No. 22-50669

In the United States Court of Appeals
For the Fifth Circuit

Defense Distributed; Second Amendment Foundation, Incorporated,

Plaintiffs - Appellants

v.

Matt Platkin, Attorney General of New Jersey, in his official capacity,

Defendant - Appellee

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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The Court should decide this appeal with oral argument for the same reasons that it did so in *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020), and *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022). It presents issues of exceptional importance for both this impactful case and federal law at large.

Another jurisdictional standoff is at hand. The Court most recently concluded that, "[u]pon return of this case to the Western District of Texas, the court should entertain a motion for preliminary injunction expeditiously." *Bruck*, 30 F.4th at 421. But despite the case against the New Jersey Attorney General having been put back before the Western District of Texas (in not just one but two valid ways), the district court still will not abide. Once again it refused to rule on Plaintiffs' motion for a preliminary injunction. The decision's sole basis is a supposed lack of "jurisdiction" that is clearly wrong. Errors of this magnitude deserve oral argument's full vetting.

Whether the AG would show up to an oral argument is unknown. Ever since this Court decided *Bruck*, he refused to appear in the Western District of Texas. The AG submitted literally *nothing* in response to the filings that put the case against him back before the Western District of Texas and *nothing* in response to the motion for a preliminary injunction. At oral argument this tactic might be explained. But its result cannot be avoided. The AG's no-show tactic triggers a waiver, forfeiture, and/or default that stops him from now making any non-jurisdictional arguments.

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NOTICE OF PANEL ASSIGNMENT

By order of the Court in this case's prior appeal, this appeal and any other "future requests for appellate relief shall be directed to the panel consisting of Judges JONES, ELROD, and HIGGINSON." Order, *Defense Distributed v. Grewal*, No. 19-50723 (Sept. 11, 2020) (per curiam) (ROA.4440).

JURISDICTIONAL STATEMENT

This is an appeal from an order denying a motion for a preliminary injunction. The appeal's parties are Plaintiffs Defense Distributed and the Second Amendment Foundation, Inc. ("SAF") and Defendant the New Jersey Attorney General. The case below includes State Department defendants that are not parties to this appeal.

The district court has subject matter jurisdiction over Plaintiffs' claims against the AG because the complaint, ROA.1860-61, and preliminary injunction request, ROA.4406 & n.1, properly invoked federal question jurisdiction, *see* 28 U.S.C. §§ 1331, 1343, diversity jurisdiction, *see* 28 U.S.C. § 1332, and supplemental jurisdiction, *see* 28 U.S.C. § 1367. *See also United States v. Ruiz*, 536 U.S. 622, 628 (2002) (jurisdiction to determine jurisdiction). *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020), upheld personal jurisdiction over the AG in Texas.

This Court has appellate jurisdiction because a timely notice of appeal, ROA.4438 (July 25, 2022), challenges the district court order denying Plaintiffs' motion for a preliminary injunction and an associated procedural motion, ROA.4436 (July 22, 2022). 28 U.S.C § 1292(a) gives this Court appellate jurisdiction over all aspects of that order, including both the motion for a preliminary injunction and the associated procedural motion. *See BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1540 (2021) (jurisdiction over an "order" includes all "fairly encompassed" issues).

ISSUES PRESENTED

Defense Distributed v. Grewal, 971 F.3d 485 (5th Cir. 2020), upheld personal jurisdiction for this case in Texas. *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), upheld venue for this case in Texas. That most recent decision required vacatur of a clearly erroneous sever-and-transfer order and concluded that, "[u]pon return of this case to the Western District of Texas, the court should entertain a motion for preliminary injunction expeditiously." *Id.* at 421 n.2. So Plaintiffs Defense Distributed and SAF presented the case against the AG to the Western District of Texas and sought a preliminary injunction. ROA.4403. But the district court refused to rule by holding that it "lacks jurisdiction." ROA.4437.

I. The first question presented is whether the district court had jurisdiction to adjudicate Plaintiffs' preliminary injunction request. Two subsidiary issues exist:

(1) *Revival*. Did the district court have jurisdiction over Plaintiffs' injunction request on the theory that vacatur of the sever-and-transfer order revived the Second Amended Complaint? It did.

(2) *Refiling*. Did the district court have jurisdiction over Plaintiffs' injunction request on the theory that Plaintiffs' sought leave to re-file the Second Amended Complaint as though suing anew? It did.

II. If the district court erred in entering the jurisdictional dismissal, the second question presented is whether, before remanding, this Court should render the requested preliminary injunction. It should. The case that started in 2018 and has yet to receive a real preliminary injunction ruling deserves one now, from this Court.

STATEMENT OF THE CASE

This is the latest installment in Defense Distributed and SAF's long-running free speech case against the AG. The case below is the one giving rise to *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020), and *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), which state the basic background.

"Since 2013, Appellants have been challenging publication restraints imposed by the U.S. State Department, federal courts, and the State of New Jersey after Defense Distributed published to the Internet computer assisted design ("CAD") files for a single-round plastic pistol." *Id.* at 421. From 2018 to present, the AG has wielded against Defense Distributed and SAF "what appear to be flagrant prior restraints." *Id.* "These Appellants' First Amendment freedoms have been restrained for years." *Id.* at n.1. "Although Defense Distributed is still prevented from publishing, the CAD files it published remain available to this day on countless other websites internationally." *Id.* (footnote omitted).

At issue here is Defense Distributed and SAF's latest effort to obtain a preliminary injunction against the AG's ongoing censorship. For nearly *four years*, Defense Distributed and SAF have sought injunctions from every court they have been before. Yet no court has ever ruled on an injunction request's merits. With both personal jurisdiction and venue now clearly established in Texas, this Court is perfectly positioned to grant the preliminary injunction that is so deserved.

I. Defense Distributed published digital firearms information.

Plaintiff Defense Distributed is a Texas company founded by Cody Wilson that exists to promote the Second Amendment's individual right to keep and bear Arms. *See* ROA.1858. To that end, Defense Distributed authors and publishes a wide variety of digital firearms information. ROA.1858. Its publications address a variety of individual firearm components, as well as a complete single-shot firearm known as the "Liberator." ROA.1868. Defense Distributed also collects, revises, and republishes digital firearms information authored by others. ROA.1868.

Plaintiff Second Amendment Foundation, Inc. ("SAF") is a nationwide non-profit membership organization that promotes the right to keep and bear arms by researching, educating, publishing, and litigating about the constitutional right to privately own and possess firearms and gun control's consequences. ROA.1858. Across the nation and in New Jersey, certain of SAF's members seek to receive the digital firearms information that Defense Distributed publishes, to publish their own digital firearms information by utilizing Defense Distributed's facilities, and to republish digital firearms information files independently. ROA.1858.

A. In Texas, Defense Distributed freely published digital firearms information online.

Before the AG came onto the scene, Defense Distributed published digital firearms information to the internet's public domain on multiple occasions. *See* ROA.1864 (complaint); *Defense Distributed v. Grewal*, 971 F.3d at 488-89. On

each occasion, Defense Distributed did so by publishing files to its defcad.org and defcad.com websites (collectively "DEFCAD") and letting visitors freely download them. One such publication period lasted from December 2012 to May. ROA.1867, 3802, 3731; *Defense Distributed v. Grewal*, 971 F.3d at 488. Another such period lasted from July 27 to July 31, 2018. ROA.1867, 3802, 3731 *Defense Distributed v. Grewal*, 971 F.3d at 488. Millions of downloads occurred during these DEFCAD publication periods. ROA.1868.

B. In Texas, Defense Distributed freely published digital firearms information by mail.

Defense Distributed also published digital firearms information via the mail. ROA.1869, 3806. From late August 2018 through early November 2018, Defense Distributed did so by storing its digital firearms information on USB drives and SD cards, selling them to customers online via DEFCAD, and shipping the USB drives and SD cards to purchasers via the United States Postal Service. ROA.1869, 3806.

C. In Texas, Defense Distributed freely published digital firearms information at a public library.

Furthermore, Defense Distributed published its digital firearms information by hosting the files at a brick-and-mortar public library in digital formats that patrons can access via computer workstations. ROA.1869*; Defense Distributed v. Grewal*, 971 F.3d at 488. The public library housing Defense Distributed's publications is in Austin, Texas. ROA.1869.

Because of these prior publications, Defense Distributed's files will exist online forever. Without coordination, the recipients of Defense Distributed's digital firearms information are persistently republishing the files at countless websites for free download. ROA.1871. The republished files are not, as one judge errantly concluded, hidden in "dark or remote recesses of the internet."[1] Simple Google searches yield the republished files with ease, ROA.1871, and always will.

II. The AG is directly censoring Defense Distributed and SAF.

A. Civil censorship is occurring.

Beginning in July 2018, the AG has acted under the color of state *civil* laws to censor the publication of digital firearms information. He issued a cease-and-desist letter expressly censoring Defense Distributed, sued Defense Distributed in court, and threatened Defense Distributed's third-party service providers—all in an effort to stop the exchange of digital firearms information that Defense Distributed initiates in Texas.

A formal cease-and-desist letter began the civil campaign on July 26, 2018. ROA.1891-93. Issued by the AG to Defense Distributed, that letter announced that publishing digital firearms information on the internet violated New Jersey's "public nuisance and negligence laws." ROA.1891-93. The AG threatened Defense

[1] *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1262 (W.D. Wash. 2018).

Distributed to stop publishing or else: "If you do not halt your efforts to proceed with publication, I will bring legal action against your company. . . ." ROA.1891-93.

Internet service providers were another of the AG's targets. Under the guise of "public nuisance" law, the AG sent letters to Defense Distributed's internet hosting provider, Dreamhost, and to its internet security provider, Cloudflare. ROA.1891-93. These letters urged—by way of threats, coercion, and intimidation—Dreamhost and Cloudflare to terminate their contracts with Defense Distributed. ROA.1891-93.

The AG's combination of censorship measures is not happenstance. His own press releases touted this litany of enforcement actions as a coordinated effort to stop the free exchange of digital firearms information. ROA.2639 (Grewal's press release). The cease-and-desist letters, the intimidation of service providers, and civil lawsuits are all part of the AG's unified plan to stop Defense Distributed "from publicly releasing computer files." ROA.2639.

B. Criminal censorship is occurring.

In the wake of DEFCAD's most recent online publications, the State of New Jersey armed the AG with Senate Bill 2465's Section 3(*l*)2. S.B. 2465, 218th Leg., Reg. Sess. (N.J. Nov. 2018). The law is codified as Section (*l*)(2) of New Jersey Code of Criminal Justice 2C:39-9.

Section (*l*)(2) is a speech crime. It outlaws the sharing of digital firearms information. With the AG as its prime enforcer, Section (*l*)(2) criminalizes constitutionally protected speech that Plaintiffs would engage in but for the AG's enforcement threats. Calling Section (*l*)(2) his favorite new "tool," the AG aims to jail Defense Distributed's principals and employees, SAF, and anyone else that dares to exercise their right to share digital firearms information.

The threat posed by Section (*l*)(2) is not merely facial. The AG backed it up at Senate Bill 2465's publicized enactment ceremony. ROA.1893-1898. At that event, the AG expressly aimed the new speech crime at Defense Distributed and its supporters. He said that Section (*l*)(2) met his demand for "stronger tools to stop them"—those sharing digital firearms information—because "a Texan named Cody Wilson," Defense Distributed, and its supporters were "not relenting" and "still trying to release these codes online." ROA.1893-1898. He said that the Section (*l*)(2) speech crime exists "to stop the next Cody Wilson - to fight the ghost gun industry." ROA.1893-1898. He promised to prosecute "anyone who is contemplating making a printable gun" and "the next ghost gun company." ROA.611. To Defense Distributed and anyone else across the political aisle who dares to share digital firearms information, the AG promises this: "***we will come after you***." ROA.611 (emphasis added).

To this day, the AG's unconstitutional enforcement threats remain in force. The cease-and-desist letter the AG issued to Defense Distributed has never been disclaimed. The coercive actions the AG took against Defense Distributed's service providers have never been disclaimed. The civil lawsuits the AG filed against Defense Distributed, its founder Cody Wilson, SAF, and others have never been disclaimed. The unequivocal threats the AG issued at the SB 2465 signing ceremony—to "stop" speakers from "releas[ing] these codes online" and to "come after you"—have never been disclaimed. If Defense Distributed or a SAF member were to publish the computer files at issue, the AG "*will come after*" them with every tool at his disposal. ROA.611 (emphasis added).

The civil legal actions that the AG wields against Plaintiffs are plainly unconstitutional. So is the speech crime that the AG threatens to enforce against Plaintiffs. In each of these respects, the AG has violated and is threatening to violate 42 U.S.C. § 1983 by acting, under color of state law, to deprive the Defense Distributed and SAF of rights, privileges, immunities secured by the Constitution and laws of the United States. And in each of these respects, the AG has done so by choosing to reach out beyond New Jersey's borders and use his legal authority to censor speech that is occurring in Texas, about Texas activities, and to and from Texas residents.

III. Defense Distributed and SAF sue to vindicate their free speech rights.

The instant action began in the Western District of Texas in 2018. ROA.30. The original and current plaintiffs are Defense Distributed and SAF. ROA.30-32; ROA.1858-59. The original Defendants were the AG and other states' officials. ROA.32-33. The State Department was added later. ROA.1859-60.

The gist of Appellants' case against the AG has not changed. Since the beginning, the AG has denied Appellants' their right to share digital firearms information because he cannot stand to let people speak in favor of the Second Amendment. ROA.1857. Through a torrent of prior restraints, the AG has punished and threatens to continue punishing Defense Distributed and SAF's members for exercising their federally-protected right to speak freely about firearms. At the suit's beginning the efforts were just civil, and with Section (*l*)(2) they escalated to criminal.

The means have escalated, but the end has been the same all along—unconstitutional content-based speech suppression via prior restraints. Hence, Defense Distributed and the Second Amendment Foundation sued the AG to halt his censorship under 42 U.S.C. § 1983. They sought a preliminary injunction immediately (and repeatedly) at every opportunity. But at every turn they were met with gamesmanship aimed at preventing any ruling on the merits.

A. Personal jurisdiction in Texas is established.

The AG's first evasive maneuver in the court below was to seek dismissal for want of personal jurisdiction. The district court granted that relief, but this Court reversed and remanded, holding that the AG has to answer for his censorship in Texas because he chose to target Texas itself and injure Texas itself with his wrongdoing. *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020).

With the AG's petition for rehearing *en banc* pending, Appellants asked this Court to issue an injunction pending appeal. As the party continuing to invoke this Court's jurisdiction, the AG could not complain about having to address a request for temporary injunctive relief in this Court. So rather than let this Court address the issue, the AG withdrew his petition for rehearing so the mandate would issue before the Court could act.

On remand from the personal jurisdiction decision, Defense Distributed and SAF amended the complaint to both (1) account for new facts about the AG's wrongdoing, and (2) assert Defense Distributed and SAF's related claims against the State Department. ROA.1854. Then the procedural shell games resumed.

B. Venue in Texas is established.

Back in the Western District of Texas, the AG next filed a motion asking the district court to both (1) sever the case against the AG from the case against the State Department, and (2) transfer the severed case against the AG to New

Jersey. ROA.2000. The district court granted that relief, again refusing to reach the preliminary injunction request. ROA.2462. But this Court overturned that decision as well, rightly holding that the "order severing and transferring of the claims against the NJAG to the District of New Jersey was a clear abuse of discretion giving rise to an appropriate exercise of the court's mandamus power." *Bruck*, 30 F.4th at 436.

During that appellate proceeding, Defense Distributed and SAF moved for this Court to issue an injunction pending appeal and/or preliminary injunction. But rather than rule on the motion when submitted, the Court carried it with the case for ten months. The main decision then denied the motion as moot, explaining that the "denial does not imply that the motion lacks merit." *Id.* at 421 n.2.

The Court's 2022 venue decision ended with several key mandates.[2] First and foremost, it required vacatur of the overturned severance-and-transfer decision:

> A writ of mandamus shall issue herein directing the district court to:
>
> (1) Vacate its order dated April 19, 2021 that severed Defense Distributed's claims against the NJAG and transferred them to the United States District Court for the District of New Jersey;

[2] For *Defense Distributed v. Bruck*, 30 F.4th 414, the Court's opinion *is* the mandate. *See* Fed. R. App. P. 41(a) ("Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs."). The Court issued the judgment as the mandate, ROA.4396, and the judgment instructs the district court to proceed in accordance with the Court's opinion, ROA.4357.

ROA.4388 (*Bruck*, 30 F.4th at 436-37). The decision also told the district court what to do with the aspect of the case that was sent to New Jersey: ask for it back, and upon return reconsolidate it with the existing case against the State Department:

> (2) Request the District of New Jersey to return the transferred case to the Western District of Texas, Austin Division; and,
>
> (3) After return, to reconsolidate Defense Distributed's case against the NJAG back into the case still pending against the State Department.

ROA.4388 (*Bruck*, 30 F.4th at 437).

Critically, the Court's 2022 venue decision also told the district court what to do about Defense Distributed and SAF's need for injunctive relief. The Court held that, once the case returned to the Western District of Texas, the district court was to "entertain a motion for preliminary injunction expeditiously":

> [2] The injunction motion pending before the panel is denied as moot. This denial does not imply that the motion lacks merit. The original preliminary injunction motion before the district court was denied on the basis of an incorrect finding that the district court lacked personal jurisdiction over the NJAG. Upon return of this case to the Western District of Texas, the court should entertain a motion for preliminary injunction expeditiously.

ROA.4360 (*Bruck*, 30 F.4th at 421 n.2).

Once the mandate issued, the district court in the Western District of Texas followed the first key instruction. It issued an order vacating the clearly erroneous severance-and-transfer decision:

> Pursuant to the Fifth Circuit Judgment, **IT IS ORDERED** that the Court's April 19, 2021, Order, (Dkt. 145), severing Defense Distributed's claims against the New Jersey Attorney General and transferring them to the United States District Court for the District of New Jersey, is **VACATED**.

ROA.4397. The district court also issued the request for a return of the aspect of the case that was sent to New Jersey:

> Additionally, pursuant to the Fifth Circuit's Judgment, the Court requests the District of New Jersey to return the transferred case to the Western District of Texas, Austin Division, to be reconsolidated with this matter.

ROA.4397.

C. The AG obstructs retransfer.

The proper resolution in the District of New Jersey is for the case there to be retransferred back to the Western District of Texas. That is so not just because this Court's decision was correct, but also because deference to this Court's resolution of the venue debate is compelled by longstanding principles of judicial comity and, separately, the law-of-the-case doctrine. But the District of New Jersey did not heed.

Rather, the District of New Jersey ***rejected*** the Western District of Texas' retransfer request. *Def. Distributed v. Platkin*, No. 3:19-cv-4753, 2022 WL 2967304 (D.N.J. July 27, 2022).[3] The court did so at the behest of the AG, who successfully achieved both a delayed decision and another obstructive ruling.

To slow the decision's pace, the AG successfully obtained a long briefing process despite Defense Distributed and SAF's request to expedite "because the Western District of Texas needs to conduct preliminary injunction proceedings immediately."[4] The court in New Jersey received the retransfer request on April 14, 2022,[5] but waited more than three months to issue its decision.

In substance, the parties took opposing positions. Defense Distributed and SAF asked the court in New Jersey to grant retransfer because this Court's decision in *Bruck* was right about the venue debate's merits and, more importantly, because deference to this Court's decision was owed and decisive.[6] The AG told the court

[3] The Court can and should take judicial notice of relevant docket activity in other courts, *see, e.g.*, *Orabi v. Att'y Gen. of the U.S.*, 738 F.3d 535, 537 & n.1 (3d Cir. 2014), and in particular here District of New Jersey case numbers 3:19-cv-4753 and 3:21-cv-9867.

[4] *See* ECF No. 166, *Defense Distributed v. Grewal*, No. 3:21-cv-9867 (D.N.J.) (Apr. 22, 2022) (NJAG request to extend briefing process); ECF No. 52, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (Apr. 25, 2022) (Defense Distributed and SAF's opposition to extension request and request to expedite) ("Time is of the essence . . . because the Western District of Texas needs to conduct preliminary injunction proceedings immediately."); ECF No. 53, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (Apr. 25, 2022) (letter order extending briefing process); ECF No. 170, *Defense Distributed v. Grewal*, No. 3:21-cv-9867 (D.N.J.) (May 17, 2022) (order further extending briefing process).

[5] ECF No. 48, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (Apr. 14, 2022) (notice).

[6] ECF No. 54, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (May 13, 2022) (DD/SAF letter brief); ECF No. 56, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (June 6, 2022) (DD/SAF supplemental brief).

to deny retransfer on the grounds that this Court's decision in *Bruck* was both incorrect and undeserving of any deference.[7]

Facing these arguments, the District of New Jersey refused to retransfer. The centerpiece of its reasoning is a direct rejection of this Court's decision in *Bruck*. The district judge in New Jersey denied retransfer by announcing that it "declines to follow the Fifth Circuit's conclusion that the local interest factor favors Texas as a forum." *Def. Distributed v. Platkin*, 2022 WL 2967304, at *14. It refused to retransfer because it thinks "the Fifth Circuit both overstates Texas's interests and downplays New Jersey's." *Id.* at *15. And it reject[ed] this Court's holding about preclusive effects of a Texas decision as flatly "not true." *Id.*

Reconsideration by the District of New Jersey is possible, at least technically. Currently pending is a motion for reconsideration by Defense Distributed and SAF, which was filed the very same day as the order refusing retransfer.[8] The motion exposes the District of New Jersey's key errors and shows how a simplified procedural posture solves for all concerns. It also requests expedited consideration "because the case involves extraordinary constitutional concerns, irreparable injury that is occurring now, and further irreparable injury that is imminently threatened."[9]

[7] ECF No. 169, *Defense Distributed v. Grewal*, No. 3:21-cv-9867 (D.N.J.) (May 13, 2022) (NJAG Letter Brief); ECF No. 57, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (June 6, 2022) (NJAG supplemental brief).
[8] ECF No. 61, *Defense Distributed v. Grewal*, No. 3:19-cv-4753 (D.N.J.) (July 27, 2022) (motion for reconsideration).
[9] *Id.* at 3.

As of this filing, the district court in New Jersey has no further action on the motion or otherwise in the case.

An extraordinary jurisdictional standoff is at hand. A fully and fairly litigated Fifth Circuit decision that squarely resolves this controversy's venue dispute has been essentially overruled by a decision of the District of New Jersey. All of the Article III interests protected by preclusion, law-of-the-case, and judicial comity doctrines are being trampled by the New Jersey Attorney General's latest gamesmanship.

Unfortunately, fiascos of this kind are familiar to Defense Distributed and SAF. The AG's latest gamesmanship is part and parcel of a long-running scheme of "tactics suggesting the abusive manipulation of federal court procedures in order to delay or altogether avoid meaningful merits consideration of Plaintiffs' claims." *Bruck*, 30 F.4th at 427.

Realizing this, Defense Distributed and SAF have been laying the groundwork for backup plans to deploy in case of shortcomings with the retransfer effort. To account for the possibility that has now come to fruition—unjustified derailment of the New Jersey retransfer process—Defense Distributed and SAF pursed in the district court below two additional methods of presenting their case against the AG to the Western District of Texas for preliminary injunction proceedings.

D. The case returns to Texas, but the district court still refuses to act.

To be sure, this Court's 2022 venue decision envisioned retransfer from the District of New Jersey as the most straightforward way of presenting the claims against the AG to the Western District of Texas for preliminary injunction proceedings. That would indeed *suffice*. But the retransfer solution is not *necessary* because additional methods of realizing the same end exist. Specifically, there exist two additional procedural devices (besides retransfer) that can successfully present Defense Distributed and SAF's claims against the AG to the Western District of Texas, setting up preliminary injunction proceedings.

1. Appellants moved for a preliminary injunction.

After this Court's proceedings in *Bruck* ended, Defense Distributed and SAF moved for a preliminary injunction. ROA.4403. The motion addressed all of the usual elements, such as likelihood of success on the merits. ROA.4412-20. It also addressed jurisdiction in detail.

Utilizing an ample evidentiary record, the motion proves both the nature of the technology at issue and the AG's "intent to crush Defense Distributed's operations and not simply limit the dissemination of digital files in New Jersey." *Grewal*, 971 F.3d at 493. *See* ROA.4406 (submitting the proof at ROA.580-1312, 2483-3939, 4427-28). Then, critically, Defense Distributed and SAF's motion for a preliminary injunction spoke to the issue of how claims against the AG could be

presented to the court below at this juncture. It invoked two additional ways of giving the district court the necessary power: (1) revival, and (2) refiling. ROA.4406 & n1. Each procedural device was developed in detail as follows.

2. Appellants presented the revival option.

First, Defense Distributed and SAF's motion for a preliminary injunction presented the option of revival. ROA.4399-4401; ROA.4406; ROA.4430. The revival option turns on the effect of the district court order (entered pursuant to this Court's mandate) vacating the sever-and-transfer decision:

> Pursuant to the Fifth Circuit Judgment, **IT IS ORDERED** that the Court's April 19, 2021, Order, (Dkt. 145), severing Defense Distributed's claims against the New Jersey Attorney General and transferring them to the United States District Court for the District of New Jersey, is **VACATED**.

ROA.4397.

Appellants took the position that, at least in the Western District of Texas, vacatur of the sever-and-transfer order had "automatically revived the case against the New Jersey AG to its prior, pre-severance/transfer status." ROA.4397. Citing treatises and federal circuit decisions, the revival argument said that vacatur automatically and as a matter of law "places the parties in the position they occupied before entry of the judgment, with the underlying case and the original pleadings intact." ROA.4399. By way of revival, the case was again ready to proceed:

> The resulting procedural posture is clear. Plaintiffs' case against the New Jersey AG is here, live, and ready to proceed. The live complaint is the Second Amend[ed] Complaint, which sues the State Department Defendants and the New Jersey AG together. Doc. 117. The New Jersey AG's motions regarding jurisdiction and venue have been deemed meritless. So the claims against the New Jersey AG are ready to continue, just as the Fifth Circuit indicated: "Upon return of this case to the Western District of Texas, the court should entertain a motion for preliminary injunction expeditiously." *Def. Distributed v. Bruck*, 30 F.4th 414, 421 (5th Cir. 2022). . . .
>
> Related actions are pending in the United States District Court for the District Court of New Jersey. . . . Plaintiffs anticipate that the transfer from New Jersey to Texas will occur in short order, and that when it does, everything should be consolidated in this Court. Critically, though, this Court *need not wait* for any other cases to be transferred to Texas in order to proceed with Plaintiffs' original case against the New Jersey AG—the instant case that has "first filed" status, was revived by the Fifth Circuit decisions about personal jurisdiction and venue, and is now back pending before this Court and ready to proceed. The instant case's claims against the New Jersey AG can and should proceed immediately, with implications of any future transfers to be decided if and when they occur.

ROA.4400.

3. Appellants presented the refiling option.

Second, Defense Distributed and SAF's motion for a preliminary injunction presented the district court below with the additional option of refiling. ROA.4406; ROA.4430. They argued that, if all else failed in the effort to bring the existing action against the AG back to life in Texas, Defense Distributed and SAF could always just start over and re-file those claims anew. ROA.4406; ROA.4430. By refiling anew in the Western District of Texas, jurisdiction would be settled and so

would venue—free of whatever case-specific procedural strings are attached to the matter in New Jersey. ROA.4406; ROA.4430.

Technically, the refiling option would *not* involve a *new* civil action because Defense Distributed and SAF's claims against the AG still belong with Defense Distributed and SAF's existing claims against the State Department. *See Bruck*, 30 F.4th at 427-433 (severing the claims is a clear abuse of discretion). So instead of filing a new freestanding action, the refiling option entails amending the existing complaint in the case against the State Department to include Defense Distributed and SAF's claims against the AG. But of course, the existing complaint in Defense Distributed and SAF's live case against the State Department *is still the Second Amended Complaint* - the document that literally states both the claims against the State Department and the claims against the AG. ROA.4406.

Refiling therefore required just the technical formality of deeming a document already on the district court's docket the current complaint. In this way the motion for a preliminary injunction invoked the refiling option as its alternative basis for action:

> Plaintiffs' Notice of Vacatur and Related Litigation explains how *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), and this Court's vacatur of the April 2021 transfer/severance decision have, as a matter of law without the need for further Court order or party pleading amendments, revived the Plaintiffs' case against the New Jersey AG as pleaded by the Second Amended Complaint. Doc. 173. *Alternatively, even if the Court were to deem it necessary for Plaintiffs to perform a technical formality of refiling the Second Amend[ed]*

> *Complaint, Plaintiffs hereby request leave to do under Federal Rule of Civil Procedure 15. In no event does the need to take such steps delay or stop the Court's adjudication of this motion for a preliminary injunction.* See 11A Charles Alan Wright & Arthur R. Miller et al., Federal Practice & Procedure § 2949 & nn. 5-6 (3d ed. West 2018) ("The grant of a temporary injunction need not await any procedural steps perfecting the pleadings or any other formality attendant upon a full-blown trial of this case.").

ROA.4406 (emphasis added).

4. The AG refused to show up.

The AG took an enormously risky tactical approach below. He filed nothing whatsoever. He intentionally refused to participate in the proceedings on Defense Distributed and SAF's latest motion for a preliminary injunction.

No procedural excuse for the AG's truancy exists. Appellants presented all of the latest filings in perfect accordance with the Federal Rules of Civil Procedure. The AG was both served with the filings normally through ECF, ROA.4402; ROA.4426; ROA.4433, and additionally acknowledged service of the filings via emails the receipt, ROA.4434. These filings appeared on the docket sheet, just like any other filing. ROA.28-29. There is no doubt that the AG received the filings. He just chose not to respond. *See* ROA.4434.

This striking failure was called to the district court's attention by separate motion. ROA.4429 ("Plaintiffs Motion to Grant as Unopposed or Set a Hearing."). Defense Distributed and SAF highlighted the pending submissions, ROA.4430, and explained that the AG's refusal to respond was both legally wrong and prejudicial,

"unnecessarily prolonging the infliction of irreparable harm." ROA.4430. The motion asked the district court to grant the motion as unopposed or alternatively to set a hearing and rule quickly, ROA.4430-31.

5. The district court refused to exercise jurisdiction.

The district court resolved Defense Distributed and SAF's request for a preliminary injunction, including both the revival and refiling procedural devices, by dismissing the motion for lack of jurisdiction. The ruling has little reasoning, skirts the issue of revival, and says nothing at all of refiling:

> Given the unusual procedural posture of this case, the Court remains mindful of the limits on its jurisdiction. (*See* Dkt. 171, at 8 ("[The Fifth Circuit] lacks power to order a return of the case to our circuit."); *see also In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015) ("It seems uncontroversial in this situation that a transfer to another circuit removes the case from our jurisdiction."). Absent contrary authority, the Court understands that it lacks jurisdiction to consider
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>
> claims against the New Jersey Attorney General in this matter. Having no power to adjudicate these motions, the Court must dismiss them.
>
> Accordingly, **IT IS ORDERED** that Plaintiffs' Motions for Preliminary Injunction, (Dkt. 174), and to Grant as Unopposed or Set a Hearing, (Dkt. 175), are **DISMISSED**.
>
> **SIGNED** on July 22, 2022.

ROA.4435-36. Defense Distributed and SAF timely appealed. ROA.4438.

SUMMARY OF THE ARGUMENT

Defense Distributed and SAF challenge the district court's decision to dismiss for lack of jurisdiction their motion for a preliminary injunction against the AG. The motion should not have been dismissed for lack of jurisdiction. It should have been adjudicated and granted. The Court should both reverse the district court's jurisdictional dismissal and render a judgment granting the preliminary injunction.

Reversal is required because the dismissal decision's sole ground—no "jurisdiction" and "no power to adjudicate," ROA.4436-37—is clearly wrong as a matter of law. Even if the merits question of whether to *grant* the injunction request is debatable, the jurisdictional question of power to *adjudicate* the request is not. Jurisdiction existed because the claims against the AG were returned to the district court by either (1) revival of the Second Amended Complaint, or (2) refiling of it. Jurisdiction existed one way or another. The refusal to exercise it warrants reversal.

To remedy that error, this Court should do what the district court should have done and grant the requested injunction. The existing record amply shows Plaintiffs' entitlement to that relief, including a high likelihood of success on multiple fronts. The AG cannot have a remand for more argument or factual development because he intentionally refused to participate in proceedings below, filing *literally nothing*. That wholesale act of waiver, forfeiture, and/or default both limits what the AG can argue on appeal and stops the AG from avoiding an immediate injunction ruling.

ARGUMENT

The district court dismissed Defense Distributed and SAF's motion for a preliminary injunction against the AG on jurisdictional grounds, holding that it "lacks jurisdiction to consider claims against the New Jersey Attorney General in this matter" and has "no power to adjudicate" the relevant motions. ROA.4436-37. De novo review applies to this jurisdictional decision. *See, e.g.*, *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011). The Court should reverse because jurisdiction existed. Before remanding, the Court should also render the judgment the district court should have and grant the preliminary injunction.

I. The district court had power to adjudicate Appellants' injunction request.

The district court dismissed Appellants' motions requesting a preliminary injunction, holding that it "lacks jurisdiction" and has "no power to adjudicate these motions." ROA.4437. That dismissal turns on the false premise that Defense Distributed and SAF's claims against the AG had *not* yet been validly presented to the Western District of Texas. *Id.* This is wrong as a matter of law.

Jurisdiction to adjudicate the preliminary injunction request existed because Defense Distributed and SAF's claims against the AG *had* been validly presented. While it is true that *one* procedural solution has yet to occur (retransfer of what lies before the District of New Jersey), Defense Distributed and SAF had nonetheless presented their claims against the AG by invoking two alternative solutions: (1) revival of the Second Amended Complaint and (2) refiling of it. One way or another, the threshold steps needed to establish jurisdiction below were clearly accomplished.

The only actual *jurisdictional* requirements below were easily satisfied. Subject-matter jurisdiction exists because the Second Amended Complaint, ROA.1860-61, and injunction request, ROA.4406 & n.1, invoked federal question jurisdiction, diversity jurisdiction, and supplemental jurisdiction, *see* 28 U.S.C. §§ 1331, 1332, 1343, 1367. Personal jurisdiction was both established by this Court's decision in *Grewal*, 971 F.3d 485, and is a waivable defense not raised below.

Whatever other holdups might be argued are decidedly *not* jurisdictional. They may relate to procedural claim-processing rules. Or they may go to the merits. But no such procedural claims-processing or merits arguments are jurisdictional. No such non-jurisdictional arguments should be raised by a district court *sua sponte* without notice. And no such non-jurisdictional arguments can be pressed for the first time on appeal by a litigant that intentionally refused to participate below.

A. Vacatur of the sever-and-transfer order presented the case.

Revival is the first of two procedural devices establishing that, when Defense Distributed and SAF moved for the preliminary injunction, the district court had jurisdiction over the Second Amended Complaint's claims against the AG. All of the filings below presented this argument. ROA.4399-4401; ROA.4406 n.1; ROA.4430. The district court rejected revival without specific reasoning, impliedly denying it by saying that it had "no power to adjudicate these motions." ROA.4437. That jurisdictional dismissal constitutes a matter-of-law error warranting reversal.

By operation of law, revival of Defense Distributed and SAF's claims against the AG below occurred upon entry of the order vacating the severance-and-transfer decision. ROA.4397 ("the Court's April 12, 20201 Order . . . is VACATED"). No exercise of discretion was required for the vacatur to cause revival. No further motion had to be filed. No further ruling needed to occur. The revival occurred by operation of law—immediately and automatically—according to the black-letter federal procedural rule defining vacatur effects:

> When a judgment has been rendered and later set aside or vacated, the matter stands precisely as if there had been no judgment. The vacated judgment lacks force or effect and places the parties in the position they occupied before entry of the judgment, with the underlying case and the original pleadings intact.

47 Am. Jur. 2d Judgments § 676 (2009).

That black-letter definition of vacatur effects is correct. It rightly equates "vacate" with "make void" and rightly states voidness consequences. *See Vacate*, Black's Law Dictionary (11th ed. 2019) ("vacate" means "nullify or cancel; make void; invalidate"); *Void*, Black's Law Dictionary (11th ed. 2019) ("void" means as "Of no legal effect; to null").

The rule that "a vacated order never happened" has been "uniformly understood" for centuries. *United States v. Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., dissenting). "More recent cases agree" as well. *Id.*

That definition of vacatur's effect—vacatur of an order places the parties in the position they occupied before the order, with prior pleadings intact—accords with the most recent Supreme Court precedent. *Pepper v. United States*, 562 U.S. 476, 507 (2011), rightly explains that a vacatur "wipe[s] the slate clean." *Id.* at 507 (analyzed by *United States v. Cardona*, 420 F. App'x 448, 452 (5th Cir. 2011)).

Circuits nationwide uphold that definition of vacatur's effect. *See, e.g.*, *United States v. Mitchell*, 38 F.4th 382, 388 (3d Cir. 2022) ("To vacate is 'to cancel or rescind' and to 'render an act void.'"); *United States v. Jackson*, 995 F.3d 522, 525 (6th Cir. 2021) ("Vacatur…'make[s] void' the thing vacated. When that thing becomes void, it is 'of no legal effect' anymore."); *United States v. Bethea*, 841 F. App'x 544, 550 (4th Cir. 2021) ("The general, legal understanding of vacatur is that it renders the original judgment null and void."); *Ditto v. McCurdy*, 510 F.3d 1070, 1077 n.4 (9th Cir. 2007) (utilizing 47 Am. Jur. 2d Judgments § 676); *Quarles v. Sager*, 687 F.2d 344, 346 (11th Cir. 1982) ("The judgment of the district court was vacated; thus, no final judgment on the merits exists.").

In the Fifth Circuit, that definition of a vacatur's effect—vacatur of an order places the parties in the position they occupied before the order, with prior pleadings intact—has been the law for decades. *See, e.g.*, *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991) (a vacated order is immediately "null and void.").

That definition also prevailed in the Court's most procedurally analogous case: *Diece-Lisa Indus., Inc. v. Disney Enterprises, Inc.*, 943 F.3d 239 (5th Cir. 2019). *Diece-Lisa* supports the conclusion that vacatur caused claim revival here. It applies because both *Diece-Lisa* and this case involved vacating an order that had changed case parties. *Diece-Lisa*'s vacated order had changed the parties by granting leave to amend a complaint, *id.* at 245, 253-54; and the vacated order below likewise changed the parties by granting a motion to sever and transfer. The key conclusion of *Diece-Lisa* is that vacatur of a party-changing order *automatically reverted the case to its prior status, immediately restoring parties and claims to what they were before entry of the vacated order*. *Id.* Just as *Diece-Lisa*'s vacatur of a party-adding order had the automatic and immediate effect of "removing" parties and "nullifying" claims against those parties, the instant vacatur of a party-subtracting order had the effect of replacing the AG as a defendant and reviving the claims against him. *See id.*[10]

The Court should simply apply the well-established rules of vacatur here. Before the district court entered the now-vacated sever-and-transfer order, Plaintiffs' Second Amended Complaint put *both* Appellants claims against the State Department Defendants *and* their claims against the AG before the Western District

[10] The vacated order in *Diece-Lisa*'s *added* parties, *id.*, whereas the vacated order here *subtracted* parties. But of course vacatur works the same for both party-adding and party-subtracting decisions. So it matters not that *Diece-Lisa* is a mirror image of this case.

of Texas. ROA.1854. For a short time, the sever-and-transfer order had a divisive effect (the exact nature of which is disputed, but need not be resolved). But once the district court vacated the sever-and-transfer order pursuant to this Court's mandate, the action before the Western District returned to the status *ex ante*—before severance and transfer—when it undoubtedly contained claims against both the State Department and the AG. The Court should so hold and reverse on this basis alone.

The Court's analysis of Defense Distributed's revival argument can and should stop there, with a straightforward application of the black-letter procedural rules about what vacatur entails. Two looming issues need not be confronted.

First, the Court need not confront any questions about whether the vacatur *should have been* ordered in the first place. That question was conclusively resolved by *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022).

Bruck was quite correct, but its correctness is beside the point. The Court's decision to mandate vacatur is final; no collateral attack is allowed. *See United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991) ("While we might have fashioned the mandate differently, we did not; the vacatur is the law of the case, and the district court 'has no power or authority to deviate' from it."); *Renteria-Gonzalez v. I.N.S.*, 322 F.3d 804, 812 (5th Cir. 2002) ("the INS cannot collaterally attack the Order To Vacate, even for want of jurisdiction, because it did not directly appeal that order . . . We therefore must treat the Order To Vacate as proper in every respect . . . .").

Second, the Court need not and should not in this appeal confront any questions about how, when proceedings resume below, revived claims in the Western District of Texas will relate to whatever claims remain against the AG in the District of New Jersey. Perhaps, for example, the parties in one court will seek to stay litigation in the other by invoking the "first filed" rule. Though it is already clear that Defense Distributed and SAF would win any such dispute,[11] the Court should not opine on that question unless and until it is actually presented for review.

* * *

For these reasons, the argument regarding complaint revival via vacatur shows that, when Defense Distributed and SAF moved for the preliminary injunction, the Western District of Texas had jurisdiction over their Second Amended Complaint's claims against the AG. The district court's jurisdictional dismissal was therefore wrong. On this basis alone, the Court should reverse the district court's decision and proceed to the remedial question of whether, before remanding for further proceedings, the Court should itself enter the requested preliminary injunction. *See infra* Part III. Alternatively or additionally, Defense Distributed and SAF presented a second argument below that established the district court's jurisdiction.

[11] Yet another effort by the AG to stop litigation in Texas with the "first filed" rule of abstention would fail for many reasons. Foremost amongst them is that Defense Distributed and SAF's case in Texas was filed "first," long before any other relevant action existed. Many other reasons exist as well. *See, e.g.*, *NOPSI v. Council of the City of New Orleans*, et al., 491 U.S. 350, 366 (1989) ("abstention is not appropriate if the federal plaintiff will 'suffer irreparable injury' absent equitable relief").

B. The request for leave to refile presented the case.

Refiling is the second procedural device establishing that, when Defense Distributed and SAF moved for the preliminary injunction, the district court had jurisdiction over their claims against the AG. As with revival, all of the filings below presented the alternative refiling argument. *See* ROA.4406 n.1; ROA.4430. And as with revival, the district court implicitly rejected refiling by saying that it had "no power to adjudicate these motions." ROA.4437. This too was error.

Appellants' alternative refiling argument should not have caused jurisdictional dismissal. It should have been adjudicated on the merits and accepted as demonstrating that Appellants' claims against the AG were still properly presented at the time of the motion for a preliminary injunction. The Court should remedy this distinct error by reversing the district court's dismissal and rendering the judgment that should have been rendered below—an order granting both the request to refile the Second Amended Complaint and the preliminary injunction.

1. The district court had jurisdiction to adjudicate the request for leave to amend.

Even if Defense Distributed and SAF's claims against the AG had not been automatically revived by the vacatur order, they were nonetheless still properly presented by Defense Distributed and SAF's alternative request for leave to refile the Second Amended Complaint. Thus, at the time of the motion for a preliminary injunction, there was no lack of jurisdiction below.

Jurisdiction would have undoubtedly existed if, instead of acting to amend the 2018 action's existing complaint, Defense Distributed and SAF had instead initiated a brand new standalone action against the AG. But refiling a *separate* standalone action would flout this Court's holding in *Bruck* that Appellants' claims against the AG belong with Appellants' claims against the State Department. Hence the use of a Rule 15 amendment to both establish jurisdiction and respect the severance ruling.

Federal Rule of Civil Procedure 15 gave Appellants the right to request leave to re-file the Second Amended Complaint. Rule 15(a)(2) gives every "party" to an existing action the right to "amend its pleading…with…the court's leave." Fed. R. Civ. P. 15(a)(2). Even on the district court's view of the case—that the original claims against the AG are gone—the district court still has before it a properly situated case by Defense Distributed and SAF against the State Department. So since Defense Distributed and SAF were each still "party" to that existing action, Rule 15 gave Defense Distributed and SAF a right to seek leave to amend their complaint.

That use of Rule 15—adding defendants to an action—is perfectly acceptable. Courts everywhere hold that "a party may make a Rule 15(a) amendment to add, substitute, or drop parties to the action." 6 Charles A. Wright & Arthur R. Miller et al., 6 Federal Practice & Procedure § 1474 & nn.22-24. (West 3d ed. 2022) (hereinafter "Wright & Miller"). This Court's precedent accords, having always

allowed Rule 15 pleading amendments to add parties. *See, e.g., Wilger v. Dep't of Pensions and Sec. for State of Ala.*, 593 F.2d 12 (5th Cir. 1979).[12]

A court's obligation to exercise jurisdiction conferred upon it is "virtually unflagging," *e.g.*, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013), and the district court here had no reason not to exercise it. Thus, once Defense Distributed and SAF invoked their right as an existing action's "parties" to seek leave to refile the Second Amended Complaint, the district court was required to adjudicate it.

A key point is proven by *Netsphere, Inc. v. Gardere Wynne Sewell, L.L.*P, 657 F. App'x 320, 323 (5th Cir. 2016), *Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd.*, 821 F.3d 573, 575 (5th Cir. 2016), and *Republic of Ecuador v. Connor*, 708 F.3d 651, 655-56 (5th Cir. 2013). Each of those decisions defeats the kind of "no power" reasoning used below, as each holds that what some called a "jurisdictional" bar was really just an argument about how to resolve a request on the merits.

[12] *See also Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003) ("In this Circuit, when a district court dismisses the complaint, but does not terminate the action altogether, the plaintiff may amend under Rule 15(a) with permission of the district court."). No dismissal of Defense Distributed and SAF's "action" ever occurred here. Nor did the district court dismiss the "complaint" at issue. There was instead only dismissal of certain "claims," which left open the plaintiffs' option to make later requests for leave to amend. *Compare Whitaker v. City of Houston, Tex.*, 963 F.2d 831, 835 (5th Cir. 1992) ("If . . . the district court's order does not expressly or by clear implication dismiss the action, then…such order merely dismisses the complaint."), *with* ROA.2462 (the now-vacated order severing and transferring Defense Distributed and SAF's "claims" against the AG).

Netsphere is the most recent example. *Netsphere*, 657 F. App'x at 323-24. At issue there, as here, was an effort "to recast…merits arguments as jurisdictional." *Id.* (citing *Grupo Mexico*, which cites *Republic of Ecuador*). One may or may not think that Defense Distributed and SAF invoked Rule 15 "erroneously, but that does not implicate subject-matter jurisdiction." *Id.* Just as in *Netsphere*, what the district court here called a lack of "jurisdiction" is "not jurisdictional at all." *Id.*

2. The request for leave to amend should have been granted.

The district court here was not just required to exercise jurisdiction and adjudicate the request for leave (which standing alone would be enough for reversal). On this record, the district court was required to grant leave. The Court should therefore reverse the district court's jurisdictional dismissal and render a judgment granting Defense Distributed and SAF's request for leave, deeming the Second Amended Complaint refiled as to both the State Department and the AG.

Rule 15 instructs district courts to "freely give leave when justice so requires." Fed. R. Civ. P. 15(b)(2).[13] The rule ever since *Foman v. Davis*, 371 U.S. 178 (1962), has been that "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). There is no substantial

[13] *See also* Wright & Miller § 1474 & n.26 ("the same basic standard for adding or dropping a party will apply whether the pleader moves under Rule 15(a) or Rule 21"); *id.* § 1479 ("the amendment of Rule 15(c) in 1966, providing for the relation back of amendments changing parties, impliedly sanctions the view that parties may be changed by a Rule 15 amendment").

reason to deny leave here; and even if one were arguable, none was presented below and none was explained by the district court. The record is completely devoid of any reason to oppose leave. The applicable rule is therefore that the "district court's failure to provide an adequate explanation to support its denial of leave to amend justifies reversal." *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 426 (5th Cir. 2004). The Court should render a judgment granting leave.

II. The AG waived, forfeited, and/or defaulted all non-jurisdictional opposition to the preliminary injunction request.

Of course the district was required to determine subject-matter jurisdiction *sua sponte*. But for all the reasons just shown, subject-matter jurisdiction existed. Next for the district court below, and hence next for this Court when it decides what to do after reversing, is the issue of how to decide the non-jurisdictional aspects of Defense Distributed and SAF's motion for a preliminary injunction.

A price must be paid for the AG's massive tactical error. In the proceedings below, the AG had a full and fair opportunity to make all manner of arguments. He could have opposed the chosen procedures. He could have opposed the motion's substance. He could have insisted on factual development. He could have asked for more time. But he did none of that. He filed literally nothing at all,[14] committing

[14] The AG filed nothing whatsoever despite Defense Distributed and SAF having expressly called the failure to everyone's attention. ROA.4429. They invoked the local rule providing that "where, as here, 'there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed.'" ROA.4403 (quoting W.D. Tex. Local Rule CV-7(a)(d)(2)).

the most complete act of waiver, forfeiture, and/or default known to law. The Court should therefore not consider any non-jurisdictional arguments made for the first time on appeal. *See, e.g.*, *VRC LLC v. City of Dallas*, 460 F.3d 607, 612 (5th Cir. 2006) ("[an appellee's] arguments made for the first time on appeal, and therefore not raised in the district court, are waived").

For this reason, after reversing the district court's errant jurisdictional dismissal, the Court should do as the district court should have and grant the preliminary injunction on grounds of waiver, forfeiture, and/or default. Alternatively, if the Court does not resolve the motion for a preliminary injunction on that basis, it should resolve the motion on its merits and reach the same result.

III. The preliminary injunction request is meritorious.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). But "none of the four prerequisites has a fixed quantitative value." *Tex. v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975). "Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Id*.

They even held out the option of letting the AG file briefs on a new schedule. ROA.4430-31. But the AG wanted nothing to do with any of this.

This action's central question is whether the AG's use of state civil and criminal law to censor Appellants violates the First Amendment and other key free speech protections. It does. Plaintiffs are likely to succeed in having both the speech crime and civil enforcement actions held unconstitutional and enjoined.

Extraordinarily harmful speech suppression makes the need for relief dire. The AG threatens to enforce a new criminal law against Plaintiffs: Section (*l*)(2) of New Jersey Revised Statutes Section 2C:39-9 (part of the Code of Criminal Justice). Section (*l*)(2) criminalizes constitutionally protected speech that Appellants have engaged in before and would be engaging in now but for the AG's suppression. Plaintiffs have been and are being censored—their exercise of constitutional rights has been and is being both directly denied and indirectly chilled—because of the AG's promise to jail them and anyone else who speaks in violation of the Section (*l*)(2) speech crime.

Section (*l*)(2) does not criminalize conduct. It criminalizes speech: "digital instructions" that "may be used" to "produce a firearm" with a "three-dimensional printer." Section (*l*)(2) makes it a crime to "distribute" that speech "to a person in New Jersey" (with limited exceptions). The law provides a limitless definition of "distribute": "to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or

make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute."

No medium escapes this new crime. Section (*l*)(2) outlaws speech delivered "by any means," including "via the Internet" or standard postal "mail." The crime also extends to in-person interactions such as "display[ing]," "present[ing]," and "giv[ing]" information face-to-face.

All kinds of digital firearms information are censored by this speech crime. The ban covers both "computer-aided design files" *and* "other code or instructions stored and displayed in electronic format as a digital model."

The information's actual use is irrelevant. The crime occurs if information "*may be used*" by a third party in certain activities, regardless of the speaker's intent.

Section (*l*)(2) punishes speakers worldwide not because the speech is false (it is not) or causes any harm (it does not), but because of speculation that the speech may sometimes bear a contingent and indirect relationship to other peoples' bad acts.

Section (*l*)(2) is unconstitutional. It is an extreme act of content-based censorship that stands no chance of satisfying strict scrutiny because it is overbroad, underinclusive, ineffective, and lacking a scienter element. More and more irreparable harm of the highest order will occur if the AG is allowed to continue enforcing Section (*l*)(2) against Plaintiffs. The harm is not just prospective. It is

current. With every passing day, the AG causes irreparable injury by chilling protected speech and forcing self-censorship.

Ultimately, the AG's enforcement of Section (*l*)(2) is likely to be held unconstitutional and permanently enjoined. Until then, the Court should prevent the infliction of further irreparable harm and restore the status quo ante by enjoining the AG's enforcement of Section (*l*)(2) against Defense Distributed and SAF.

In addition to the *criminal* law, the AG has for years been acting in parallel to censor Plaintiffs under the color of state *civil* laws. These actions impose a prior restraint that is just as violative of free speech protections as is Section (*l*)(2). They too are bound to be held unconstitutional. They too should be enjoined until a final judgment stops this censorship for good.

A. Plaintiffs will likely succeed on the First Amendment claim.

Plaintiffs plead that the AG has violated, is violating, and is threatening to violate 42 U.S.C. § 1983 by acting, under color of state law, to abridge Plaintiffs' First Amendment freedoms. ROA.1924-26. Plaintiffs are likely to succeed on the merits of the First Amendment claim for at least three independent reasons.

Before addressing those arguments, the Court should hold that the Plaintiffs' distribution of the digital firearms information at issue qualifies as First Amendment speech. Proof shows that the digital firearms information at issue here qualifies as First Amendment speech under all of the applicable modern precedents. *Compare*

ROA.1863-65, ROA.3794-99 (declaration of the seminal industry expert), ROA.3731-35 (declaration of Defense Distributed's Director), *and* ROA.3461-3512 (industry publication explaining 3D printing processes), *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) ("[G]iven that the purpose of [the delivery of a tape recording] is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of 'speech' that the First Amendment protects."), *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."), and *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) ("source code is speech").

1. Content-based censorship makes Section (*l*)(2) unconstitutional.

New Jersey's speech crime is a content-based speech restriction. Facially, the law 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); *see NIFLA v.*

Becerra, 138 S. Ct. 2361, 2371 (2018); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The law's justification also makes it content-based because its enactors created the crime to punish the idea being conveyed—digital firearm information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

As a content-based speech restriction, the Constitution renders the speech crime presumptively invalid; it is valid only if New Jersey "prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. That burden cannot be met for four reasons.

First, New Jersey's speech crime does not advance a compelling state interest because "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). "Without a significantly stronger, more direct connection" between the speech and a third party's criminal conduct, "the Government may not prohibit speech on the ground that it may encourage [third-parties] to engage in illegal conduct." *Id.*; *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (state cannot impose a "flat ban" on solicitations by public accountants on the ground that solicitations "create[] the dangers of fraud, overreaching, or compromised independence"). Yet that is precisely what New Jersey has done. It has violated the rule that "a free society prefers to punish the few who abuse [their] rights . . . after they break the law than

to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Second, New Jersey's speech crime does not meet the narrow tailing requirement because plausible, less restrictive alternatives exist. "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it," *Bartnicki*, 532 U.S. at 529, not on tangential, third-party speakers. But rather than opting for the former approach and banning the harmful *conduct* it fears, New Jersey has elected to target *speech* that is, at most, remotely and only sometimes associated with that conduct.

Third, New Jersey's speech crime is substantially underinclusive. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). While it criminalizes speech by normal people, Section (*l*)(2) does nothing about the speech of firearms manufacturers or wholesalers. While it criminalizes speech regarding "firearms," New Jersey's speech crime does nothing about speech regarding other dangerous instrumentalities such as poison or bombs. And while it criminalizes the "distribution" of digital firearms information, New Jersey's speech crime does nothing about the *possession* or *use* of that same information to, for example, produce an illegal firearm—the evil that New Jersey means to combat.

Fourth, the AG cannot prove that Section (*l*)(2) advances the state's aims. Justifications backed by mere "anecdote and supposition" do not suffice, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000), and neither does "ambiguous proof," *Brown*, 564 U.S. at 800. Compelling "empirical support" of efficacy must be given. *Globe Newspaper Co. v. Sup. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 (1982). The proof must demonstrate that the "restriction will in fact alleviate" its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). It is not enough to offer "mere speculation or conjecture." *Id*. No proof of efficacy exists here. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016) ("Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.").

In particular, the AG's effort to prove efficacy is bound to fail because the information he seeks to censor is already available across the internet. The digital firearms information that Defense Distributed already published was thereby committed to the internet's public domain, where independent republishers beyond New Jersey's control will make those files readily accessible on one website or another forever—regardless of whether the AG decides to exact vengeance on the publisher he most dislikes.

The AG admitted as much in his own court filings, which take the position that "posting these codes is a bell that can never be un-rung." ROA.2734. But overwhelming proof establishes that this "Pandora's box" has already been opened, and, by New Jersey's own admission, it "can never be closed." ROA.2658. Post-hoc prosecution of Defense Distributed certainly will not help.

2. Overbreadth makes Section (*l*)(2) unconstitutional.

Plaintiffs are also likely to succeed on the merits of their First Amendment claim because New Jersey's 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. New Jersey's speech crime violates this doctrine in a litany of ways.

First, New Jersey's speech crime is overbroad because it criminalizes speech regardless of its relationship to illegal conduct. A state may "suppress speech for advocating the use of force or a violation of law only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id*. at 253. A "contingent and indirect" relationship to criminal conduct will not suffice, nor will an allegation that there is "some unquantified potential for subsequent criminal acts." *Id*. at 250.

New Jersey's speech crime does not target speech that is "directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action"—it targets *every instance of distribution*. *Id.* at 253. Virtually all the speech it covers falls squarely on the protected side of the line, either because the expression's recipients commit no illegal act at all or because, if they did, 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 this law still criminalizes every instance of "distribut[ion]" no matter what.

Second, New Jersey's speech crime is overbroad because it also criminalizes sharing information about any "firearm component." This covers a wide array of generic items—such as fasteners, nuts, bolts, and screws—that have unlimited potential uses and are not unique to firearms. Even if New Jersey could criminalize certain speech about a completed "firearm," it could not possibly criminalize speech about mundane parts available to anyone in any hardware store.

Third, New Jersey's speech crime is overbroad because it fails to distinguish between information that has, and has not, been committed to the public domain. As noted, digital firearms information is already freely circulating in the public domain, and "the Government may not . . . restrict individuals from disclosing information that lawfully comes into their hands in the absence of a state interest of the highest

order." *United States v. Aguilar*, 515 U.S. 593, 605 (1995). Yet this statute draws no distinction between truly novel "instructions" and those that everyone with a smartphone or computer has been able to obtain with simple Google search.

3. A missing scienter element makes Section (*l*)(2) unconstitutional.

Appellants' First Amendment claim is also likely to succeed because New Jersey's speech crime lacks a necessary scienter element. States cannot create speech crimes without including a stringent requirement of scienter—i.e., knowledge of the fact that truly distinguishes innocent acts from guilty ones. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010); *New York v. Ferber*, 458 U.S. 747, 765 (1982); *Smith v. California*, 361 U.S. 147, 153-54 (1960).

New Jersey's speech crime lacks the needed scienter element because it does not even require the speaker to *know* that instructions will "be used to program a three dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component"—let alone know that the recipient would use the information to engage in *illegal* production of a firearm. Hence, the requisite scienter requirement is missing. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 247-48 (4th Cir. 1997).

B. Plaintiffs will likely succeed on the Due Process Clause claim.

Plaintiffs are also likely to succeed on the merits of their claim that New Jersey's speech crime is void for vagueness under the Due Process Clause.[15] "A law may be vague in violation of the Due Process Clause for either of two reasons: 'First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.'" *Act Now*, 846 F.3d at (D.C. Cir. 2017). Section (*l*)(2) is unconstitutionally vague in both respects.

Specifically, New Jersey's speech crime is unconstitutionally vague because it criminalizes code or 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) (emphasis added). But it is impossible for a speaker to know what counts as "code . . . *that may be* used to" engage in such programming. In the same way that "(w)hat is contemptuous to one man may be a work of art to another," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), what "may be used" by one programmer can be totally useless to another. Speakers like Defense Distributed cannot tell in advance on which side of the line their speech will fall.

[15] Pre-enforcement facial vagueness challenges are allowed to address the Due Process Clause's concern for "arbitrary and discriminatory enforcement," *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*, 846 F.3d 391, 410 (D.C. Cir. 2017), and also to the extent that they seek to halt the chilling of protected speech, *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1241 (11th Cir. 2015). Plaintiffs' claim implicates both concerns.

Because of indeterminacies like this, the statute both chills speech nationwide and encourages arbitrary and discriminatory enforcement. *See id*. ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections."). Indeed, the statements made during the New Jersey speech crime's signing ceremony show that the AG wishes to prosecute Defense Distributed not because it poses some sort of unique threat, but because the AG has a vehement political dislike for Defense Distributed's founder. *See* ROA.2844-46, 2852 (repeatedly targeting "Cody Wilson"). As the Court has already put it, the AG is enforcing this law because he wants to "crush Defense Distributed's operations and not simply limit the dissemination of digital files in New Jersey." *Grewal*, 971 F.3d at 493.

C. Plaintiffs will likely succeed on the Commerce Clause claim.

Plaintiffs are also likely to succeed on the claim that the Attorney General has subjected and is subjecting the Plaintiffs to an unconstitutional deprivation of the right to be free of commercial restraints that violate the dormant Commerce Clause. Under this doctrine, New Jersey's speech crime triggers strict scrutiny because it "regulat[es] conduct that takes place exclusively outside the state." *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at *11 (D.N.J. Aug. 20, 2013). Even though speakers like Defense Distributed operate their websites in a passive fashion from Texas, New Jersey's speech crime expressly

projects New Jersey's law about what can and cannot be said on the internet throughout the entire Union. Because this extraterritorial application is a direct and substantial part of the statute, New Jersey's speech crime is unconstitutional per se, "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997).

D. The civil enforcement efforts are also unconstitutional.

In every key respect, the same constitutional analysis that applies to the new speech crime applies to the AG's use of civil legal methods to achieve the same ends. Plaintiffs are likely to succeed on their Section 1983 action's First Amendment claim because the AG's conduct violates the doctrine regarding unconstitutional prior restraints. The AG's deployment of a cease and desist letter to Defense Distributed 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." ROA.2630-31. So do civil actions like the AG's effort to obtain an *ex parte* temporary restraining order against Defense Distributed. *See* ROA.629. As prior restraints, the AG's civil censorship efforts bear a heavy presumption of unconstitutionality. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71-72 (1963); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 579 (5th

Cir. 2005). But the AG cannot overcome this burden. The same reasoning that prevents New Jersey's speech crime from surviving strict scrutiny also spells defeat for the civil censorship effort. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981).

Importantly, this constitutional violation encompasses both the action taken directly against the Plaintiffs and the *indirect* efforts to threaten, coerce, and intimidate internet service providers. *See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003); *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991). Both types of censorship should be enjoined.

E. Irreparable harm will occur without an injunction.

Defense Distributed knew of New Jersey's speech crime's passage on the day that it became law and witnessed the signing ceremony. *See* ROA.1896. From that time to present, Defense Distributed reasonably feared that the AG would commence enforcement of the new law against Defense Distributed, its officers, its employees, and/or its agents at any moment. *See id.*

Hence, the AG has accomplished illegal censorship of three distinct categories of speech. If not for the AG's unconstitutional actions, Appellants would be freely exercising their First Amendment rights in all three respects.

Category one is the free and open publication of digital firearms information *on the internet* to persons in New Jersey, *see* ROA.1897, which New Jersey's speech crime prohibits by making it a crime to "distribute" the banned "digital instructions" "by any means, including the Internet." This right has been exercised in the past by Defense Distributed. *See id.* If not for the AG's ongoing censorship, this right would be exercised in the future by Defense Distributed and SAF and its members. *See id.*

Category two is the free and open publication of digital firearms information *via the mail* to persons in New Jersey, *see* ROA.1897, which New Jersey's speech crime prohibits by defining "distribute" to mean "mail." This right has been exercised in the past by Defense Distributed. *See id.* If not for the AG's ongoing censorship, it right would be exercised in the future by Defense Distributed. *See id.*

Category three is the free and open *offering and advertisement* of digital firearms information to persons in New Jersey, *see* ROA.1897, which New Jersey's speech crime prohibits by defining "distribute" to mean "offer" and "advertise." This right too has been exercised in the past by Defense Distributed. *See id.* If not for the AG's ongoing censorship, this right would be exercised in the future by Defense Distributed and SAF and its members.

The AG's *civil* censorship covers all three categories of conduct as well. *See* ROA.1898. His cease and-desist order said to "halt publication" of any and all so-called "printable gun computer files." *See id.* The civil lawsuits sought prior

restraints against all manner of "distributing" "printable-gun computer files." *See id.* And the threats against internet service providers targeted all "computer files" with digital firearms information. *See id.*

The AG's censorship of *non-internet speech* is completely unique. *See id.* at ROA.1898. Neither the federal government nor any other state government seeks to censor the non-internet speech of Defense Distributed and SAF that the AG does. *See id.* The resulting censorship of constitutionally protected speech is uniquely attributable to the AG alone. *See id.*

The AG's censorship of internet speech is unique as well—both in breadth and nature. *See* ROA.1898. His civil and criminal censorship efforts against Defense Distributed and SAF's internet speech apply to more speech than federal officials' efforts do, impose different burdens than federal officials' efforts do, and threaten far greater penalties than federal officials' efforts do. *See id.* The resulting censorship of constitutionally protected speech is uniquely attributable to the AG alone. *See id.*

For all three categories of censorship, irreparable harm is clearly evident. The chilling of these constitutionally protected activities itself constitutes irreparable harm, *see Dana's Railroad Supply v. Attorney General, Florida*, 807 F.3d 1235, 1241 (11th Cir. 2015), and threatening to enforce the speech crime imposes an unconstitutional prior restraint. *See, e.g.*, *Fairley v. Andrews*, 578 F.3d 518, 525 (7th

Cir. 2009). If enforced as threatened, the speech crime would entail unconstitutional convictions. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-33 (1982). All of these lost freedoms are irreparable harms of the highest order.

F. The balance of equities favors an injunction.

The balance of equities favors a preliminary injunction. The risk of erroneously denying the injunction entails the "potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004). "The harm done from letting [an] injunction stand pending a trial on the merits, in contrast, will not be extensive," especially where, as here, "[n]o prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands." *Id*.

Indeed, New Jersey will not suffer any harm—and certainly not irreparable harm—if the status quo is restored during this suit's pendency. The only viable interest New Jersey could have is a retrospective one: punishing citizens for past speech. But there is nothing urgent about that draconian goal; the punishment can be doled out a year from now just as well as it can today.

Whatever interests the AG might have in immediate censorship (none) will never be achieved because the bell has already been rung. Every file that has already been introduced to the internet's public domain will always be there, as independent republishers beyond anyone's control have made and will continue to make the files

readily accessible on one website or another forever. *See, e.g.*, ROA.3741. It therefore does the government no harm whatsoever to temporarily stall whatever punitive enforcement actions they have in mind against Plaintiffs.

G. The public interest favors an injunction.

Preserving constitutional rights always serves the public interest, *see, e.g.*, *O'Donnell v. Goodhart*, 900 F.3d 220, 232 (5th Cir. 2018), whereas "enforcement of an unconstitutional law is always contrary to the public interest," *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

NetChoice, LLC v. Paxton, No. 21A720, 2022 WL 1743668 (U.S. May 31, 2022), provides further support for Plaintiffs' motion. There the Supreme Court issued relief akin to a preliminary injunction against a novel state law regulating important speech on the internet. The same kind of relief is warranted here because, as compared to *NetChoice*, the speech at issue is equally important and the AG's censorship is far *more unconstitutional*.

CONCLUSION

The Court should reverse and vacate the district court order dismissing Plaintiffs' preliminary injunction request. The Court should then render an order granting Plaintiffs' motion for a preliminary injunction, enjoining the AG from (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 Appellants' computer files with digital firearms information.

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CERTIFICATE OF SERVICE

On August 18, 2022, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished by both the appellate CM/ECF system to all registered users for this case.

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CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 because it contains 12,147 not-exempted words.

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