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

Reply Brief of Appellants

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ARGUMENT

Two fundamental flaws doom the AG's opposition. First, the AG fails to understand this appeal's objective. The point is not to bring back the case in New Jersey. That is a separate problem to be dealt with otherwise. The appeal's point is to reprise in Texas the claims that were there originally – the classic use of vacatur.

Second, the AG fails to acknowledge how badly he lost *Bruck* He gives lip service to the notion that a "collateral attack" on *Bruck* is forbidden. But virtually all of his arguments commit a collateral attack nonetheless. His point now is not really about *what Bruck* did. All agree that *Bruck*'s mandate required vacatur. The AG's argument now is all about *whether Bruck* was allowed to mandate vacatur. But that issue was litigated in *Bruck* itself and conclusively decided. Every major vacatur argument was made and lost in *Bruck*—both at the panel level and in the AG's failed petition for rehearing *en banc*. His loss there—*Bruck*'s decision to issue a mandate that both requires a retransfer request *and* compels vacatur—is law of the case that neither the AG nor a second-guessing later panel can disrupt.

I. Appellate jurisdiction exists.

This Court has jurisdiction regardless of whether or not the district court did. If the district court *had* jurisdiction, as Defense Distributed and SAF say, then Appellate jurisdiction exists; and if the district court *lacked* jurisdiction, as the AG says, appellate jurisdiction exists as well. The district court's jurisdiction or lack thereof determines *how* this Court should use its jurisdiction—not *whether* it exists. Appellants' Response to Appellee's Motion to Dismiss supplies a complete answer to the denial of appellate jurisdiction. The reply therefore focuses on the merits.

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

Issue I in the appeal is whether the district court had jurisdiction to adjudicate the preliminary injunction request. Because Plaintiffs properly re-presented their claims against the AG by way of either revival or refiling, the AG *is* a party below and the district court *did* have jurisdiction to adjudicate the injunction request. The errant jurisdictional dismissal should be reversed and the case remanded for proceedings on the merits. Br. of Appellants at 26-37; Appellants' Reply in Support of Appellants' Motion for an Injunction Pending Appeal at 2-11; *see also infra* Part III (before remanding the Court should render the requested preliminary injunction).

A. The revival and refiling efforts are consistent with *Bruck*.

The AG's main point says that the Plaintiffs' use of revival and refiling procedures cannot possibly succeed because this Court's decision in *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), did not expressly foresee and endorse those options. Instead, the AG says, Bruck expressly foreclosed the revival and refiling options by recognizing one and only one way out of this procedural standoff (retransfer). That is wrong for two reasons.

First, the AG's reading of *Bruck* is wrong because *Bruck* could not possibly have invalidated future hypothetical procedural steps that had not occurred at the time of decision. Anything *Bruck* might have said about the validity of revival and refiling options *that had not yet occurred* is dicta.

Second, the AG's reading of *Bruck* is wrong because *Bruck* did not invalidate the revival and refiling options. It did not even discuss them, assuming instead that the impasse would be solved otherwise. That assumption was an expectation (and a fair one at that), but not a holding. Everything Appellants did on remand accords with *Bruck*'s actual holdings and mandate, which are crystal clear and fully compatible with *multiple* solutions to the impasse—both the primary option (retransfer) that should come to fruition and the secondary options (revival and retransfer) that the AG's continued recalcitrance has made necessary.

Critically, the current procedural impasse entails *two separate problems* in need of *two separate solutions*. Call it "cloning." Call it "splitting the atom." Call it "Horcruxes." The labeling does not matter. What matters is that there are *two* procedural problems to be solved. One is in Texas, and the other is in New Jersey. This proceeding (below and on appeal) is only about solving the problem in Texas.

The Western District of Texas' sever-and-transfer order took what should have been one unified action with all claims (both the claims against the State Department and the claims against the AG) and split it in two. If ever a "cloning" of cases happened, it was then—when the district court (at the AG's behest) turned a single case into two and sent one away. That error created *two* distinct procedural glitches in need of *two* distinct solutions. Only one is at issue in this appeal.

Problem #1 is in Texas. It is about is an *absence* of claims. The case with Plaintiffs' claims against the State Department should include the Plaintiffs' claims against the AG as well. But while the district court's sever-and-transfer decision was in effect, the case with the Plaintiffs' claims against the State Department lacked the Plaintiffs' claims against the AG. The claims against the AG *were not* where they were supposed to be—in Texas alongside the case against the State Department.

Problem #2 is in New Jersey. It is about an *excess* of claims. Plaintiffs' claims against the AG should be proceeding in only the Texas-based case alongside Plaintiffs' claims against the State Department. But because of the district court's

clearly erroneous sever-and-transfer decision, an extra set of the Plaintiffs' claims against the AG now exists in New Jersey, where they *do not* belong.

Bruck realized the existence of these two distinct problems. So it solved them with two distinct mandates. The AG's refusal to see this duality is a critical error.

To solve Problem #1—the erroneous *absence* of claims against the AG in Texas—*Bruck* made the district court vacate its sever-and-transfer order. This was the simpler problem to solve, given that vacatur automatically accomplishes all that is needed by *fiat*. Hence *Bruck*'s use of vacatur to solve Problem #1 without fanfare.

To solve Problem #2—the errant presence of claims against the AG in New Jersey—*Bruck* mandated the retransfer request. This was arguably the more difficult problem to solve, given the supposed need for cooperation by the District of New Jersey. Hence *Bruck*'s detailed discussion of the retransfer solution for Problem #2.

The AG fails to see Problem #1 at all, fatally infecting his treatment of *Bruck*. The AG wrongly thinks that the instant appeal is an attempt to solve Problem #2's issue of handling the excess claims that are in New Jersey. The AG wrongly thinks that proceedings below—the revival and refiling options pursued in the Western District of Texas—were an attempt to remotely control the District of New Jersey. Hence the talk of territorial limitations. But nothing the Plaintiffs did below asked for action on the claims in New Jersey, and nothing the Appellants do on appeal asks for action on the claims in New Jersey.

It is true that Problem #2 needs dealing with. The existence of duplicate claims in multiple jurisdictions can be problematic (but is not necessarily injurious), depending on how the cases are litigated. Hence the existence of various non-jurisdictional claims-processing rules like stay doctrines, preclusion defenses, and the discretionary "first-filed" rule. For the Appellants, Problem #2's main harm is increased litigation cost. Defense Distributed and SAF lack the New Jersey Attorney General's infinite litigation budget. They need justice that is swift and efficient. Extra claims entail needless expense and distraction of litigation energies.

Thus, Plaintiffs are diligently dealing with Problem #2. But Plaintiffs are *not* dealing with Problem #2 remotely via the Western District of Texas or via this Court. Plaintiffs are dealing with Problem #2 on its own, in the District of New Jersey, by pressing their retransfer request through the requisite processes.

Of course it would have been ideal for these Problems #1 and #2 to have been solved simultaneously in one fell swoop. That would have happened if the District of New Jersey had immediately granted the retransfer request. But the law often supplies multiple solutions to the same problem, and there is nothing wrong with *Bruck* yielding a mandate that does so. Indeed, the fact that *Bruck*'s Problem #2 expectations have been upended (by the AG's remarkable opposition to retransfer) is all the more reason for *Bruck* to have solved Problem #1 separately, with a vacatur that took effect regardless of how much foot dragging happened in New Jersey.

The AG's qualms about how Problem #2 will or might be solved are inapposite because this appeal is about Problem #1—the erroneous absence of claims against the AG in Texas. *Bruck* correctly started Problem #1's repair by mandating vacatur of the sever-and-transfer order. Plaintiffs then correctly carried out Problem #1's repair by invoking the vacatur in both their revival and reviling procedures. Once the main issue's proper perspective is set—the test is whether vacatur solved for the absence of claims in Texas, not whether it solved for the extra claims in New Jersey—most of the AG's opposition becomes inapposite.

B. Revival of the complaint 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." Br. of Appellants at 27-32. Apart from the Problem #2 issue of how to deal with the extra claims in New Jersey, *Bruck*'s vacatur completely and automatically solved Problem #1 by reviving the Texas complaint's claims against the AG. *Id.*

The AG denies this by saying that territorial limitations should stop circuit courts from issuing such vacaturs, citing *Bruck* and *Red Barn*. This argument is wrong and, more importantly, no longer open for debate.

Territorial limitations on circuit power are not implicated where, as is this case here with Problem #1, the vacatur operates wholly within this circuit and a district

court therein. The AG is therefore wrong to say that vacatur should not be allowed to solved this impasse.

More importantly, though, the *Bruck* vacatur's propriety can no longer be questioned. *Bruck* itself resolved the issue of whether or not to mandate vacatur, and the AG lost. Every *Red Barn* argument he now makes was made and rejected in *Bruck*, both at the panel level and in a failed petition for rehearing *en banc*. The *Bruck* vacatur can no longer be questioned, even with another rehash of *Red Barn*. *Bruck*'s vacatur must simply be applied, just as Plaintiffs proposed below.

1. Territorial limitations are no problem.

The AG says that Appellants' vacatur theory is "inconsistent with the territorial limitations placed on the courts of appeals." Br. at 21. But that point once again misunderstands which problem revival operates on. Revival via vacatur does not address Problem #2 by trying to *bring back to Texas* the claims that are in New Jersey. Vacatur solves Problem #1 by recreating claims against the AG *in Texas*.

Everything that Plaintiffs asked the Western District of Texas to do was within the Western District of Texas' territory. The case they asked the Western District of Texas to adjudicate was that court's own case—not a case in the District of New Jersey. The filings they asked the Western District of Texas to adjudicate were entered in that court's own docket—not the New Jersey case's docket. They asked the Western District of Texas to enjoin the AG in his role as a party to that court's own case—not in his role as a party to the case in the District of New Jersey.

Everything this Court is asked to do is likewise within this Court's territory. Appellants want the Fifth Circuit to issue a judgment directed to the Western District of Texas—not the District of New Jersey. They want that judgment to direct action on a docket in the Western District of Texas—not a docket in the District of New Jersey. They want an injunction pending appeal entered against the AG in his role as a party to this Fifth Circuit appeal—not in his role as a party to the case in New Jersey. All of these is consistent with whatever "territorial limitations" exist.

The AG's view of territorial limitations cares about "where the case's files actually are." Br. at 22. He deems it critical to determine if a "transfer of the original papers" ever happened. *Id.* Assuming for the sake of argument that that is the critical test, it is satisfied here. Everything that matters to this appeal—every case file at issue and every paper at issue—is now in Texas and has always been in Texas.

The "case" that this appeal concerns is Western District of Texas case number 1:18-cv-00637. ROA.1. That case was originally filed in the Western District of Texas and that case never left the Western District of Texas. *See* ROA.1-29.

The "papers" that this appeal concerns are Plaintiffs' Second Amended Complaint and the injunction filings submitted on remand from *Bruck*. Those were all originally filed in the Western District of Texas and those have all remained in the Western District of Texas. The Second Amended Complaint, in particular, still exists as entry 117 in the Western District of Texas' docket. ROA.21; ROA.1854.

None of these realities conflict with the sever-and-transfer order. It is true that the District of New Jersey received *a* case and *that case's* papers. But what it received was a *new* case with *new* papers. The severance did not *extinguish* case number 1:18-cv-00637 or send it anywhere; it created a new case and sent that new case to New Jersey. Nor did the transfer send away case number 1:18-cv-00637's papers; it sent away only the new papers from the new case. The *new* case and *new* papers are Problem #2. Problem #1's case and papers remain, as always, in Texas.

The AG's cited authorities do not hold otherwise. *See* Br. at 22. They all involved mere decisions to transfer—not transfer *preceded by severance*. They all also involved action on an entire case—not action on certain *claims within a case*.

The case/claim distinction for such procedural actions is critical. Actions to dispose of "claims" within a "case" do not dispose the "case" itself. *Whitaker v. City of Houston, Tex.*, 963 F.2d 831, 835 (5th Cir. 1992), and *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003), are two of the many cases establishing that. Both were cited in the first brief, *see* Br. of Appellants at 37, and at oral argument on the motion for an injunction pending appeal. The AG has no answer.

Diece-Lisa Industries, Inc. v. Disney Enterprises, Inc., 943 F.3d 239 (5th Cir. 2019), shows how vacatur works perfectly solve Problem #1—the absence of claims in Texas that this appeal is all about. *See* Br. of Appellants at 29-30. Drawing on centuries of black-letter law about vacatur's function, *Diece-Lisa* establishes that

vacatur of a party-changing order automatically reverts the case to its prior status, restoring parties and claims to what they were before the vacated order. *Id.* Here that means reviving the Second Amendment Complaint's claims against the AG.

The AG has no answer to this. His sole point is that *Diece-Lisa* provides no help as to Problem #2—the extra claims in New Jersey. But the AG has not done anything to disrupt *Diece-Lisa*'s obvious application to Problem #1—the only problem that *Bruck*'s vacatur has been invoked to solve.

2. The AG is collaterally attacking *Bruck*.

Bruck already crossed every bridge that the AG says is uncrossable. By issuing a writ of mandamus that included the vacatur requirement, *Bruck* necessarily rejected every major anti-vacatur argument the AG now makes. The AG knows that he will lose if his arguments "collaterally attack the portion of the writ in *Bruck* that vacates the underlying transfer order." Br. at 20. Yet that is precisely what they do.

The AG's repeated argument about jurisdiction exemplifies this. The AG says that the district court's sever-and-transfer order caused in the Western District of Texas a "loss of jurisdiction" that "meant the loss of the ability of the transferor court to take action." Br. at 22. But if that were true, *Bruck* could not possibly have ordered the district court to vacate *anything* (let alone request retransfer). *Bruck*'s issuance of a writ directing vacatur necessarily defeats the AG's argument about lack of jurisdiction for *Bruck* itself and the district court on remand.

Much is made of *In re Red Barn Motors, Inc.*, 794 F.3d 481 (5th Cir. 2015). But everything the AG has to say about *Red Barn* is an impermissible collateral attack on *Bruck* as well. The AG's *Red Barn* arguments are not about *whether Bruck* did in fact issue a vacatur. All agree that it did. The AG's *Red Barn* arguments are about whether *Bruck* should have issued a vacatur. They are about *Bruck*'s result supposedly contradicting *Red Barn*. Everything the AG says about *Red Barn* now could have been said in *Bruck* itself. Indeed it was.

The AG made all of his current *Red Barn* arguments to the *Bruck* panel that rejected him; and he made those sake *Red Barn* arguments in the *Bruck* petition for rehearing *en banc*. The failed petition for rehearing *en banc* expressly challenged *Bruck*'s vacatur as conflicting with *Red Barn*. The "territorial limitations" point that occupies so much of the instant appellee's brief was sentence one of the petition for rehearing.[1] The rehearing petition's question presented was "[w]hether this Court has jurisdiction to vacate"[2]—the same idea that the AG wants to litigate again. The AG's learned counsel would not have made the stringent Rule 35(b) certification if *Bruck* had not decided what his petition for rehearing *en banc* said *Bruck* decided.

[1] Petition for Rehearing En Banc at 1-2, *Defense Distributed v. Bruck*, No. 21-50327 (5th Cir. Apr. 18, 2022).
[2] *Id.* at 3.

The AG lost the *Red Barn* argument in *Bruck* and lost it again in *Bruck*'s failed petition for rehearing. *Bruck*'s propriety can no longer be questioned—especially on grounds that the AG expressly argued and lost before. Even if another panel of this Court "might have fashioned the mandate differently," *Bruck*'s decision to mandate vacatur is permanently "the law of the case." *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991); *see also Renteria-Gonzalez v. I.N.S.*, 322 F.3d 804, 812 (5th Cir. 2002) (jurisdictional arguments cannot overcome a vacatur that is law of the case).

3. *Bruck*'s vacatur must be given full effect.

A key concession occurs on pages 20 and 21. There the AG concedes, as he must, that the order vacating the district court's sever-and-transfer decision had a real effect on the proceedings below. Br. at 20-21. This concession undermines everything the AG said before about the vacatur's impact below (supposedly none).

If the AG's view of *Bruck*'s upshot were true, *Bruck*'s vacatur of the district court's sever-and-transfer order accomplished *nothing*. On the AG's view, there was nothing in the Western District of Texas for the vacatur to act upon; on his view, there was no jurisdiction for the Western District of Texas to act; and on his view, the AG was not "party" to whatever got vacated. But by conceding that the vacatur *did* operate to change the case, the AG shows that his entire theory is wrong.

Having opened the door with this key concession, the AG tries to say that the vacatur's effect was extraordinarily slim and one-sided. He says that the vacatur did only what he wants (eliminate law-of-the-case concerns) and not what Plaintiffs wanted. *Id.* But of course vacatur law is not one-sided. No court has ever held that vacaturs work to only one side's advantage. The AG's limitation has no support.

Either *Bruck* mandated vacatur of the sever-and-transfer order or it didn't. There is no such thing as a half- or second-class vacatur—especially on this record. A full-fledged vacatur occur here. So under *Diece-Lisa* and centuries of black-letter law, the vacatur's effect was to immediately revive the Second Amended Complaint.

C. 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." Br. of Appellants at 33-36. What courts do by technical *fiat* alone, courts can take away by *fiat* as well. Just as the district court accomplished the severance not in any actual physical sense, but merely by *deeming* the Second Amended Complaint to have a certain new status, so too the district court completely undid its order by the mere act of vacating it. Plaintiffs then resolved any doubt about technical loose ends by seeking leave to "refile" the Second Amended Complaint that had been there on the docket all along.

The AG says that Plaintiffs never actually refiled the Second Amended Complaint. Br. at 27. But that is only because Rule 15 required the Plaintiffs to seek leave first, which they did as the alternative to their main argument (revival). *See* Fed. R. Civ. P. 15. What matters is that the AG was a party to every motion the Plaintiffs filed in August of 2022, including the two motions that presented the request for leave to amend. The request was made not just in one document's footnote, but in a second document clearly above the line as well. ROA.4406 n.1; ROA.4430 (highlighting the "alternative request for leave to amend").

The AG next denies the refiling option's efficacy by saying that no "service" occurred. Br. at 28-29. But the AG was served via ECF with everything the Plaintiffs filed below, including the notice of vacatur that invoked the revival argument, ROA.4402, the motion for a preliminary injunction that invoked both the revival and refiling arguments, ROA.4426, and the motion to grant the preliminary injunction request as unopposed that invoked both revival and refiling arguments as well, ROA.4433. Of course the AG was also served with the Second Amendment Complaint when filed in 2020. ROA.1854. Service via ECF throughout the life of a case is standard for parties that, like the AG, decide at a case's beginning to "waive any objections to the absence of a summons or service." ROA.134.

Even if a service failure had occurred here (it did not), the failure would not have created any jurisdictional fault. It instead would have presented just another claims-processing issue that the AG needed to raise below. *See Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd.*, 821 F.3d 573, 576 (5th Cir. 2016) ("issues raised by the method of service . . . did not cast doubt on the district court's 'jurisdiction'")

The rules show that Plaintiffs' use of Rule 15 and standard ECF service was perfectly orthodox. So does the AG's own practice. When the shoe is on the other foot—when the AG is the one seeking to add parties to a case—the AG himself utilizes the very procedure [motion with service by ECF] he now says is defective. In at east these four cases, the AG did just as Plaintiffs did below and added parties to an existing federal civil action by filing a motion and serving the motion under Rule 5 (the rule that allows for service by ECF):

- *State of Texas v. United States et al.*, Cause No. 1:18-cv-00068, Motion for Leave to Intervene of Proposed Defendant-Intervenor State of New Jersey, Doc. #39 (S.D. Tex. May 21, 2018).

- *State of California v. United States Envtl. Protection Agency & Stephen L. Johnson*, Cause No. 1:07-cv-02024-RCL, Motion to Intervene as Party-Plaintiffs, Doc. # 3 (D.D.C. Nov. 8, 2007).

- *United States et al. v. Valero Refining Co.-California, et al.*, Cause No. 5:05-cv-00569-WRF, Unopposed Motion to Intervene as a Plaintiff under Rule 24, Doc. # 16 (W.D. Tex. July 14, 2005)

- *United States et al. v. Oxy Vinyls, LP*, Cause No. 3:06-cv-01005, Unopposed Motion to Intervene as a Plaintiff under Rule 24, Doc. # 4 (N.D. Tex. June 8, 2006).

The AG's forgetfulness is not new. His gamesmanship entails flip flopping about key procedural rules all the time. This is just the latest revealing instance.

III. As a party below, the AG waived, forfeited, and/or defaulted all non-jurisdictional opposition.

The AG says that no waiver could have occurred while he was not a party. But that just begs the question. If the AG *was* a party that the district court had jurisdiction over, his refusal to show up below constitutes a complete waiver, forfeiture, and/or default of all non-jurisdictional opposition. Whatever may be said about his "party" status vis-à-vis the entire "case," the AG was undoubtedly a party to both the "order" being appealed from and the proceedings giving rise to it.

For their part, the Plaintiffs did everything necessary to make the AG a party to the preliminary injunction proceedings and the resulting decision. A plaintiff is the "master of the claim," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), and has the right to define a matter's parties by naming them as such in the caption of their pleadings and motions. *See* Wright & Miller § 1321; *Abraugh v. Altimus*, 26 F.4th 298, 303 (5th Cir. 2022).[3] Though not the only way of doing so, the plaintiff's statement of parties in their caption is usually the conclusive method of defining the proceeding's parties. *See id.* Every caption at issue here made the AG a defendant below, ROA.4398; ROA.4403; ROA.4429; ROA.4438, including the

[3] *Cf.* Wright & Miller § 1321 & n.2 ("Because Federal Rule of Civil Procedure 7(b)(2) expressly incorporates "[t]he rules governing captions," Rule 10(a) applies to all motions as well.").

caption of the Second Amended Complaint, ROA.1854, and the caption of the motion for a preliminary injunction, ROA.4403. None differed.

For its part as well, the district court did everything necessary to make the AG a party to the preliminary injunction decision. With the case caption again defining the matter's parties, the district court made the AG a party to its injunction decision by expressly listing the AG in the caption as a party defendant. ROA.4436.

These captions are decisive. Every caption below made the AG a party and nothing contradicted them. Just as there was "no basis for looking past the caption" in *Abraugh*,26 F.4th at 303, there is no basis for looking past captions here. Plaintiffs exercised their right to make the AG a party and the district court rightly accepted that framing. Thus, the AG was a party to both the order on appeal and the proceedings leading to it. Section 1292(a)(1) appellate jurisdiction requires no more.

Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996), is cited as supposedly defeating this conclusion. But the word "caption" does not even appear in that case, and the motions *Bennett* confronted were totally unlike the ones at issue here. The *Bennett* filing "did not purport to bring the [challenging party] back in" to the case. *Id.* at 588. Defense Distributed and SAF's filings obviously did just that.

U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728 (Fed. Cir. 1992), and United States v. Uni Oil, Inc., 710 F.2d 1078, 1080 n.1 (5th Cir. 1983), do the AG no better. They were both about appellate captions—not the trial court captions at

issue here. *Id.* Appellate filings do not implicate the special rules that govern trial court filings and give captions special significance. *See* Fed. R. Civ. P. 7(b)(2).

IV. The Court should render the requested preliminary injunction.

A party that wrongly refuses to file anything all should not benefit from having committed such a grave tactical error. Yet that absurd result is what the AG asks for here. The AG wants the Court to rule that, even though he *wrongly* refused to show up and file anything whatsoever in response to critical motions such as these, courts should bail him out and make the error cost him nothing. But no bailout is warranted where, as here, it prejudices the Plaintiffs that followed the rules all along.

There is no need for "the parties to develop the factual record in the district court," Br. of Appellee at 39, because a fulsome factual record already exists. Plaintiffs made that record, proving up every facet of their entitlement to a preliminary injunction. That record is before this Court, ready to be adjudicated.

The AG *chose* not to participate in that record's development. He certainly could have played ball below, even when protesting jurisdiction. *See* Fed. R. Civ. P. 12(b) ("No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."). Just look to what the AG did earlier in this very case. In response to Plaintiff's first motion for a preliminary injunction, the AG simultaneously (1) disputed jurisdiction, ROA.475, *and* (2) responded to the preliminary injunction motion's substance, ROA. 1628. What the response calls impossible he himself did in this very case. The supposed "double bind" is therefore false.

CONCLUSION

The Court should reverse and vacate the district court order dismissing Defense Distributed and SAF's 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. Meanwhile, the motion for an injunction pending appeal should be granted.

October 5, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 5, 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. Service will be accomplished by the appellate CM/ECF system to all registered users for this case.

/s/ *Chad Flores*
Chad Flores

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This filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 because it contains 4,891 not-exempted words.

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/s/ *Chad Flores*
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