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' Petition for Rehearing *En Banc*

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Rule 35 Statement

I. The question of appellate jurisdiction is of exceptional importance.

This case presents an exceptionally important question about appellate jurisdiction over district court orders denying a preliminary injunction and staying an action indefinitely. The panel held that no such appellate jurisdiction exists.

Appellate jurisdiction should always be accurately defined, honoring both Article III and Congress's allocation of judicial power with exactitude. This is particularly true of appeals from preliminary injunction decisions, which recur frequently and necessitate swift appellate attention because of ongoing irreparable harm. This cutting-edge First Amendment case exemplifies the issue's importance.

For more than a year, New Jersey Attorney General Gurbir Grewal has censored and continues to censor the Plaintiffs/Appellants in clear violation of the Constitution. He imposes an illegal regime of both civil and criminal enforcement actions that stops these citizens from merely *speaking* about Second Amendment issues he disdains. If Plaintiffs dare to utter the banned words, Grewal will jail them.

Plaintiffs sued under 42 U.S.C. § 1983 for an injunction stopping this ongoing infliction of irreparable constitutional harm. When the district court issued orders refusing a preliminary injunction and staying the case indefinitely, Plaintiffs appealed under 28 U.S.C. § 1292(a)(1), the statute covering orders "refusing . . . injunctions." They also moved for an injunction pending appeal.

In a 2-1 decision, the panel dismissed the appeal for lack of appellate jurisdiction and refused to rule on the motion for an injunction pending appeal. Judge Phipps dissented. Right or wrong, the panel's decision is extraordinarily important because of what Chief Justice Marshall established in *Cohens v. Virginia*, 19 U.S. 264 (1821): Article III courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id.* at 404. "The one or the other would be treason to the constitution." *Id.*

II. The panel's 2-1 jurisdictional dismissal conflicts with both *Rolo* (3d Cir. 1991) and *Victaulic* (3d Cir. 2007).

This appeal should be decided on the merits, not dismissed for lack of jurisdiction. The panel's dismissal is wrong and conflicts with circuit precedents.

The panel held that the Court lacks appellate jurisdiction over district court "orders staying all proceedings and dismissing a pending preliminary injunction without prejudice to being refiled following the resolution of a related action in the Western District of Texas that is now on appeal before the Fifth Circuit Court of Appeals." Op. at 2. Regardless of whether these orders are "final" under § 1291, the Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which covers interlocutory orders "refusing . . . injunctions." *See* Appellants' Br. at 1 (invoking § 1292). Yet the panel disregarded § 1292 entirely and held that "this Court is without jurisdiction to hear this appeal because the challenged orders are not appealable under 28 U.S.C. § 129***1***." Op. at 2 (emphasis added). This conflicts with two circuit precedents.

First, the majority's holding conflicts with *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), which held that an "order refusing to reach the merits of the application for a preliminary injunction is appealable under § 1292(a)(1)." *Id.* at 702–03. *Rolo*'s holding establishes appellate jurisdiction here.

Second, the majority's holding conflicts with *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007), which held that § 1292(a)(1) gives the Court jurisdiction over "an appeal from the (implicit) denial of the preliminary injunction." *Id.* at 231–32. *Victaulic*'s holding establishes appellate jurisdiction here.

The panel majority is wrong. *Rolo*, *Victaulic*, and Judge Phipps are right. The case should not have been dismissed for want of jurisdiction. 28 U.S.C. § 1292(a)(1) supplies appellate jurisdiction, which should be exercised immediately to stop the extraordinary irreparable harm that Grewal's ongoing censorship continues to inflict.

* * *

Local Rule 35.1 Statement of Counsel: For these reasons, I believe, based on a reasoned and studied professional judgment, that (1) this appeal involves a question of exceptional importance—the scope of appellate jurisdiction over preliminary injunction decisions, and (2) the panel decision is contrary to *Rolo* and *Victaulic*, such that *en banc* rehearing is necessary both to maintain uniformity of decisions and to correct a grave error.

Statement of the Case

In this free speech case, seven Plaintiffs sued a state official engaged in unconstitutional censorship, App. 7–90, and moved for a preliminary injunction to stop the ongoing infliction of irreparable harm, App. 91–964. The state official, New Jersey Attorney General Gurbir Grewal, tried to avoid an injunction by seeking a stay of all proceedings. App. 968–69, 974, 988–992. All seven Plaintiffs pressed for the preliminary injunction and all seven opposed the stay request. App. 970–973, 975–980, 992–1003. Judge Anne Thompson presided.

In two orders, the district court refused to issue the injunction without regard to its merits and stayed the action indefinitely. App. 3–4, 1004–1006. It did so because of another case in the Western District of Texas. Grewal is a party to the Texas action, as are two of the instant Plaintiffs; but the other five Plaintiffs are not.

All seven Plaintiffs timely appealed from both district court orders, and the two appeals were consolidated. Plaintiffs invoked the Court's interlocutory appellate jurisdiction over orders refusing injunctions. *See* 28 U.S.C. § 1292(a)(1).

In the Appellants' Brief, Plaintiffs argued that the district court erred by refusing the preliminary injunction and staying the action as to both (i) the five Plaintiffs that are not part of the Texas action, and (ii) the two Plaintiffs that are. By motion in this Court, Plaintiffs sought an injunction pending appeal against Grewal's ongoing censorship. Grewal moved for summary affirmance.

The panel rendered a 2-1 decision that dismissed the appeals for lack of appellate jurisdiction. Judge Phipps dissented and would have upheld jurisdiction.

The majority opinion holds that circuit courts *lack* jurisdiction over both district court orders staying a case indefinitely and district court orders refusing a preliminary injunction. Both holdings use the same reasoning, saying that jurisdiction is missing "because the challenged orders are not appealable under 28 U.S.C. § 1291." Op. at 2. The entire decision spans a single paragraph:

> The foregoing appeals are dismissed for lack of appellate jurisdiction and the Motion for Summary Affirmance is denied as moot.[1] Generally, we may only hear appeals from "final decisions of the district courts of the United States." 28 U.S.C. § 1291. Appellants have appealed the district court's orders staying all proceedings and dismissing a pending preliminary injunction without prejudice to being refiled following the resolution of a related action in the Western District of Texas that is now on appeal before the Fifth Circuit Court of Appeals. First, the order staying the matter is not final. Second, appellate courts generally lack jurisdiction over issues that have been dismissed without prejudice. *See Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 438-40 (3d Cir. 2003). Appellants have presented no argument warranting a different result. Thus, this Court is without jurisdiction to hear this appeal because the challenged orders are not appealable under 28 U.S.C. § 1291.
>
> [1]The Honorable Peter J. Phipps would hold that the Court has jurisdiction to hear the appealed district court orders and Motion for Summary Affirmance.

Op. at 2. With that cursory treatment, the panel majority dismissed the appeal for lack of jurisdiction and refused to grant the motion for an injunction pending appeal.

Argument

I. The panel's refusal to take appellate jurisdiction warrants rehearing.

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). The panel's contrary holding is plainly wrong.

The panel's fundamental error confused appellate jurisdiction over final decisions with appellate jurisdiction over interlocutory decisions. The opinion reasons that "the order staying the matter is not final." Op. at 2. But "final" status only matters for § 1291's jurisdiction over "final" decisions—not § 1292's jurisdiction over interlocutory orders like preliminary injunction refusals.

The panel opinion also used invalid postponement reasoning. It said that "appellate courts generally lack jurisdiction over issues that have been dismissed *without prejudice*" Op. at 2 (emphasis added), and mentioned the possibility of Plaintiffs seeking relief again *after* the Texas action ends, *id.* But the cited case involved only § 1291. It had nothing to do with § 1292 and preliminary injunctions.

Section 1292(a)(1) establishes appellate jurisdiction over *all* district court orders "refusing . . . injunctions"—not just "final" orders refusing injunctions. There is no exception for refusals made "without prejudice" and there is no exception

for cases where a new injunction motion might result in new injunction order. Congress designed the statute this way for a good reason that this case illustrates. Plaintiffs requested a preliminary injunction to stop Grewal's *ongoing* censorship from causing irreparable free speech harms *now*. Logic dictates—and Congress agreed—that postponing such relief is the same as refusing it. The statute, therefore, grants an unqualified right to appeal *any* orders refusing injunctions. Under § 1292(a)(1), the panel had no choice but to take jurisdiction.

B. The panel decision conflicts with *Rolo* (3d Cir. 1991).

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.

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.

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 the panel'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. *See* Op. at 2. 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); *accord CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 135–36 (3d Cir. 2004).

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. The panel decision conflicts with *Victaulic* (3d Cir. 2007).

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. Rehearing *en banc* is warranted.

To stop Grewal's ongoing violation of constitutional free speech rights, Plaintiffs have done everything that the judicial system asks of them. Yet in the district court and now at the panel level in this Court, the system has failed in extraordinary ways.

In the district court, Plaintiffs filed a motion for a preliminary injunction with all of the necessary legal argument, App. 941–43, and evidentiary support, App. 147–964. But instead of reaching the merits, the district court abstained by staying the entire action indefinitely and refusing the preliminary injunction. App. 34, 2018. It did so without giving Plaintiffs fair notice and an opportunity to be heard. By surprise at a "Status Conference," the district court both entertained Grewal's abstention request and granted it summarily, notwithstanding Plaintiffs' objections, and despite the need for immediate action on the preliminary injunction.

At the panel level in this Court, Plaintiffs again did everything right. When the Court invited preliminary letters about jurisdiction, Plaintiffs invoked § 1292(a)(1) and *Rolo* expressly and repeatedly. The Court then referred the issue to the merits panel and told the parties to address it in briefs. *See* Order of October 9, 2019. The Appellants' Brief invoked both § 1292(a)(1) and *Rolo* expressly: "Under *Rolo* . . ., the district court's orders are decisions 'refusing . . . injunctions' that Section 1292(a)(1) makes appealable." Appellants' Br. at 1.

Yet the majority never cited § 1292(a)(1) and never cited *Rolo*. The only thing it said of Plaintiffs' argument was that "Appellants have presented no argument warranting a different result. Thus, this Court is without jurisdiction to hear this appeal because the challenged orders are not appealable under 28 U.S.C. § 1291." Op. at 2.

For run-of-the-mill non-threshold appellate issues, a decision's failure to grapple with all of a party's arguments may not warrant rehearing. But when the issue is appellate jurisdiction and when the failure is so stark, rehearing is warranted.

Judge Phipps was right to dissent for two separate reasons. The panel majority opinion is wrong on its face, flatly contradicting § 1292 and conflicting with this Court's prior decisions in *Rolo* and *Victaulic*. And it is a manifest injustice for the Plaintiffs that supplied the correct authorities so squarely, to no avail.

For these reasons, the Court should grant the petition for rehearing, vacate the panel decision and the judgment rendered thereupon, and assign the case to the calendar for rehearing *en banc* with supplemental briefs and oral argument.

II. The motion for an injunction pending appeal warrants immediate attention.

After filing the Appellants' Brief, Plaintiffs moved for an injunction pending appeal against Grewal's ongoing censorship. A response and reply were filed, making the motion ripe for decision. The panel opinion says that the "appeals are dismissed for lack of appellate jurisdiction" and specifies that another pending motion was "denied as moot" (Grewal's motion for summary affirmance). Op. at 2. But it does not expressly rule on the motion for an injunction pending appeal. As a result, that motion was either impliedly denied or remains pending. In either case, the motion warrants immediate attention. *See* Appellants' Motion for Injunction Pending Appeal at 2 (Request for Expedited Consideration).

At least two options exist. In addition to granting rehearing *en banc*, the Court could either (1) direct the panel to resolve the motion for an injunction pending appeal immediately, or (2) resolve the motion for an injunction pending appeal itself (*en banc*). In light of the extraordinary procedural and substantive failures already encountered at every level, the Court should exercise the latter option.

Conclusion

The Court should grant the petition for rehearing, vacate the panel decision and the judgment rendered thereupon, and assign the cases to the calendar for rehearing *en banc* with supplemental briefs and oral argument.

Meanwhile, until the Court has both resolved this petition for rehearing and the case, Appellants' motion for an injunction pending appeal should be granted.

December 5, 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 3,891 not-exempted words.

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6. On December 5, 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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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 28, 2019
ACO-009-E

Nos. 19-1729 & 19-3182

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

v.

ATTORNEY GENERAL STATE OF NEW JERSEY

(D.N.J. No. 3-19-cv-04753)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

1. Motion by Appellee for Summary Affirmance;

2. Motion by Appellants for an Injunction Pending Appeals;

3. Response by Appellants to Appellee's Motion for Summary Affirmance;

4. Response in Opposition by Appellee to Motion for Injunction Pending Appeals;

5. Reply by Appellee in Support of Motion for Summary Affirmance;

6. Reply by Appellants in Support of Motion for Injunction Pending Appeal.

Respectfully,
Clerk/pdb

_____ORDER_____

The foregoing appeals are dismissed for lack of appellate jurisdiction and the Motion for Summary Affirmance is denied as moot.[1] Generally, we may only hear appeals from "final decisions of the district courts of the United States." 28 U.S.C. § 1291. Appellants have appealed the district court's orders staying all proceedings and dismissing a pending preliminary injunction without prejudice to being refiled following the resolution of a related action in the Western District of Texas that is now on appeal before the Fifth Circuit Court of Appeals. First, the order staying the matter is not final. Second, appellate courts generally lack jurisdiction over issues that have been dismissed without prejudice. *See Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co*., 316 F.3d 431, 438-40 (3d Cir. 2003). Appellants have presented no argument warranting a different result. Thus, this Court is without jurisdiction to hear this appeal because the challenged orders are not appealable under 28 U.S.C. § 1291.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: November 21, 2019
PDB/cc: All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

[1] The Honorable Peter J. Phipps would hold that the Court has jurisdiction to hear the appealed district court orders and Motion for Summary Affirmance.