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.

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

Brief of Appellee
Matthew J. Platkin, Attorney General of New Jersey

MATTHEW J. PLATKIN
Acting Attorney General of New Jersey
JEREMY M. FEIGENBAUM
Solicitor General
ANGELA CAI
Deputy Solicitor General
TIM SHEEHAN
MELISSA MEDOWAY
MELISSA FICH
CHANDINI JHA
JOHN T. PASSANTE
Deputy Attorneys General
New Jersey Attorney General's Office
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625
angela.cai@njoag.gov

Attorneys for New Jersey Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has already been noticed in this case. *See* Per Curiam Order (Sept. 16, 2022); Notice of Tentative Oral Argument Date (Sept. 19, 2022).

JURISDICTIONAL STATEMENT

Appellants seek to appeal from the Western District of Texas's dismissal of a motion for preliminary injunction for lack of jurisdiction. As set forth below, the district court lacked jurisdiction to issue the injunction. And as set forth below and in Appellees' Motion to Dismiss filed August 29, 2022, this appeal should be dismissed for lack of jurisdiction.

QUESTIONS PRESENTED

1. Whether this appeal should be dismissed for lack of jurisdiction.
2. Whether the district court correctly dismissed the motion for preliminary injunction for lack of jurisdiction.

INTRODUCTION

The district court denied Appellants' motion for preliminary relief on the basis that the New Jersey Attorney General ("NJAG"), against whom the injunction was sought, was not a party to the case before it. That decision was correct.

Although the procedural history of this case is complex, this Court's cases and hornbook principles of law make this particular appeal straightforward. Appellants are entities that intend to distribute printable gun files that enable "virtually anyone with access to a 3D printer to produce, among other things," functional firearms and that produce "fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 455 (5th Cir. 2016). Appellants filed a civil action in the Western District of Texas, pleading claims against the NJAG to enjoin his enforcement of New Jersey laws that interfere with their distribution in New Jersey. In an amended complaint, Appellants added claims against U.S. Department of State ("USDOS") officials, arguing that these federal officials breached a settlement agreement with them, and otherwise asserting APA and constitutional claims against then-existing federal rules. On April 19, 2021, the district court granted the NJAG's motion to sever Appellants' claims against him from their claims against the USDOS officials, and to transfer the claims against him to the District of New Jersey. Appellants did not seek a stay of that transfer decision, so transfer to the New Jersey district court

was effectuated the next day. That case was then consolidated with another lawsuit filed by Appellants and other plaintiffs already pending in the District of New Jersey, without objection from Appellants.

That procedural history posed an obstacle for Appellants in their last appeal to this Court. Although Appellants never sought a stay of the district court's transfer order, they did appeal that transfer to this Court. And the panel majority agreed with Appellants that the district court's transfer-and-severance order was erroneous. But this Court also acknowledged a "twist in this case": transfer had been effectuated "to a district court outside the Fifth Circuit, a court over which this court exercises no control." *Defense Distributed v. Bruck*, 30 F.4th 414, 423 (5th Cir. 2022). As a result, this Court reasoned, the transferor district court in Texas lost its jurisdiction over the case, *id.* at 424, and the Fifth Circuit further "lack[ed] power to order a return of the case to our circuit," *id.* at 423; *see also In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015). This Court therefore identified only one "path to a cognizable mandamus remedy": to "request that the transferee district court return the case." *Id.* at 424. As a result, this Court required the Texas district court to vacate its transfer order; to then "[r]equest the District of New Jersey to return the transferred case to the Western District of Texas"; and to then, "[a]fter return," "reconsolidate Defense Distributed's case against the NJAG back into the case still pending against the State

Department," *id.* at 436-37, as well as "entertain a motion for preliminary injunction expeditiously," *id.* at 421 n.2. This Court provided no other relief.

That backdrop proves fatal to Appellants' current appeal. While the District of New Jersey has so far declined to return Appellants' case against the NJAG to the Western District of Texas, Appellants have persisted in seeking injunctive relief in the Texas forum anyway. On June 6, Appellants moved for a preliminary injunction against the NJAG in the Texas docket that contains claims against USDOS officials, and from which the NJAG had been terminated over a year before. But the district court correctly found that "it lacks jurisdiction to consider [Appellants'] claims" because the NJAG was not a party to the case. ROA.4436-37. Contrary to Appellants' claims, this Court's prior mandamus order did not create a second and parallel case against the NJAG in the Western District of Texas. And contrary to Appellants' alternative theory, they have not established the NJAG as a party in their separate suit against USDOS officials: Appellants have neither refiled any claims against the NJAG nor re-served him with proper process. And because the NJAG is not a party, no relief can be granted against him. The district court's dismissal was therefore correct.

To be sure, multiple options were available to Appellants. Most obviously, they could have sought a stay of the Texas district court's transfer order before the suit was sent to the District of New Jersey, thus avoiding this jurisdictional tangle.

And even today, Appellants have tools at their disposal. Appellants can seek—and are seeking—reconsideration before the District of New Jersey, and they can petition for mandamus to the Third Circuit if that motion fails. And Appellants can move for preliminary injunctive relief in their case against the NJAG in the District of New Jersey at any time. But Appellants cannot obtain any relief from this Court against the NJAG because this case remains in the District of New Jersey. As a result, this Court should dismiss this appeal or, in the alternative, affirm the district court's dismissal of the case for lack of jurisdiction.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. This appeal involves Appellant Defense Distributed's effort to distribute computer files that enable any recipient with access to 3D printers—even terrorists, felons, and domestic abusers—to make untraceable and undetectable firearms. *See Dep't of State*, 838 F.3d at 455. These files "allow virtually anyone with access to a 3D printer to produce, among other things, [a] single-shot plastic pistol … and a fully functional plastic AR-15 lower receiver." *Id.* Other files and equipment allow users to "produce fully functional, unserialized, and untraceable metal AR–15 lower receivers in a largely automated fashion." *Id.*

In 2015, Defense Distributed filed a lawsuit against the federal government in the District Court for the Western District of Texas challenging a directive requiring the company to remove printable-gun files from its website. ROA.30. Defense

Distributed sought a preliminary injunction, but the district court denied its motion, and this Court affirmed. *See Dep't of State*, 838 F.3d at 461. In 2018, however, the federal government changed positions and entered into a Settlement Agreement that essentially gave Appellant the relief it had been seeking. ROA.4135.

Following the announcement of the Settlement Agreement, a number of state and local officials took action. On July 26, 2018, the NJAG sent a letter to Appellant demanding that it cease and desist from distributing the files to New Jersey residents, because such action would violate New Jersey state law. ROA.57.

2. In response, on July 29, 2018, Appellants filed suit in the Western District of Texas against the NJAG in his official capacity, along with several other state and local officials. Appellants alleged claims under the First, Second, and Fourteenth Amendments, under the dormant Commerce Clause and Supremacy Clause, and under state tortious interference law. ROA.30. Appellants demanded declaratory and injunctive relief and attorneys' fees and costs. ROA.43. As this is an *Ex Parte Young* suit, they did not seek damages.

The procedural history quickly grew more complicated. On January 30, 2019, the district court dismissed Appellants' claims against the NJAG for lack of personal jurisdiction. That dismissal led Appellants to take two steps in response. Appellants appealed that final judgment to this Court. *See Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020). And Appellants filed a new lawsuit in the District of New

Jersey, joined by additional plaintiffs, again seeking to enjoin the NJAG, and again pursuing the vast majority of the same legal claims. *See* No. 19-cv-4753, Dkt. 1, 17 (D.N.J.). This second complaint stated that the District of New Jersey "constitutes a proper venue for this action because a substantial part of the events or omissions giving rise to the claim occurred here." *Id.*, Dkt. 17, ¶ 26.

To avoid the problem of duplicative litigation that risked conflicting results, the District of New Jersey stayed Appellants' separate suit. *See* No. 19-cv-4753, Dkt. 26 (D.N.J. Mar. 7, 2019), *appeal dismissed sub. nom. Defense Distributed v. Att'y Gen. of N.J.*, 972 F.3d 193 (3d Cir. 2020). As a result, there was a lawsuit proceeding against the NJAG in the Western District of Texas and one against him in the District of New Jersey—involving additional plaintiffs—that was temporarily stayed.

This Court ultimately reversed the dismissal of the Texas action, finding that Appellants' allegations sufficiently supported jurisdiction over the NJAG at the motion-to-dismiss stage, *see Grewal*, 971 F.3d at 496-97, although Judge Higginson's concurrence recognized that the truth of those particular factual allegations remained hotly contested, *see id.* at 497 n.1. Judge Higginson also noted that "there is now parallel litigation in Texas and New Jersey, and the parties, and either district court, may seek transfer under 28 U.S.C. § 1404(a)." *Id.* at 499 n.3.

3. On remand, Appellants did not seek preliminary relief in the Texas district court. Instead, two months later, Appellants filed a Second Amended Complaint.

ROA.1854. Although the First Amended Complaint had pled claims relating to the NJAG's cease-and-desist letter regarding the potential enforcement of New Jersey's public nuisance law against Appellants, *see* ROA.135, in November 2018, the New Jersey Legislature had passed a new law to prohibit the distribution of certain code capable of producing firearms using a three-dimensional printer "to a person in New Jersey" who is not a licensed manufacturer. N.J. Stat. Ann. § 2C:39-9(*l*)(2). The SAC therefore pursued new claims against the enforcement of Section 2C:39-9(*l*)(2). *See* ROA.1854 ¶¶ 141-61.[1] The SAC also added claims against various USDOS officials for the first time, both alleging a breach of a 2018 settlement agreement, *id.* ¶¶ 95-126, and asserting APA violations and constitutional claims involving then-existing federal regulations, *id.* ¶¶ 184-215, 225-54.

4. The NJAG then moved before the Texas district court to sever and transfer the claims against him to New Jersey, where Appellants' parallel action against him remained pending. The court granted that motion on April 19, 2021. ROA.2462. The next day, April 20, 2021, Appellants' suit against the NJAG was officially severed from their lawsuit against the USDOS officers, and their lawsuit against the NJAG was transferred and docketed as Case No. 21-cv-9867 (D.N.J.). Appellants filed a

[1] The lawsuit filed in 2019 in the District of New Jersey similarly brought claims against Section 2C:39-9(*l*)(2).

notice of appeal to this Court, but Appellants did not move to stay the transfer. ROA.2479.

On June 11, 2021, the District of New Jersey granted the NJAG's motion to consolidate the transferred case with Appellants' already-pending New Jersey litigation. No. 21-cv-9867, Dkt. 159 (D.N.J.). Appellants did not oppose the motion to consolidate, did not move for a stay, and did not move for retransfer in the District of New Jersey. Instead, since April 20, 2021, Appellants' claims against the NJAG resided exclusively in the District of New Jersey.

At the same time, however, Appellants proceeded with their appeal from the Western District of Texas's transfer order in this Court. Although a panel of this Court believed that the Texas district court's underlying severance-and-transfer order was incorrect, the panel also recognized that this procedural history introduced a significant "twist in this case": transfer had already been effectuated "to a district court outside the Fifth Circuit, a court over which this court exercises no control." *Bruck*, 30 F.4th at 423. As a result, the Texas district court had lost its power to "enter an appealable order in the case," *id.* at 424, and the Fifth Circuit "lack[ed] power to order a return of the case to our circuit," *id.* at 423. Given this limitation, *Bruck* explained that precedent provided only one "path to a cognizable mandamus remedy": to "request that the transferee district court return the case." *Id.* at 424 (quoting *Red Barn*, 794 F.3d at 484).

Ultimately, this Court crafted a remedy consistent with both its view that the transfer order was erroneous and with the jurisdictional limits it had identified. This Court issued a writ of mandamus "directing the district court to: (1) Vacate its order dated April 19, 2021 that severed Defense Distributed's claims against the NJAG and transferred them to the United States District Court for the District of New Jersey; (2) Request the District of New Jersey to return the transferred case to the Western District of Texas, Austin Division; and, (3) After return, to reconsolidate Defense Distributed's case against the NJAG back into the case still pending against the State Department." *Id.* at 436-37. Consistent with that approach, it added that "[u]pon return of this case to the Western District of Texas, the [district] court should entertain a motion for preliminary injunction expeditiously." *Id.* at 421 n.2.

5. While this case has not yet been returned to the Western District of Texas, Appellants nevertheless persisted in seeking relief there against the NJAG.

After the Western District of Texas sent the required "request" to the District of New Jersey to "return the transferred case," the parties submitted briefs before the District of New Jersey, detailing their respective positions on transfer and continuing to dispute whether the consolidated litigation belonged in Texas or New Jersey. *See Defense Distributed v. Platkin*, No. 19-4753 (D.N.J.) (consolidated with No. 21-9867), Dkts. 54, 56, 57. Appellants asked the District of New Jersey to "grant the transfer request and return the entire controversy to the Western District of Texas

immediately," emphasizing this Court had "held that the case against the New Jersey AG should be transferred back to Texas and reconsolidated with the related case against the State Department, with preliminary injunction hearings against the New Jersey AG to proceed in Texas expeditiously." Dkt. 54 at 1.

But the District of New Jersey disagreed and denied the motion in a 36-page opinion. *See* Dkt. 58. Although the District of New Jersey acknowledged that "the Texas District Court [had] issued a non-binding request for retransfer," the transferee court also explained that because the order was not binding and could not be binding, the transferee court still had to use its independent judgment to evaluate the propriety of transfer. *Id.* at 35. The District of New Jersey ultimately decided to "decline" to transfer the case back to Texas, and concluded that "the litigation [would] proceed" in New Jersey instead. *Id.*

Even while these proceedings were taking place in the District of New Jersey, Appellants decided to submit several filings in the Western District of Texas. After the Texas district court severed Appellants' lawsuit against the NJAG from their suit against USDOS officials and transferred it to New Jersey in April 2021, the separate suit against USDOS officials proceeded under Docket No. 18-637. (Docket No. 18-637 thus lists only the federal officials as defendants, and it recognizes the NJAG as "TERMINATED" as of April 19, 2021. ROA.3.) On June 6, 2022, 66 days after the *Bruck* decision issued, Appellants filed a "Notice of Vacatur" in that docket arguing

that their claims against the NJAG had been "automatically revived" by the Fifth Circuit's *Bruck* decision, ROA.4398-99, and moved for a preliminary injunction against the NJAG on the same day, ROA.4403. Because the NJAG was not a party to the underlying proceedings, it did not respond. The district court, relying on this Court's mandamus decision, found that until the lawsuit had actually been returned from New Jersey, "it lacks jurisdiction to consider [Appellants'] claims." ROA.4436-37. In short, the district court was without "power to adjudicate these motions" and had to "dismiss them." ROA.4437.

Appellants filed the instant appeal from the denial of their preliminary relief application, ROA.4438, and sought an injunction pending appeal from this Court to enjoin the NJAG's enforcement of New Jersey law. The NJAG opposed the motion, and filed a cross motion to dismiss the appeal, on the basis that he is not actually a party to the district court proceedings in Texas while the lawsuit remains pending in the District of New Jersey. A motions panel of the Fifth Circuit held oral argument on September 14, 2022, but ultimately declined to rule on these motions and instead set the appeal for expedited consideration before this panel. *See Defense Distributed v. Platkin*, Order, Sept. 16, 2022. Two judges issued a concurring opinion reiterating this Court's "request" that the District of New Jersey return the case to the Western District of Texas. *See id.* at 2-3 (Ho and Elrod, JJ., concurring).

While merits briefing is pending in this Court, proceedings are continuing in the District of New Jersey as well. The same day the District of New Jersey declined to transfer Appellants' action against the NJAG to Texas, Appellants dismissed their 2019 lawsuit in the District of New Jersey—with which the transferred lawsuit had been consolidated—without prejudice. No. 19-4753, Dkt. 60. Based on that maneuver, on the same day, Appellants filed a motion for reconsideration. *See* Dkt. 61. And shortly after this Court's September 16 Order, Appellants filed a "Motion to Grant the Fifth Circuit's Return Request." Dkt. 64. Both motions remain pending.

SUMMARY OF THE ARGUMENT

I. This Court must dismiss Appellants' appeal or affirm the district court because the NJAG is not a party to Appellants' lawsuit in Texas. *Bruck* makes clear that Appellants have no pending claims in the Western District of Texas against the NJAG unless and until the District of New Jersey returns the litigation.

A. The NJAG is not a party to Appellants' separate lawsuit against USDOS officials in Texas. Appellants' theories—that this Court's opinion created a second parallel case against the NJAG in Texas (the "revival theory"), or that Appellants' subsequent request to refile did so (the "refiling theory")—are incorrect.

This Court's prior order both did not revive Appellants' action against the NJAG in the Western District of Texas and could not have done so. This Court's decision did not revive Appellants' suit in Texas; the opinion instead made clear that

the Texas court could only reconsolidate the claims against the NJAG into the docket against USDOS officials, and could only consider a motion for a preliminary injunction, after the return of the litigation from the District of New Jersey. And for good reason: the transfer of the case against the NJAG meant "no relief remained open" whatsoever in the transferor court, *Drabik v. Murphy*, 246 F.2d 408, 409 (2d Cir. 1957), which includes the power to create a second, cloned lawsuit in Texas. After all, Appellants filed only one complaint—and consistent with the rules governing case initiation and transfer, it proceeds only in one court at a time. *See, e.g.*, *In re Flight Transp. Corp. Sec. Litig.*, 764 F.2d 515, 516 (8th Cir. 1985) (finding an "attempt[] both to transfer the cases to Pennsylvania and to retain jurisdiction in Minnesota … exceeds the transfer power"). Appellants can identify no support for their contrary rule.

Appellants' alternative refiling theory fails as well. Most importantly, Appellants did not actually refile any claims against the NJAG. Appellants instead filed a preliminary injunction application in a docket that pleads only claims against federal defendants, and in a footnote in that motion buried an alternative request for leave to refile their claims against the NJAG. *See* ROA.4406. The court never acted on that request; no claims against the NJAG were subsequently filed; and the NJAG was not served in that lawsuit. *See, e.g.*, *Maiz v. Virani*, 311 F.3d 334, 340 (5th Cir. 2002); *Hous. Auth. of Atlanta v. Millwood*, 472 F.2d 268, 272 (5th Cir. 1973). Nor

would actual refiling be tenable: the second-filed rule, among other legal doctrines, prevents dissatisfied plaintiffs from simply refiling duplicative suits when they disagree with how a transferee court is handling a transferred case.

B. Because the NJAG is not a party to Appellants' lawsuit in Texas, no preliminary injunction can be awarded against him. Under Federal Rule of Civil Procedure 65, decades of case law, and hornbook jurisdictional rules, injunctions—including preliminary injunctions—may not issue except against parties to that case and those in privity with the parties. Although Appellants rely on the All Writs Act for support, that statute only authorizes injunctions "in aid of" a court's jurisdiction. And whether or not the NJAG can continue enforcing New Jersey law has no bearing whatsoever on this Court's jurisdiction, because it would not compel or even impact return of the case from the District of New Jersey. Appellants have other options for seeking relief, but they may not currently obtain a preliminary injunction against the NJAG in the Western District of Texas.

II. Even if this Court concludes that the NJAG is a proper party, it should remand Appellants' request for a preliminary injunction so that the district court can consider the motion in the first instance. A remand order would be consistent with this Court's role as a court of review, not first view, and with the district court's role as the finder of fact. In this case in particular, multiple hotly contested questions turn at least in part on factual disputes: whether Appellants satisfy the equitable criteria

for preliminary injunctions, including the balance of the equities and public interest; whether Appellants' printable files are protected speech; whether the challenged law survives means-end scrutiny; and whether Appellants can meet the higher burden of establishing personal jurisdiction for purposes of a preliminary injunction.

ARGUMENT

I. THIS COURT MUST DISMISS OR AFFIRM BECAUSE THE NJAG IS NOT A PARTY TO THIS CASE.

Until Appellants' case against the NJAG is returned from the District of New Jersey, he is not a party to their separate suit against USDOS officials in the Western District of Texas. And because the NJAG is not a party to the district court proceedings in which Appellants are seeking relief, their motion for a preliminary injunction against him necessarily fails. Appellants had options to avoid this jurisdictional dilemma, and Appellants continue to have a range of options now to obtain relief, but none of those options support their position in this particular appeal.

A. The NJAG Is Not A Party To This Case.

This Court already explained in *Bruck* the only path for Appellants to bring the NJAG back to the Western District of Texas as a party in their lawsuit. First, the district court must request the District of New Jersey to return the transferred case. Second, it must wait for the District of New Jersey to comply with the request. Third, "[a]fter return," the Western District of Texas must "reconsolidate" the case against the NJAG into the case pending against the State Department. *Bruck*, 30 F.4th at 437.

But as Appellants concede, their case is still in the District of New Jersey. *See* Brief of Appellants ("Br.") at 26 (acknowledging that the "procedural solution [of]…

retransfer of what lies before the District of New Jersey" did not occur). Nonetheless, Appellants applied for a preliminary injunction in Docket No. 18-637 in the Western District of Texas, which only contains their case against USDOS officials, and from which the NJAG was "TERMINATED" in April 2021. ROA.3. Appellants offer two justifications for its approach: *first*, that *Bruck* did not just request return of the case from New Jersey but created a second parallel case against the NJAG in Texas (the "revival theory"); and *second*, that Appellants subsequently refiled claims against the NJAG in Texas (the "refiling theory"). Neither theory holds up.

i. The Revival Theory Fails.

Appellants first contend that the "vacatur" of the severance-and-transfer order "automatically" revived their prior claims against the NJAG in Texas. Br. 28. Their theory flies in the face of *Bruck* and hornbook principles of jurisdiction.

1. Appellants' interpretation of the "vacatur" in *Bruck* is inconsistent with that decision. *Bruck* was explicit that the lawsuit against the NJAG now resided only in New Jersey, and explained that the Texas District Court had no jurisdiction over that case until the New Jersey court returned it. As *Bruck* put the point, because transfer to an out-of-circuit district court had been fully effectuated on April 20, 2021, "the Texas transferor court can no longer enter an appealable order in the case," and the Fifth Circuit "lacks power to order a return of the case to our circuit." 30 F.4th at 423-24. The only "path to a cognizable mandamus remedy" was the one

contemplated in *Red Barn*: to "direct[] the transferor district court to request that the transferee district court return the case." *Id*. at 424 (quoting *Red Barn*, 794 F.3d at 484).

The order this Court carefully crafted therefore made clear that vacatur would not revive any claims in Texas on its own. The writ of mandamus it issued instead directed the Texas district court to vacate its severance-and-transfer order, then to "[r]equest the District of New Jersey to return the transferred case," and only then—"*[a]fter return*"—to "reconsolidate [Appellants'] case against the NJAG back into the case still pending against the State Department." *Id.* at 437 (emphasis added); *see id.* at 421 n.2 (adding that "*upon return of this case* … the court should entertain a motion for preliminary injunction") (emphasis added). In other words, *Bruck* made clear that even after vacatur, Appellants only had a suit in Texas "pending against the State Department," and made clear that Appellants could not seek reconsolidation or apply for a preliminary injunction against the NJAG until their case against him was returned.

Appellants' filings soon after *Bruck* understood that decision in the same way. Appellants told the District of New Jersey that swift retransfer was needed in light of the *Bruck* mandamus writ "because the Western District of Texas needs to conduct preliminary injunction proceedings immediately"—consistent with footnote two of that opinion—and could not yet do so. *See Defense Distributed v. Platkin*, No. 19-

4753 (D.N.J.), Dkt. 52 at 1; *see also, e.g.*, Dkt. 54 at 2 (Appellants arguing that were the District of New Jersey to decline to re-transfer the case to Texas, it "would create 'serious interference' with" the Texas court's ability to "adjudicat[e] the Plaintiffs' case against the [NJAG] together with the case against" USDOS officials).

Appellants' effort to seek a preliminary injunction now is simply inconsistent with *Bruck*. The Texas district court did comply with *Bruck* and "[r]equest the District of New Jersey *to return* the transferred case." *Bruck*, 30 F.4th at 437 (emphasis added). But return has not yet happened. And so the consolidation that Appellants could request only "[a]fter *return*," *id.*, and the preliminary relief they could move for only "[u]pon *return*," *id.* at 421 n.2 (emphases added), remain unavailable in the Texas district court.

To be clear, these arguments do not collaterally attack the portion of the writ in *Bruck* that vacates the underlying transfer order. Vacatur accomplishes something separate from Appellants' revival theory. This Court had expressed concern that any "review in the transferee court" of Appellants' retransfer request might be "illusory" due to "law-of-the-case principles"—that is, that the transferee court would be bound to the transferor court's original order. *Id.* at 425; *see also, e.g.*, *Chrysler Credit Corp. v. Country Chrysler*, 928 F.2d 1509, 1516 (10th Cir. 1991) ("[T]raditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer order…."). Vacatur eliminated

that potential concern: the Texas court's transfer order is no longer a law-of-the-case ruling that constrains the decisions of the transferee court. But vacatur did not create a second, mirror-image suit.

2. Appellants' construction of *Bruck* also fails because that opinion *could not* have revived Appellants' action in the Western District of Texas.

First, Appellants' theory is inconsistent with the territorial limitations placed on the courts of appeals. As the courts of appeals have long acknowledged, "[o]nce the files in a case are transferred physically to the court in the transferee district, the transferor court loses *all* jurisdiction over the case." *Chrysler*, 928 F.2d at 1516-17 (emphasis added). *Drabik v. Murphy*, 246 F.2d 408 (2d Cir. 1957), demonstrates the provenance of this rule. As Judge Hand explained in that opinion, a transferor district court has "lost all jurisdiction over [an] action" once "the transfer" was "complete," which impacted the options available to a transferor court even if a party later objects to that transfer order. *Id.* at 409. There was a solution to this jurisdictional problem: a plaintiff could "move[] seasonably for a stay" of the transfer, to preserve review by the circuit that oversees the transferor court. *Id.* But if that stay does not occur, then the plaintiff has failed to "preserve the jurisdiction" of the transferor court. *Id.* And this Court, even before *Bruck*, recognized these same principles, holding that "[i]t seems uncontroversial in this situation that a transfer to another circuit removes

the case from our jurisdiction, and numerous circuits have stated that rule plainly." *Red Barn*, 794 F.3d at 484 (collecting cases).

The test, courts made clear, turns on where the case's files actually are—since they may only sit within one reviewing circuit's territorial domain at any given time. As a result, "physical transfer of the original papers" of an action "to a permissible transferee forum deprives the transferor circuit of jurisdiction to review the transfer." *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); *see also Chrysler*, 928 F.2d at 1516; *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 250 (4th Cir. 1991) (holding jurisdiction is "conveyed from" a transferor district to the transferee court when the "the record is physically transferred"); *Robbins v. Pocket Beverage Co.*, 779 F.2d 351, 355 (7th Cir. 1985) (same). This principle is no less applicable in the age of electronic docketing. *See Red Barn*, 794 F.3d at 483 (noting completion of inter-circuit transfer and attendant loss of jurisdiction occurred when "[t]he clerk electronically transferred the case" to the transferee court); *Miller v. Toyota Motor Corp.*, 554 F.3d 653, 654 (6th Cir. 2009) ("Jurisdiction follows the file.").

These precedents confirm that the loss of jurisdiction also meant the loss of the ability of the transferor court to take action—something *Bruck* recognized when it confirmed "the Texas transferor court can no longer enter an appealable order in the case." 30 F.4th at 424. That principle forecloses Appellants' revival theory—that somehow this Court could create a cloned case in the transferor court that restores

jurisdiction. In *Drabik*, Judge Hand specifically emphasized that "no relief remained open" whatsoever in the transferor court. 246 F.2d at 409; *see id*. at 410 ("[W]hatever may be [plaintiff's] relief, if any, the District Court for the Southern District of New York *may not* grant it." (emphasis added)). Similarly, the Tenth Circuit made clear in *Chrysler Credit* that after transfer was effectuated, the transferor court loses "*all* jurisdiction" after transfer, and in fact "lacked jurisdiction to 'reopen' the case." 928 F.2d at 1516–17, 1520 (emphasis added).

And in *Red Barn*, this Court made clear that it could take no action that would automatically restore jurisdiction in the transferor court after an out-of-circuit transfer was already effectuated. Although the appellant in *Red Barn* had requested vacatur of the Middle District of Louisiana's transfer decision so that it could continue to proceed in that court, *see* Petition for Writ of Mandamus, *Red Barn*, No. 15-30067 (Jan. 27, 2015) at 17, this Court recognized it had no ability to provide relief that would allow the parties to continue litigating in Louisiana. As this Court put the point, an appeal from any transfer already effectuated to an out-of-circuit court is "a proceeding in which *no* appeal to this court can be taken, *short of* the purely speculative possibility that the Indiana court transfers it back." 794 F.3d at 484 (emphases added). That was why *Red Barn* acknowledged only that this Court could order a transferor court to *request* the return of a case, and why *Bruck* went no further than that.

Second, Appellants' revival theory is inconsistent with the fundamental rules that govern case initiation and transfer. It is beyond peradventure that the filing of a single complaint produces a single suit; the complaint commences one civil action and is assigned a single docket number by a clerk of court pursuant to Federal Rule of Civil Procedure 79(a). And one transfer motion under Section 1404(a) means the case can only exist in a single jurisdiction at a time. *See In re Flight Transp. Corp. Sec. Litig.*, 764 F.2d 515, 516 (8th Cir. 1985) (holding that the district court's "attempt[] both to transfer the cases to Pennsylvania and to retain jurisdiction in Minnesota … exceeds the transfer power conferred under § 1404(a)"); *In re Brand-Name Prescription Drugs Antitrust Litig.*, 264 F. Supp. 2d 1372, 1377-78 (JPML 2003) (same). But in Appellants' view, the Second Amended Complaint ("SAC")—which was filed and served once—would allow *identical sets of claims* against the *identical defendant* to proceed as two separate civil actions proceeding in different dockets in the District of New Jersey *and* in the Western District of Texas. Nothing in the rules surrounding transfer or case initiation permits such a result.

Third, the consequences of Appellants' revival theory are extraordinary. Were Appellants' rule the law, then any transferor district court—frustrated by a transferee court's handling of the case—could "vacate" its prior transfer order on a motion for reconsideration and proceed with a duplicative case in its docket. For example, a California federal court that transferred a case to a federal court in Texas on judicial

economy rationales could, after finding that the Texas court proceeded too slowly in granting class certification or based on any other disagreement, simply vacate its transfer order and resurrect the case in California. To put it mildly, this is not what Section 1404 contemplates, and would make a hash of its animating purpose.

Appellants' responses falls short. They primarily argue that vacatur must allow them to proceed with their case in Texas because, in the normal course, vacatur restores the status quo ante. Br. 28-30. But that brushes past the central problem in this case: once the underlying transfer order was effectuated, and Appellants' lawsuit against the NJAG docketed in the District of New Jersey, it became impossible for this Court to restore the status quo ante. After all, should Appellants' revival theory prevail, the status quo before the transfer order would *not* be restored. Rather than returning the litigants to the "position they occupied before the order," Br. 29, Appellants' revival theory would create two suits when there was but one. That goes beyond the jurisdictional powers of this Court. And that is why the rulings in both *Red Barn* and *Bruck*—building upon decades of precedent across circuits that limits the review of effectuated transfer orders—foreclose this possibility.

Appellants' reliance on *Diece-Lisa Industries, Inc. v. Disney Enterprises, Inc.*, 943 F.3d 239 (5th Cir. 2019), Br. 30, only highlights the defects in their claim. In *Diece-Lisa*, this Court vacated a district court's decision to dismiss an amended complaint adding new defendants. 943 F.3d at 254. This Court understood its vacatur

to have the effect of reinstating the new defendants and directed the district court to rule on those defendants' claims. *Id*. But this case presents problems not present in *Diece-Lisa*. There, unlike here, it was actually possible for vacatur to restore the status quo ante. *See id*. at 253-5. And unlike this case, *Diece-Lisa* involved vacatur of an order that raises no jurisdictional limitations on the district court or this Court. That problem is what *Bruck* already recognized, which Appellants repeatedly ignore: that the severance-and-transfer order, once effectuated, took the case outside the geographic jurisdiction of both the district court and this Court. The reference to "vacatur" in the *Bruck* opinion does not upend that entire body of law.

ii. The Refiling Theory Fails.

Appellants' alternative theory—that "refiling" the SAC restored the NJAG as a party to their lawsuit in Texas, Br. 33—is also incorrect. As explained above, when the district court issued its severance order in April 2021, it turned Appellants' complaint into two separate and distinct suits with distinct jurisdictional properties. *See, e.g.*, *United States v. O'Neil*, 709 F.2d 361, 368 (5th Cir. 1983) ("Where a single claim is severed out of a suit, it proceeds as a discrete, independent action."). As a result of the severance-and-transfer, Appellants have one suit in the Western District of Texas against USDOS officials, to which the NJAG is not a party, and one suit in the District of New Jersey against the NJAG, to which the USDOS officials are not a party.

Appellants' refiling theory does nothing to change that. All that Appellants have filed in Texas since *Bruck* is a notice of vacatur, relying on their revival theory, a motion for preliminary relief, and a motion to grant the relief as unopposed. ROA.28-29. Those filings presumed the NJAG is a party, but did nothing to make him one. The only reference to refiling in the preliminary injunction motion is a single sentence, in a footnote, stating that "even if the Court were to deem it necessary for Plaintiffs to perform a technical formality of re-filing [claims against the NJAG], Plaintiffs hereby request leave to do [so] under [FRCP] 15." ROA.4406 n.1 (Appellants allege, Br. 33, that their request for leave to refile was also included in a second document, citing ROA.4430, but that "request" was a bare citation to the previous footnote.). But the district court did not grant or deny Appellants' buried request for leave, which means the NJAG necessarily did not become a party to their lawsuit against the federal officials. And given that the NJAG did not become a party, the district court could not issue orders as to the NJAG. *See Ginsburg v. Stern*, 242 F.2d 379, 381 (3d Cir. 1957) (holding that after district court denied plaintiffs' request to add five defendants but later entered judgment in the five proposed defendants' favor, the judgment "was a nullity since the court below refused to and could not make them defendants"). Indeed, Appellants' argument before this Court that the district court should have acted—but did not act—on that request for leave

to refile, Br. 33-36, provides powerful evidence that the NJAG has in fact not been added as a party in this separate Texas docket.[2]

The refiling theory also falls short because the NJAG was never served with the allegedly-refiled claims. Courts, of course, only have jurisdiction over the parties that have been served. *See Maiz*, 311 F.3d at 340 ("It is a fundamental rule of civil procedure that '[b]efore a federal court may exercise jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.'" (quoting *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)); *Millwood*,

[2] Moreover, Appellants cannot claim that the district court was required to rule on their Rule 15 request. As a threshold matter, "[d]enial of leave to amend a complaint" on a properly filed motion "is not an appealable interlocutory order under 28 U.S.C. § 1292(a)(3) because it does not determine a litigant's rights or liabilities." *Solar Turbines v. Ship-Side Crating Co.*, 96 F.3d 1444, 1444 (5th Cir. 1996). And beyond that dispositive problem of reviewability, Appellants are wrong on the merits. First, their "single conclusory sentence in a footnote is insufficient to raise an issue for review." *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006). Appellants buried their request in a footnote that neither followed the local rules, *see* W.D. Tex. Civ. R. 7, nor gave the district court any reasons for why leave to amend should be granted. Second, Appellants identify no cases supporting their contention that a district court must allow a dissatisfied litigant to add back in a party that has been severed and transferred. In *Netsphere, Inc. v. Gardere Wynne Sewell, L.L.P*, 657 F. App'x 320 (5th Cir. 2016), and *Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd*., 821 F.3d 573 (5th Cir. 2016), this Court merely explained that a party cannot circumvent waiver rules by recasting their waived argument as jurisdictional. And *Republic of Ecuador v. Connor,* 708 F.3d 651 (5th Cir. 2013), concerned only whether a federal court's authority to issue discovery orders in foreign tribunals was jurisdictional for purposes of applying estoppel. None of the trio of cases Appellants cite addressed whether a court could restore a case that had been transferred out of its jurisdiction by allowing the plaintiff to simply refile.

472 F.2d at 271 (stating that even where a "motion to add a party is granted," service of process still "must be made in the usual way" (citations omitted)). Requesting in a footnote in a lawsuit against federal officials for leave to file a pleading that also names the NJAG as a defendant does not make the NJAG a party, is not service of process, and is not a basis to enter an injunction against a New Jersey official.

None of Appellants' responses overcome that defect. The NJAG's awareness of Appellants' desire to refile via continued receipt of ECF notices does not satisfy the requirement of service, *Maiz*, 311 F.3d at 340 (discussing need for service despite party's awareness), particularly where the docket marks him—like other government defendants who had been dismissed—as "TERMINATED." *See* ROA.3. Nor does it matter that the NJAG was listed in the caption. *See Bennett v. Pippin*, 74 F.3d 578, 588 (5th Cir. 1996) (holding defendant was terminated as a party once it was dismissed from case notwithstanding that it appeared in the caption); *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 730 (Fed. Cir. 1992) (rejecting the claim that "continued status as a party is evidenced by its inclusion in this court's official caption"); *cf. United States v. Uni Oil, Inc.*, 710 F.2d 1078, 1080 n.1 (5th Cir. 1983) (rejecting the converse effort to deny party status based on omission from caption). And the NJAG's prior waiver of service, ROA.12, was tied to the "discrete, independent action" that is now pending before the District of New Jersey. Just as

one complaint produces only one suit, a waiver in response to that complaint applies only to that single case.

Appellants' hypothetical arguments that the NJAG would be a party *if* they filed a new case in Texas and served him, or *if* they had been granted leave to amend and served him, would not change the result. *See* Br. 34, 36-37 (arguing court should have granted request for leave to amend). As a threshold matter, that did not happen here: *this* appeal must be dismissed because the NJAG is not a party. But even if this Court speculated as to that hypothetical, Appellants would nevertheless fall short. For one, refiling would be inconsistent with the exclusive path *Red Barn* and *Bruck* identified for this case to proceed in Texas—request for return of the case from the District of New Jersey, then re-consolidation with the case against USDOS officials. *See Bruck*, 30 F.4th at 423-24, 437; *Red Barn*, 794 F.3d at 484. For another, any effort to file a duplicative case in the transferor forum would run headlong into the second-file rule, which seeks to avoid duplication, potentially inconsistent and conflicting results, and a race between jurisdictions to a preclusive judgment. *See, e.g.*, *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999); *W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 728-29 (5th Cir. 1985).

Indeed, endorsing Appellants' refiling theory would lead to untenable results that destabilize the law of transfer. Under Appellants' theory, a plaintiff dissatisfied with a decision to transfer could simply refile a duplicative case in the original venue

and proceed anew, hoping that this time they draw a judge less inclined to transfer. Unsurprisingly, Appellants offer no authority that supports such a workaround. This Court should not endorse such an unsupported theory.

B. Because The NJAG Is Not A Party, No Relief Can Be Granted.

Because the NJAG is not a party to the proceedings before the district court, precedent makes clear that this Court can simply dismiss Appellants' appeal from the denial of relief against him. *See Pettus v. Sec. Serv. Fed.*, 49 F.3d 728, 728 (5th Cir. 1995) (explaining that the "motion for a temporary restraining order names someone who is not a party to this appeal" and for that reason—among other defects—"we DISMISS the appeal [and] the motion for a TRO"); *Holloway v. United States*, 789 F.2d 1372, 1374 (9th Cir. 1986) (dismissing appeal where court of appeals "cannot grant effective relief" because the relevant actor "is not a party to this appeal").

In the alternative, this Court should affirm the district court's decision denying Appellants' motion for a preliminary injunction on the same grounds. After all, "it is a principle of general application that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (cleaned up); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (adopting this same "elementary" rule); *Texas v. Dep't of Labor*, 929

F.3d 205, 210 (5th Cir. 2019) (same); *Freeman v. Lester Coggins Trucking*, 771 F.2d 860, 865-66 (5th Cir. 1985) (finding contrary rule would violate the nonparty's due process); *cf. Nken v. Holder*, 556 U.S. 418, 428 (2009) ("When a court employs the extraordinary remedy of injunction, it directs the conduct of a *party*." (emphasis added)). That is equally true for preliminary injunctions: pursuant to Federal Rule of Civil Procedure 65, a preliminary injunction may only bind "the parties," their agents, and those "in active concert" with the parties. Fed. R. Civ. P. 65(d)(2); *see Texas*, 929 F.3d at 210-11. For the reasons given above, the only parties in Appellants' suit in the Western District of Texas are Appellants and a series of USDOS officials. The district court thus correctly held that it had no power to adjudicate this preliminary injunction application against the NJAG.

Appellants offer up three arguments for why the Texas district court (and now this Court) could preliminarily enjoin the NJAG's enforcement of New Jersey law even if he is not a party, but each comes up empty. *First*, Appellants are incorrect to suggest that this Court could grant injunctive relief under the All Writs Act. *See* Mot. for Inj. Pending Appeal at 7-8. For one, the Act applies only if this Court enjoys pre-existing jurisdiction. Indeed, this Court has held, that Act "empowers courts to issue writs of mandamus *if* the courts also have appellate jurisdiction," not against parties over which the court has no jurisdiction. *Bruck*, 30 F.4th at 423; *see also Texas v. Real Parties in Interest*, 259 F.3d 387, 392 (5th Cir. 2001) ("[A]lmost 200 years of

Supreme Court precedent establishes that the Act … cannot serve as an *independent* basis of jurisdiction."); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (confirming that All Writs Act authorizes appellate court to issue writs only "'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction."); *Red Barn*, 794 F.3d at 483 (agreeing Act "empowers us to issue writs of mandamus, but that statutory authority does not itself confer jurisdiction"); *In re McBryde*, 117 F.3d 208, 220 (5th Cir. 1997) (same); *Brittingham v. Comm'r. of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) (same). That is why this Court could not order return of this case from New Jersey to Texas given the limits on its jurisdiction, *Bruck*, 30 F.4th at 423-24, and why this Court contemplated the adjudication of a preliminary injunction application only *after* the return of the case to Texas, *id.* at 421 n.2. If neither of Appellants' theories establish the NJAG as a party, then the All Writs Act provides no way to bootstrap an injunction to create jurisdiction over him.

For another, the All Writs Act only allows courts to issue injunctions that are "necessary or appropriate in aid of" its jurisdiction, 28 U.S.C. §1651(a), but an order enjoining the NJAG from enforcing New Jersey law would not be "in aid of" this Court's jurisdiction at all. *See Shoop v. Twyford*, 142 S. Ct. 2037, 2045 (2022) (discussing these limits in habeas context); *Red Barn*, 794 F.3d at 483-84 (transfer context). The cases in which courts have issued All Writs Act injunctions against nonparties were thus carefully limited to cases in which the writs were necessary to

protect the Court's jurisdiction or to protect the efficacy of orders it had issued under preexisting jurisdiction. *See, e.g.*, *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174-75 (1977) (granting All Writs Act injunction against nonparty telephone company that was necessary to implement the court's surveillance order) (cited by Appellants at Mot. for Inj. Pending Appeal 7-8). The writ issued in *Bruck* is a good example: that order was designed to protect this Court's jurisdiction by seeking return of a lawsuit to a district court within this circuit's territorial jurisdiction. But enjoining the enforcement of New Jersey laws that govern the distribution of printable gun files has nothing to do with protecting this Court's jurisdiction; it would not effectuate return of the case from the District of New Jersey or allow reconsolidation with the lawsuit against federal defendants. Instead, it would simply grant merits relief in a case that is still in New Jersey. That does not effectuate or protect the validity of any order of this Court.

Second, Appellants' reference to 28 U.S.C. § 1292(a)(1) gets them no further. Br. 2. As *Bruck* established, the Texas court "can no longer enter an appealable order in the case." 30 F.4th at 424. Although Section 1292(a)(1) of course provides this Court the jurisdiction to review denials of preliminary injunction motions, that statute does not allow this Court to grant relief where jurisdiction in the district court is otherwise lacking. Said another way, the mere fact this Court can review *whether* the NJAG is a party under Section 1292(a)(1) does not allow this Court to enjoin the

enforcement of New Jersey law if he is not. Appellants' contrary argument seems to have no stopping point: it would allow anyone to seek relief against any nonparty in the district court and then claim that because Section 1292(a)(1) permits an appeal, the All Writs Act must then allow an injunction. That is not the law.[3]

Finally, Appellants are incorrect to argue that the NJAG waived any objections by not participating before the district court. Br. 37. Because the NJAG is not a party in Appellants' lawsuit against federal defendants in the Western District of Texas, the NJAG could not have waived or forfeited arguments before that court. This Court rejected a similar argument in *Bennett*, where a defendant was dismissed without prejudice early in a Section 1983 action and later reinstated on the day of trial. 74 F.3d at 582, 587. In the interim—while the defendant was not a party—the judge entered an arbitration order, "agreed to by the parties," which stated that the parties had waived their right to a jury trial. *Id.* at 582. This Court rejected the contention that the defendant had likewise waived its right to a jury trial, reasoning that the defendant "was not a party" to the arbitration and was not a party when arbitration was ordered, and thus "was not a party to any waiver attending

[3] Appellants' analogy to other nonparties subject to appellate review is unavailing. Appellants equate the NJAG to a defendant who is dismissed by a challenged district court order, Opp. to Mot. to Dismiss 8, but the distinction is that, in such a case, the defendant was indisputably a party *at the time of* the district court's order, which is why that defendant remained subject to the appellate court's jurisdiction. This case is different: Appellants moved for merits relief long after jurisdiction was lost.

those proceedings." *Id.* at 588. So too here: because the NJAG was not a party to the proceeding against the USDOS officials after severance—as is reflected on the district court docket itself—his nonappearance may not be construed as either waiver or forfeiture. *Cf. Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 n.1 (5th Cir. 2003) ("For purposes of appellate jurisdiction, we treat an improperly served defendant as never before the district court.").

* * *

Appellants have a range of options available to them. Appellants are already seeking reconsideration from the District of New Jersey, and also filed an updated "Motion to Grant the Fifth Circuit's Return Request." And Appellants can petition for mandamus to the Third Circuit—which has the authority to review the District of New Jersey's decision—if the motions fail. Appellants can also seek preliminary injunctive relief in their case against the NJAG in the District of New Jersey at any time, even today or tomorrow. As the NJAG has already explained, he would oppose the application on the merits and equities, but he would not oppose it on jurisdiction or venue.

And this Court has options to address this sort of jurisdictional dilemma in the future. This problem happened only because Appellants both insisted on appealing the Western District of Texas's transfer order to the Fifth Circuit and declined to seek a stay of that transfer order in either the Western District or in this Court. In

other words, Appellants effectively asked the Fifth Circuit to review a suit that was by then in New Jersey, within the control of the Third Circuit. To avoid this situation, multiple circuits and district courts adopt a supervisory rule that delays the effective date of an inter-circuit transfer, to ensure that appellate review is available in the transferor circuit if necessary. *See, e.g.*, *Starnes*, 512 F.2d at 935 (en banc D.C. Circuit stating district court should increase abeyance of transfers to 20 days); S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.1 (ordering Clerk to "effectuate the transfer of the case to the transferee court" after seven days elapse)[4]; D. Conn. Local. Civ. R. 83.7 (providing 11 days)[5]; E.D. Mo. Local R. 4.06 (14 days)[6]; N.D. Ill. Local R. 83.4 (14 days).[7] These rules exist precisely because, as the NJAG has argued and as *Bruck* expressly recognized, the effectuation of a transfer to an out-of-circuit district court otherwise deprives them of jurisdiction.

But whichever paths Appellants take, and whatever rules this Court adopts in the future, no preliminary injunction can issue against the NJAG while Appellants' case against him remains in the District of New Jersey.

---

[4] https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf.

[5] https://www.ctd.uscourts.gov/sites/default/files/Revised-Local-Rules-09-04-2022.pdf.

[6] https://www.moed.uscourts.gov/sites/moed/files/CMECF_localrule.pdf.

[7] https://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf.

II. IF THIS COURT CONCLUDES THAT APPELLANTS CAN OBTAIN RELIEF AGAINST THE NJAG, IT MUST REMAND THE PRELIMINARY INJUNCTION MOTION TO THE DISTRICT COURT.

Even if the Court finds that the NJAG is a party to the case—and as explained above, the NJAG is not—this Court should still remand to the district court to allow that court to consider the preliminary injunction application in the first instance. This Court has repeatedly emphasized the importance of having the parties develop the factual record in the district court, and having the district court make the appropriate findings of fact, before an appellate tribunal will rule on motions for injunctive relief. *See, e.g.*, *Sierra Club v. FDIC*, 992 F.2d 545, 551-52 (5th Cir. 1993) ("[I]t is … impossible for us to review the propriety of the district court's injunction without a more complete development of these factual and legal issues."); *White v. Carlucci*, 862 F.2d 1209, 1210 n.1 (5th Cir. 1989) (same). That makes sense: the Fifth Circuit is a "court of review, not first view," *Vista Health Plan, Inc., v. U.S. Dep't of Health & Human Servs.*, 31 F.4th 946, 951 n.2 (5th Cir. 2002), and is not the finder of fact, *see Chavez v. Plan Benefit Servs.*, 957 F.3d 542, 547 (5th Cir. 2020) ("Appellate judges are not finders of fact, and . . . it's up to the district judge to find the facts."). The need for a preliminary injunction application to be heard by the district court in the first instance is thus especially great when "legal issues are novel," *Sierra Club*,

992 F.2d at 552, or when "facts . . . are hotly disputed," *Davis v. United States*, 422 F.2d 1139, 1142 (5th Cir. 1970). That is the case here.

Indeed, at least five important questions that weigh heavily on the disposition of Appellants' preliminary relief motion turn in part on "hotly disputed" facts. *First*, whether Appellants can satisfy the equitable factors—*i.e.*, irreparable harm, balance of the equities, and the public interest—requires additional fact-finding. This Court's own precedents make that clear. In 2016, Defense Distributed sought a preliminary injunction against enforcement of USDOS regulations that had likewise limited its ability to distribute its printable gun files. In affirming the denial of that injunction, this Court relied on the factual record developed in the district court to conclude that both the balance of harms and public interest cut against granting an injunction. *See Dep't of State*, 838 F.3d at 454. This Court highlighted particular evidence in the record that demonstrated the threat to national security posed by the distribution of printable gun files that would allow terrorists to print untraceable and undetectable weapons, and highlighted the ways in which the national security would be harmed "forever" even by a temporary judicial award of relief. *Id*. at 459-60. Even the dissent invoked specific record evidence when disagreeing that the balance of harms favored the government. *Id*. at 462 (Jones, J., dissenting) (evaluating security interests on the "facts here" and concluding they did not outweigh harms to company). The same would be true here: any analysis of the equitable factors of irreparable harm, balance

of harms, and public interest, including the specific harms to public safety that motivate New Jersey's statute, requires a similar factual record and findings, which the district court has not yet made.

Second, as to the First Amendment claim, Appellants' own cases establish that a record is required to determine whether their printable gun files constitute protected speech in the first place before any injunction could issue. Appellants' own cases make clear that this inquiry is highly fact-dependent, turning on the technical characteristics of the code and its use. *See Universal City Studios v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) (distinguishing code used to convey information to humans and code used to convey information to computers, and explaining that the latter is "never protected"); *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 111 (2d Cir. 2000) (finding computer program was not First Amendment speech because, as "marketed," it was "automatic"—with "nothing to interpret"—and instructed its users to mechanically follow instructions). Here, the district court has not found facts about the nature of Appellants' printable gun files and how they operate, and no record has yet been developed on that score, which would prevent this Court from properly determining whether—even under the cases Appellants cite—the files constitute protected speech.

Third, even if the files that Appellants seek to distribute constitute protected speech, factual questions remain pertaining to whether New Jersey's law nonetheless

may survive First Amendment review. As another of Appellants' cases confirms, in certain circumstances, "security interests can outweigh the interests of protected speech and require the regulation of [computer code]." *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000). Whatever level of scrutiny applies, the parties have yet to build a record about the strength of the government interest and the tailoring of the law, including facts about the ramifications of making Appellants' files accessible to all persons, including felons, domestic abusers, and terrorists; the difficulties law enforcement faces when attempting to trace printed guns later used in crime; and the scope of the printable gun files actually subject to Section 2C:39-9(*l*)(2). These are all questions that "should be resolved in the first instance by the trial court." *SEC v. Arcturus Corp.*, 928 F.3d 400, 422 (5th Cir. 2019); *see also Junger*, 209 F.3d at 485 (remanding to district court because "the record does not resolve whether" national security interests justify regulation of "encryption source code").

Fourth, Appellants' Commerce Clause and Due Process claims also require record development. Appellants argue that the challenged New Jersey laws regulate conduct exclusively outside the state in violation of the Commerce Clause, Br. 50-51, but that is unsupported by the record. "The critical inquiry [in Commerce Clause challenges] is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). By its terms, Section 2C:39-9(*l*)(2) only prohibits distributing covered files

"to a person in New Jersey." And the founder of Defense Distributed has stated that Appellants continue to disseminate their files to individuals outside of New Jersey. Decl. of Cody Wilson, Dkt. 152-1 ¶ 9, *Defense Distributed v. Grewal*, No. 18-cv-637 (May 5, 2021). Appellants have not shown that Section 2C:39-9(*l*)(2) will have the practical effect of controlling conduct exclusively outside New Jersey, and more record development would be necessary. Likewise, factual deficiencies undermine Appellants' claim that the New Jersey laws are void for vagueness. Appellants assert that the New Jersey laws result in arbitrary enforcement without pointing to evidence about how New Jersey interprets and implements its provisions. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (to assess whether ordinance is facially invalid based on arbitrary enforcement, "[w]e must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it"); *SEIU Loc. 5 v. City of Houston*, 595 F.3d 588, 597 (5th Cir. 2010) ("Vagueness can be ameliorated by . . . . limits placed on an ordinance by a municipality's governing body.").

Fifth, without additional factfinding, Appellants cannot meet their burden to establish personal jurisdiction for the purposes of obtaining an injunction—which is higher than the burden to survive a motion to dismiss. Although this Court has found that the district court has personal jurisdiction over the NJAG on the pleadings, "more is required" for preliminary relief. *Enter. Int'l, Inc. v. Corporacion Estatal*

Petrolera Ecuatoriana, 762 F.2d 464, 471 (5th Cir. 1985). District courts are required to make findings establishing jurisdiction for a preliminary injunction. *Id*.; *see also Visual Sciences v. Integrated Commc'ns*, 660 F.2d 56, 59 (2d Cir. 1981) ("A prima facie showing of jurisdiction will not suffice . . . where a Plaintiff seeks preliminary injunctive relief."). That is especially true here, where this Court has recognized that jurisdiction rests on the disputed question of whether the NJAG attempted to stop Appellants from distributing printable gun files outside of New Jersey. *See Grewal*, 971 F.3d at 492 n.6; *id.* at 497 n.1 (Higginson, J., concurring). Even Appellants previously asked for jurisdictional discovery in the district court. *See* Pltfs' Resp. to the Mot. to Dismiss 14, Dkt. 73, *Defense Distributed v. Grewal*, No. 18-cv-637 (W.D. Tex. Dec. 12, 2018). It is thus premature to decide Appellants' preliminary injunction request at this stage.

Finally, nothing about this analysis should change because the NJAG did not previously respond to the merits of Appellants' preliminary injunction motion in the district court. Although Appellants claim that the NJAG has waived his opposition to preliminary relief, the NJAG had a sensible reason not to participate in the district court proceedings: because the NJAG was contesting the district court's jurisdiction, he had to avoid invoking the judgment of the court on a non-jurisdictional question by asking for discovery and/or asking for a preliminary injunction to be denied on the merits. *See Maiz*, 311 F.3d at 341 (litigants who "filed their own motions which

specifically requested a ruling from the trial court" on non-jurisdictional matter had acquiesced to the court's jurisdiction). To hold that the NJAG waived its arguments on the merits would put litigants in a double bind: if they address the merits, they concede jurisdiction, but if they contest jurisdiction, they waive merits arguments. If this Court believes the NJAG was incorrect as to jurisdiction, then preliminary injunction proceedings can begin expeditiously, but only in the district court.

CONCLUSION

This Court should dismiss the appeal or, in the alternative, affirm the district court's dismissal of the motion for lack of jurisdiction.

September 28, 2022

Respectfully submitted,

MATTHEW J. PLATKIN
Acting Attorney General of New Jersey

By: /s/ Angela Cai
Angela Cai
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625
(609) 815-2633
angela.cai@njoag.gov

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 10,804 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: September 28, 2022

/s/ Angela Cai
Angela Cai

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2022, I filed the foregoing Brief of Appellee Matthew J. Platkin, Attorney General of New Jersey with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system and via e-mail. Counsel of record for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system and by e-mail.

Dated: September 28, 2022

/s/ Angela Cai
Angela Cai