the panel refused to address the district court's lack of subject-matter jurisdiction. Such testing is required by *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), which holds that this Court always has jurisdiction to address a district court's lack of subject-matter *jurisdiction* and is always obligated to vacate judgments issued without it—even if the judgment cannot be assailed *on the merits* due to problems like mootness. *Id.* at

66–73; *accord Williams v. I.N.S.*, 795 F.2d 738, 742 (9th Cir. 1986). Here, an appellant's brief made the district court's lack of subject-matter jurisdiction totally apparent. Yet in dismissing this appeal, the panel said nothing about the district court's subject-matter jurisdiction and gave no excuse for not testing it.

Finally, rehearing is warranted because the panel erroneously held the case moot. No one can tell which of the States' mootness arguments the panel bought because the order does not say. But it matters not. All are wrong.

For all of these reasons, the dismissive panel decision that ended this appeal cannot stand. It did not merely commit manifest errors as to issues of exceptional importance. It did so surreptitiously—in a conclusory order with no meaningful indication of the decision's true basis. An honest order would have at least let the parties challenge it facially. But this decision both does a severe injustice and, by confessing so little, cloaks it in hopes of avoiding reversal by higher authorities.

If in this case the judicial power to safeguard First Amendment freedoms on the merits no longer exists, then for Article III's sake, the district court's judgment must at least be vacated due to *Munsingwear* and a lack of original jurisdiction. Otherwise, if the courts charged with protecting all Americans continue to ignore the civil liberties of what Judge Lasnik called "cybernaut[s]" in the "remote recesses of the internet," ER54, they can expect to be ignored in kind.

Statement of the Case

I. The appeal presents issues of extraordinary importance.

This case entails a long-running and important First Amendment controversy about Second Amendment speech on the internet. After years of litigation outside of this Circuit, the State Department did the right thing when it decided to cease imposing an unconstitutional prior restraint upon Defense Distributed and the Second Amendment Foundation, Inc., and resolve the controversy by agreement.

Pursuant to a settlement agreement that was valid when executed and is valid today, the State Department undertook to roll back its prior restraint by, among other things, temporarily modifying a pertinent regulation and issuing a license for Defense Distributed, SAF, and all U.S. persons to publish the computer files at issue. Quickly, these rights were exercised by Defense Distributed, SAF members, and many other law-abiding citizens. The files at issue are now readily available online.

Then came States that disfavor speech about the Second Amendment. Despite conceding that the files at issue are perfectly legal—they admit Defense Distributed has every right to "hand them around domestically," ER1809—these States insisted that the State Department reimpose its prior restraints against online publication. So they sued the State Department under the Administrative Procedure Act to have the temporary modification and license vacated.

The district court granted relief. After issuing a nationwide preliminary injunction, its final judgment vacated the license and temporary modification, forcing the State Department to revive its unconstitutional regime—all on the dangerous theory that the "First Amendment is irrelevant." ER23687.

Realizing that the decision below cannot possibly withstand appellate scrutiny, the States moved to dismiss the appeal as moot. The event that they said supposedly mooted the case happened all the way back in July 2018, at week *one* of the case. But the States *never* made their leading mootness argument below. They gladly litigated in their forum of choice to obtain political headlines to their liking. Only now, with reversal imminent, do they retreat by way of a mootness suggestion.

The panel went right along with this gamesmanship, doing just as the States asked. It dismissed the appeals without more. It both refused to evaluate the district court's subject-matter jurisdiction, as is always required, and refused to vacate the district court's judgment, as *Munsingwear* requires for supposedly moot appeals.

A. First Amendment speech about the Second Amendment is at issue.

1. Defense Distributed published digital firearms information.

This case is about digital firearms information. *See* Defense Distributed Br. of Appellants at 4–6. It exists in the form of coded computer files, pertains to both entire firearms and individual firearm components, and addresses their physical properties, production methods, and uses. *Id.* It includes, but is not limited to, what

authorities refer to as "Computer Aided Design files" or "CAD files" and what authorities refer to as "Computer Aided Manufacturing files" or "CAM files." *Id.*

Defense Distributed is a Texas-based company that promotes the Second Amendment's right to keep and bear firearms by exercising the First Amendment right to speak about firearms. *See* Defense Distributed Br. of Appellants at 7–9. To that end, Defense Distributed engaged in the publication of a wide variety of digital firearms information to the American public, primarily via the internet. *Id.*

Hundreds of millions of Americans have the right to produce a firearm for personal use at home, and all Americans have the right to learn about firearms even if they never produce one. Defense Distributed has a right to share its digital firearms information with each of these citizens and each citizen has a right to hear what Defense Distributed has to say. Hence "DEFCAD," the website Defense Distributed published at defcad.org and defcad.com in the times at issue. *Id.*

Online at DEFCAD, Defense Distributed published important sets of digital firearms information to the internet's public domain on multiple occasions. One publication period lasted from December 2012 to May 2013. *See* Defense Distributed Br. of Appellants at 7–13. Another publication period lasted from July 27, 2018, to July 31, 2018. *Id.* The computer files that were published during these two periods were downloaded millions of times. *Id.*

The digital firearms information that Defense Distributed published in these periods constitutes speech. Akin to blueprints, the files supply information in the abstract. *Id.* Each is an important expression of technical, scientific, artistic, and political matter. *Id.* They carry these values apart from any application that the information's recipient might choose to devote the information to. *See* Felicia R. Lee, *3-D Printed Gun Goes on Display at London Museum*, N.Y. Times, Sept. 16, 2013. Thus, the digital firearms information at issue qualifies as First Amendment speech entitled to all of the Constitution's protections against censorship.

2. *Defense Distributed I* interrupted publication.

An interruption of Defense Distributed's online publications was caused by a dispute with the State Department. The dispute resulted in litigation called *Defense Distributed I*, which originated in the Western District of Texas and made several trips to the Fifth Circuit. *See Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016) (panel opinion); *id.* at 461–76 (Jones, J., dissenting); *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211 (5th Cir. 2017) (Elrod, Jones, Smith and Clement, JJ., dissenting from the denial of rehearing en banc); *Def. Distributed v. U.S. Dep't of State*, 947 F.3d 870 (5th Cir. 2020).

The plaintiffs in *Defense Distributed I* were Defense Distributed, SAF, and a SAF member. ER15694–15695. The defendants were State Department officials. ER15696.

Defense Distributed I began after the State Department used the Arms Export Control Act of 1976, 22 U.S.C. ch. 39 ("the AECA"), and its primary implementing regulations, the International Traffic in Arms Regulations, 22 C.F.R. Parts 120–130 ("the ITAR"), to impose a prior restraint on public speech concerning technical firearms data, including Defense Distributed's digital firearms information. Under this prior restraint, the State Department required that Defense Distributed obtain prior United States government approval before publication of such technical data could occur on the internet and at other public venues. In *Defense Distributed I*, Defense Distributed and SAF challenged the State Department's enforcement of the AECA/ITAR regime as ultra vires action not authorized by the statutes and regulations at issue, and as violations of the First, Second, and Fifth Amendments of the Constitution. *See* Defense Distributed Br. of Appellants at 13–15

3. The license and Temporary Modification let publication resume.

In the midst of that litigation, the parties to *Defense Distributed I* settled their dispute. *See* Defense Distributed Br. of Appellants at 16–19. Reports correctly understood that the State Department's decision to settle "essentially surrenders" to the constitutional challenge Defense Distributed and SAF had been pressing. *Id.*

The *Defense Distributed I* settlement agreement is memorialized by the "Settlement Agreement": a written contract that all sides executed validly. ER653. It obligates the State Department to do several key things about the files at issue.

The first key Settlement Agreement obligation concerns a new final rule. ER653. Paragraph 1***(a)*** requires the State Department to draft and fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising United States Munitions List ("USML") Category I to exclude the files at issue from the ITAR system of prior restraints. *Id.*

The second key Settlement Agreement obligation concerns a temporary modification during the new final rule's development. ER653–54. Paragraph 1***(b)*** requires the State Department to announce, while the above-referenced final rule is in development, a temporary modification, consistent with International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the Defense Distributed I Files; and to publish the announcement on the Directorate of Defense Trade Controls website on or before July 27, 2018. ER653–54.

The third key Settlement Agreement obligation concerns a license. ER654. Paragraph 1***(c)*** requires the State Department to issue a license to the *Defense Distributed I* plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that certain files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). *Id.*

Then the State Department began the effort to carry out its Settlement Agreement obligations. ER1700–1701. By July 27, 2018, it had done the following.

In an attempt to comply with the obligation imposed by Settlement Agreement Paragraph 1***(b)***, the State Department made a temporary modification to USML Category I, pursuant to 22 C.F.R. § 126.2, to "exclude" the *Defense Distributed I* Files from Category I. ER662. By way of the Temporary Modification, the State Department authorized the distribution of the *Defense Distributed I* Files without any prior restraint. *Id.*; *see* ER467–68; ER14513.

In an attempt to comply with the obligation imposed by Settlement Agreement Paragraph 1***(c)***, the State Department issued Defense Distributed a license—a letter issued by the State Department's Acting Deputy Assistant Secretary for the Directorate of Defense Trade Controls—authorizing the Defendants to publish files for "unlimited distribution." ER14542–14543.

Thus, from July 27 to July 31, 2018, Defense Distributed, SAF, and any "U.S. person" were free to publish and republish the *Defense Distributed I* Files on the internet and free to receive them there. And so publication occurred, as detailed above.

B. The States sued to force the federal government to censor speech.

Plaintiffs are nineteen states and the District of Columbia, called "the States." All have a Democrat governor and/or attorney general. The federal defendants are the State Department and its officials. ER473–474. The private defendants are Defense Distributed, SAF, and its member. ER474–475.

The States pleaded two Administrative Procedure Act claims. ER531–538. One targeted the State Department's issuance of the license and the other targeted the State Department's issuance of the Temporary Modification. *Id*.

C. The district court reimposed the unconstitutional regime by vacating the license and Temporary Modification.

The district court accepted both of the States' APA claims. ER13–24. First, it held that the State Department's issuance of the Temporary Modification was "without observance of procedure required by law," 5 U.S.C. § 706, because a Congressional notice requirement had not been met. ER13–24. Second, it held that the State Department's issuance of both the Temporary Modification and the license were "arbitrary and capricious," 5 U.S.C. § 706, because of insufficient explanation and evidentiary support in the administrative record. ER13–24.

Part of the district court's judgment addressed the First Amendment implications of a decision vacating the Temporary Modification and license. It held the Constitution's First Amendment "not relevant to the merits":

> Whether or not the First Amendment precludes the federal government from regulating the publication of technical data under the authority granted by the AECA ***is not relevant to the merits*** of the APA claims plaintiffs assert in this litigation.

ER25 (emphasis added). It also held that the First Amendment can be "abridged" so long as it is not "abrogated." ER56. Defense Distributed and SAF appealed.

II. The panel dismissed the appeal as moot without more.

Once the appeal got under way, the States realized that reversal was imminent. Defense Distributed's brief showed that the district court both lacked subject-matter jurisdiction because of multiple Article III shortcomings, Defense Distributed Br. of Appellants at 35–48, and was wrong on the merits because the APA cannot require abridgement of the First Amendment, *id.* at 48–53. So rather than be squarely defeated, the States moved to dismiss both appeals as moot. *See* Dkt. 20-1.

Defense Distributed and SAF responded jointly, opposing the dismissal request with several categories of argument. Dkt. 21. First, the response defeated the States' mootness suggestion on its own terms. *Id.* at 3–16. Second, it showed that mootness-based dismissals cannot occur unless and until disputes regarding the district court's subject-matter jurisdiction are resolved. *Id.* at 16–17; *accord* Dkt. 27 at 3. Third, the response showed that, if the case were moot, *Munsingwear* requires vacatur of the district court's judgment. Dkt. 21 at 19–21.

The panel consisted of Chief Judge Thomas and Judges Schroeder and Callahan. Its order gives no meaningful indication of the mootness reasoning. It says nothing about the district court's jurisdiction. And it says nothing about *Munsingwear*. It dismisses the appeal without any meaningful engagement:

> Appellees have moved to dismiss these consolidated appeals as moot (Docket Entry No. 20 in No. 20-35030). On June 19, 2020, this court issued an order to show cause as to whether appellants possess the requisite standing to bring and/or prosecute these appeals.
>
> Upon a review of the record, the briefing on the motion to dismiss, and the responses to the court's June 19, 2020 order, we conclude that these appeals are moot because no present controversy exists as to which any effective relief may be granted to appellants. *See Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 815-16 (9th Cir. 1995) (affirming dismissal of action to enjoin government's sale of disputed lands as moot where government voluntarily canceled sale and "there was no immediate prospect of another, similar lease sale").
>
> Accordingly, the motion to dismiss is granted. These appeals are dismissed for lack of jurisdiction.

Dkt. 30 at 2.

Argument

Appellants Defense Distributed, the Second Amendment Foundation, Inc., and Conn Williamson petition for rehearing *en banc* of their consolidated appeals. In a scant three-paragraph order, the panel held that the appeals are moot and dismissed them. But the panel did *not* go on to vacate the district court's judgment, as the appellants had requested. It refused to do any *Munsingwear* analysis at all. Nor did the panel evaluate the district court's subject-matter jurisdiction, as the appellants had requested as well. The panel's decision did nothing but deem the appeals moot and dismiss the appeals. That warrants rehearing for three reasons.

I. The panel's refusal to address *Munsingwear* warrants rehearing.

Rehearing is warranted because the panel silently defied the vacatur requirement of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Under *Munsingwear*, the "established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending [a] decision on the merits is to reverse or vacate the judgment below." *United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020) (quoting *Munsingwear*). Defense Distributed and SAF demanded just that in response to the motion to dismiss, and also showed why an exception does not apply.[1] Dkt. 27 at 19-20. Yet the panel totally ignored the issue.

[1] The exception for mootness caused by an appellant does *not* apply because the appellants here are Defense Distributed and SAF, and they had nothing do to with

This error's simplicity makes it no less blatant and no less impactful. The *Munsingwear* doctrine is designed to protect both litigants and the judicial system itself. By silently sabotaging it here, the panel both wronged the litigants who presented the argument in perfect compliance with all appellate practices and disserved the citizenry that deserves transparent judging of free speech cases.

II. The panel's refusal to address jurisdiction below warrants rehearing.

Just as importantly, rehearing is warranted because the panel refused to address the district court's lack of jurisdiction. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), dictates that, even if an appellate court cannot reach a district court's judgment on the merits, it always has jurisdiction to test the district court's subject-matter jurisdiction and is always obligated to vacate a district court judgment issued without it. *Id.* at 66–73. This Court's precedent accords. It too teaches that "a continuing dispute as to jurisdiction is sufficient to prevent a finding of mootness." *Williams v. I.N.S.*, 795 F.2d 738, 742 (9th Cir. 1986).

Since Defense Distributed's appellant's brief made the district court's lack of subject-matter jurisdiction perfectly clear, the panel both possessed and was required to exercise appellate jurisdiction for "the purpose of correcting the error of the lower

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the supposedly mooting actions. Dkt. 27 at 19-20. The case the States cited in reply below, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (per curiam), does not apply because that "party seeking review had 'caused the mootness by voluntary action.'" *Alvarez v. Smith*, 558 U.S. 87, 95 (2009).

court in entertaining the suit." *Arizonans for Official English*, 520 U.S. at 73 (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986)). But despite Defense Distributed and SAF having demanded exactly that, Dkt. 27 at 16-20; Dkt. 27 at 3; the panel once again ignored a critical issue altogether.

One act of defying clear precedent that silently tramples an appellant's well-briefed position ought to be enough to warrant rehearing en banc. The panel's refusal to address the district court's jurisdiction makes two.

III. The panel's mootness conclusion warrants rehearing.

Last but not least, rehearing is warranted because the panel's mootness conclusion is wrong. The case is *not* moot for the reasons explained in the response to the motion to dismiss, Dkt. 21 at 2–18, *not one of which the panel grappled with*.

Perhaps the panel silently held that an August 2018 letter from the Department of Justice caused mootness. That would be wrong because (1) the "2018 letter merely announces compliance with the temporary restraining order issued below, ECF No.23, which as a matter of law does not moot the case," Dkt. 21 at 5–8, and (2) "evidence shows that the federal government will reinstitute the actions at issue" as soon as the decision below is reversed. *Id.* at 8–9.

Or perhaps the panel silently held that mootness stems from new rules adopted by the State and Commerce Departments. That too would be wrong because (1) the new rules are currently enjoined, *id.* at 10–11, (2) the new rules grandfather the

license at issue, giving it continued legal force no matter what, *id.* at 11, (3) the "judgment's collateral consequences prevent mootness," *id.* at 13–15, and (4) the case is "capable of repetition yet evading review," *id.* at 15.

No one can tell which of the States' mootness arguments the panel bought because the order does not say. But it matters not, as all are wrong for the reasons that Defense Distributed and SAF briefed and the panel refused to confront.

Conclusion

Article III courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). "The one or the other would be treason to the constitution." *Id.*

The Court should grant the petition, vacate the panel's order, and exercise appellate jurisdiction without delay.

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Respectfully submitted,

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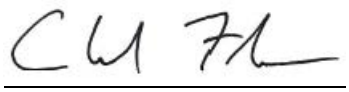
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