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' Supplemental Brief

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I. Appellate jurisdiction exists.

A. 28 U.S.C. § 1292(a)(1) supplies appellate jurisdiction.

Appellate jurisdiction here arises from the district court's denial of Plaintiffs/Appellants motion for a preliminary injunction. *See* App. 94–964 (motion). The district court denied that motion both impliedly and expressly.

First, the district court issued an order that "STAYED" the action indefinitely, impliedly denying Plaintiffs' then-pending motion for a preliminary injunction:

> 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.

App. 4 (March 7, 2019). Second, the district court confirmed the stay's implication and "DISMISSED" the motion for a preliminary injunction:

> 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.

App. 1018 (Aug. 28, 2019). Plaintiffs filed timely notices of appeal from both orders, App. 12, 1019, and this Court properly consolidated the appeals.

28 U.S.C. § 1292(a)(1) supplies interlocutory appellate jurisdiction over all district court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1) (with exceptions not at issue). Both of the orders at issue here "refus[ed]" an "injunction" within the meaning of § 1292(a)(1). Thus, just as the Appellants' Brief explained, Appellants' Br. at 1, jurisdiction exists by virtue of § 1292(a)(1).

This conclusion flows directly from the statute's text, which is clear and free from any ambiguity. Section 1292(a)(1) covers any and all orders "refusing . . . injunctions." Such an order need not be "final" to be appealable. There is no exception for refusals made "without prejudice" and there is no exception for orders that might be followed by a new and different ruling on a new and different motion. "Final" or not, and regardless of whether or not hypothetical future injunction requests might yield future injunction decisions, any existing order "refusing" to issue a preliminary "injunction" is appealable under § 1292(a)(1). That this case falls squarely within the statute's clear text should be the end of the matter.

B. *Rolo* (3d Cir. 1991) establishes appellate jurisdiction.

In *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), this Court held that § 1292(a)(1) provided appellate jurisdiction over an order that is indistinguishable from the orders at issue here. *Rolo* is inescapable. All material

facts match. No relevant distinction exists. A lengthy block quotation is warranted, lest there be any doubt about *Rolo*'s decisiveness:

> We turn next to the question of whether we have appellate jurisdiction pursuant to § 1292(a)(1) over the district court's May Order staying the Rolos's application for a preliminary injunction. Section 1292(a)(1) provides that the courts of appeals shall have jurisdiction of appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, *refusing* or dissolving injunctions . . . ." Our jurisdiction pursuant to § 1292(a)(1) extends to the review of "orders that grant or deny injunctions *and orders that have the practical effect* of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.'" As we noted in *Cohen v. Board of Trustees*, 867 F.2d 1455 (3d Cir.1989) (in banc), the label put on an order by the district court does not prevent us from treating it as an injunction for purposes of § 1292(a)(1).
>
> Although the May Order did not expressly "refuse" a preliminary injunction, it nonetheless had the practical effect of doing so. *See* 11 C. Wright & A. Miller Federal Practice and Procedure § 2962 at 614 (1973) ("when a court declines to make a formal ruling on a motion for a preliminary injunction, its refusal to issue a separate order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.").
>
> For an interlocutory order to be immediately appealable under § 1292(a)(1), however, the Rolos "must show more than that the order has the practical effect of refusing an injunction." Unless they can demonstrate that the district court's order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectively challenged' only by an immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal."
>
> In support of their motion for a preliminary injunction, the Rolos have tendered competent evidence, by way of sworn affidavits, tending to show that defendants Ambase and City Trust are currently liquidating and distributing their assets in an effort to render the companies judgment proof—a proposition which remains uncontradicted on the current record. In this context, we conclude that

> the May Order's deferral of consideration of the preliminary injunction application was an effective denial of that application and that, assuming the truth of the Rolos's allegations, that denial would impose "serious, perhaps irreparable" consequences on them. Accordingly, the district court's order refusing to reach the merits of the application for a preliminary injunction is appealable under § 1292(a)(1).

Id. at 702–03 (citations omitted). Everything that made *Rolo*'s order appealable is true of the orders below.

First, the practical effects match. Just as in *Rolo*, even though Judge Thompson's first order "did not expressly 'refuse' a preliminary injunction, it nonetheless had the practical effect of doing so." *Id.* Likewise, her second order, which expressly "DISMISSED" the injunction motion, had that practical effect.

Second, the consequences match. Just as in *Rolo*, Judge Thompson's orders undoubtedly have a "serious, perhaps irreparable, consequence." *Id.* Namely, they expose Plaintiffs to Grewal's blatantly unconstitutional censorship, which was ongoing when the orders were issued and continues to this very day. Indeed, the case for appealability here is even stronger than in *Rolo* because the interests being vindicated are more compelling than *Rolo*'s. Whereas *Rolo* involved ongoing business harms that were "*perhaps* irreparable," *id.* (emphasis added), this action involves constitutional harms regarding free speech that are *undoubtedly* irreparable. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Third, the need for an immediate appeal matches. Just as in *Rolo*, Judge Thompson's orders can be "'effectively challenged' only by an immediate appeal." *Id.* After Judge Thompson's stay ends, an appeal challenging it will be moot. The constitutional rights that Grewal violates in the meantime can never be untrampled. *See CTF Hotel Holdings, Inc. v. Marriott Intern., Inc.*, 381 F.3d 131, 136 (3d Cir. 2004) ("Time only runs in one direction. Accordingly, we can not correct any error the District Court may have made in staying [the] suit unless we review it now.").

Finally, the underlying motion's support matches. *Rolo*'s motion included "competent evidence" of irreparable harm that was "uncontradicted on the current record." *Id.* So too here. With both the district court motion for a preliminary injunction and the motion for an injunction pending appeal in this Court, Appellants justified their request for immediate injunctive relief by supplying extensive and compelling proof of every pertinent issue. *See* App. 147-964; Appellants' Br. at 18 & n.5; Appellants' Motion for Injunction Pending Appeal at 10 & n.2. All of that proof is uncontradicted. Grewal has never supplied any opposing evidence.

An important part of *Rolo*'s holding addresses Grewal's postponement notion—the idea that no appeal lies if there is a hypothetical chance that a new injunction motion might result in new injunction order. The *Rolo* defendant made that postponement argument and it was rejected. In the preliminary injunction context, postponement arguments do not stop § 1292's application:

> The defendants misread the dictum they rely upon from *Cohen v. Board of Trustees*, 867 F.2d at 1464. As we there stated, an order granting or denying a stay which does no more than postpone or accelerate resolution of an action seeking injunctive relief is not appealable under § 1292(a)(1) as a grant or denial of an injunction. The May Order in this case, however, does far more. Assuming the Rolos's allegations to be true, *the district court's refusal to consider the application for a preliminary injunction effectively denied them the ultimate relief that they seek*. . . .The Rolos here moved under Rule 65(a) for an order directed to a party, enforceable by contempt, and designed to protect the relief they sought. *The district court's refusal to entertain that motion under the circumstances there alleged had precisely the same effect on the Rolos as would an order expressly denying that motion. Accordingly, our conclusion that we have jurisdiction under § 1292(a)(1) is consistent with the Cohen case.*

Rolo 949 F.2d at 702–03 n.5 (emphasis added).

Hence, the fact that Judge Thompson's orders were denied *without prejudice* does *not* exclude them from § 1292. Just as in *Rolo*, Judge Thompson's repeated and express "refusal to consider the [Plaintiffs'] application for a preliminary injunction effectively denied them the ultimate relief that they seek." *Rolo*, 949 F.2d at 703 n.5. So under *Rolo*, each "order refusing to reach the merits of the application for a preliminary injunction is appealable" *Id.* at 703.

C. *Victaulic* (3d Cir. 2007) establishes appellate jurisdiction.

In *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007), this Court held that § 1292(a)(1) supplies appellate jurisdiction over an order that is indistinguishable from the orders at issue here. *Id.* at 231–35. *Victaulic* applies the same rules as *Rolo* in even more detail. *Id.* It too is controlling.

Victaulic's holding turns on whether an order has the "practical effect" of denying an injunction. The *Victaulic* order "did not explicitly deny an injunction"; "dismissal of four counts of the complaint" was all that it spoke of. Nonetheless, *Victaulic* held that § 1292(a)(1) applied because the order's "practical effect" was to deny a preliminary injunction:

> By moving for a preliminary injunction, Victaulic demonstrated that one of its chief goals was to end Tieman's (admitted) violation of the covenant not to compete. Thus, the dismissal had the practical effect of refusing an injunction.

Id. at 231.

The "practical effect" that sufficed in *Victaulic* exists here. "By moving for a preliminary injunction" below, every Plaintiff demonstrated that ending Grewal's ongoing constitutional violations was "one of its chief goals." *Id.* Indeed, *the* chief goal was to obtain an injunction stopping Grewal's current wrongdoing. *See* App. 64–65 (complaint). Judge Thomson's orders therefore "had the practical effect of refusing an injunction." *Victaulic Co.*, 499 F.3d at 231.

Furthermore, *Victaulic* held an injunction denial appealable even where "similar relief is hypothetically possible" elsewhere. *Id.* The *Victaulic* defendant argued that the denial was not appealable "because similar relief is hypothetically possible" via another proceeding. *Id.* But *Victaulic* rejected this expressly: "Again, we disagree." *Id.* Jurisdiction under § 1292(a)(1) does *not* turn on whether "similar relief is hypothetically possible" elsewhere. *Id.* It does *not* turn on whether an

appellant "*could*" seek similar relief in a separate proceeding. *Id.* (emphasis in original). And it does not turn on what is "possible," especially where the alternative is "atypical." *Id.* The injunction denial was appealable in *Victaulic* regardless of any conceivable hypotheticals. Likewise, the denials in this case are appealable.

At bottom, *Victaulic* is another well-reasoned case with matching material facts and an inescapable holding about appealability under § 1292(a)(1). There, as here, the district court "effectively denied the relief that is at the heart of [Plaintiffs'] claims." *Id.* So under *Victaulic*, "appellate jurisdiction exists here." *Id.*

D. The CodeIsFreeSpeech.com publishers play no role whatsoever in the Texas case.

With regard to all seven of the Appellants, Grewal's keystone argument about control of *Defense Distributed II* is wrong for the reasons just explained. It contradicts the plain text of § 1292(a)(1), *Rolo*, and *Victaulic*. As to five Appellants in particular, Grewal's keystone argument is wrong for an additional reason. The argument assumes that all seven Appellants are parties to the Texas case. But the five CodeIsFreeSpeech.com publishers have nothing to do with the Texas case.

In the instant action, all five of the CodeIsFreeSpeech.com publishers are plaintiffs, *see* App. 11-13, all five have standing, *see* App. 45-51, all five assert the complaint's Section 1983 claims in full, *see* App. 51-64, and all five moved for the preliminary injunction that Judge Thomson's stay order effectively refused, *see* App. 94-143. But in the Texas case, these five litigants are completely absent. They are

not plaintiffs, not defendants, and not anything else. They play no role whatsoever in that case and cannot control its fate in any way. When the district court rejected the motion for a preliminary injunction below, it put the CodeIsFreeSpeech.com publishers out of court entirely.

By Grewal's own logic, the CodeIsFreeSpeech.com publishers have been completely excluded from the court system in precisely the way that *Rolo* and *Victaulic* hold is sufficient to make a "stay" order appealable. Grewal has been confronted with this issue repeatedly and has no valid answer. *See* Appellants' Letter of April 23, 2019 at 1-2.

Thus, with respect to the five CodeIsFreeSpeech.com publishers in particular, both of the orders at issue here "refus[ed]" an "injunction" within the meaning of § 1292(a)(1), *Rolo* and *Victaulic*. That alone is enough to end the jurisdictional debate because once part of an "order" crosses the Section 1292(a)(1) threshold as to at least one appellant, jurisdiction exists over the entire "appeal." *See OFC Comm Baseball v. Markell*, 579 F.3d 293, 298-300 (3d Cir. 2009); 16 Charles A. Wright & Arthur R. Miller et al., Federal Practice & Procedure § 3921.1 (3d ed. West 2020) ("Review [under § 1292(a)(1)] properly extends to all matters inextricably bound up with the injunction decision. In addition, the scope of review may extend further to allow disposition of all matters appropriately raised by the record, perhaps leading to final disposition of the case.").

II. The motion for an injunction pending appeal should be addressed immediately.

Grewal does not want to avoid *multiple* adjudications of his censorship policy's constitutionality. He wants to avoid *any and all* adjudication of his actions' merits, preliminary or otherwise. And due to the decision below, he has succeeded.

No court anywhere has ever ruled on the merits of Plaintiffs' request for a preliminary injunction against Grewal's ongoing censorship. The district court in Texas did not do so because Grewal convinced it to dismiss the action for want of personal jurisdiction. The district court below did not do so because Grewal convinced it to abstain and stay the entire action. Personal jurisdiction is the only issue Grewal's Fifth Circuit brief addressed, and that issue is totally absent here.

Right now, there is one and only one judicial body with a pending request for injunctive relief against Grewal's censorship. It is not the district court in Texas. It is not the Fifth Circuit. And it is not the district court below. It is this Court. Appellants' Motion for Injunction Pending Appeal complies with every applicable procedural rule, includes a request for expedited consideration, and has been fully briefed since October 2019. Appellants respectfully request that the Court adjudicate this, the only existing request of its kind, without any further delay.

Conclusion

The Court should hold that appellate jurisdiction exists.

Appellants' motion for an injunction pending appeal should be granted.

January 27, 2020

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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.

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6. On January 27, 2020, 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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