No. 21-50327

In the United States Court of Appeals
For the Fifth Circuit

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED,

Plaintiffs - Appellants

v.

ANDREW J. BRUCK, Acting Attorney General of New Jersey, in his official and individual capacities,

Defendant - Appellee

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

Reply Brief of Appellants

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Plaintiffs Defense Distributed and the Second Amendment Foundation want their claims against the New Jersey Attorney General and State Department resolved in one fell swoop, harmoniously and efficiently in the court where they all belong. The AG's gamesmanship seeks chaotic segregation, hoping to gain delay and an unfounded home court advantage to prolong his censorship regime at any expense. The Court has jurisdiction to set this litigation back on track and should exercise it as soon as possible to minimize the constitutional harms that mount every day.

Transferring the case against the AG was a clear abuse of discretion because all of the § 1404(a) factors disfavor transfer. This was not a close discretionary call. The factors were so lopsided as to allow for only one conclusion. But the Court need not reach that part of the appeal because of the more obvious error about severance.

Everyone agrees that the district court's transfer decision could not have occurred without the predicate severance decision. And according to the AG, severance was proper only because "Plaintiffs' newly added claims against the State Department arise out of a completely distinct set of operative facts." ROA.2022. But once again, at "this stage of the litigation, we are required to resolve all factual disputes in favor of the plaintiff." *Def. Distributed v. Grewal*, 971 F.3d 485, 492-93 n.6. (5th Cir. 2020). For the case Plaintiffs actually pleaded—not the one the AG imagines—severance was clearly improper because he was a necessary party.

Both factually and legally, Plaintiffs' case against the AG is part and parcel of Plaintiffs' case against the State Department. In no uncertain terms, the complaint shows that the AG's censorship occurred in conjunction with and as part of the same transactions by which the State Department violated Plaintiffs' right to publish the computer files at issue—namely, the *Washington* litigation to which all were parties. ROA.1882-1890. If in that case the State Department had honored its Settlement Agreement (and constitutional) obligations, a federal regulatory regime and license would have protected Plaintiffs' right to publish the computer files at issue *from the assault that Grewal conducted*. *Id.* But instead of that happening, the AG violated Plaintiffs' rights by obtaining a nationwide injunction that took away important federal speech protections *and* the State Department violated Defense Distributed and SAF's rights by *letting the AG do it* instead of opposing all the way. *Id.*

This direct factual and legal relationship meets the Rule 19 necessary party standard, requiring that the AG and State Department be sued together. And because of the AG's necessary party status, the district court had no discretion to sever the AG's part of the case and transfer it to New Jersey. This manifest fault in the decision below constitutes both reversable error for appellate purposes and a clear abuse of discretion for mandamus purposes. One way or another, relief is warranted.

I. Jurisdiction exists.

The Court has jurisdiction to both correct the district court's errant severance/transfer decision and to issue a preliminary injunction or injunction pending appeal. The question is not whether jurisdiction exists, but which—appellate jurisdiction via the collateral order doctrine or original mandamus jurisdiction. Either way, the Court has all the power it needs.

A. The Court has appellate jurisdiction.

In re Rolls Royce Corp., 775 F.3d 671 (5th Cir. 2014), is quite correct in holding that severance/transfer decisions are *not* effectively reviewable on appeal from a final judgment. *Id.* at 676-77. That is completely consistent with Plaintiffs' invocation of appellate jurisdiction via the collateral order rule. The conclusion *Rolls Royce* went on to reach—that the unavailability of meaningful review from final judgment gives rise to mandamus jurisdiction *but not a collateral order appeal*—is likely errant and would warrant reconsideration if it were controlling. But *Rolls Royce* is not controlling because the rule of orderliness gives precedence to other decisions that uphold the collateral order doctrine's application here.

In re Sepulvado, 707 F.3d 550 (5th Cir. 2013), is one of the controlling cases. It predates *Rolls Royce* and squarely holds that the collateral order doctrine covers transfer decisions. *Id.* at 552.

The AG tries to avoid *Sepulvado* by saying that it "never mentions the collateral order doctrine." AG Br. 11. But the decision quite obviously employed the collateral order doctrine by using its elements expressly:

> As in *Bradford*, "the appeal of the transfer order: (1) will conclusively determine the correctness of the transfer; (2) is separate from the merits of the [habeas] motion; and (3) is effectively unreviewable if the appeal is dismissed." *Id.* We conclude, therefore, that we have jurisdiction over both the district court's order and the motions it transferred thereby.

Sepulvado, 707 F.3d at 552.

The AG also tries to avoid *Sepulvado* by saying that the Court upheld jurisdiction just "because it *is* the transferee court." AG Br. 11. But the Court's transferee status only justified jurisdiction over the motions; it did not justify jurisdiction over the order transferring the motions. Yet *Sepulvado* held that "we have jurisdiction over *both* the district court's order *and* the motions it transferred thereby." *Id.* (emphasis added). Judge Smith knew full well the holding his opinion renders: The collateral order doctrine gave jurisdiction over the transfer order. *Id.*

Lest there be any doubt, the *Bradford* decision that *Sepulvado* invokes above ("As in *Bradford*…") is expressly about the "collateral order" doctrine. *In re Bradford*, 660 F.3d 226 (5th Cir. 2011). It too predates *Rolls Royce* and it too holds that the collateral order doctrine covers transfer decisions. *Id.* at 229 ("[T]his is an appealable, collateral order, and we thus have jurisdiction").

The AG also has no effective answer for *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973), which illustrates why exceptional severance orders like this one qualify for the collateral order doctrine. *Id.* at 714-17 (cited by Appellants' Br. ("Pls.' Br.") at 1). "Due process" concerns are not a distinction, as the AG tries to say. AG Br. 11. They are a common thread. For just as in *Garber*, the decision below denies the Plaintiffs the critical right of suing the AG and State Department in unison before the court where they both belong. *See Garber*, 477 F.3d at 716.

Exceptions to the general rule of *Sepulvado* and *Bradford* exist. But this is no such exceptional case.[1] If ever the Plaintiffs' interests in the transfer/severance decision are to be effectively vindicated, now is the time. An immediate appeal is warranted.

B. The Court has mandamus jurisdiction.

If appellate jurisdiction via the collateral order doctrine does not cover this proceeding, the Court's mandamus jurisdiction clearly does. The AG offers three supposed barriers to its exercise here. None are valid.

[1] The exceptions occur when an action's transfer/severance issues *are also* dispositive issues for a final judgment. *See Persyn v. United States*, 935 F.2d 69 (5th Cir. 1991); *Brinar v. Williamson*, 245 F.3d 515 (5th Cir. 2001). There is no such duplication of keystone issues here. Though important, the instant transfer/severance issues are *not* also merits issues for the final judgment.

1. This Court can control the relevant lower court.

The AG says that "transfer to the District of New Jersey deprived this Court of jurisdiction, as this Court has no power to issue orders binding the transferee court." AG Br. 7. But this Court stayed the transfer order with the *per curiam* decision of June 23, 2021. By operation of law, the stay suspends the transfer order so as to preserve all of the authority this Court needs and avoid comity-based concerns about intra-circuit friction. And indeed, the District of New Jersey has opted to do nothing else until this Court resolves the appeal. *See* AG Br. at 5 n.2.

Even if the stay were ignored, the no-authority argument is wrong because this Court still has sufficient power over the district court below. This Court's statutory authority to issue all writs "necessary and appropriate in aid of [its] jurisdiction," 28 U.S.C. § 1651(a), includes the authority to issue writs of mandamus as to any case over which the Court would eventually have appellate jurisdiction, *In re McBryde*, 117 F.3d 208, 219 (5th Cir. 1997). That covers the instant order because it is both part of the transferred claims against the AG and—critically—also part of the not-transferred claims against the State Department that remain in Texas within this Court's appellate jurisdiction, *see* 28 U.S.C. § 1294.

To be clear, the continuation of the case against the State Department in Texas is not a necessary part of the authority argument. This Court would have the requisite authority even if all of the case had been sent to New Jersey. *See* Pls.' Br.

1-2 (citing 15 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure Civil § 3846 (4th ed. 2021) (hereinafter "Wright & Miller")). But because of the State Department case's continued jurisdictional anchoring effect, this Court's authority to issue the necessary relief is beyond question.

As an exercise of this jurisdiction, the Court can remedy the district court's error in either or both of two separate ways. It can issue a writ of mandamus that directs the Western District of Texas to request that the District of New Jersey return the case against the AG to Texas. *See In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 & n.6 (5th Cir. 2015) ("[S]everal circuits, where appropriate, have endorsed the method of directing the transferor district court to request that the transferee district court return the case"). And it can issue a writ of mandamus that directs the Western District of Texas to vacate its severance/transfer order. *See id.* ("[C]ourts have also held that a court of appeals has jurisdiction to vacate a completed inter-circuit transfer if the case was transferred to a court in which it could not have originally been brought").

This aspect of the Plaintiffs' position does not create unnecessary intra-circuit friction. The AG's does. No matter what, this Court will have jurisdiction over the severance/transfer decision on appeal from the final judgment in the State Department case. On Plaintiffs' view, this Court also has jurisdiction over that same decision vis-à-vis the AG—a harmonious result that avoids unnecessary conflict.

But on the AG's view, appellate jurisdiction over the same order lies both in this Court vis-à-vis the State Department and the Third Circuit vis-à-vis the AG—an absurd result that poses all of the friction concerns the AG says are important.

No wonder, then, that governing Third Circuit precedent recognizes this Court's authority to review the instant order by way of mandamus. The last time a Texas court transferred an entire case to the District of New Jersey, the Third Circuit held that "review is available only through mandamus or certification to the Fifth Circuit." *Bobian v. Czech Airlines*, 93 F. App'x 406, 408 (3d Cir. 2004). The AG's no-authority position has been rejected by every circuit at issue.

2. Seeking retransfer will not suffice.

The AG next says that mandamus in this Court is unavailable because Plaintiffs can get adequate relief by moving the District of New Jersey to retransfer the case and challenging any denial thereof in the Third Circuit. AG Br. 7-8. This is wrong for two independent reasons.

First, a retransfer effort is inadequate because it poses issues that are analytically distinct from and substantially harder to prevail upon than transfer in the first instance. *See* Wright & Miller § 3855 & n.4-6 ("[R]eview from final judgment is unlikely to result in reversal of a ruling concerning transfer"). If Plaintiffs had to seek retransfer from the District of New Jersey, they would be barred from relitigating the actual transfer issues and would instead be required to defeat

law-of-the-case principles that substantially elevate the necessary showing. *See id.*; *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982) ("the decision of the transferor court that the suit could have been brought in the transferee court is the law of the case and should not be reconsidered except in unusual circumstance"); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) ("[T]he policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law….").

Persyn, 935 F.2d 69, supports the Plaintiffs, not the AG. It says that retransfer is an adequate option if and only if the issue regarding retransfer was *subject-matter jurisdiction*. *Id.* That makes sense because all courts must continuously evaluate jurisdiction on a clean slate. But subject-matter jurisdiction is not embedded in this transfer decision. *Persyn* expressly says that retransfer is *not* an adequate alternative where, as here, both district courts have subject-matter jurisdiction. *Id.*[2]

Second, a retransfer effort is inadequate because it cannot account for the district court's predicate error regarding severance. The decision being reviewed rests as much on the step-one severance conclusion as it does on the step-two transfer conclusion. Yet a retransfer effort can, by definition, only reach half of the inquiry.

[2] The unpublished decision in *Shugart v. Hawk*, 39 F.3d 320 (5th Cir. 1994), turns on the conclusion that direct review of the transfer decision at issue could be had in another circuit. *Id.* at *1. But as shown above, direct review of the transfer decision now at issue cannot even be had in the District of New Jersey, let alone the Third Circuit.

The AG never explains how a retransfer effort in the District of New Jersey could account for the severance issues, given that the case against the State Department is in Texas beyond the District of New Jersey's jurisdictional reach.

C. There is no Rule 21 problem.

The AG says that "Appellants did not file the mandamus petition required by Rule 21." AG Br. 7-8, 23-24. But even if meaningful deviations occurred (none did), they are harmless and not jurisdictional. The AG's quibbles lack impact because the AG has had a full and fair opportunity to join issue without handicap.

No meaningful Rule 21 deviation occurred here. There is no deadline for sending a copy to the district court, which happened over a month ago; if this Court wanted to seek the district court's views, it could do so now without any unfairness to any party and Plaintiffs would support it. Mandamus requests need not "name the district court" in any special fashion, as the AG says without citation. *Id.* Plaintiffs did so expressly anyhow. Pls.' Br. x, 22, 34. That the Plaintiffs' main filing is styled just "Brief of Appellants" does not matter because the Court asks that parties *either* file a distinct petition *or* "request[] that we treat their appeal as a petition for a writ," *In re Delta Services Indus., Etc.*, 782 F.2d 1267, 1272 (5th Cir. 1986), and regularly addresses the merits of alternative requests for mandamus relief that are included within principal appellants' briefs, *see, e.g.*, *In re Foster*, 644 F. App'x 328, 330 (5th Cir. 2016). The AG's word limit complaint is also empty, as neither side is adhering

to the word limits that apply to mandamus briefs and the AG could have asked for more words if necessary. But he was instead content to file a main submission that is hundreds of words under the cap for briefs.

The parts of Rule 21 that really matter are the substantive ones calling for a statement of the relief sought, issues presented, facts necessary to understand the issue, and the reasons why the writ should issue. Fed. R. App. P. 21(a)(2)(B). Plaintiffs did all of that in spades, including a prominent "Alternative petition for writ of mandamus" section, Pls.' Br. at 2, and arguments showing that the district court committed a "clear abuse of discretion," *id.* at 2, 24. No significant rule violations occurred and no prejudice whatsoever has been caused to the AG or court below.

Plaintiffs' method of simultaneously presenting both the appeal and mandamus request was a perfectly orthodox way of advancing the Court's interest in judicial efficiency and simplified submissions. If appellate jurisdiction is not exercised, mandamus jurisdiction should be.

II. The district court clearly erred in severing the case against the AG.

A. The AG is a necessary party.

The district court most clearly abused its discretion by severing the AG despite his status as a necessary party to the case against the State Department. *See* Pls.' Br. at 25-31. The AG's few answers are buried in the back of the brief and wrong.

The AG's main counterargument is that Plaintiffs waived their assertion that he is a necessary party under Rule 19(a)(1)(B)(i). AG Br. 48. Not so. The State Department made this very point below, ROA.2081-82, and Plaintiffs expressly adopted it by right, ROA.2096. "[N]o rule prohibits appellate amplification" of it now. *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015).

Next, the AG asserts that he alone can claim necessary party status. AG Br. 49. He is estopped from making this argument, however, having convinced the *Washington I* court that Defense Distributed was a necessary party over its objection. *See* 2:18-cv-1115-RSL, Dkt.119 at 7-8. More importantly, the text of Rule 19 flatly disproves the AG's assertion, allowing courts to join parties *against their will*:

> A person who refuses to join as a plaintiff may be made either a defendant or…an involuntary plaintiff.

Fed. R. Civ. P. 19(a)(2). What triggers Rule 19 is the AG's claim of "an interest relating to the subject of the action," which he evidenced by litigating *Washington I*. Whether the AG now likes to own the resulting necessary party status is irrelevant.

The AG next says that, if he is a necessary party, every state that sued in *Washington I* is as well. AG Br. 50. If that is true, so be it; no precedent makes this consequence relevant to the severance analysis. But there is an obvious factual difference that could be explored on remand if the AG or State Department seek to add more states as necessary parties: The AG went much further than his counterparts in censoring the Plaintiffs and interfering with the Settlement

Agreement. *See Def. Distributed v. Grewal*, 971 F.3d 485, 492-93 (5th Cir. 2020) ("*Grewal II*") (documenting these efforts).

The AG also says he no longer has an interest in the Settlement Agreement because the State Department no longer regulates Plaintiffs' publications. He is toeing the same line the State Department made in its motion to dismiss below and is wrong for the same reasons that the State Department is. *See* Dkt. 168 at 5-8 (Plaintiffs' Response to the State Department's Motion to Dismiss) ("Regulatory jurisdiction over much of the speech at issue…was not transferred to the Commerce Department's EAR regime. The scope of computer files still subject to the State Department's ITAR regime is very substantial and the State Department's continued prior restraint on Plaintiffs' constitutional right to publish these files is still very much in controversy."). This point also ignores the case's request for retrospective damages, ROA.1937-38, that will exist no matter what changes in the future.

The AG's last argument on the necessary party issue is that the case against the State Department will not produce bad precedent for him because the claims differ. AG Br. 50-51. As outlined below, however, the key First Amendment holdings sought against both defendants are materially indistinguishable.

B. Judicial economy disfavors severance (and transfer).

The district court also clearly abused its discretion by completely mishandling the Rule 21 analysis of judicial economy, in particular by misunderstanding the impact of *Grewal II*. Pls.' Br. 31-41. When that case is properly construed, this predominant factor clearly weighs against severance.

1. Litigation in Texas would be more efficient than New Jersey.

Litigating all of the Plaintiffs' claims in Texas is clearly the most efficient way forward. It avoids duplicative litigation and uses the courts that are best equipped to handle the issues. *See* Pls.' Br. 32-34.

The AG denies that severance and transfer entails any duplicative litigation, emphasizing that Plaintiffs have claims against the State Department that they do not have against the AG. AG Br. 33. But even if some of the claims' issues do not overlap, a great majority do. In particular, the core constitutional aspects of each claim clearly overlap and would be more efficiently litigated together, as would key matters like the continuing effect of the State Department's license. Pls.' Br. 37-38.[3]

Next, the AG claims litigation would be more efficient in New Jersey because other plaintiffs there are also challenging 3(*l*)(2). *Id.* at 34-35. But because of Third

[3] The AG's invocation of sovereign immunity, AG Br. 33, need not be considered because it goes to the substance of that defense, not the propriety of severance. In any event, it is wrong because New Jersey waived the AG's sovereign immunity by (1) statutorily waiving its employees' immunity for torts in state court, *see* N.J. Stat. § 59:3-1; and (2) making "voluntary appearance[s] in federal court" to invalidate the Settlement Agreement and otherwise censor the Plaintiffs, *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 619 (2002).

Circuit rulings that the AG himself obtained, the courts in New Jersey will not do anything with their jurisdiction's pending litigation about 3(*l*)(2) so long as the Texas case about 3(*l*)(2) continues. *See* ROA.2098-99.

The true efficiency inquiry should focus not on the issues particular to the AG's speech crime (important as they are), but on the more broadly influential issues about how the First Amendment and other federal speech doctrines apply to the computer files that are common to both the AG and State Department cases. On Plaintiffs' view, those issues should be litigated only once, in the district court below and this Court. But on the AG's view, those issues will have to be litigated repeatedly by both the courts here *and* the District of New Jersey and Third Circuit.

With respect to case familiarity, the AG argues that New Jersey courts are equally capable of handling the legal issues and equally familiar with the facts. AG Br. 35-36. But while that may have been true at the controversy's inception in 2015, six-plus years of extensive litigation in Texas give Texas courts unquestionably greater experience with both the facts and law. *See* Pls.' Br. 34. If the AG has his way, the New Jersey courts would be starting from scratch in addressing the case's predominant legal and technical issues. The New Jersey courts' knowledge of their state's firearms law does not make up for this discrepancy because federal law is where the material controversies lie and the state laws at issue are clear.

2. This Court has already resolved the jurisdictional issue.

The main point of disagreement on the judicial economy factor is whether new disputes about personal jurisdiction will make Texas less efficient. But this Court has already settled the feared issue of personal jurisdiction. *Grewal II* made clear that Texas has personal jurisdiction over claims regarding the speech crime, affirmatively accounting for the AG's threat to enforce that statute in its analysis:

- The very first sentence of the opinion announces that it concerns "the *ongoing efforts* of New Jersey's Attorney…to hamstring the plaintiffs' distribution of materials related to the 3D printing of firearms," not just the cease-and-desist letter. 971 F.3d at 488 (emphasis added).

- The facts the Court labeled "[o]f relevance to th[e] appeal" included "threatening Defense Distributed with criminal sanctions." *Id.* at 489.

- The Court acknowledged that the AG's threat to enforce 3*(l*)(2) "affirm[ed] [his] intention to undermine Defense Distributed's operations and ha[d] significant effects on Texas." *Id.* at 492 n.5.

- In distinguishing *Stroman*, the Court concluded that the AG did "not cabin his request" to his own state like the official in that case, citing the fact that the AG "threatened Defense Distributed's founder, Cody Wilson, by name" at 3(*l*)(2)'s signing ceremony as proof of his "intent to crush Defense Distributed's operations and not simply limit the dissemination of digital files in New Jersey." *Id.* at 493.

- Most importantly, this Court indicated that its jurisdictional holding was not limited to the AG's cease-and-desist letter but was "derivative of the specific language used in [that] letter *coupled with other actions he took that, together*, demonstrate his intent to gut Defense Distributed's operations and restrict Texans' access to Defense Distributed's materials." *Id.* at 496 n.10 (emphasis added).

Despite all of this, the AG offers three arguments to insist on a festering jurisdictional dispute. None are persuasive.

First, the AG insists that *Grewal II* only addressed the claims based on the cease-and-desist letter because Plaintiffs had not yet pleaded their 3(*l*)(2) claim. AG Br. 27. But raising the 3(*l*)(2) issue in Plaintiffs' motion for a preliminary injunction was procedurally sufficient to inject the claim into the case and its appeal; in effect, the motion *served as* an amended complaint.[4] *See* Wright & Miller § 2949 & nn. 5-6; *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 694 (2d Cir. 1966). Thus, when this Court ruled on personal jurisdiction, it ruled on the speech crime claim as well.

Second, the AG argues that the distinction this Court drew between *Stroman* and the cease-and-desist-letter claim does not hold for the 3(*l*)(2) claim because his 3(*l*)(2) threat is "a product of [the state's] regulatory scheme." AG Br. 28. Relatedly, the AG points out that *Grewal II* indicated his threat to enforce 3(*l*)(2) alone would not support jurisdiction. *Id.* at 28-29. Both arguments fail for the same reason: Texas has jurisdiction over the AG because of the *combination* of his actions, including *both* the cease-and-desist letter *and* the 3(*l*)(2) threat. The Court took care to clarify that the letter was not the sole basis for jurisdiction, finding that the "more important" distinction with *Stroman* was the AG's "much broader" "assertion of legal authority." *Grewal II*, 971 F.3d at 492-93, 496 n.10.

[4] The AG's contention that *Grewal II* does not mention this motion and Plaintiffs excluded it from their briefing is simply wrong. *Compare* AG Br. 27 n.6, *with Grewal II*, 971 F.3d at 488-89, 492 & n.5, 493; Br. of Appellants, *Grewal II*, 2019 WL 6457013 (C.A.5), 9-11, 34.

Third, the AG asserts that, while the cease-and-desist letter did "not cabin its request" to New Jersey, 3(*l*)(2) *is* limited to his home state. AG Br. 28. But the very next paragraph of the opinion makes clear that the AG's threat to enforce 3(*l*)(2) is one of the "actions [he took that] confirm [his] intent to force Defense Distributed to close shop" entirely. 971 F.3d at 493.

The geographic scope of 3(*l*)(2) is not limited to New Jersey, as the AG says. This unprecedented speech crime applies to all speech that reaches New Jersey *regardless of its origin*, defining "distribute" broadly to include any act of "mak[ing] available via the Internet or by any other means." N.J. Stat. § 2C:39-9(*l*)(2). No matter what state the speaker is in, their utterance of speech that reaches New Jersey makes them a 3(*l*)(2) criminal.

Suppose that, from its offices in Austin, Defense Distributed published information that violates Section 2C:39-9(*l*)(2) to the entire internet, including New Jersey. By its plain terms, the speech crime will have occurred and the issuance of warrants to arrest Defense Distributed's publishers could soon follow. That Defense Distributed did literally nothing in New Jersey would not matter to the statute or its enforcer the AG. *See* ROA.610 ("we will come after you"). This is the nature of the AG's nationwide exercise of authority, directed specifically at Defense Distributed in Austin, that *Grewal II* rightly held triggers jurisdiction in Texas.

The AG next says that *Grewal II* did not *permanently* settled the jurisdictional issues because jurisdiction has to be both pleaded *and later proven*. AG Br. 30-31. But Plaintiffs already supplied ample proof of the AG's purposeful availment at the motion to dismiss stage, and, at later stages, they need only establish jurisdictional facts by a preponderance of the evidence. *See In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 778 (5th Cir. 2018). The substantive analysis will thus remain the same later in this litigation, making short work of any future jurisdictional challenges the AG might raise.

Finally for this factor, the AG deems relevant a promised future argument based on Texas's long-arm statute. AG Br. 30-31. But *Grewal II* held that he waived that defense, and because the opinion covers *all* Plaintiffs' claims, the AG's failure to raise it initially waives it for all purposes. *See* 971 F.3d at 496 ("[O]bjections to personal jurisdiction…must be raised in a timely fashion, *i.e.*, as a party's first pleading in the case, or they are waived."). This matter-of-law argument will also be quickly resolved (against the AG [5]), causing no substantial litigation burden.

[5] The statute covers anyone that commits a tort in whole or part in Texas, which the AG did.

C. The remaining Rule 21 factors disfavor severance.

The AG's arguments on the remaining Rule 21 factors also lack merit. *See* Pls.' Br. 38-42. None of them support severance, and many go the other way.

First, all of Plaintiffs' claims "arise out of the same transaction or occurrence," *In re Rolls Royce Corp.*, 775 F.3d 671, 680 n.40 (5th Cir. 2014), namely the simultaneous and intertwined AG and State Department efforts to halt Plaintiffs' publication of computer files with digital firearms information. *See* Pls.' Br. 38-40; *supra* at 1-2.

The AG cannot deny this, so he accuses Plaintiffs of analyzing the issue at too high a level of generality. AG Br. 37. But his cases do not apply because they are ones in which the *source* of the legal duty or breach differs. *See id.* By contrast, precedent says that where the *source* of the legal duty is the same (e.g., the First Amendment), and the defendants are engaging in the same torts (e.g., censoring the same speech by the same plaintiff via regulation), the claims "share an aggregate of operative facts," are "logically related," and thus arise from the same transaction. *N.Y. Life Ins. v. Deshotel*, 142 F.3d 873, 881 (5th Cir. 1998). That is the case here.

Second, "the claims present common questions of law and fact." *Rolls Royce*, 775 F.3d at 680 n.40. As noted, both cases' key facts center on Plaintiffs' efforts to publish computer files with digital firearms information, and both assert parallel claims about the violation of federal free speech protections. Pls.' Br. 41.

The common questions of fact run deep as well. S*ee supra* at 1-2. The Settlement Agreement obligated the State Department to issue a license to Defense Distributed and modify its regulations, thereby allowing Defense Distributed to publish its files shielded from the AG's censorship desires. But because the State Department failed supply those shields properly, the AG successfully interfered, obtaining injunctions in *Washington I* that invalidated the license and blocked the regulatory changes. With the preemptive federal license and regulations off the books, the AG then came after Defense Distributed with the newly minted speech crime. Then the State Department refused to appeal the adverse ruling obtained by the AG, making it complicit in the AG's censorship. This keystone course of factual events plays a central role in both the case against the AG and the case against the State Department.

The AG tries to defeat these commonalities by asserting differences in the legal theories being pleaded. He says that Plaintiffs have brought prior restraint claims against the State Department and content-based restriction claims against the AG. AG Br. 39. But the live complaint refutes this characterization. Plaintiffs have brought *both* types of First Amendment challenges against *both* defendants. *Compare* ROA.1913 *with* ROA.1923-24.

In any event, the AG's attempt to tease out miniscule legal distinctions is no matter. The key legal analysis for prior restraints and content-based-restrictions overlaps substantially, each requiring, for example, the defendant to prove, at minimum, that its regulation satisfies strict scrutiny. *Compare Matter of Subpoena*, 947 F.3d 148, 155 (3d Cir. 2020) (prior restraints), *with Reagan Nat'l Advert. v. Austin*, 972 F.3d 696, 702 (5th Cir. 2020) (content-based restrictions).

Third, severance does not avoid any "prejudice" to the parties. *Rolls Royce*, 775 F.3d at 680 n.40. To the contrary, severance causes prejudice by forcing Plaintiffs to incur the expense of litigating in two forums what they could far more efficiently litigate in one. The only prejudice the AG identifies if the case is not severed is purported harm *to Plaintiffs*. AG Br. 40. "That the plaintiff may suffer some inconvenience in the district it chose," however, "is not an argument that a defendant can make successfully in support of its transfer motion." Wright & Miller § 3849. The same logic extends to severance.

Finally, the factor about differing sources of proof is neutral because the cases have both overlapping and differing sources of proof. *See* Pls.' Br. 42. The AG denies the tie by saying that overlapping evidence goes only to background matters. AG Br. 40-41. But as the complaint shows, ROA.1862-1866, overlapping proof goes to keystone merits issues like the nature of Plaintiffs' publications (to determine, for instance, whether it constitutes "speech" under the First Amendment).

All the evidence on these issues will be the same across Plaintiffs' claims, rendering this factor neutral.

III. The district court clearly erred in transferring the case against the AG.

The district court's error with respect to the transfer order is even more apparent. Pls.' Br. at 42-56. Because the AG did not meet his high burden to "clearly demonstrate that a transfer is for the convenience of parties and witnesses," *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc), the court clearly abused its discretion in granting his motion. The AG's answers all fail.

A. The private interest factors favor Texas.

Contrary to the AG's reasoning, the first, second, and fourth factors all favor Texas. Pls.' Br. 44-51. Under the first, the AG failed to "show that transfer will result in more convenient access to…sources of proof." *Hammers v. Mayea-Chang*, 2019 WL 6728446, at *6 (E.D. Tex. Dec. 11, 2019); Pls.' Br. 44-46. Likewise, he failed to show a "need for compulsory process . . . to secure a witness" under the second. *Williamson-Dickie Mfg. Co. v. M/V HEINRICH J*, 762 F. Supp. 2d 1023, 1030 (S.D. Tex. 2011); Pls.' Br. 47-49. Thus, both factors favor Texas, especially given the Texas-based sources of proof already in the record. *See J2 Glob. Communications, Inc. v. Protus IP Sols.*, 2008 WL 5378010, at *3 (E.D. Tex. Dec. 23, 2008).

The AG does not meaningfully deny that he failed to identify specific evidence or unwilling witnesses located in New Jersey, as required to meet his burden on the first two factors. AG Br. 46. Instead, he argues that *Plaintiffs* did not identify the Texas sources of proof "in their district court briefs" under the first factor, and that "the district court found that the 'state officials' who enacted [Section 3(*l*)(2)] are 'based in New Jersey'" under the second. AG Br. 46.

But it was not Plaintiffs' responsibility to introduce evidence *against* transfer, and the district court was unquestionably aware of the Texas-based evidence they had previously introduced even if Plaintiffs did not point it out directly. Furthermore, the court's finding that some unknown "state officials…based in New Jersey" may need to provide testimony lacks evidentiary support and, in any event, does not establish that *compulsory* process is necessary for these state-employee witnesses. *See* Pls.' Br. 47-48. As such, the AG's arguments on these two factors do not push them in New Jersey's favor. *See J2 Glob.*, 2008 WL 5378010, at *3.

The fourth private interest factor favors Texas for the same reasons that judicial economy considerations disfavor severance. *See* Pls.' Br. 49-51; *supra* § II.B.1. The AG argues otherwise because Plaintiffs filed suit in New Jersey and can "more immediately seek relief" there. AG Br. 47. But this argument fails

because Plaintiffs' chose to sue in New Jersey out of necessity, not convenience,[6] and Plaintiffs alone get to decide whether their chosen forum is worth the supposed costs the AG cites. *See* Wright & Miller § 3849.

B. The public interest factors favor Texas.

The public interest factors also favor Texas. *See* Pls.' Br. 51-57. ***First***, Texas's "local interest in having [the] localized interests" this case implicates "decided at home" cannot be overstated. *Volkswagen*, 545 F.3d at 315. The AG has "projected himself across state lines and asserted a pseudo-national executive authority" in Texas, seeking "to bar Defense Distributed from publishing its materials anywhere," chilling its speech, and reducing "Texans' access to [its] materials." *Grewal II*, 971 F.3d 492-93, 495. In this way, he has imposed a speech crime on all Texans despite no Texan ever assenting to it. The lack of legislative recourse, coupled with the severity of the injury to Plaintiffs and Texans, gives Texas a stronger interest in this case than New Jersey. Pls.' Br. 52-54.

The AG cannot deny Texas's significant interest in this case. So instead, he argues that New Jersey's is stronger because states usually have an interest in the interpretation and validity of their own statutes. AG Br. 42-44 & n.10.

[6] The fact that Plaintiffs' have not dismissed their claims in New Jersey does not imply that Plaintiffs view New Jersey as the better forum. That case has been stayed pending the outcome of this litigation, and Plaintiffs have discerned no benefit to dismissing it, especially considering the AG's procedural shell games.

The AG's authority says nothing, however, about the unique circumstances of this case where one state has tried to impose its law on another state. Pls.' Br. 53-54. In these circumstances, the aggressor state's interest *is* considerably diminished because the out-of-state courts' rulings will have no direct effect on the aggressor state's citizens. If this Court, for example, were to declare 3(*l*)(2) unconstitutional, that ruling would simply preclude the AG from enforcing it *in the Fifth Circuit*. It would not preclude enforcement in New Jersey if the Third Circuit deemed it constitutional. Thus, the strength of New Jersey's interest in having *this* case decided at home is reduced.

The AG also claims that Plaintiffs waived the argument that Texas has a stronger interest in this case than New Jersey. *Id.* at 44 n.10. But Plaintiffs (through the State Department) *did* argue that Texas has a strong interest stemming from the AG's "efforts to enforce [Section 3(*l*)(2)] as part of a series of related steps targeting Plaintiffs." ROA.2089.[7]

Second, the Texas federal courts have much greater "familiarity…with the law that will govern the case" under the third public interest factor, given their more extensive experience with the facts and legal issues. *Volkswagen*, 545 F.3d at 315;

[7] The Court could also consider the argument for the first time on appeal because failing to do so would produce a "manifest injustice," inflicting severe prejudice on Plaintiffs in the form of "duplicative proceedings" that leave Texas jurists no say in the evaluation of a foreign law that has been forced upon the state. *See Jama v. Gonzales*, 431 F.3d 230, 233 (5th Cir. 2005).

Pls.' Br. 54-56. The AG responds that the New Jersey courts are better equipped to interpret New Jersey law, AG Br. 42-43, but there is little need for interpretation here because the statute is clear. Pls.' Br. 55.

The AG claims that interpretation will be necessary because "[t]he district court previously acknowledged that Section [3(*l*)(2)] is susceptible to more than one reading." AG Br. 44. But the district court did not offer competing interpretations of 3(*l*)(2) that would require interpretation according to New Jersey law, but instead simply (and erroneously) held that Plaintiffs did not adequately allege the content of their speech to demonstrate coverage. *See* ROA.437-41, 1371-73.

For his part, the AG misconstrues Plaintiffs' void-for-vagueness challenge as an argument "that the text *is* ambiguous." AG Br. 45. But Plaintiffs have never argued that 3(*l*)(2) is subject to more than one reasonable interpretation. Rather, the problem is that, by criminalizing speech which "*may* be used to program a three-dimensional printer to manufacture or produce a firearm," the statute "fail[s] to…enable ordinary people to understand what conduct it prohibits." Mot. for Inj. Pending Appeal at 17. It is *vague*, not ambiguous. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97-98 (2010). No amount of interpretation can change that.

Finally, the last public interest factor favors Texas because there is minimal risk of conflicting interpretations of 3(*l*)(2). The transfer order creates a significant risk of a circuit split that would leave Plaintiffs unprotected. *Volkswagen*, 545 F.3d at 315. The AG's counterarguments regarding the district court's supposed finding of ambiguity and Plaintiffs' void-for-vagueness concerns fail for the reasons just discussed. *See* AG Br. 45-46. And its footnoted argument that there is no risk of a circuit split wrongly assumes the claims against the State Department and the claims against the AG do not overlap. Accordingly, this factor favors Texas.

Conclusion

The Court should reverse the decision to sever and transfer the case against the AG, render a judgment denying the motion, and return the case to the Western District of Texas for the resumption of proceedings on the merits. Alternatively, the Court should issue a writ of mandamus directing the district court below to both vacate its severance/transfer order and request that the District of New Jersey return the case against the AG to Texas.

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