No. 19-50723

In the United States Court of Appeals
For the Fifth Circuit

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED,

Plaintiffs - Appellants

v.

GURBIR S. GREWAL, Attorney General of New Jersey, in his official and individual capacities; MICHAEL FEUER, City Attorney for Los Angeles, California, in his official and individual capacities; ANDREW CUOMO, Governor of New York, in his official capacity; MATTHEW DENN, Attorney General of Delaware, in his official capacity; JOSH SHAPIRO, Attorney General of Pennsylvania, in his official capacity; THOMAS WOLF, Governor of Pennsylvania, in his official capacity,

Defendants - Appellees

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 case with the benefit of oral argument. For the first issue, a question about judicial estoppel, the decision will need to account for a complex procedural history that oral argument can help define. And for the second issue, a question of specific personal jurisdiction, the decision will need to grapple with apparent tension in precedents—*Calder v. Jones*, 465 U.S. 783 (1984), and *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), versus *Stroman Realty Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008)—that oral argument can help resolve.

Oral argument is also warranted by this case's extraordinary subject. For more than a year, New Jersey Attorney General Gurbir Grewal has censored and continues to censor law-abiding Texans in clear violation of the Constitution. He imposes an illegal regime of both civil and criminal enforcement actions that stop them from engaging in speech the Constitution protects. His censorship has shut down websites published at facilities in Austin, halted a Texas company's ability to mail information from Austin, and even criminalized the speech published at a public library in Austin. If the Appellants dare to utter words Grewal dislikes, he will imprison them. With every passing moment, this inflicts more and more irreparable harm upon both the Appellants and the entire citizenry. Yet the district court dismissed the action on the theory that Grewal cannot be sued in Texas at all. A controversy of this extraordinary nature warrants the Court's closest attention.

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Jurisdictional Statement

The district court had original jurisdiction because the complaint, ROA.123, establishes that the action arises under the Constitution and laws of the United States, *see* 28 U.S.C. § 1331, and that the action is to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution and statutes providing for equal rights of citizens or of all persons within the jurisdiction of the United States, *see* 28 U.S.C. § 1343.

This Court has appellate jurisdiction because the appellants timely filed a notice of appeal on July 31, 2019, ROA.1808, from the Final Judgment of January 30, 2019, ROA.1752, and the Order of July 1, 2019, ROA.1803, which dispose of all parties' claims. *See* 28 U.S.C. § 1291.

Issues Presented

When state officials engage in censorship that violates the Constitution's free speech guarantees, 42 U.S.C. § 1983 gives censored citizens a right to sue in federal court to stop the censorship. This is true both where the official censors citizens in his home state and where, as here, the official reaches out beyond his borders to censor citizens in another state. The appeal is not about *whether* federal law supplies that cause of action. It certainly does. The appeal is about *where* to bring the action.

The state official at issue is New Jersey Attorney General Gurbir Grewal. He violated Section 1983 by, *inter alia*, issuing a cease-and-desist letter that commanded censorship of constitutionally-protected speech regarding firearms. Plaintiffs sued in Texas because Grewal's censorship command itself constituted the wrongdoing and was intentionally deployed by Grewal into Texas for the purpose of censoring speech occurring in Texas by Texans about Texas activities.

The district court granted Grewal's Rule 12(b)(1) motion to dismiss for lack of personal jurisdiction. It held that, even though Grewal chose to reach out beyond New Jersey's borders and censor speech occurring in Texas, Grewal need not litigate the resulting Section 1983 action in Texas.

Appellants challenge the district court's decision about personal jurisdiction over Grewal with three arguments. Each warrants reversal independently.

I. Judicial estoppel

The first question presented is whether judicial estoppel bars Grewal's denial of personal jurisdiction's minimum contacts. The key dispute is about whether the jurisdiction position Grewal took as defendant below contradicts the jurisdictional position Grewal took as plaintiff in a separate case against these same parties. If judicial estoppel applies, reversal for further proceedings below is warranted without more and the remaining two issues need not be resolved.

II. Minimum contacts under *Calder* and *Wien Air Alaska*

The second question presented is whether Grewal had specific personal jurisdiction's "minimum contacts" with Texas. The key dispute is about which precedents govern: *Calder v. Jones*, 465 U.S. 783 (1984), and *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), or *Stroman Realty Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008). If Grewal had minimum contacts with Texas, reversal for further proceedings below is warranted without more and the remaining issue need not be resolved.

III. Dismissal versus transfer

The third question presented in the alternative is whether, even if courts in Texas lack personal jurisdiction over Grewal, the district court erred by dismissing the case instead of transferring it to the federal district court in New Jersey. If so, the Court should reverse and render a judgment transferring the action immediately.

Statement of the Case

This case concerns extraordinarily important questions of free speech. Plaintiffs are peaceful, law-abiding American citizens in Texas. The First Amendment protects their right to share digital firearms information. The Defendant at issue is New Jersey Attorney General Gurbir Grewal. He denies the right to share digital firearms information because he cannot stand to let people speak about the Second Amendment's right to keep and bear Arms. Through a torrent of civil and criminal enforcement actions, Grewal has punished and threatens to continue punishing Plaintiffs for daring to speak against his wishes. The Constitution forbids this. So Plaintiffs sued in Texas to halt Grewal's censorship under 42 U.S.C. § 1983.

Grewal fears litigating the merits because he will lose if it ever comes to that. At every turn, he seeks to evade judicial review of his censorship's legality. With a preliminary injunction imminent below, Grewal sought a Rule 12(b)(2) dismissal for lack of personal jurisdiction on the theory that his censorship of speech occurring in Texas cannot possibly be litigated in Texas. At the same time, in a federal court in the Ninth Circuit that Grewal likes better, Grewal is successfully suing the Plaintiffs on the very same jurisdictional theory that Grewal deems invalid below. Despite both the error and hypocrisy in his position, the district court below granted Grewal's motion to dismiss for lack of personal jurisdiction and terminated the case before the motion for a preliminary injunction could be evaluated on its merits.

I. New Jersey Attorney General Gurbir Grewal is censoring Defense Distributed and the Second Amendment Foundation.

A. Grewal is the only defendant at issue on appeal.

In the district court, Plaintiffs sued both Grewal and several officials from other states. ROA.123. The district court's judgment dismissed Grewal and the other officials. ROA.1737. On appeal, Plaintiffs' challenge only the judgment regarding Grewal and not the judgment regarding the other state officials. Accordingly, the statement of the case pertains to Plaintiffs and Grewal alone.

B. Digital firearms information is First Amendment speech.

The speech in this First Amendment case concerns the Second Amendment. *See generally, e.g.*, ROA.18–62, 123–97. Specifically, it is about "digital firearms information": information about firearms and firearm components stored in the form of digital computer files. ROA.129–30, 535–42.

Digital firearms information exists in a variety of computer file formats, such as portable document format (.pdf) files, stereolithography (.stl) files, Initial Graphics Exchange Specification (.igs) files, SoLiDworks PaRT (.sldprt) files, SketchUp (.skp) files, Standard for the Exchange of Product Data ("STEP") (.stp) files, and DWG (.dwg) files. ROA.129, 919. In some formats, certain digital firearms information files are called "computer aided design files" or "CAD files." ROA.907, 919.

Standing alone and apart from any application, digital firearms information constitutes an important expression of technical, scientific, artistic, and political matters. ROA.124, 126; Felicia R. Lee, *3-D Printed Gun Goes on Display at London Museum*, N.Y. Times, Sept. 16, 2013 ("'A non-designer [Cody Wilson] has managed to make the biggest impact in design this year,' said . . . the senior curator of contemporary architecture, design and digital at the Victoria and Albert Museum."). Considerable value also lies in digital firearms information's many applications.

In one application, digital firearms information can be used with other technologies to create digital two- and three-dimensional models of firearms and firearm components. *See* ROA.912–13. These digital models serve important purposes wholly apart from fabrication. *See* ROA. 912–13. For example, without any fabrication occurring, these models let users study object properties, render realistic object images for product visualization, and conduct parametric modeling of object families. *See* ROA. 912–13; *see also* ROA.930 (Forbes magazine noting that "only a fraction of those who download the printable gun file will ever try to actually create one").

In another application, digital firearms information can be used with three-dimensional printing technologies to fabricate objects. *See* ROA.913–14. Serious misconceptions plague public dialogues about this process. Some are

innocent, some are political. In this Court, let there be no mistake about the key fact: Digital firearms information does not create firearms. People do. *See* ROA.913–14.

When Grewal suggests that any single machine or engineering technique can *bring an entire firearm into existence*, he contradicts rudimentary engineering truths. *See* ROA.912–17. Even with a perfectly accurate set of digital firearms information, all-powerful software, and a state-of-the-art 3D printer, the digital model of a firearm component does not fabricate the component on its own. ROA.912–14. Component fabrication occurs only if and when a person *chooses* to perform a complex series of actions such as tailoring the design, selecting suitable materials, choosing an effective process, and physically completing an extensive series of steps. ROA.912–14. Even then, fabrication occurs only part-by-part, followed by totally separate component assembly processes. ROA.912–14.

As a matter of law, this action's digital firearms information qualifies as First Amendment speech entitled to all of the Constitution's protections against censorship.[1] Although not yet directly at issue, the case will uphold this eventually.

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[1] *Compare* ROA.124–30 (second amended complaint), ROA.914–17 (Declaration of John Walker, the seminal industry expert explaining 3D printing processes), ROA.918–26 (Declaration of Defense Distributed's Director identifying exemplary digital firearms information), ROA.1030–81 (3D Insider's publication explaining 3D printing processes), ROA.1082–99 (All3DP's publication explaining 3D printing processes), *and* ROA.1100–24 (3Dhubs' 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

C. Plaintiffs published digital firearms information.

Plaintiff Defense Distributed is a Texas company that exists to promote the Second Amendment's individual right to keep and bear Arms. *See* ROA.126, 918–19. To that end, Defense Distributed authors and publishes a wide variety of digital firearms information. ROA.126, 129–30, 918–19. Its publications address a variety of individual firearm components, as well as a complete single-shot firearm known as the "Liberator." ROA.48, 129–30, 905–06, 919–22. Defense Distributed also collects, revises, and republishes digital firearms information that has been previously authored by others. *See* ROA.921–22. Cody Wilson founded Defense Distributed. ROA.905, 918.

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.126–27,

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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."), *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) ("source code is speech"), Brief of Amicus Curiae Electronic Frontier Foundation in Support of Plaintiffs-Appellants, *Def. Distributed v. U.S. Dep't of State*, 2015 WL 9267338, at * 11, 838 F.3d 451 (5th Cir. 2016) ("[F]unctional consequences of speech are considered not as a bar to protection, but to whether a regulation burdening the speech is appropriately tailored"), *and Def. Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680, 692 (W.D. Tex. 2015).

901–02. 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.126–27, 901–02.

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

Before Gurbir Grewal came onto the scene, Defense Distributed published digital firearms information to the internet's public domain on multiple occasions. ROA.124, 126, 134, 905–06, 920–24. 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. *See* ROA.134, 181–82, 918–20. One such publication period lasted from December 2012 to May 2013. ROA.905–06, 920–21. Another such period lasted from July 27 to July 31, 2018. ROA.921–23.

Millions of downloads occurred during these DEFCAD publication periods. *See* ROA.906, 910–11, 928–31. Recipients of Defense Distributed's publications included SAF members. ROA.901–04.

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

Defense Distributed also published digital firearms information via the mail. ROA.919, 923–24. 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.923–24.

3. 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.126, 128. The public library housing Defense Distributed's publications is in Austin, Texas. ROA.126, 128.

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.910–11, 971–90. The republished files are not, as one judge errantly concluded, hidden in "dark or remote recesses of the internet."[2] Simple

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

Google searches yield the republished Defense Distributed files with ease, ROA.134, 347, and always will. This bell cannot be unrung.

D. Grewal is censoring Defense Distributed's speech in Texas.

1. Civil censorship is occurring.

Beginning in July 2018, Grewal has for more than a year 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.178–79. Issued by Grewal to Defense Distributed, that letter announced that publishing digital firearms information on the internet violated New Jersey's "public nuisance and negligence laws." ROA.178. Grewal threatened Defense 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.178.

Direct legal action came next. Four days after issuing the cease-and-desist letter, Grewal sued Defense Distributed in a New Jersey state court and sought an *ex parte* nationwide temporary restraining order (prior restraint) to stop Defense

Distributed's online publications. *See* ROA.617–48, 732–34. This action was removed to federal court and administratively terminated. ROA.1293–96.

Internet service providers became Grewal's next target. Under the guise of "public nuisance" law, Grewal sent letters to Defense Distributed's internet hosting provider, Dreamhost, and to its internet security provider, Cloudflare. ROA.718–22. These letters urged—by way of threats, coercion, and intimidation—Dreamhost and Cloudflare to terminate their contracts with Defense Distributed. ROA.718–22.

Grewal'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.723–24. The cease-and-desist letters, the intimidation of service providers, and the civil lawsuits are all part of the Grewal's unified plan to stop Defense Distributed "from publicly releasing computer files." ROA.723.

2. Criminal censorship is occurring.

In the wake of DEFCAD's most recent online publications, New Jersey armed Attorney General Gurbir Grewal with Senate Bill 2465's Section 3(*l*)2. S. 2465, 218th Leg., Reg. Sess. (N.J. Nov. 2018) (codified as N.J. Stat. 2C:39-9(*l*)2)). 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 Grewal as its prime enforcer, Section (*l*)(2) criminalizes constitutionally protected speech that Plaintiffs would engage in but for Grewal's enforcement threats. Calling Section (*l*)(2) his favorite new "tool," Grewal aims to jail Defense Distributed, SAF, and anyone else that dares to exercise their right to share digital firearms information. ROA.394–95.

Section (*l*)(2) does not criminalize conduct. It criminalizes speech as such: any "digital instructions" that "may be used" by a person to "produce a firearm" with a "three-dimensional printer." N.J. Stat 2C:39-9(*l*)(2). It is now a "third degree crime" to "distribute" that speech "to a person in New Jersey" (except for licensed manufacturers). *Id.* Convictions under Grewal's new speech crime entail a prison sentence of three to five years. N.J. Stat 2C:43-6.

Section (*l*)(2) criminalizes every conceivable mode of communication. No meaningful form of human interaction survives. The keystone "distribute" term means "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." N.J. Stat 2C:39-9(*l*)(2). The law also specifies that it outlaws speech delivered "by any means," including "the Internet" and including standard postal "mail." *Id.*

No type of digital firearms information survives the new crime either. Section (*l*)(2) outlaws both "computer-aided design files" and "other code or instructions stored and displayed in electronic format as a digital model." N.J. Stat 2C:39-9(*l*)(2).

Information's *actual* use is irrelevant. Section (*l*)(2) lets Grewal jail speakers regardless of whether or not any actual danger or harm exists. The crime occurs if the information "***may*** be used" in a proscribed way. *Id.* (emphasis added). Critically, the new speech crime also lacks any meaningful *intent* requirement.

The threat posed by Section (*l*)(2) is not merely facial. Grewal backed it up at Senate Bill 2465's publicized enactment ceremony. ROA.383–412. At that event, Grewal 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.394–95. He said that the Section (*l*)(2) speech crime exists "to stop the next Cody Wilson - to fight the ghost gun industry." ROA.396. He promised to prosecute "anyone who is contemplating making a printable gun" and "the next ghost gun company." ROA.397. To Defense Distributed and anyone else across the political aisle who dares to share digital firearms information, Gurbir Grewal promises this: "***we will come after you***." ROA.397. (emphasis added).

To this day, Grewal's unconstitutional enforcement threats remain in force. The cease-and-desist letter Grewal issued to Defense Distributed has never been disclaimed. The coercive actions Grewal took against Defense Distributed's service providers have never been disclaimed. The civil lawsuits Grewal filed against Defense Distributed, its founder Cody Wilson, SAF, and others have never been disclaimed. The unequivocal threats Grewal's 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, Grewal "*will come after*" them with every tool at his disposal. ROA.397 (emphasis added).

The civil legal actions that Grewal wields against Plaintiffs are plainly unconstitutional. So is the speech crime that Grewal threatens to enforce against Plaintiffs. In each of these respects, Grewal 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, Grewal 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 Texans.

II. Procedural posture.

A. Defense Distributed and SAF sued Grewal in Texas.

The instant action began in the United States District Court for the Western District of Texas on July 29, 2018. ROA.18. Defense Distributed and SAF are the plaintiffs. ROA.126. Defendants are Grewal and other states' officials. ROA.127.

On the date that this suit began, the criminal aspect of Grewal's censorship had not yet begun (the speech crime was enacted in November 2018). ROA.383. But the civil aspect most definitely had, as Grewal deployed the cease-and-desist letter's censorship command against Defense Distributed on July 26, 2018. ROA.178.

Once the instant suit was filed, Grewal did not just refuse to submit to personal jurisdiction in Texas. He did the opposite, fleeing to a Ninth Circuit district court that he likes better than Texas to sue both Defense Distributed and SAF on the very same jurisdictional theory that he now deems invalid.

B. Grewal sued Defense Distributed and SAF in Seattle on the jurisdictional theory that websites go everywhere.

Days *after* Plaintiffs sued Grewal in the instant case, both Defense Distributed and SAF were sued by New Jersey and other states in *State of Washington et al. v. United States Department of State et al.*, No. 2:18-cv-1115-RSL (W.D. Wash.). That case concerns issues that are distinct from, but related to, the instant dispute. An important factual detour is required.

1. Because of *Defense Distributed I*, the federal government realized Defense Distributed and SAF's First Amendment rights in a Settlement Agreement and carried out obligations to protect them.

The instant action is known as *Defense Distributed II* because of a prior action also originating in the Western District of Texas called *Defense Distributed I*. *Defense Distributed I* has been to this Court once already, in an interlocutory appeal. *See Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016) (panel opinion); *id.* at 461–76 (Jones, J., dissenting); *Def. Distributed v. U.S.s Dep't of State*, 865 F.3d 211 (5th Cir. 2017) (Elrod, Jones, Smith and Clement, JJ., dissenting from the denial of rehearing en banc). After proceedings developed on remand, *Defense Distributed I* is again on appeal. *See Def. Distributed v. U.S. Dep't of State*, No. 1:15-CV-372-RP, 2018 WL 9866515 (W.D. Tex. Oct. 22, 2018) (order on appeal as case number 18-50811 in the United States Court of Appeals for the Fifth Circuit).

The plaintiffs in *Defense Distributed I* are Defense Distributed, SAF, and an individual SAF member. ROA.793. The defendants in *Defense Distributed I* are State Department officials.[3] ROA.793. Grewal is not a party to *Defense Distributed I*. *See* ROA.793.

[3] The *Defense Distributed I* defendants are the United States Department of State, the Secretary of State, the State Department's Directorate of Defense Trade Controls, the Acting Deputy Assistant

Defense Distributed I began after the State Department used the Arms Export Control Act of 1976, 22 U.S.C. ch. 39 ("the AECA"), and its primary implementing regulations, the International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130 ("the ITAR"), to impose a prior restraint on public speech concerning technical firearms data, including Defense Distributed's digital firearms information. ROA.738. Under this prior restraint, the State Department required that Defense Distributed obtain prior United States government approval before publication of such technical data could occur on the internet and at other public venues. ROA.738.

In *Defense Distributed I*, Defense Distributed and SAF challenged the State Department's enforcement of the AECA/ITAR regime. ROA.793. In particular, they challenged the State Department's governance of the digital firearms information at issue (the "*Defense Distributed I* Files") as ultra vires action not authorized by the statutes and regulations at issue, and as violations of the First, Second, and Fifth Amendments of the Constitution. ROA.803.

At a preliminary stage of the litigation, the district court denied plaintiffs' motion for a preliminary injunction. *Def. Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015). Interlocutory appellate proceedings left that preliminary decision undisturbed. A divided Fifth Circuit panel affirmed the Court's

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Secretary of State for Defense Trade Controls in the Bureau of Political-Military Affairs, and the Acting Director of the Office of Defense Trade Controls Policy Division. ROA.793.

preliminary decision. *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016). Five judges dissented from the Fifth Circuit's denial of rehearing en banc. *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211 (5th Cir. 2017).

After the interlocutory appeal concluded, parties to *Defense Distributed I* settled their dispute by agreement. The *Defense Distributed I* settlement agreement is memorialized by the "Settlement Agreement": a written contract that all sides executed validly. ROA.158–66. It obligates the State Department to do several key things with regard to the files at issue in *Defense Distributed I*. The Settlement Agreement includes, *inter alia*, the following three key obligations:

- The first key Settlement Agreement obligation concerns a new final rule. Settlement Agreement Paragraph 1(a) requires the State Department to draft and fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising United States Munitions List ("USML") Category I to exclude the files at issue from the ITAR system of prior restraints. ROA.159.
- The second key Settlement Agreement obligation concerns the issuance of a temporary modification during the new final rule's development. Settlement Agreement Paragraph 1(b) requires the State Department to announce, while the above-referenced final rule is in development, a

temporary modification, consistent with International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the Defense Distributed I Files; and to publish the announcement on the Directorate of Defense Trade Controls website on or before July 27, 2018. ROA.159–60.

- The third key Settlement Agreement obligation concerns a license. Settlement Agreement Paragraph 1(c) requires the State Department to issue a license to the Defense Distributed I plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that certain files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). ROA.160.
- The fourth key Settlement Agreement obligation concerned official acknowledgement. Settlement Agreement Paragraph 1(d) requires the State Department to acknowledge and agree that the temporary modification of USML Category I permits any United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the *Defense Distributed I* Files, and that the license issued to the *Defense Distributed I* plaintiffs

permits any such person to access, discuss, use, reproduce or otherwise benefit from the files. ROA.160.

After the Settlement Agreement was executed, the State Department began to carry out its obligations in several key respects, including the following:

- By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(b). It made a temporary modification to USML Category I, pursuant to 22 C.F.R. § 126.2, to "exclude" the *Defense Distributed I* Files from Category I. ROA.43. By way of the Temporary Modification, the State Department authorized the distribution of the *Defense Distributed I* Files without any prior restraint.
- By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(c). It issued Defense Distributed a license—a letter issued by the State Department's Acting Deputy Assistant Secretary for the Directorate of Defense Trade Controls—authorizing the Defendants to publish the Published Files, Ghost Gunner Files, and CAD Files for "unlimited distribution." ROA.37–38.
- By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(d). It

> acknowledged and agreed that the temporary modification permits any United States person to access, discuss, use, reproduce, or otherwise benefit from the *Defense Distributed I* Files; and that the license issued to the *Defense Distributed I* plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files. ROA.37–38.

From July 27 to July 31, 2018, Defense Distributed, SAF, Conn Williamson, and any "U.S. person" were free to publish the *Defense Distributed I* Files on the internet, free to receive them on the internet, and free to republish them on the internet. And so they did, as detailed above. *See supra* at 6-8.

2. In the Washington action, Grewal sued the federal government and Defense Distributed and SAF to stop the federal government's implementation of the Settlement Agreement.

On July 30, 2018—*after* Grewal had issued his cease-and-desist letter's censorship command to Defense Distributed and *after* Defense Distributed and SAF and sued Grewal for it in the instant action—New Jersey and several other state officials initiated a civil action against the State Department, Defense Distributed, SAF, and a SAF member in the United States District Court for the Western District of Washington. The "Washington action" is currently docketed as *State of Washington et al., v. United States Department of State et al.*, No. 2:18-cv-1115-RSL. It seeks injunctive relief against the State Department's temporary regulatory

modification and its approval of the *Defense Distributed I* Files for public release. ROA.1432 ("Complaint for Declaratory and Injunctive Relief").

In the Washington action, New Jersey—with Grewal as counsel of record—successfully convinced the district court to exercise personal jurisdiction over Defense Distributed *even though Defense Distributed never did anything in Washington.* Grewal's complaint acknowledged that Defense Distributed's "headquarters and principal place of business are located in Austin, Texas," ROA.1440. And his only operative jurisdictional fact about Defense Distributed was the prediction that, in the future, Defense Distributed would publish a passive website providing computer files to visitors on the internet. ROA.1438. The website itself was Grewal's only basis for asserting personal jurisdiction—and it worked.

At Grewal's behest, and over Defense Distributed's objection, the district court in Washington exercised personal jurisdiction over Defense Distributed. *E.g.*, ROA.900. Then Grewal used this jurisdictional tactic to his advantage.

On August 27, 2018, again at Grewal's behest, the district court in the Washington action issued a preliminary injunction against the State Department defendants: "The federal defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the 'Temporary Modification of Category I of the United States Munitions List' and the letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation

issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued until further order of the Court."[4] ROA.900.

C. The district court granted Grewal's motion to dismiss for lack of personal jurisdiction.

Plaintiffs' original complaint here was filed *before* Grewal sued both Defense Distributed and SAF in the Washington action. *See* ROA.18. Plaintiffs live

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[4] Later in the instant case, Grewal tried to argue that this injunction mooted the instant litigation. But as Plaintiffs quickly showed, that position was wrong for a multitude of reasons.

First, Grewal's mootness argument was wrong about *who* the Washington action's preliminary injunction applies to. The Washington action's injunction issues commands only to the State Department officials at issue there—the so-called "federal defendants." ROA.900.. It does not tell Defense Distributed or SAF to do or not to anything.

Second, Grewal's mootness argument was wrong about *what* the Washington action's injunction applies to. It enjoins the State Department from enforcing (1) the "Temporary Modification of Category I of the United States Munitions List" that was issued on July 27, 2018, and (2) the "letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018." ROA.900. The preliminary injunction does *not* act upon the Settlement Agreement itself.

Third, Grewal's mootness argument was wrong about the Washington action's overall role in this controversy. "Even if the states in that case ultimately prevail, the State Department will *not* be barred from complying with the Settlement Agreement." ROA.539. "Success for the states in the Washington action means only that the State Department can simply re-perform the regulatory modification and license issuance in accordance with the APA." ROA.539.

Finally, contrary to what Grewal's mootness argument presupposed, Plaintiffs do not need the State Department's permission to publish the digital firearms information at issue in this litigation. The complaint pleads this, ROA.136, and Plaintiffs' motion for a preliminary injunction explained it as well, ROA.539 ("The regulatory changes and license that resulted from *Defense Distributed I* may be *sufficient* to establish the Plaintiffs' right to share the digital firearms information at issue here. But as a matter of law, they are *not necessary*.").

Timing looms large because the instant action began *before* the Washington action. *Before* any injunction had issued in Washington, the Plaintiffs here pleaded that their injuries—most importantly, their inability to exercise First Amendment freedoms and publish digital firearms information to the internet's public domain—stemmed from Grewal's issuance of cease-and-desist orders. *See, e.g.*, ROA.24 ("But for Defendant Grewal's letter, Defense Distributed would freely distribute the files in New Jersey."). As a matter of both law and fact, that reality has not changed.

complaint was filed *after* the Washington action's preliminary injunction arrived, and it did *not* change course. ROA.123. Just like the original complaint, Plaintiffs' live pleading alleged that their inability to exercise First Amendment freedoms (and other injuries) is caused by Grewal's issuance of the cease-and-desist censorship command and the accompanying threats of legal action. *See, e.g.*, ROA.124 ("Defense Distributed desires and intends to resume its publication of these files on the internet, and its audience desires and intends to receive them there. But the Defendants forced Defense Distributed to stop publishing the files on the internet.").

Grewal filed a motion to dismiss for lack of personal jurisdiction, ROA.433. to which Plaintiffs responded, ROA.1374, and Grewal replied, ROA.1655. Meanwhile, Plaintiffs had moved for a preliminary injunction halting Grewal's ongoing censorship efforts. ROA.1316; *see* ROA.1616 (Grewal's response); ROA.1670 (Plaintiffs' reply). A hearing with oral argument was held. ROA.1811.

The Court granted Grewal's motion and dismissed the action for lack of personal jurisdiction without prejudice, holding that "Plaintiffs may pursue their claims in a court of proper jurisdiction." ROA.1751. The order addressed both of the issues that Plaintiffs now assert on appeal.

First, the district court's order addresses the issue of judicial estoppel. ROA.1741–41. It began by correctly recognizing the doctrine's general elements and identifying the two positions at issue, pitting Grewal's jurisdictional position in

this case against Grewal's jurisdictional position in the Washington action. ROA.1741–42. But instead of recognizing these positions as presenting a conflict, the district court held that the positions Grewal espoused in these two actions were "in no way inconsistent." ROA.1742.

After rejecting judicial estoppel, the district court held that Plaintiffs had failed to establish that Grewal had "minimum contacts with the State of Texas." ROA.1744–47. To do so, it expressly declined to follow *Calder v. Jones*, 465 U.S 783 (1984), and concluded that Grewal's conduct "has no relation to Texas, was not expressly aimed at Texas, and does not avail itself of any Texas laws or benefits." ROA.1746. According to the court, Grewal's only relationship to the State of Texas was a "mere fortuity." ROA.1747.

Plaintiffs filed a motion to alter or amend the judgment, ROA.1753, which the court denied, ROA.1803. Plaintiffs timely filed a notice of appeal. ROA.1808–09.

Summary of the Argument

Defense Distributed and SAF's case against Grewal should not have been dismissed for lack of personal jurisdiction. Multiple harmful errors warrant reversal.

First, the district court's jurisdictional dismissal should be reversed because Grewal is estopped from denying personal jurisdiction. In the court below, Grewal's jurisdictional position is that disputes about censorship of Defense Distributed's publications cannot possibly be litigated away from New Jersey. Yet right after this lawsuit was filed, Grewal chose to turn around and sue Defense Distributed on the same subject in Seattle, Washington—a place where Defense Distributed has done literally nothing ever. To be consistent, Grewal ought to have acknowledged that whatever legal rule justifies his jurisdictional capture of Defense Distributed in Washington also justifies jurisdiction over Grewal in Texas. But instead, he changed positions for no reason but gamesmanship. Grewal uses one jurisdictional rule for the Ninth Circuit courts he likes and a totally opposite jurisdictional rule for the Fifth Circuit courts he fears. Judicial estoppel prevents him from "having it both ways." *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004).

Second, the district court's jurisdictional dismissal should be reversed because Grewal's purposeful-availment argument is wrong. The controlling rule comes from Judge Higginbotham's opinion for the Court in *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999): "When the actual content of communications with a forum

gives rise to intentional tort causes of action, this alone constitutes purposeful availment." *Id.* at 213. This rule applies to the cease-and-desist letter that Grewal deployed into Texas as a means of censoring speech intimately connected to the State of Texas. The cease-and-desist letter's censorship command is it itself the constitutional wrongdoing that Section 1983 makes actionable, and under *Wien Air*, "this alone constitutes purposeful availment." *Id.*

Supreme Court precedent compels this result as well. *Calder v. Jones*, 465 U.S. 783 (1984), which was reaffirmed with new emphasis in *Walden v. Fiore*, 571 U.S. 277, 286–88 (2014), shows that jurisdiction over Grewal exists. Just as in *Calder*, the "sources" of information in Grewal's cease-and-desist letter are *in Texas*, *id.*, the letter itself is "about the plaintiff's activities in [Texas]," *id.*, the letter's censorship command was "widely circulated" in Texas, *id.*, and the "brunt" of the injury was suffered in Texas. *Id.* And just like *Calder*'s libel, Grewal's intentional tort of unconstitutional censorship "actually occur[s]" not where it originates, but where it arrives—in the State of Texas. *Id.* None of the resulting Texas connections are "random, fortuitous, or attenuated." *Id*. at 286. Grewal's activity amounts to "intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* Thus, under *Calder* and *Wien Air Alaska*, Grewal's motion to dismiss should have been denied. The Court should reverse and order that this case proceed in the Western District of Texas immediately.

Argument

The district court resolved this action by granting Grewal's motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). ROA.1737. It based the decision on Plaintiffs' First Amended Complaint, ROA.123, and Plaintiffs' Motion for a Preliminary Injunction, ROA.1316, accepting all of the Plaintiffs' allegations and other factual showings as true. ROA.1737–41; ROA.1814 ("there is no contested issue of fact"). In that procedural posture, the district court granted each defendants' motion to dismiss by holding that Plaintiffs failed to make a "*prima facia* showing that personal jurisdiction is proper." ROA.1740.

In this appeal, Defense Distributed and SAF challenge the district court's dismissal for lack of personal jurisdiction as to New Jersey Attorney General Gurbir Grewal (not any other defendant). The *de novo* standard of appellate review applies. *See, e.g.*, Charles Alan Wright & Arthur R. Miller et al., 5B Federal Practice & Procedure § 1351 (3d ed.) (hereinafter "Wright & Miller"). The Court should hold that the dismissal of the case against Grewal for lack of personal jurisdiction was improper, reverse the district court's judgment, and remand for further proceedings.[5]

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[5] Because the district court ruled only on the Rule 12(b)(1) issue of personal jurisdiction, it did not consider other asserted grounds for dismissal (such as failure to state a claim under Rule 12(b)(6)) and did not consider Plaintiffs' motion for a preliminary injunction. The Court should not address these matters for the first time in the instant appeal; it should leave them for the district court to consider on remand in the first instance. *See, e.g.*, *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 768 n.3 (5th Cir. 2019); *Lopez v. Pompeo*, 923 F.3d 444, 445 n.1 (5th Cir. 2019); *Firefighters' Ret. Sys. v. EisnerAmper, L.L.P.*, 898 F.3d 553, 561 (5th Cir. 2018).

I. Grewal is judicially estopped from denying personal jurisdiction below.

In response to Grewal's motion to dismiss, ROA.463, Plaintiffs argued that the motion should be denied because Grewal is judicially estopped from disputing personal jurisdiction, ROA.1375, 1381–83, 1674, 1730, 1817–22. Instead of rejecting that argument, ROA.1741 (reasoning that no contradiction existed), the district court should have accepted it and denied the motion on this basis alone.

A. Judicial estoppel applies to positions about personal jurisdiction.

"Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 742–43 (2001). In other words, "[t]he doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Id.* (quoting Moore's Federal Practice).

The rule is that, "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *Id.* (quoting Wright & Miller's Federal Practice & Procedure). It is "firmly established both in this circuit and

elsewhere." *U.S. ex. rel. Bernard Lumber Co., Inc. v. Lanier-Gervais Corp.*, 896 F.2d 162, 168 (5th Cir. 1990).

The judicial estoppel doctrine applies to both "factual" and "legal" positions. *Rep. of Ecuador v. Connor*, 708 F.3d 651, 656 (5th Cir. 2013). It also applies to positions taken "necessarily, although implicitly." *Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.,* No. 10 CIV. 2333 LTS, 2011 WL 1327137, at *3 (S.D.N.Y. Mar. 31, 2011). And personal jurisdiction is no exception. Just like every other important recurring issue in litigation, the judicial estoppel doctrine applies with full force to positions about personal jurisdiction. *E.g., Henry Law Firm v. Cuker Interactive, LLC*, No. 5:18-CV-5066, 2018 WL 3025959, at *6 (W.D. Ark. June 18, 2018).

B. Grewal's position in the Washington case against Plaintiffs conflicts with Grewal's position in the Texas case by Plaintiffs.

Here, the judicial estoppel doctrine bars Grewal from challenging personal jurisdiction in Texas because of the position he took in the Washington action, *State of Washington v. United States Department of State*, No. 2:18-cv-1115-RSL (W.D. Wash.). The Washington action's plaintiffs include New Jersey—Grewal is lead counsel—and its defendants include Defense Distributed and SAF; and as far as Defense Distributed and SAF are concerned, the Washington action concerns a parallel iteration of this case's same fundamental controversy. But instead of being consistent about personal jurisdiction, Grewal took a jurisdictional position in Washington that is completely at odds with the one he takes in Texas.

The district court rejected the judicial estoppel argument by concluding that Grewal's positions in the instant case and the Washington case are "not contradictory." ROA.1742. But that was simply wrong. Contradiction is evident.

In the instant case, Grewal took the position that (1) disputes about censoring Defense Distributed cannot possibly be litigated away from New Jersey, because (2) personal jurisdiction's "minimum contacts" exist as to Grewal only in New Jersey. ROA.479–81. But in the Washington case, Grewal took the position that (1) there is nothing wrong with litigating disputes about censoring Defense Distributed away from New Jersey because (2) personal jurisdiction's "minimum contacts" exist anywhere that Defense Distributed's website goes. *See* ROA.1382 (citing *State of Washington v. U.S. Dep't of State*, No. 2:18-cv-1115-RSL, Dkt. 29 (W.D. Wash.) ("This Court has jurisdiction over . . . the parties hereto . . . ."), *and id.*, Dkt. 119 (Grewal arguing that Defense Distributed and SAF are "necessary parties")).

These litigating positions that are not coherent. They are contrary, and Grewal maintains them both in an effort to gain undue advantages. If Defense Distributed is amenable to suit anywhere for publishing digital firearms information on a Texas-based website, then by that same logic, Grewal is amenable to suit in Texas for acting to shut down that Texas-based website. No coherent "minimum contacts" theory can *both* justify the Washington action's jurisdiction over Defense Distributed *and* defeat this action's jurisdiction over Grewal.

Indeed, Defense Distributed's connection to Washington is orders of magnitude *weaker* than Grewal's connection to Texas; and if litigating in Washington is not unfair to Grewal, neither is litigating in Texas. The very same theory of personal jurisdiction that advantaged Grewal in Washington should have foreclosed his opposition to jurisdiction in Texas. But instead of maintaining consistent positions, he switched sides on the issue for no reason but gamesmanship.

Grewal's contradictory position about personal jurisdiction in the Washington litigation yielded very real advantages. Most obviously, he used his contradictory jurisdictional position to sue Defense Distributed in the forum deemed most favorable. In his forum of choice—a state that has far less to do with this controversy than Texas—Grewal successfully obtained a nationwide temporary restraining order against the State Department, ROA.135–36, a nationwide preliminary injunction against the State Department, ROA.136, and even an order holding that the Washington action's "findings will bind" Defense Distributed and SAF as Rule 19 necessary parties, ROA.1383. Though those decisions are erroneous and ripe to be reversed on appeal, Grewal has undoubtedly benefitted from them in the meantime.

"Restated, the doctrine of estoppel prevents a party from 'having it both ways,'" *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004), and "courts may apply it flexibly to achieve substantial justice," *Reed v. City of Arlington*, 650 F.3d 571, 576 (5th Cir. 2011) (en banc). The district court's

no-contradiction conclusion is wrong, and all of estoppel's other elements are met. The doctrine should be applied here to bar Grewal's denial of personal jurisdiction.

II. Grewal is subject to specific personal jurisdiction in Texas.

Alternatively, the Court should reverse the district court's jurisdictional dismissal because Plaintiffs' showing of personal jurisdiction's "minimum contacts" sufficed. Supreme Court precedent has long held that specific jurisdiction may be exercised over a nonresident "if the defendant has 'purposefully directed' his activities at residents of the forum" to a sufficient degree. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Under *Calder v. Jones*, 465 U.S. 783 (1984), in particular, that test was met here.

A. Specific personal jurisdiction's "minimum contacts" are the issue.

The Constitution permits the exercise of personal jurisdiction over a nonresident defendant if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). General personal jurisdiction is not at issue here. The question is one of specific personal jurisdiction, whereby jurisdiction depends on an "affiliation between the forum and the underlying controversy"—namely, an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011)

(quotations omitted). The suit must "arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Super. Ct. of Calif., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017). Plaintiffs' action against Grewal meets this test.

B. Grewal's Texas contacts are extensive.

Plaintiffs' complaint includes several important categories of jurisdictional allegations. Each warrants close attention.

At the outset, Plaintiffs complaint addresses specific jurisdiction's contacts by alleging that Grewal "forced Defense Distributed to stop publishing the files on the internet," ROA.124, which is an activity that necessarily occurred in Texas because that is the place at which Defense Distributed publishes its website, *see* ROA.128. In other words, the complaint alleges that the action "arises from actions that the Defendants took and intend to take against Defense Distributed's activities in Austin, Texas and Defense Distributed's property in Austin, Texas, including computer servers and library materials." ROA.128. This is purposeful availment of Texas.

Most importantly, the complaint alleges the following keystone Texas contact: "On July 26, 2018, Grewal issued Defense Distributed a formal cease-and-desist letter" that "commanded Defense Distributed to cease publishing the *Defense Distributed I* Files" and "threatened to punish Defense Distributed for publishing the *Defense Distributed I Files* online." ROA.138–39. "As the chief law

enforcement officer for New Jersey," Grewal "demand[ed] that [Defense Distributed] halt publication of the printable-gun computer files." ROA.179.

In the same way that a "defendant might well fall within the State's authority by reason of his attempt to *obstruct* its laws," *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality op.), Grewal subjected himself to personal jurisdiction in Texas by literally becoming a governing official *of Texas* and declaring which Texas activities are legal and illegal. Grewal's cease-and-desist letter does not merely try to enjoy the benefit of Texas law—it purports to *change Texas law*. Displacing Attorney General Gen Paxton with the stroke of a pen, Grewal's deliverance of the cease-and-desist letter's censorship command to Defense Distributed changed—albeit unconstitutionally—the legal status of speech about the Second Amendment occurring in Texas.

Additionally, the *nationwide* injunction that Grewal obtained in the Washington action bears special emphasis. This extraordinary action changed the federal speech permissions[6] that apply to citizens in all fifty states, including the Texans that are most directly at issue. *See* ROA.136 (the injunction addresses the license issued "to Cody R. Wilson, Defense Distributed, and [SAF]").

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[6] To be clear, the injunction has *not* deprived anyone of the Constitutional right to publish digital firearms information; but it has deprived them of a federal regulatory change and license that Grewal conceded served as a sufficient basis for engaging in that same activity.

Another relevant fact is that, in addition to its website publications and mailings, *see* Dkt. 67 at 7–8, "Defense Distributed also publishes information about firearms at a brick-and-mortar public library in digital formats that patrons can access via computer workstations at the library." ROA.126. "The public library that displays Defense Distributed's publications is in Austin, Texas." ROA.128. By demanding that Defense Distributed cease *all* publications without limitation, Grewal's censorship directly impacts the public library in Austin.

Furthermore, Grewal decided to make contact with Texas in several additional ways that constitute purposeful availment. In addition to the cease-and-desist letter that made Defense Distributed change what website servers (in Texas) displayed on the internet, ROA.138–39, Grewal also sought to achieve that same end—to take down Defense Distributed's website—by threatening companies that contracted to provide internet security services for Defense Distributed, ROA.139–40.

Last but not least, Grewal stood at a live broadcast's podium to call out Defense Distributed's founder by name and promise that he would "come after" "anyone who is contemplating making a printable gun" and "the next ghost gun company." ROA.1328–29; *see* ROA.396 (Grewal: the Section (*l*)(2) speech crime exists because "a Texan named Cody Wilson" is "not relenting" and "still trying to release these codes online").

C. Jurisdiction over Grewal is demonstrated by *Calder* (U.S. 1984) and *Wien Air* (5th Cir. 1999).

On these facts, the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), shows that jurisdiction over Grewal exists. Jurisdiction over Grewal is also demonstrated by *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999). The district court erred in refusing to follow these precedents. *See* ROA.1744–47.

Calder was sound when it was decided and is sound now. It is grounded in the "purposeful direction" principle of *Burger King*, which teaches that specific jurisdiction may be exercised over a nonresident "if the defendant has 'purposefully directed' his activities at residents of the forum." *Burger King*, 471 U.S. at 472 (citation omitted). When an out-of-state defendant purposefully directs her conduct at a state, "[j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State." *Id.* at 476.

Accordingly, *Calder* upheld the exercise of personal jurisdiction on facts that are completely comparable to this case. Since its issuance, litigants have debated which of *Calder*'s facts matter most to its holding. That debate was laid to rest in *Walden v. Fiore*, 571 U.S. 277 (2014), which both reaffirmed *Calder*'s holding and identified the controlling facts that govern future cases. A block quotation of *Walden*'s controlling definition of *Calder* ensures that no relevant facet is omitted:

> In *Calder*, a California actress brought a libel suit in California state court against a reporter and an editor, both of whom worked for the National Enquirer at its headquarters in Florida. The plaintiff's libel

claims were based on an article written and edited by the defendants in Florida for publication in the National Enquirer, a national weekly newspaper with a California circulation of roughly 600,000.

We held that California's assertion of jurisdiction over the defendants was consistent with due process. Although we recognized that the defendants' activities "focus[ed]" on the plaintiff, our jurisdictional inquiry "focuse[d] on 'the relationship among the defendant, the forum, and the litigation.' " *Id.*, at 788, 104 S.Ct. 1482 (quoting *Shaffer*, 433 U.S., at 204, 97 S.Ct. 2569). Specifically, we examined the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story.

We found those forum contacts to be ample: The defendants relied on phone calls to "California sources" for the information in their article; they wrote the story about the plaintiff's activities in California; they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and the "brunt" of that injury was suffered by the plaintiff in that State. 465 U.S., at 788–789, 104 S.Ct. 1482. "In sum, California [wa]s the focal point both of the story and of the harm suffered." *Id.*, at 789, 104 S.Ct. 1482. Jurisdiction over the defendants was "therefore proper in California based on the 'effects' of their Florida conduct in California." Ibid.

The crux of Calder was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons. *See* Restatement (Second) of Torts § 577, Comment b (1976); *see also* ibid. ("[R]eputation is the estimation in which one's character is held by his neighbors or associates"). Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, *see id.*, § 558, the defendants' intentional tort actually occurred in California. *Keeton*, 465 U.S., at 777, 104 S.Ct. 1473 ("the tort of libel is generally held to occur wherever the offending

> material is circulated"). In this way, the "effects" caused by the defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to California, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

Walden, 571 U.S. at 286–88 (footnotes omitted). So defined, *Calder* applies here.

Just as in *Calder*, Grewal's delivery of the cease-and-desist letter's censorship command into Texas created a relationship with the State of Texas itself, "not just to a plaintiff who lived there." *Id.* Just as in *Calder*, the "sources" of information in Grewal's cease-and-desist letter are *in Texas*. *Id.* Just as in *Calder*, Grewal's letter itself is "about the plaintiff's activities in [Texas]." *Id.* Just as in *Calder*, Grewal's censorship command was "widely circulated" in Texas (and nationwide). *Id.* And just as in *Calder*, the "brunt" of the injury was suffered in Texas. *Id.*

To the extent that *Calder* relied on the special aspect of the tort at issue (libel), its reasoning continues to apply with full force here. In every relevant respect, a state official that commits Section 1983's tort of unconstitutional censorship creates just as strong a connection with the forum state itself as does a defendant that commits libel. For jurisdictional purposes, these two speech-based torts are equally connective to the receiving forum. Censorship is damaging not just as to the speaker in an isolated vacuum, but because of the harm that censorship necessarily inflicts on the speaker's *relationship to surrounding audiences*. Just like libel, censorship's harm "actually occur[s]" not where it originates, but where it arrives. *Id.*

In these ways, Grewal's delivery of the cease-and-desist letter's censorship command connected him to Texas itself, "not just to a plaintiff who lived there." *Id.* And as in *Calder*, that connection was "combined with the various facts that gave the [cease-and-desist letter] a [Texas] focus." *Id.*

None of that connection is "random, fortuitous, or attenuated." *Id*. It is "intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* Thus, Plaintiffs' case against Grewal falls squarely within the boundaries of the *Calder* holding that *Walden* reaffirmed.

To hold otherwise, the district court relied upon a conclusion about "fortuity": "The only relationship any of the Defendants' actions have with the State of Texas is the 'mere fortuity' that Defense Distributed resides there." ROA.1747. But under this Court's decision in *Wien Air Alaska*, the "fortuity" notion is a manifest error.

In *Wien Air Alaska*, Judge Higginbotham's opinion for the Court rightly concluded that a "fortuity" excuse does not work where, as here, "the actual content of communications with a forum gives rise to intentional tort causes of action":

> The defendant argues that communications directed into a forum standing alone are insufficient to support a finding of minimum contacts. *See, e.g.*, *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir.1986); *Patterson v. Dietz, Inc.*, 764 F.2d 1145, 1147 (5th Cir.1985); *Nationwide Mutual Ins. v. Tryg International Ins.*, 91 F.3d 790, 796 (6th Cir.1996); *Reynolds v. International Amateur Athletic Fed.*, 23 F.3d 1110, 1116 (6th Cir.1994); *FDIC v. Malmo*, 939 F.2d 535 (8th Cir.1991); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir.1987). *Cf. Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir.1997)

> (service of process on plaintiff in forum insufficient to support personal jurisdiction in abuse of prosecution claim).
>
> In all of these cases, however, the communications with the forum did not actually give rise to a cause of action. Instead, the communications merely solicited business from the forum, negotiated a contract, formed an initial attorney client relationship, or involved services not alleged to form the basis of the complaint. These cases are thus distinguishable from the present case. ***When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment.*** *The defendant is purposefully availing himself of "the privilege of causing a consequence" in Texas. Cf. Serras v. First Tennessee Bank National Ass'n.*, 875 F.2d 1212 (6th Cir.1989). It is of no use to say that the plaintiff "fortuitously" resided in Texas. *See Holt Oil*, 801 F.2d at 778. If this argument were valid in the tort context, the defendant could mail a bomb to a person in Texas but claim Texas had no jurisdiction because it was fortuitous that the victim's zip code was in Texas. It may have been fortuitous, but the tortious nature of the directed activity constitutes purposeful availment.

Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999) (emphasis added).

Just as in *Wien Air Alaska*, communications such as the cease-and-desist letter that Grewal delivered into Texas were themselves a distinct tort—the constitutional tort Congress codified in 42 U.S.C. § 1983. Thus, in this context of intentional wrongdoing expressly aimed at and delivered to Texas, it "is of no use to say that the plaintiff 'fortuitously' resided in Texas." *Id.* The rule that decided *Wein Air Alaska* decides this appeal as well. Where, as here, "the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." *Id.*

Under both *Calder* and *Wien Air Alaska*, the existence of specific personal jurisdiction does *not* turn on the particular variety of tort that a communication delivers. Jurisdictionally, there is no difference between a libel (*Calder*), fraudulent communication that violates state common law (*Wien Air Alaska*), and a censorship communication that violates the Constitution and 42 U.S.C. § 1983 (this case). In all instances, the communication itself constitutes the wrongdoing and suffices to establish minimum contacts—especially where, as in both this case and in *Calder*, the communication's content is intensely focused on forum activities.

D. *Stroman Realty* is not controlling.

Stroman Realty Inc. v. Wercinski, 513 F.3d 476 (5th Cir. 2008), was the district court's main ground for decision. ROA.1744–45. In that case, the Court held that an out-of-state officials' cease-and-desist letter did not meet the test for specific personal jurisdiction. *Id.* But as Plaintiffs explained below, ROA.1385–86, *Stroman Realty* does not warrant dismissal for several reasons.

Whether "the minimum contacts are sufficient to justify subjection of the non-resident to suit in the forum is determined not on a mechanical and quantitative test, but rather under the particular facts upon the quality and nature of the activity with relation to the forum state." *Miss. Interstate Exp., Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982). The quality and nature of *Stroman Realty*'s contacts are not analogous to Grewal's. Key disparities make that case inapposite.

The most critical distinction concerns the *content* of the commands at issue. In both *Stroman Realty* and this case, the out-of-state officials sent cease-and-desist commands into Texas, the suit's forum. *See Stroman Realty*, 513 F.3d at 484. But in *Stroman Realty*, the letter's cease-and-desist command focused on activities occurring *outside of Texas*. *Id.* Here, in contrast, Grewal's cease-and-desist command focused on activities occurring *within Texas*. The speech that Grewal's cease-and-desist command censors is created by a speaker in Austin, published to the internet in Austin, placed into the mail in Austin, and displayed in public libraries in Austin. The State of New Jersey is not this activity's center of gravity. Texas is. So while *Stroman Realty*'s facts might align it with *Walden*'s end result, the nature and quality of Grewal's censorship commands fit squarely within *Calder*'s.

Also, the *Stroman Realty* official did nothing but send a cease-and-desist letter. *Stroman Realty*, 513 F.3d at 484. In contrast, Grewal did far more. In addition to the cease-and-desist letter, Grewal *also* (1) obtained a nationwide injunction that governs the State of Texas itself and everyone in it, (2) threatened companies that contracted to provide internet security services for Defense Distributed, ROa.139–40, and last but not least, (3) stood at a live broadcast's podium to call out Defense Distributed's founder by name and promise that he would "come after" "anyone who is contemplating making a printable gun" and "the next ghost gun company." ROA.1328–29. Nothing of the sort existed in *Stroman Realty*.

Alternatively, if *Stroman Realty*'s holding is determined to be on all fours, the Court should revisit it for two reasons. First, *Stroman Realty*'s holding ought to be revisited in light of the later decision in *Walden*, 571 U.S. 277. *Walden* reembraced as good law a line of decisions—namely *Calder*—that *Stroman Realty* treated as inapplicable. *Compare Stroman Realty*, 512 F.3d at 488–489 (disregarding *Calder*, 465 U.S. 783, and *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1267 (5th Cir. 1978), *rev'd on other grounds sub nom Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979)), *with Walden*, 571 U.S. at 286 (reaffirming *Calder*). Regardless of whether or not *Stroman Realty* assessed the state of Supreme Court law correctly at the time, *Walden*'s reconceptualization of *Calder* shows that *Stroman Realty*'s interpretation of *Calder* was incorrect.

Second, *Stroman Realty*'s holding ought to be revisited in light of *Wien Air Alaska*, which establishes as the law of this Circuit the rule that, "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." 195 F.3d 208, 213. If *Stroman Realty* had applied that rule, the outcome would have been different. But since the *Stroman Realty* briefs did not cite *Wien Air Alaska*, the Court's decision in *Stroman Realty* did not have the occasion to account for it. Now that the Court has been presented with *Wien Air Alaska* squarely, it can apply the rule of orderliness accordingly. *See, e.g.*, *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014)

("[I]n [*Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)], we specifically rejected the idea that later Supreme Court and other decisions that were not directly on point could alter the binding nature of our prior precedent.").

III. Alternatively, the district court should have transferred the action to New Jersey instead of dismissing it.

In the district court briefing on Grewal's motion to dismiss, Plaintiffs made an important point about how the court should dispose of the case in the event that personal jurisdiction was found lacking. The proper disposition in that scenario, they submitted, was for the court to transfer the action to the court in which Grewal was unquestionably subject to personal jurisdiction—the United States District Court for the District of New Jersey:

> If the Court decides that it lacks personal jurisdiction over the New Jersey Attorney General or Delaware Attorney General, then in accordance with the relief that footnote 3 of [Grewal's] motion requests, the Court should transfer this case to an appropriate district ("New Jersey in the case of the NJAG . . . "). Dkt. 57 at 7 n.3. In no event is dismissal warranted.

ROA.1387. The district court did not address this issue expressly; it just silently rejected it by ordering dismissal. ROA.1751. This was error, and it was harmful.

Well-established federal law gives district courts the authority to transfer a case from a venue that lacks personal jurisdiction to one that has it. *See* 28 U.S.C. § 1404; Wright & Miller §§ 3482, 3845, 3827. Personal jurisdiction in the transferee court is required, *see id.*, and it is obviously present here. Grewal cannot possibly

dispute personal jurisdiction in New Jersey, and he did not. Both of his filings accepted that, in the event of a transfer, the District of New Jersey would be an appropriate transferee court. ROA.475, 1660. No reason to oppose Plaintiffs' transfer request existed, which is why none was given.

Dismissing the action against Grewal instead of transferring it to New Jersey was not a harmless error. It caused several significant forms of prejudice.

When the district court dismissed this action, an urgent motion for a preliminary injunction was pending, ready to be decided. *See* ROA.1316 (motion); ROA.1616 (response); ROA.1670 (reply); ROA.1811 (hearing). Instead of having the transferee court immediately pick the case up right where the Western District of Texas left off—with the pending motion for a preliminary injunction—the dismissal gave Plaintiffs no choice but to start all over again from square one, incurring substantial delay and expense that should have been avoided.

Following the district court's instruction, ROA.1751 ("Plaintiffs may pursue their claims in a court of proper jurisdiction."), Defense Distributed and SAF pursued their only option. They sued Grewal at home in the District of New Jersey, *see Defense Distributed, et al. v. Grewal*, No. 3:19-cv-04753-AET-TJB (D.N.J.), and moved for a preliminary injunction, *id.* Dkt. 18. Critically, though, because of the instant action's continuing pendency below and this Court—*i.e.*, because the district court below dismissed the case instead of transferring it directly to New

Jersey—the district court in New Jersey refused to rule on the Plaintiffs' motion for a preliminary injunction and stayed the action. *Id.* Dkt. 26 ("all proceedings in this action are STAYED until the action in the Western District of Texas (Civil Docket No. 18-1637) is resolved and no other motions for relief and/or appeals are viable"). That was error, and Plaintiffs have said so on appeal to the Third Circuit. *See* Appellants' Brief, *Defense Distributed v. Grewal*, Nos. 19-1729 & 19-3182 (3d. Cir.), 2019 WL 5109684 (Oct. 9, 2019). But to no avail. The Third Circuit dismissed the appeal for lack of appellate jurisdiction. *Defense Distributed v. Grewal*, Nos. 19-1729 & 19-3182 (3d Cir. Oct. 28, 2019).[7]

In this way, the district court's decision to dismiss the action instead of transferring it to New Jersey has unnecessarily prejudiced Defense Distributed and SAF's ability to obtain an adjudication of critically-important requests for injunctive relief. If the district court below had simply transferred the case as Plaintiffs requested (and Grewal did not dispute), none of this obstruction and delay would have occurred. Meanwhile, the irreparable harm Plaintiffs' motion for a preliminary injunction establishes remained unresolved. With each passing day, Grewal's unconstitutional censorship regime rages on. Relief from one court or another is needed immediately.

[7] As of this brief's filing date, the deadlines to seek rehearing in the Third Circuit and/or certiorari in the Supreme Court have not expired.

Conclusion

The district court's decision regarding New Jersey Attorney General Gurbir Grewal should be reversed. Because Grewal was judicially estopped from denying personal jurisdiction, *see supra* Part I, and because Plaintiffs established that Grewal had minimum contacts with Texas, *see supra* Part II, the Court should hold that Grewal's motion to dismiss for lack of personal jurisdiction should have been denied and remand the case for further proceedings in the Western District of Texas. Alternatively, if the Western District of Texas lacked personal jurisdiction over Grewal, the Court should hold that the district court should have transferred Plaintiffs' action against Grewal to the United States District Court for the District of New Jersey and render a judgment doing so, *see* 28 U.S.C. § 1631.

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