Nos. 19-1729 & 19-3182

In the United States Court of Appeals
for the Third Circuit

Defense Distributed, Second Amendment Foundation, Inc., Firearms Policy Coalition, Inc., Firearms Policy Foundation, Calguns Foundation, California Association of Federal Firearms Licensees, Inc., and Brandon Combs,

Plaintiffs - Appellants,

v.

Gurbir Grewal, Attorney General of the State of New Jersey,

Defendant - Appellee.

Appeal from the United States District Court for the
District of New Jersey; No. 3:19-CV-4753

Appellants' Motion for Injunction Pending Appeal

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Motion for Injunction Pending Appeal

Appellants Defense Distributed, the Second Amendment Foundation, Inc. ("SAF"), and the CodeisFreeSpeech.com publishers[1] move for an injunction pending appeal against Appellee Gurbir Grewal, the New Jersey Attorney General. In both consolidated appeals (case numbers 19-1729 and 19-3182) the Court should issue an injunction pending appeal holding that, until the Court resolves the appeals and issues the mandates, New Jersey Attorney General Gurbir Grewal is enjoined from engaging in the following activities:

(1) enforcing New Jersey Statute § 2C:39-9(*l*)(2) against Appellants,

(2) directing Appellants to cease and desist publishing computer files with digital firearms information, and

(3) directing Appellants' communication service providers to cease and desist publishing computer files with digital firearms information.

[1] The "CodeisFreeSpeech.com publishers" are Appellants Firearms Policy Coalition, Inc., Firearms Policy Foundation, the Calguns Foundation, California Association of Federal Firearms Licensees, Inc., and Brandon Combs.

Request for Expedited Consideration

Appellants request expedited consideration of this motion for two reasons. First, Congress directed the Court to "expedite the consideration of . . . any action for temporary or preliminary injunctive relief," 28 U.S.C. § 1657(a), which this motion is part of. Second, extraordinary circumstances warrant expedited relief.

For more than a year, New Jersey Attorney General Gurbir Grewal has censored and continues to censor the Appellants in clear violation of the United States Constitution. He imposes an illegal regime of both civil and criminal enforcement actions that stop Appellants from engaging in speech the Constitution protects. Grewal's civil censorship actions violated Appellants' rights to free speech in the past and continue to do so. Worse, Grewal now wields the repressive power of an unconstitutional new speech crime. If these citizens dare utter words Grewal dislikes, he will imprison them. With every passing moment, this inflicts more and more irreparable harm upon both the Appellants and the entire citizenry. Expedited consideration of a motion to halt this is warranted.

For a briefing schedule, the Court should direct that "a response in opposition, if any, must be filed within 7 days after service of the motion and any reply within 3 days after service of the response." 3d Cir. L.A.R. 27.7 (2011). Appellants are available to present oral argument on thirty-six hours' notice.

Argument

The Appellants' Brief supplies a statement of facts and procedural history for both the appeal and the instant motion. Appellants' Br. at 4-26. It also establishes the appeal's likelihood of success. *Id.* at 27-53. For those and the following reasons, the Court should grant an injunction pending appeal.

I. The four-factor injunction test applies with no deference.

An injunction pending appeal should issue if a preliminary injunction would. *See, e.g.*, *Reilly v. City of Harrisburg*, 858 F.3d 173, 176-79 (3d Cir. 2017). Factors to consider are (1) the movant's likelihood of success on the merits; (2) the movant's irreparable harm without an injunction; (3) the nonmovant's irreparable harm with an injunction, and (4) the public interest. *Id.* Two stages of analysis are to occur:

> [A] movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.

Id. Legal determinations are always made de novo; and in First Amendment cases such as this, courts have a special "constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

II. Plaintiffs have a sufficient likelihood of success across the board.

A sufficient likelihood of success exists if the movant has a "reasonable chance" of success, which is a lower bar than "more likely than not." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). Plaintiffs meet this threshold as to the appeal—the only showing required at this time—and as to the overall case. Both now and ultimately, Grewal will likely lose.

A. Plaintiffs will win this appeal, which is all that need be shown.

For injunctions pending appeal, the relevant likelihood of success concerns the appeal—*not* the entire underlying case. By definition, an injunction pending appeal lasts only until the appeal's end; it does not extend beyond the appeal into proceedings on remand. The likelihood of success (and other factors) should therefore be measured with regard to the appeal alone.

By that measure, a sufficient likelihood of success definitely exists here. The Appellants' Brief already on file demonstrates this.

The appeal addresses the district court's handling of Plaintiffs' motion for a preliminary injunction. *See* Appellants' Br. at 2, 4, 18-26. All seven Plaintiffs sued Grewal under 42 U.S.C. § 1983, App. 7-90, and all seven moved for a preliminary injunction to stop his censorship, App. 91-964. When Grewal tried to avoid the merits by seeking a stay, App. 968-69, 974, 988-992, all seven Plaintiffs pressed for the injunction and opposed the stay, App. 970-973, 975-980, 992-1003.

The district court employed the so-called "first filed" abstention rule, rejected the motion for a preliminary injunction, and stayed the entire action indefinitely. App. 3-4, 1004-1006; *see* Appellants' Br. at 2, 4, 18-26. The decision below should be reversed for *nine* independent reasons.

First, the Appellants' Brief (at 32-35) shows a glaring error about the district court's treatment of the CodeIsFreeSpeech.com publishers, in particular. The district court's decision has one and only justification: the pendency of a federal case in Texas called *Defense Distributed II*. Grewal, Defense Distributed, and SAF are parties to *Defense Distributed II*. But the CodeIsFreeSpeech.com publishers are not. They and their claims below play no role whatsoever in *Defense Distributed II*. Legally, the Texas action means nothing to the CodeIsFreeSpeech.com publishers and cannot possibly justify staying their claims and denying preliminary relief.

This argument constitutes a complete ground for reversal as to the CodeIsFreeSpeech.com publishers. It thus constitutes a complete reason to conclude that the CodeIsFreeSpeech.com publishers have the requisite likelihood of success on appeal. But that is not all that this key argument establishes.

The Appellants' Brief goes on to show (at 36-37) that, because of how this conclusion alters the procedural posture, the error as to the CodeIsFreeSpeech.com publishers also necessitates reversal as to Defense Distributed and SAF. The argument therefore shows the requisite likelihood of success as to all Plaintiffs.

Arguments two through seven are common to all Plaintiffs. The Appellants' Brief shows (at 32-35) that reversal is warranted because this action's relationship to *Defense Distributed II* does not justify a stay:

2. The first-filed rule applies only if a prior action is "ongoing." But *Defense Distributed II* was not "ongoing" when the district court abstained and is not "ongoing" now. For purposes of abstention, *Defense Distributed II* is over. *See* Appellants' Br. at 38-39 (invoking *IFC Interconsult, AG v. Safeguard Int'l Partners*, 438 F.3d 298, 306 (3d Cir. 2006), and *Bass v. Butler*, 258 F.3d 176, 179 (3d Cir. 2001)).

3. The first-filed rule applies only if an instant action and prior action are truly duplicative *currently*. But the instant action and *Defense Distributed II* are not duplicative *currently*, and Grewal's hypothetical future forecasts do not suffice. *See* Appellants' Br. at 39-40 (invoking *Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 285 (3d Cir. 2017)).

4. Even when all of the first-filed abstention rule's main requirements are met, an equitable backstop prevents it from applying where, as here, doing so exposes litigants to alleged irreparable harm or serious prejudice. *See* Appellants' Br. at 40-43 (invoking *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014), *NOPSI v. Council of the City of New Orleans*, 491 U.S. 350, 366 (1989), *Ohio Civil Rights*

Com'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 626 (1986), *Harman v. Forssenius*, 380 U.S. 528, 537 (1965), *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 214 (3d Cir. 1993), *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 542 (3d Cir. 2017), and *Zahl v. Harper*, 282 F.3d 204, 210 (3d Cir. 2002)).

5. The first-filed abstention rule turns *not* on a static timing test of which action started first, but on a dynamic test of whether one action will clearly afford relief *more* expeditiously and effectively than another. Although *Defense Distributed II* was filed first, the action below can afford relief *equally* as well and should therefore proceed without delay. *See* Appellants' Br. at 44-45 (invoking *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 189 F.2d 31 (3d Cir. 1951) (en banc), and *Univ. of Md. at Balt. v. Peat Marwick Main & Co.*, 923 F.2d 265, 276 n.16 (3d Cir. 1991)).

6. Federal courts cannot abstain from exercising jurisdiction merely because the instant action parallels a predecessor. But Grewal's abstention argument runs headlong into this rule, in that he invokes nothing but partial parallelism. *See* Appellants' Br. at 46-48 (invoking *Sprint Commcns., Inc. v. Jacobs*, 571 U.S. 69, 81–82 (2013), and *Ryan v. Johnson*, 115 F.3d 193, 198 (3d Cir. 1997)).

7. *If* the district court had considered each of the legally relevant issues discussed above, it would have had to reject Grewal's abstention request. But where, as here, a district court fails to even *consider* all of the relevant legal factors that guide discretion, the erroneous method itself warrants reversal. *See* Appellants' Br. at 49 (invoking *Timoney v. Upper Merion Twp.*, 66 F. App'x 403, 406 (3d Cir. 2003)).

Eighth, the Appellants' Brief (at 49-51) then shows that reversal is warranted because the district court violated the Due Process Clause. The stay decision occurred by surprise at a "Status Conference." Without notice, the district court both entertained the stay request and granted it summarily, without affording Plaintiffs a fair opportunity to respond. The court even openly scoffed at the demand for procedural regularity, saying that while "*some people* call that due process," the court would not be "in any way constrained to require motion practice rules when a party seeks a stay." App. 995 (emphasis added). But of course stay decisions require the same due process as any other decision—especially where, as here, they put litigants out of court with irreparable harm mounting all the while.

Finally, the Appellants' Brief (at 51-53) shows that the district court was required to adjudicate the Plaintiffs' motion for a preliminary injunction on the merits *regardless of whether or not a stay is proper*. *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), is on all fours. Just as in *Rolo*, the district court

here "abused its discretion when it deferred consideration of the preliminary injunction application for an indeterminate period in the face of affidavits tending to show that irreparable injury would occur in the interim and when it did so without considering whether that injury will in fact occur." *Id.* at 703-04. *Rolo* requires "that the district court address the [Plaintiffs'] motion for a preliminary injunction *without delay*." *Id.* (emphasis added).

For these nine independent reasons, the Plaintiffs' appeal presents far more than just the requisite "reasonable chance" of success. *Singer Mgmt. Consultants*, 650 F.3d at 229. The Court will likely reverse and render a judgment holding that the district court must (1) exercise jurisdiction over this action immediately, and (2) begin by deciding the motion for a preliminary injunction on its merits. Alternatively, the Court will likely vacate and render a judgment holding that the district court must (1) reconsider the abstention request by affording Plaintiffs due process and using the proper legal rules, and (2) first decide the motion for a preliminary injunction on its merits. *See* Appellants' Br. at 54.

B. Ultimately, Grewal's actions will likely be held unconstitutional.

To warrant an injunction pending appeal, the Court need not conclude that the Appellants will likely succeed as to the underlying case. But though not necessary, such a holding would certainly suffice to justify the requested relief. So as an additional ground for relief, the Court can hold that Appellants have the requisite

likelihood of success as to the underlying case at large. On the merits, Grewal's censorship cannot be sustained.

Once the case resumes, the central question will be whether Grewal violates the First Amendment, the Due Process Clause, the Commerce Clause, and the Supremacy Clause by using his civil and criminal legal authority to censor Defense Distributed, SAF, and the CodeIsFreeSpeech.com publishers.[2] Ultimately, the Plaintiffs will likely prevail on the merits and the Court will likely hold that (1) Grewal's enforcement of the new speech crime is unconstitutional, and (2) Grewal's ongoing civil censorship actions are unconstitutional. A final judgment restoring the Plaintiffs' freedom of speech is very likely coming, and not a moment too soon.

1. First Amendment speech is at issue.

The Court should begin its First Amendment analysis by holding that the Plaintiffs' distribution of the digital firearms information at issue qualifies as speech for all constitutional purposes. Although Grewal has not (yet) disputed this below, the Plaintiffs' proof shows that the digital firearms information at issue here clearly

[2] The electronic record appendix includes the live complaint, App. 7-90, the Plaintiffs' motion for a preliminary injunction, App. 91-92, the brief supporting the motion, App. 94-143, and all evidence filed electronically below, App. 147-964. The record also includes two items that were presented as paper filings only and are therefore not reprinted in the appendix: Exhibit 56, the June 24, 2015 Supplemental Declaration of Cody Wilson, and Exhibit 57, The Liberator Code Book: An Exercise in Free Speech. *See* App. 965-66 (order admitting Exhibits 56 and 57).

qualifies as First Amendment speech under all of the applicable modern precedents. *Compare* App. 16-17 (complaint), App. 546-551 (Defense Distributed's Director identifying exemplary digital firearms information), App. 528-543 (industry expert explaining digital firearms information and 3D printing processes), App. 665-716 (3D printing process explanations), App. 718-735, (same), *and* App. 737-761 (same), *with Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."), *Bartnicki v. Vopper*, 532 U.S. 514, 526-27 (2001) (same); *Junger v. Daley*, 209 F.3d 481, 482 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."), *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) ("[C]omputer code, and computer programs constructed from code can merit First Amendment protection."), *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) ("source code is speech"). This is a speech case, and an extraordinarily important one at that.

2. Grewal's speech crime is clearly unconstitutional.

Grewal's threatened enforcement of the Section (*l*)(2) speech crime should be held unconstitutional for at least six reasons, which are set forth in full by the complaint and motion for a preliminary injunction:

(1) It is unconstitutionally content-based. *See* App. 51-54, 124-27.

(2) It is unconstitutionally overbroad. *See* App. 51-54, 57-59, 128-30.

(3) It unconstitutionally lacks a scienter element. *See* App. 51-54, 130-31.

(4) It is unconstitutionally vague. *See* App. 57-59, 131-33.

(5) It unconstitutionally violates the dormant Commerce Clause. *See* App. 59-61, 133-34.

(6) It unconstitutionally violates the Supremacy Clause. *See* App. 61-64, 134-38.

Appellants only need to show a "reasonable chance" of success as to one ground. This motion (constrained as it is by word limits) can quickly show two.

a. The speech crime is unconstitutionally content-based.

"Content-based laws" are "those that target speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Section (*l*)(2) is content-based because it criminalizes "digital instructions" that "may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component." N.J. Stat 2C:39-9(*l*)(2). Section (*l*)(2) is therefore "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. As a matter of law, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

The burden-shifting rule is crucial. It applies not just to trial, but to preliminary injunctions and injunctions pending appeal. Plaintiffs seeking an injunction pending appeal "***must be deemed likely to prevail*** unless the Government has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than [the challenged statute]." *Id.* (emphasis added); *accord Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). That rule is decisive here.

Plaintiffs have proposed several less-restrictive alternatives, App. 125-31, to which Grewal has no answer. Most obviously, New Jersey could achieve its legitimate ends less restrictively by banning only harmful *conduct*—not speech that is merely and only sometimes remotely associated with that conduct. *See Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). Indeed, Section (*l*)(2)'s neighboring crimes do just that by outlawing conduct and conduct alone. *See, e.g.*, N.J. Stat 2C:39-9(g); N.J. Stat 2C:39-9(*l*)(1).[3]

Grewal's burden of proof is extraordinary. To sustain Section (*l*)(2), he has to prove that crime prevention requires *both* conduct bans *and speech suppression*. He cannot meet that burden with mere "anecdote and supposition." *United States v.*

[3] To be clear, this case does *not* present a question about whether New Jersey's conduct proscriptions are constitutional. Appellants take no position on such questions at this time, and assume only for the sake of argument that such conduct restrictions are more narrowly tailored than Section (*l*)(2).

Playboy Entm't Grp., Inc., 529 U.S. 803, 822 (2000). Nor can it be done with "ambiguous proof." *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 800 (2011). Compelling "empirical support" has to be given. *Globe Newspaper Co. v. Sup. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 (1982). Grewal has not met that burden.

One reason for this shortcoming is common to many contexts. Grewal cannot show that crime prevention *requires* speech suppression here because "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016).

Another reason is context-specific. The information Grewal wants to censor will always be available on the internet. The computer files that Defense Distributed originally published online were thereby committed to the internet's public domain, where independent republishers beyond both the Plaintiffs' and New Jersey's control will make those files readily accessible on one website or another *forever*. *See* App. 338, 356, 532, 535-36, 609, 620, 623-24, 626-28, 638-40, 644-663, 762-783, 909-18; PX 57 (The Liberator Code Book: An Exercise in Free Speech, admitted at App. 965-66). Likewise, new digital firearms information will continually be published in the future by the millions of internet users beyond Grewal's reach. No matter how much action Grewal takes against a few disliked publishers, the information he seeks to forever delete from public consciousness will always be available on the internet.

For these reasons, Grewal has not shown and cannot show that proposed less restrictive alternatives are less effective than Section (*l*)(2). Appellants must therefore be "deemed likely to prevail" on the claim that Grewal's speech crime is unconstitutionally content-based. *Ashcroft*, 542 U.S. at 665; *Reilly*, 858 F.3d at 180. This conclusion alone shows the Appellants' likelihood of success on the merits.

b. The speech crime is unconstitutionally overbroad.

The overbreadth doctrine "prohibits the Government from banning unprotected speech" where "a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft*, 535 U.S. at 255. Among other reasons, *see* App. 128-130, Section (*l*)(2) is overbroad because it criminalizes (and chills) speech regardless of its relationship to illegal conduct.

The "government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id.* If ever governments can silence citizens to prevent illegal conduct, it is only where, among other requirements, the speech is "*integral* to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (emphasis added). But speech cannot be "integral to criminal conduct" if it has only a "contingent and indirect" relationship to that conduct. *Ashcroft*, 535 U.S. at 250. In other words, government cannot base speech bans on "some unquantified potential for subsequent criminal acts." *Id.*

Virtually all of the speech covered by Section 3(*l*)(2) falls squarely on the protected side of this line, either because the expression's recipient commits no illegal act at all or because, if they were to do so, the causal link is merely contingent and indirect. *Cf. Staples v. United States*, 511 U.S. 600, 610 (1994) ("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."). Yet Section 3(*l*)(2) still criminalizes every instance of speech's "distribut[ion]" no matter what. This rule renders the law unconstitutionally broad.

3. Grewal's civil censorship is clearly unconstitutional.

Grewal's civil enforcement actions are just as unconstitutional as his criminal efforts. *See* App. 52, 141-42. Textbook prior restraints are at issue. The cease-and-desist letter Grewal issued constitutes a prior restraint because it demands—in advance, and upon pain of legal punishment—that Defense Distributed never publish "printable-gun computer files for use by New Jersey residents." App. 27, 83-84. So do the civil lawsuits (all now terminated) that sought injunctions against all manner of "distributing" "printable-gun computer files." App. 30-31, 226.

As prior restraints, the law presumes that Grewal's actions are unconstitutional and gives Grewal the burden of justifying them. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71-72 (1963). Thus, as in the case of content-based laws, the Plaintiffs should be "deemed likely to prevail" unless Grewal can show

this Court a valid prior-restrain justification. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004); *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). He cannot. The same reasoning that prevents Section 3(*l*)(2) from surviving strict scrutiny also spells defeat for the civil censorship's prior restraint.

Importantly, this constitutional violation encompasses both the actions taken directly against the Plaintiffs (cease-and-desist letters and civil litigation) *and* Grewal's indirect efforts to threaten, coerce, and intimidate the Plaintiffs' internet service providers. *See* App. 30, 86-90. The holding of *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam), applies:

> A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, *or in some less-direct form*.

Id. at 334 (emphasis added). So does *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015), which upheld injunctive relief against an official that "proceed[ed] against [the speaker] not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers." *Id.* at 230; *see id.* at 231 ("such a threat is actionable and thus can be enjoined even if it turns out to be empty"). For these reasons, Appellants are likely to succeed in their effort to have Grewal's civil censorship declared unconstitutional and enjoined.

III. Vast irreparable harm is occurring right now and will continue without an injunction pending appeal.

A sufficient risk of irreparable harm exists if, in the absence of an injunction, irreparable harm is "likely"—*i.e.*, "more apt to occur than not"—as opposed to "merely possible." *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015). With respect to the criminal and civil actions at issue here, that test is clearly satisfied.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.); *accord K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013). The Plaintiffs are suffering that irreparable harm now and will continue to suffer it unless and until Grewal's censorship is enjoined.

Specifically, Plaintiffs engage in three categories of conduct that Grewal is unconstitutionally censoring both criminally and civilly. If not for Grewal's unconstitutional actions, the Plaintiffs would be freely exercising their First Amendment rights. These losses amount to irreparable harm in every instance.

Category one is the publication of digital firearms information on the internet. This right has been exercised in the past by Defense Distributed, App. 8, 10, 17-18, 28, 47, 236-37, 330-31, 354-58, 412-16, 529-31, 545-50, 601-03, and the CodeIsFreeSpeech.com publishers, App. 9, 34-35, 40-41, 47, 148-49. If not for Grewal's ongoing censorship, this right would be exercised in the future by Defense Distributed, App. 8, 10, 38-40, 48, 50, 549-553, SAF and its members, App. 9, 11,

48-49, 50, 523-24, 526-27, and the CodeIsFreeSpeech.com publishers, App. 34-35, 45, 48-50, 152.

Category two is the publication of digital firearms information via the mail. This right has been exercised in the past by Defense Distributed. App. 8, 10, 17-18, 32-33, 47, 546-47, 550-53. If not for Grewal's ongoing censorship, this right would be exercised in the future by Defense Distributed, App. 8, 10, 39-40, 48-50, 552-53.

Category three is the offering and advertisement of digital firearms information. This right has been exercised in the past by Defense Distributed, App. 8, 10, 17-18, 28-29, 32-33, 47, 545-50, 601-03, and the CodeIsFreeSpeech.com publishers, App. 9, 40-41, 47, 50-51, 148-49. If not for Grewal's ongoing censorship, this right would be exercised in the future by Defense Distributed, App. 8, 10, 38-40, 48-51, 549-553, SAF and its members, App. 9, 11, 48-50, 523-24, 526-27, and the CodeIsFreeSpeech.com publishers, App. 34-35, 45, 48-51, 152.

Grewal's *criminal* censorship covers all three categories of conduct. Internet publications are covered because Section 3(*l*)(2) makes it a crime to distribute the banned "digital instructions" "by any means, including the Internet." N.J. Stat 2C:39-9(*l*)(2). Mailed publications are covered because the speech crime also defines "distribute" to mean "mail." *Id.* And offers and advertisements are covered because Section 3(*l*)(2) defines "distribute" to mean "offer" and "advertise." *Id.*

Grewal's *civil* censorship covers all three categories of conduct as well. His cease-and-desist order said to "halt publication" of any and all so-called "printable-gun computer files." App. 27, 83-84. The civil lawsuits (all terminated) sought prior restraints against all manner of "distributing" "printable-gun computer files." App. 30-31, 226. And the threats against internet service providers targeted all "computer files" with digital firearms information. App. 30, 86-90.

Legally, Grewal's criminal censorship causes several distinct First Amendment harms. First, the speech crime would, if enforced as Grewal threatens, result in unconstitutional convictions. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932–33 (1982). Second, the act of threatening to enforce the speech crime already imposes an unconstitutional prior restraint. *See, e.g.*, *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) ("Threatening penalties for future speech goes by the name 'prior restraint,' and a prior restraint is the quintessential first-amendment violation."). Additionally, Grewal's criminal efforts already cause a chilling effect—they stop citizens from engaging in speech that, while not technically covered by Section 3(*l*)(2), might arguably be—that is itself distinct First Amendment harm. *See Dana's R.R. Supply v. Atty. Gen., Flo.*, 807 F.3d 1235, 1241 (11th Cir. 2015) ("Litigants who are being 'chilled from engaging in constitutional activity,' . . . suffer a discrete harm independent of enforcement."). All of these lost First Amendment freedoms constitute irreparable harms of the highest order.

The same rule holds true with respect to Grewal's civil censorship actions. Just like the speech crime, Grewal's use of civil efforts to censor the Plaintiffs violates the Plaintiffs' constitutional rights in a way that can never be repaired. *See, e.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015).

IV. The balance of equities favors an injunction pending appeal and an injunction pending appeal will serve the public interest.

For Plaintiffs, the risk of erroneously denying an injunction entails the "potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 671 (2004). This is a paramount interest. *See, e.g.*, *id.* For Grewal, in contrast, an erroneous injunction's harm would be either nonexistent or at least "not be extensive" for two reasons. *Ashcroft*, 542 U.S. at 671. First, since no criminal prosecutions have occurred yet, "none will be disrupted if the injunction stands." *Id.* Second, and most importantly, an injunction will leave Grewal perfectly free to protect the public from actual criminals by enforcing the vast array of constitutional criminal laws that are "already on the books." *Id.*; *see also In re Revel AC, Inc.*, 802 F.3d 558, 575 (3d Cir. 2015) (harm must be shown by "record evidence," not "hollow representations").

Finally, preventing the violation of constitutional rights always serves the public interest, and the "the enforcement of an unconstitutional law vindicates no public interest." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013).

V. All procedural requirements have been met.

Federal Rule of Appellate Procedure 8 requires that the district court be given an opportunity to afford the relief this motion requests. That opportunity occurred here. This motion seeks the same kind of injunction that the Plaintiffs sought from the district court with (1) their pre-judgment motion for a preliminary injunction, App. 91, which was denied, App. 3; App. 1018, and (2) their post-judgment motion for an injunction pending appeal, App. 1008, which was denied as well, App. 1016.

The motion's timing is proper. At the appeal's outset, the Court imposed a jurisdiction hold, resulting in a pause that the Appellants patiently awaited. But now that the Court has lifted that hold, it is appropriate to proceed with all due haste. Grewal, having caused the hold in the first place, was certainly not prejudiced by it.

Finally, an injunction pending appeal should not entail a bond because (1) Grewal will suffer no meaningful loss, and more importantly (2) a bond requirement would unduly interfere with the constitutional rights at issue. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 239 (7th Cir. 2015); *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991).

Conclusion

Defense Distributed, the Second Amendment Foundation, and the CodeIsFreeSpeech.com publishers request that the Court (1) give this motion expedited consideration, and (2) grant it.

October 21, 2019

Respectfully submitted,

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Certifications

1. At least one of the attorneys whose name appears on this brief is a member of the bar of this Court.

2. The text of this document's electronic version matches its paper copies.

3. A virus detection program, BitDefender Endpoint Security Tools major version 6, has been run on the file and no virus was detected.

4. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32 because it contains 5,121 not-exempted words.

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6. On October 21, 2019, this filing was served on the opposing party's counsel by delivering it through the Court's electronic docketing system to the following registered user of the system:

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DEFENSE DISTRIBUTED, SECOND AMENDMENT FOUNDATION, INC., FIREARMS POLICY COALITION, INC., FIREARMS POLICY FOUNDATION, CALGUNS FOUNDATION, CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, and BRANDON COMBS, Plaintiffs, v. GURBIR GREWAL, ATTORNEY GENERAL of the STATE of NEW JERSEY, Defendant.	Civ. No. 19-4753 **ORDER**

THOMPSON, U.S.D.J.

IT APPEARING that on July 29, 2018, Plaintiffs Defense Distributed and Second Amendment Foundation, Inc. filed an action in the Western District of Texas seeking to enjoin Defendant Gurbir S. Grewal, Attorney General of New Jersey, from enforcing N.J.S.A. § 2C:39-9(*l*)(2) (Civil Docket No. 18-637, ECF No. 1); and it further

APPEARING that on January 30, 2019, the Western District of Texas dismissed that action because the court lacked personal jurisdiction over Defendant Gurbir S. Grewal, Attorney General of New Jersey (Civil Docket No. 18-637, ECF No. 100); and it further

APPEARING that on February 5, 2019, Plaintiffs Defense Distributed and Second Amendment Foundation, Inc., among others, filed an action in this Court seeking to enjoin

Defendant Gurbir S. Grewal, Attorney General of New Jersey, from enforcing N.J.S.A. § 2C:39-9(*l*)(2) (ECF No. 1.); and it further

APPEARING that on February 27, 2019, Plaintiffs Defense Distributed and Second Amendment Foundation, Inc. filed a Motion to Amend Judgment in the Western District of Texas as to Defendant Gurbir S. Grewal, Attorney General of New Jersey (Civil Docket No. 18-637, ECF No. 102); and it further

APPEARING that on March 3, 2019, Defendant Gurbir S. Grewal, Attorney General of New Jersey, seeks an order for this Court to stay this action pending resolution of the action in the Western District of Texas (ECF No. 20); and it further

APPEARING that on March 7, 2019, counsel for Plaintiffs, Charles Flores and Daniel Schmutter, and counsel for Defendant, Melissa Medoway and Glenn Moramarco, participated in a conference with the Court wherein Plaintiffs opposed the requested stay (ECF No. 25);

IT IS on this 7th day of March, 2019,

ORDERED that all proceedings in this action are STAYED until the action in the Western District of Texas (Civil Docket No. 18-637) is resolved and no other motions for relief and/or appeals are viable.

Anne E. Thompson

ANNE E. THOMPSON, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DEFENSE DISTRIBUTED, SECOND AMENDMENT FOUNDATION, INC., FIREARMS POLICY COALITION, INC., FIREARMS POLICY FOUNDATION, CALGUNS FOUNDATION, CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, and BRANDON COMBS,

Plaintiffs,

v.

GURBIR GREWAL, ATTORNEY GENERAL of the STATE of NEW JERSEY,

Defendant.

Civ. No. 19-4753

ORDER

THOMPSON, U.S.D.J.

IT APPEARING that on March 7, 2019, the Court ordered that all proceedings in this action are stayed until the related action in the Western District of Texas (Civ. Dkt. No. 18-637) is resolved and no other motions for relief and/or appeals are viable (Order at 1–2, ECF No. 26),

IT IS on this 28th day of August, 2019,

ORDERED that Plaintiffs' Amended Motion for Preliminary Injunction (ECF No. 18) is DISMISSED without prejudice. Plaintiffs may refile this Motion once the stay has been lifted in this action.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.