No. 21-50327

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEFENSE DISTRIBUTED, *et al.*,

Plaintiffs-Appellants,

v.

GURBIR S. GREWAL, ATTORNEY GENERAL OF NEW JERSEY,

Defendant-Appellee.

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

OPPOSITION TO APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

In Appellants' telling, the single question before this Court is whether a New Jersey law, N.J. Stat. Ann. § 2C:39-9(*l*)(2), contravenes the Constitution. But "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *In re Gee*, 941 F.3d 153, 161 (5th Cir. 2019) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973)). To obtain any injunction pending appeal, it is not enough for a movant to contend that some court, somewhere, at some time, might find a law invalid; instead, the movant must establish that *this* Court can do so *now*. Appellants cannot meet that burden for four independent reasons.

First, this Court has no jurisdiction over the underlying appeal—a prerequisite for any injunction pending that appeal. The decision from which Appellants appeal is one by the Western District of Texas transferring this case to the District of New Jersey, which is a nonfinal, non-appealable order. *See In re Rolls Royce Corp.*, 775 F.3d 671, 676 (5th Cir. 2014). Nor could this Court follow Appellants' suggestion to construe this appeal as a petition for mandamus and grant an injunction pending that hypothetical petition. Whatever petition or appeal is filed, at this time this Court lacks jurisdiction over the forum (the District of New Jersey) and the parties, and thus cannot issue an order binding them. Appellants could seek immediate injunctive relief, but they must do so in the pending District of New Jersey action.

Second, no personal jurisdiction lies over Appellants' claims against Section 2C:39-9(*l*)(2), which have never been before this Court. The previous appeal to this Court presented a different question: whether under Rule 12, Appellants sufficiently pled personal jurisdiction for claims arising out of the Attorney General's cease-and-desist letter. While Appellants prevailed, they subsequently amended their complaint to challenge Section 2C:39-9(*l*)(2) for the first time. That state law, enacted months *after* the cease-and-desist letter, expressly applies only to the dissemination of files to New Jersey and lacks ties to Texas. Still more, although Appellants are seeking an injunction—meaning they must *prove* rather than allege personal jurisdiction—they provided no evidence showing links between their claims and Texas.

Third, even assuming jurisdiction is proper, the Federal Rules foreclose relief. This Court cannot grant an injunction unless Appellants first sought the same relief at the district court. Fed. R. App. P. 8(a). They did not. After remand from this Court, Appellants declined to seek preliminary relief during the 220 days the case was pending before the Western District of Texas and during the 39 days after it was transferred to the District of New Jersey. They presented their request to this forum alone, preventing development of any record on their application.

Finally, were that not enough, Appellants cannot satisfy the traditional criteria for an injunction pending appeal. For one, Appellants cannot establish any likelihood of success: even if this Court finds jurisdiction, Appellants cannot show the district

court clearly abused its discretion in ordering a transfer (the only question in the underlying appeal), and do not even try. Instead, Appellants argue that this Court should only ask whether this state statute must eventually be enjoined by some court somewhere. But without proof that the transfer was clearly erroneous, this is not the forum to have that debate. For another, Appellants cannot establish irreparable harm: the refusal to seek emergency relief from the two district courts since remand in September undermines any argument that this Court should look past the motion's procedural defects and act on an emergency basis.

STATEMENT OF FACTS AND OF THE CASE

In July 2018, Appellants initiated this lawsuit challenging a cease-and-desist letter from the Attorney General warning that dissemination of printable gun files for use by New Jersey residents would violate New Jersey public nuisance law. No. 18-cv-637, Dkt. 1. In January 2019, the district court granted the Attorney General's motion to dismiss for lack of personal jurisdiction and denied Appellants' then-pending motion for preliminary injunction as moot. Dkt. 100. This Court then reversed the dismissal, concluding that Appellants had sufficiently alleged personal jurisdiction as to the cease-and-desist letter. *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020). The mandate issued on September 11, 2020. Dkt. 111.

In the 259 days between issuance of the mandate and the date of their motion (May 28, 2021), Appellants made no effort to seek preliminary relief against the

Attorney General.[1] Instead, two months later, Appellants filed their Second Amended Complaint, challenging for the first time N.J. Stat. Ann. § 2C:39-9(*l*)(2), a state statute that prohibits the distribution of certain code capable of producing firearms using a three-dimensional printer "to a person in New Jersey" who is not a licensed firearms manufacturer. Dkt. 117. That statute post-dates the cease-and-desist letter by three months, and was not mentioned in prior versions of the complaint or in this Court's previous opinion. The Second Amended Complaint also added claims against U.S. State Department officials.

The New Jersey Attorney General moved to sever and transfer all claims against him to the District of New Jersey. Dkt. 121. Appellants opposed that motion, but did not seek preliminary relief. Dkt. 135. On April 19, 2021, the district court granted the motion, severing all the claims against the New Jersey Attorney General from the claims against federal officials and transferring the severed action under 28 U.S.C. § 1404(a). Dkt. 145. The district court applied the factors identified in *In re Volkswagen AG*, 371 F.3d 201 (5th Cir. 2004). Dkt. 145 at 11-16. On April 20, 2021, the case was transferred and docketed as Case No. 3:21-cv-9867 (D.N.J.). On June

[1] Appellants complain that the mandate's issuance mooted their prior motion for injunction pending appeal in this Court, but ignore that the mandate enabled them to seek relief at the district court. *See* No. 19-50723, Doc. 00515561916 at 2 (Attorney General noting mandate would return case "to the district court for a thorough and prompt assessment of the factual, procedural, and state law questions presented by Appellants' preliminary injunction motion, and allow for the proper development of the record"). Appellants declined to do so.

11, 2021, the case was consolidated with another lawsuit Appellants had filed in 2019 against the New Jersey Attorney General in the District of New Jersey, which challenged the same law. No. 19-4753 (D.N.J.).

Appellants filed a notice of appeal. Dkt. 147. Although Appellants subsequently filed a preliminary injunction motion against the federal defendants on May 5, 2021, Dkt. 152, they chose not to seek such relief against the New Jersey Attorney General from either the Western District of Texas or the District of New Jersey. Instead, Appellants waited another 39 days—until May 28—to seek this injunction in this Court.

ARGUMENT

I. This Court Lacks Jurisdiction To Grant An Injunction Pending Appeal.

This Court cannot issue an injunction pending appeal unless it has jurisdiction over the underlying appeal. *See NAACP v. Thompson*, 321 F.2d 199, 203 (5th Cir. 1963) (finding that where "we do not have before us an appealable order of the trial court … this Court has no jurisdiction to grant the motion [for injunction pending appeal] since there is no valid appeal pending in this Court"); Fed. R. App. P. 8(a) committee note (noting "power of a court of appeals" to issue injunctions pending appeal "exists by virtue of the all writs statute," 28 U.S.C. § 1651); 28 U.S.C. § 1651 (permitting federal courts to act as "necessary or appropriate in aid of *their respective jurisdictions*" (emphasis added)). After all, if this Article III court lacks jurisdiction,

then it has no power to award relief of any kind, and Appellants cannot establish any likelihood of success. Here, the underlying appeal—and thus the instant motion—suffers from two independent jurisdictional defects: the appeal is of a nonfinal and non-appealable order, and Appellants have not established specific jurisdiction over their new claims against Section 2C:39-9(*l*)(2).

A. This Court Lacks Appellate Jurisdiction In The Absence Of A Final, Appealable Judgment.

The first defect is straightforward: because there is no final order to review, there is no appellate jurisdiction. Despite Appellants' one-sentence assertion to the contrary, Mot. 5 n.2, the transfer ruling that is the subject of this appeal is not a final order, nor does it fall under the "specific class of interlocutory orders which are made appealable by statute or jurisprudential exception." *Save the Bay, Inc. v. U.S. Army*, 639 F.2d 1100, 1102 (5th Cir. 1981). Indeed, this Court has repeatedly held that transfer orders are not appealable either as interlocutory orders under 28 U.S.C. § 1292(b), *see In re Rolls Royce Corp.*, 775 F.3d 671, 676 (5th Cir. 2014), or under the collateral order doctrine, *see id.* ("transfer orders do not fall within the scope of [the collateral order] doctrine"), which means no injunction can issue.[2]

[2] The precise Wright & Miller provision Appellants cite actually confirms that a transfer order "is not immediately appealable." 15 Wright & Miller, Fed. Prac. & Proc. § 3855 (4th ed. 2021). Furthermore, *In re Sepulvado*, 707 F.3d 550 (5th Cir. 2013), in no way supports Appellants, since that case involved an inapposite "transfer" from a district court *to a court of appeals* under 28 U.S.C. § 2244, a provision that relates to second or successive habeas applications.

Nor do Appellants have any alternative basis for appellate jurisdiction for their interlocutory challenge. Though Appellants glibly invoke mandamus jurisdiction in one sentence in a footnote, that runs into two problems: there is no jurisdictional basis for mandamus, *see In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015) (noting power to issue "writs of mandamus … does not itself confer jurisdiction. We can issue a writ of mandamus only if we have jurisdiction."), and Appellants did not file any mandamus petition.

As to the former, because the transfer to the District of New Jersey removed the case from this Court's jurisdiction, there is no jurisdiction for a hypothetical mandamus petition. *Red Barn* found that where a district court granted a motion under Section 1404(a) transferring any case to a district in another circuit, this Court "lacks jurisdiction" to issue orders binding proceedings in the transferee district court, including via mandamus. *Id.* at 484. The panel noted that once the case is transferred pursuant to Section 1404(a), the transferor district loses jurisdiction. And since this Court's power is territorially limited to the districts in this circuit, it likewise loses jurisdiction when a case is transferred to a court outside its domain. *See id.* (describing as "uncontroversial" that a "transfer to another circuit removes the case from our jurisdiction," and collecting cases).

In short, "[t]his is not just a case in which no appeal to the Fifth Circuit has been perfected; instead, it is a proceeding in which no appeal to this court can be

taken, short of the purely speculative possibility that [a transferee] court transfers it back." *Id.* This makes sense, since mandamus is never proper when there are "other adequate means to attain the relief [movant] desires." *In re Volkswagen of Am.*, 545 F.3d 304, 311 (5th Cir. 2008). Appellants have those means: they can move for the District of New Jersey to transfer the case back or seek emergency relief from that court. *See* 15 Wright & Miller § 3855; *Nat'l Union Fire Ins. Co. of Pittsburgh v. Am. Eurocopter Corp.*, 692 F.3d 405, 408 n.4 (5th Cir. 2012). They have not.[3]

But this Court need not determine whether Appellants *could* successfully seek mandamus, because they have not filed such a petition. *See EEOC v. Neches Butane Prods. Co.*, 704 F.2d 144, 151-52 (5th Cir. 1983) (denying request to treat appeal as mandamus petition where no petition was filed); *Mut. Fire Ins. v. Booth*, 24 F.3d 240 (5th Cir. 1994). Mandamus "may never be employed as a substitute for appeal," *Will v. United States*, 389 U.S. 90, 97 (1967), and has specific requirements separate from those for appellate review. *Volkswagen*, 545 F.3d at 309-10; Fed. R. App. P. 21(a)(1), (a)(2)(B), (b)(4) (laying out rules for seeking mandamus, including notice

[3] Notably, dicta in *Red Barn* describes the "potential" of issuing a mandamus to a transferor district court to make a *non-binding* request for retransfer, but cautioned that even such a request must be reserved for an "extreme case" since it can "provok[e] a possible conflict between the Circuits." 794 F.3d at 484-85. (Indeed, the State knows of no examples in which this Court has actually taken that step.) But if that request would be "extreme," then Appellants' motion—not for a request but for a binding *injunction* over two parties currently litigating in a New Jersey district court—obviously goes too far.

to the trial judge). That is especially so where, as here, Appellants offer no excuse for failure to comply with those settled rules. *See EEOC*, 704 F.2d at 152 (holding that a "mandamus petitioner may not fail to comply with rule 21 without providing an adequate excuse"). All that is before this Court is an improper appeal from a nonfinal transfer order to an out-of-circuit court.

B. This Court Lacks Personal Jurisdiction Over Appellants' Claims Against Section 2C:39-9(*l*)(2).

As to the second jurisdictional problem, Appellants have not established, and cannot now establish, personal jurisdiction for their challenge to Section 2C:39-9(*l*)(2)—the focus of this motion. Last year, this Court held that personal jurisdiction had been sufficiently alleged as to claims arising out of the Attorney General's cease-and-desist letter, which warned Appellants not to violate New Jersey's common law of public nuisance. *See Defense Distributed v. Grewal*, 971 F.3d 485, 489 (5th Cir. 2020). But specific personal jurisdiction must be established on a claim-by-claim basis, *Seiferth v. Helicopteros Atuneros*, 472 F.3d 266, 275 (5th Cir. 2006), and it has never been established over Appellants' challenge to Section 2C:39-9(*l*)(2), which was not mentioned in the complaint this Court previously reviewed.

And Appellants cannot establish jurisdiction over their claims against Section 2C:39-9(*l*)(2). For one, this Court stressed personal jurisdiction was properly alleged in a prior complaint because those claims were "based on Grewal's cease-and-desist letter." 971 F.3d at 492. In doing so, this Court distinguished the claims in *Stroman*

Realty, Inc. v. Wercinski, 513 F.3d 476 (5th Cir. 2008), as being "more a product of Arizona's regulatory scheme than it was the cease-and-desist letter itself. Not so for the plaintiffs' claims here, many of which are based on injuries stemming solely and directly from Grewal's cease-and-desist letter." 971 F.3d at 492. But a challenge to Section 2C:39-9(*l*)(2) is not and cannot be "based on" a cease-and-desist letter predating its enactment and thus never mentioned it. To the contrary, any request to enjoin enforcement of Section 2C:39-9(*l*)(2) is obviously "more a product of [New Jersey's] regulatory scheme than it was the cease-and-desist letter." *Id.*

For another, this Court stressed that based upon Appellants' allegations, the letter sufficed for jurisdiction since the Attorney General did "not cabin his request by commanding the plaintiffs to stop publishing materials to New Jersey residents." *Id.* But whatever might be said about the letter's threatened enforcement of public nuisance law, Section 2C:39-9(*l*)(2) explicitly only prohibits a person from distributing covered files "to a person in New Jersey." The New Jersey Legislature's passage of this statute in no way constitutes contacts with Texas. And while the Attorney General referenced Appellants' founder at the Governor's bill signing, this Court rightly held that this did not "represent direct contacts with Texas," because "the broadcast event … took place in New Jersey." 971 F.3d at 492. There is thus no jurisdiction over Appellants' new and distinct claims.

Finally, Appellants cannot meet their burden to establish jurisdiction for the purpose of obtaining an injunction, which is higher than the burden to survive dismissal. As such, reliance on this Court's determination on a motion-to-dismiss posture that jurisdiction was sufficiently alleged is now insufficient. *See Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 471 (5th Cir. 1985) (finding that although "a plaintiff need only make a prima facie showing of jurisdiction in response to a motion to dismiss," "more is required" for a preliminary injunction). This Court has therefore required district courts to make factual findings establishing jurisdiction over the party to be enjoined. *Id.*; *see also Visual Sciences v. Integrated Commc'ns*, 660 F.2d 56, 59 (2d Cir. 1981) ("A prima facie showing will not suffice . . . where a plaintiff seeks preliminary injunctive relief."). That is especially true here, where this Court identified specific factual disputes that bore on jurisdiction. *See* 971 F.3d at 492 n.6; *see id.* at 497 n.1 (Higginson, J., concurring). But because Appellants never renewed any request for preliminary relief, the parties did not introduce evidence on this question below. Instead, to the degree there is new evidence, Appellants subsequently confirmed they still disseminate their files while excluding individuals in New Jersey—demonstrating that compliance with Section 2C:39-9(*l*)(2) does not affect their dissemination outside of the state. *See* Decl. of Cody Wilson, Dkt. 152-1, ¶ 9(c) (W.D. Tex. May 5, 2021) ("Registered defcad.com

members are further screened to ensure that they are not residents of and persons in the State of New Jersey who lack a federal firearms license.").

II. Appellants' Motion Is Barred By Rule 8.

Additionally, this Court should deny the motion because Appellants failed to comply with FRAP 8, which required them to "have either first tried and failed to obtain [an injunction] in the district court or, alternately, 'show that moving first in the district court would be impracticable.'" *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020) (quoting Fed. R. App. P. 8(a)(2)(A)). That "cardinal principle" of Rule 8 applications plays an important role: to ensure that the parties can build an appropriate record in the district court as to the merits of a movant's claim and the equitable factors on which injunctive relief depends, and that a trier of fact can make appropriate determinations. *See* 16A Wright & Miller § 3954. But Appellants decided not to seek any preliminary relief after the mandate issued in 2020: they did not seek an injunction at any time during the 220 days in which the case was pending in the Western District of Texas or for the 39 days after the transfer to the District of New Jersey. Instead, they bypassed the district court. That failure to comply with Rule 8 is "sufficient grounds to deny [the] motion." *Whole Woman's Health*, 972 F.3d at 654 (collecting cases); *see also Armando v. Davis*, 675 F. App'x 470, 471 (5th Cir. 2017); *In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982); *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001).

Appellants' assertion that moving in the district court is unnecessary because the "motion seeks the same kind of injunction that the district court refused to grant," Mot. 9 n.3, is error. In support, Appellants point only to the district court's decision in January *2019* dismissing the case for lack of personal jurisdiction, which disposed of a then-pending request for preliminary relief as moot. *See id.* (citing Dkt. 100). But that runs into three problems. First, "[i]t does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal." *Whole Woman's Health*, 972 F.3d at 654 (quoting *Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970)). Second, this Court reversed that personal jurisdiction ruling, meaning that the district court *never* "refused to grant" preliminary relief once it was clear this case could proceed beyond the Rule 12 stage, since Appellants never asked it to do so. Third, Appellants never appealed the refusal to grant their 2018 preliminary injunction motion, confirming that Appellants have not been diligently seeking emergency relief.

Appellants' equally conclusory alternative contention—that "returning to the district court at this juncture would be impracticable and inequitable," Mot. 9 n.3—fails in light of Appellants' own litigation conduct. Days after commencing this appeal, Appellants filed motions for emergency injunctive relief *in the same district court case* against U.S. officials, raising overlapping First Amendment arguments. Clearly, Appellants realize presenting these arguments to this district court judge is

not futile—and would not have been futile for the 220 days this case was pending before that court. And Appellants also had 39 days to seek relief after the case was transferred to the District of New Jersey—an alternative Appellants ignore.

Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981), does not remotely support Appellants' impracticability claim. In *Ruiz*, this Court found it would have been futile to first make certain arguments in support of a motion for stay pending appeal in the district court, where "the district court would not be hearing anything new that would affect its decision after 159 days of trial, during which 349 witnesses testified and some 1565 exhibits were received in evidence, and untold hours of argument." *Id.* at 567. This case is the opposite. Because Appellants refused to seek this relief before the district court, they deprived the Attorney General of the opportunity to develop a record, and precluded the court from making findings of fact.

III. The Traditional Factors Governing Injunctions Pending Appeal Require Denying This Motion.

While the procedural and jurisdictional defects outlined above are fatal to this motion, it also fails on its merits. "A preliminary injunction is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion." *Black Fire Fighters Ass'n of Dallas v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990). Appellants must prove that (1) they will likely prevail on the merits of the appeal; (2) they will suffer irreparable injury absent an injunction; (3) an injunction will not substantially injure the State; and (4) the

injunction serves the public interest. *Tex. Alliance for Retired Americans v. Hughs*, 976 F.3d 564, 566 (5th Cir. 2020). As to the first prong, Appellants have forfeited any argument that they will succeed on the merits of their underlying appeal of the transfer ruling, and any assessment of their constitutional claims is premature. Moreover, the remaining factors cut decisively against granting injunctive relief.

A. Appellants Are Not Likely To Prevail On The Merits Of This Appeal.

Appellants are unable to establish a likelihood of success on the merits of this appeal. At the outset, Appellants ignore that their burden is to prove they will likely prevail on *this appeal of the underlying transfer ruling*, instead devoting the entirety of their brief to their First Amendment, Due Process Clause, and Commerce Clause claims. *Id.* at 567-68 (party seeking stay pending appeal must show "that she is likely to succeed on the merits of her appeal"); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 939 (5th Cir. 1984). But if Appellants cannot prove that the transfer was clearly erroneous, this Court will *never* be the proper forum to decide the merits and issue any relief. Moreover, there is no appealable order as to the constitutional claims, meaning that the merits of those arguments cannot guide the instant injunction analysis. Yet Appellants' brief is entirely devoid of legal analysis as to the transfer—the sole issue on appeal. Appellants have thus forfeited any claim that they are likely to succeed on its merits. *See Wise v. Wilkie*, 955 F.3d 430, 437-38 (5th Cir. 2020) (argument first made in reply brief "is too little too late").

Nor will Appellants likely prevail on the merits of the transfer appeal. Even if the Court got past the jurisdictional obstacles, *supra* at 5-14, review is deferential: Appellants must establish a "clear abuse of discretion." *In re Volkswagen*, 545 F.3d at 310. They cannot meet that high burden. The district court carefully applied all the private and public interest factors governing Section 1404(a) motions, and found that virtually every factor supported granting the motion or was neutral. Dkt. 145 at 11-16. *Inter alia*, the court found that New Jersey has a strong interest in having its statutes evaluated by federal courts with expertise in its laws; myriad factual questions relating to jurisdiction would be eliminated by transfer, including personal jurisdiction over the challenge to Section 2C:39-9(*l*)(2); a transfer avoids unnecessary conflicts of law; and the convenience of witnesses supported sending the case to New Jersey. *Id.* That was no "clear abuse of discretion."

And as to Appellants' underlying constitutional claims—which are, again, not a part of this appeal—it is premature to address their merits without the benefit of a record and related findings of fact. This Court has emphasized the importance of a factual record before ruling on motions for injunctive relief. *See, e.g.*, *Sierra Club v. FDIC*, 992 F.2d 545, 551-52 (5th Cir. 1993) ("[I]t is … impossible for us to review the propriety of the district court's injunction without a more complete development of these factual and legal issues."); *White v. Carlucci*, 862 F.2d 1209, 1210 n. 1 (5th Cir. 1989). The need is especially great when "legal issues are novel," *Sierra Club*,

992 F.2d at 552, or when "facts ... are hotly disputed," *Davis v. United States*, 422 F.2d 1139, 1142 (5th Cir. 1970). But no record exists here because of Appellants' decision to seek emergency relief in the first instance from this appellate court.

Key facts remain "hotly disputed." To take one example, as to Appellants' First Amendment claim, the parties have not introduced facts as to how Appellants' printable gun files operate—i.e., whether they communicate directly with a printer or require human intervention—even though other courts find such facts relevant in a free speech analysis. *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 451-54 (2d Cir. 2001). Still more, the parties have never built any record as to the ramifications of making Appellants' files accessible to all persons, including felons, domestic abusers, and terrorists; the difficulties law enforcement faces when tracing printed guns; and the scope of printable gun files subject to Section 2C:39-9(*l*)(2), all of which relate to the strength of the government interest and the tailoring of the law. These questions "should be resolved in the first instance by the trial court." *SEC v. Arcturus Corp.*, 928 F.3d 400, 422 (5th Cir. 2019).

The Commerce Clause claim likewise lacks factual support. While Appellants assert that Section 2C:39-9(*l*)(2) "regulat[es] conduct that takes place exclusively outside the state," Mot. 18, they have made no effort to refute factually that they could still comply with the statute by blocking access to their files to users with New Jersey IP addresses. In fact, as noted above, the company's founder has sworn to the

contrary, explaining that Appellants continue to disseminate their files in other states and "[r]egistered defcad.com members are further screened to ensure that they are not residents of and persons in the State of New Jersey." Dkt. 152-1 ¶ 9(c). While the merits are not properly before this Court, Appellants' failure to develop a record is still fatal to their position.

B. The Remaining Factors Cut Squarely Against Appellants.

As to the remaining equitable factors, Appellants' irreparable harm argument is refuted by their litigation conduct. *See Dillard v. Sec. Pac. Corp.*, 85 F.3d 621 (5th Cir. 1996) (noting delay in requesting relief "strongly impl[ies] that delay was not causing irreparable harm"); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("[O]ur sister circuits … have found that a party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm."). Appellants chose not to seek injunctive relief in the district court for 259 days. As explained above, *supra* at 12-14, Appellants were capable of seeking injunctive relief in the proper forum—and even sought injunctive relief against the U.S. State Department in the same district court during that time—but declined to do so. As the Third Circuit found in another suit in which Appellants challenged Section 2C:39-9(*l*)(2), Appellants' "failure to move for a preliminary injunction or expedite [this] appeal indicates that the underlying harm complained

of is not serious," and undermines this motion. *Defense Distributed v. Att'y Gen. of New Jersey*, 972 F.3d 193, 201 n.8 (3d Cir. 2020).

Appellants also passed up opportunities to obtain immediate injunctive relief in their parallel suit in the District of New Jersey against the same defendants. Appellants instead insisted on litigating the same claims in the Western District of Texas and New Jersey simultaneously, precluding them from obtaining immediate relief in the latter. As the Third Circuit found, "[i]f the Attorney General's actions harmed Plaintiffs and they needed immediate relief, they could have withdrawn their action in Texas and pursued the New Jersey action. They did not." *Id.* at 201. That Appellants had this path to seek prompt relief "but did not take it … thus represents 'a strong indication that the status quo can continue' and belies an assertion of irreparable harm." *Id.* Were this Court to disagree, it would create a conflict with another circuit on a finding of harm involving *the same facts and parties*.

Appellants' allegations of harm are outweighed by the real harms to the public interest if the statute is enjoined. Allowing Appellants to disseminate these printable gun files to New Jersey residents would present serious harms to both New Jersey and the public interest—and would do so permanently, not temporarily. This Court has previously explained why "the national defense and national security interest would be harmed forever" if Defense Distributed were granted this relief, even on an interim basis. *Defense Distributed v. Dep't of State*, 838 F.3d 451, 460 (5th Cir.

2016) (contrasting the permanent harm to the government with the temporary harm to Appellants, and affirming denial of preliminary injunction of federal export regulations). Indeed, Appellants themselves recognize that once Defense Distributed posts the files, they may circulate in perpetuity via third parties. Mot. 22. That some past files remain on the internet does not mean Appellants can freely distribute files further. Doing so would inflict *more* harm to New Jersey, just as for any other online contraband that already exists, be it pirated recordings or malware.[4] It is always the case that a state would "suffer[] the irreparable harm of denying the public interest in the enforcement of its laws" if its law is enjoined, *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013), but the harm would be especially great here. No injunction should issue, especially given the jurisdictional, procedural, and merits-related flaws that plague this motion.

CONCLUSION

This Court should deny Appellants' motion.

[4] Moreover, that Defense Distributed placed those files in the public domain in likely violation of federal law in the first place, *see Defense Distributed v. U.S. Dep't of State*, 838 F.3d at 455, bears on the propriety of any injunction. *See Sugar Busters LLC v. Brennan*, 177 F.3d 258, 272 (5th Cir. 1999) (recognizing a party's unclean hands is a basis to deny its request for injunctive relief).

Respectfully submitted,

/s/ Angela Cai

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Dated: June 11, 2021

/s/ Angela Cai
Angela Cai

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I hereby certify that on June 11, 2021, I filed the foregoing Opposition To Appellants' Motion For An Injunction Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Angela Cai
Angela Cai