No. 17-190

In The
Supreme Court of the United States

DEFENSE DISTRIBUTED, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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November 2017

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REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF ARGUMENT

1. Respondents practice what they preach. Just as they approve of the lower court's refusal to address the merits of Petitioners' First Amendment claim, Respondents fail to mention—let alone address—this Court's controlling decision in *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004). Again, that precedent provides, in a First Amendment context, that "[i]n deciding whether

to grant a preliminary injunction, a district court *must* consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits." *Id.* at 666 (citation omitted) (emphasis added).

And just as Respondents ignore *Ashcroft*, they largely ignore the ten circuit decisions confirming the mandatory nature of a merits inquiry on a First Amendment preliminary injunction. It is one thing to argue (incorrectly) that the merits are superfluous just because they might be outweighed. It is quite another matter to deny the fact that this Court and ten circuits mandate a merits analysis.

2. *Ashcroft* and its ten circuit analogues are not the petition's only aspects that Respondents disregard. Petitioners ask "[w]hether it is always in the public interest to follow constitutional requirements." Pet. i. The lower court's frankly remarkable holding—that the Constitution may not serve the public interest—conflicts squarely with the decisions of five circuits. Pet. 30-32. Respondents ignore the question entirely.

3. Respondents compound their evasions by misstating the standard of review for preliminary injunctions. It is black-letter law that an abuse of discretion standard governs the balancing of the preliminary injunction prongs. But errors of law made in the course of denying preliminary injunctions are reviewed de novo, or considered in and of themselves to constitute an abuse of discretion.

Respondents err in suggesting that federal courts have discretion to commit errors of law. They do not.

Which is all the more reason why an appellate court cannot, in reviewing a preliminary injunction denial, refuse to review the merits of a First Amendment claim or relegate the Constitution to second-tier status.

4. Respondents' failure to address the merits of Petitioners' third proposed question is inexplicable. The question of whether arms-trafficking regulations may be used as a prior restraint against public speech would warrant certiorari even under normal circumstances. Instead, Respondents argue only that the lower court's failure to address the merits is a reason not to do so here.

On this much, the parties may be in agreement. However, the correct remedy is not to deny the petition, but to summarily reverse with instructions that the lower court follow this Court's precedent, and that of ten other circuits, requiring a merits analysis. And in doing so, the lower court should be instructed to follow the precedent of the five circuits holding the Constitution to define the public interest.

ARGUMENT

I. Respondents Ignore *Ashcroft* and Ten Circuit Precedents that Mandate a Merits Inquiry in Weighing First Amendment Injunctions.

Rather than address their place on the wrong side of *Ashcroft* and a 10-1 circuit split, Respondents

proclaim that no court has specifically rejected the novel error they espouse. This logic would dispose of any petition for certiorari. Of course "Petitioners identify no case holding that analysis of the merits of a First Amendment challenge is necessary *even if* a court concludes that the balance of equities and the public interest would weigh against injunctive relief for independent reasons *in any event*." BIO 20 (emphasis added). That is because Petitioners have identified decisions of this Court and ten circuits holding that a merits analysis is necessary, *period*.

There are no "even ifs" or "in any events" in First Amendment cases, where courts overwhelmingly hold that the balance of equities and public interest *cannot be properly determined* absent a merits inquiry. Ten circuits "have held that the likelihood of success on the merits is a crucial, indispensable inquiry in the First Amendment context." Pet. App. 93a (citations omitted); Pet. 25-29. Respondents should have addressed this fact. Of course "[t]he courts of appeals generally agree on the [preliminary injunction] standard." BIO 19 (citations omitted). The courts of appeals also generally agree that a merits analysis is indispensable.

Acknowledging the merits inquiry's centrality—as virtually all courts do—does not "eviscerate" the four-prong preliminary injunction standard in favor of "a single inquiry into the merits of a plaintiff's First Amendment claim." BIO 18. Only one circuit takes that position. See *Scott* v. *Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) (First Amendment plaintiff "is entitled to [preliminary injunctive] relief if his claim is likely to

succeed"). But as Petitioners demonstrated, the prevailing standard holds the merits inquiry as "often" "determinative." Pet. 26-29 (citing numerous cases). Refusing to evaluate the merits of First Amendment claims is not remotely consistent with the established norms prevailing throughout the nation. And it does not reflect examination of "the balance-of-equities and public-interest factors in detail." BIO 21.

Careful reading reveals another manifestation of what Judge Jones identified as Respondents' "determined ambiguity" in formulating litigating positions. Pet. App. 54a. Respondents stop short of arguing that a merits inquiry is never strictly required; rather, they offer that a merits inquiry "is not required in *all* instances . . . *if* the other factors weigh decisively against relief." BIO 15 (emphasis added). In isolation, the balance of equities and public interest prongs might always suggest some outcome. But if the merits are optional, in which "instances" should courts conduct a merits inquiry?

Respondents do not explain. Nor do Respondents cite the only authority that the majority below offered for the proposition that the merits prong is optional, *Southern Monorail Co.* v. *Robbins & Myers, Inc.*, 666 F.2d 185 (5th Cir. Unit B 1982). Instead, Respondents rely upon *Winter* v. *Natural Res. Def. Counsel, Inc.*, 555 U.S. 7 (2008) where the balance of equities and public interest prongs—"the safety of the fleet"—outweighed the potential "harm to an unknown number of marine mammals that [plaintiffs] study and observe." *Id.* at 26. But *Winter* does not support the proposition that

the merits inquiry is optional. It merely supplies an example of where the balance favored the government.

More to the point, *Winter* concerned a statutory claim on which the likelihood of success was not intertwined, at least not at a very high degree, with the outcome of the other three prongs. Environmental interests can be quite significant, and often warrant protection via preliminary injunctive relief. But unlike the violation of fundamental First Amendment rights, many if not most statutory violations have never been held to constitute irreparable harm per se. The protection of wildlife does not hold the same automatic and paramount public interest status as does the First Amendment. Cf. *United States* v. *Stevens*, 559 U.S. 460, 476 (2010).

This is not to suggest that *Winter* is completely inapposite. *Winter* presciently rejected the reading that Respondents would foist upon it. "Of course, military interests do not always trump other considerations, and we have not held that they do." *Winter*, 555 U.S. at 26. This can only mean that military interests must be weighed against others, and not, in Judge Elrod's words, be offered "as a magic spell, the mere invocation of which makes free speech instantly disappear." Pet. App. 96a. Respondents, not Petitioners, would supplant the established four-prong balancing test with a one-prong test, automatically denying injunctive relief whenever the government can type "national security" in its brief.

In *Winter*, "the proper determination of where the public interest lies [did] not strike us as a close question." *Winter*, 555 U.S. at 26. Here, the lower court did not properly determine where the public interest lies, because it refused even to consider whether Respondents' content-based prior restraint offended the First Amendment. Nor did the court consider that such a violation, in its scope and order, would contradict the public interest.

The only adverse precedent Respondents address regarding the 10-1 circuit split explains that the merits inquiry is crucial in First Amendment injunction cases precisely because it informs the other factors' determination. *Sindicato Puertorriqueño de Trabajadores* v. *Fortuño*, 699 F.3d 1, 10-11 (1st Cir. 2012) (per curiam). Respondents assert that *Sindicato* is distinguishable in that the district court there did not find irreparable harm on a claim of First Amendment injury, which a merits inquiry might have revealed. BIO 21-22. But as with the other nine circuits whose precedents Respondents ignore, *Sindicato* is not so limited. *Sindicato* described the merits inquiry as "the linchpin of the preliminary injunction analysis," *id.* at 10, and directed that the district court should have "engage[d] with the merits before moving on to the remaining prongs of its analysis," *id.* at 11. Irreparable harm was not the only factor requiring a merits inquiry. "The district court failed to consider the interest of the public in having a robust debate on the issues of concern to plaintiffs." *Id.* at 15-16.

II. Respondents Fail to Address the 5-1 Circuit Split Favoring the Proposition that Enforcing the Constitution Serves the Public Interest.

The majority below expressly held that enforcing fundamental constitutional rights may not serve the public interest, Pet. App. 13a, a position diametrically opposed by at least five circuits, Pet. 30-32, and by Judge Elrod's dissent from denial of rehearing en banc, Pet. App. 95a ("there is a paramount public interest in the exercise of constitutional rights, particularly those guaranteed by the First Amendment."). Petitioners asked this Court to resolve this important conflict; Respondents have left it unaddressed.

The closest Respondents come to acknowledging this question is by positing a strained analogy between First Amendment rights and the interests of aliens to remain in the country. Regarding the latter, Respondents offer that "[t]he government—and thus the public—also frequently has countervailing interests that courts must consider and weigh." BIO 18 (citations omitted). From there, Respondents argue that "courts must balance that harm [of a First Amendment violation] against the injury to the government and the public in each individual case before issuing an injunction." *Id.* But this does not respond to the fact that five circuits hold that enforcing the Constitution serves the public interest per se, contrary to the decision below here.

Nor do Respondents address the fact that in First Amendment cases, the government's national security interests are accounted for when considering the plaintiff's likelihood of success on the merits. When speech harms national security, the public interest prong weighs more in the government's favor because the First Amendment is less likely to protect such speech. Pet. 30-31. The merits analysis affords Respondents an opportunity to substantiate, rather than assert, their claims. But they are not interested in doing so.

Respondents' failure to address the Constitution's diminished status should not be understood as relinquishing the argument in future cases. Left undisturbed, the opinion below will doubtless feature in innumerable government pleadings minimizing the Constitution's relevance. After all, courts in the Fifth Circuit are now free to substitute their own free-flowing conceptions of the public interest for constitutional values and commands. This is decidedly not a complement to the model of "judicial restraint" Respondents reference. BIO 16. This Court should at least clarify when and how federal courts should identify interests supplanting the Constitution, and what these extra-constitutional interests might be.

Cursory dismissal of an interest in constitutional enforcement does not comport with the public interest, let alone in "detail." BIO 21. As Judge Jones noted, the alleged public interest here amounted to nothing more than "a rote incantation of national security . . . belied by the facts here and nearly forty years of contrary Executive Branch pronouncements." Pet. App. 23a. And

as Judge Elrod added for herself and three colleagues, this supposedly detailed examination was nothing more than a "mere assertion" of national security, Pet. App. 95a, a "paltry assertion" amounting to a "magic spell," Pet. App. 96a.

If the public interest lies in enforcing the Constitution, it also lies in granting this petition.

III. Courts Lack Discretion to Commit Errors of Law.

Having glossed over the lower court's substantial departures from precedent in refusing to conduct a merits inquiry and denigrating the Constitution's public interest status, Respondents are left with a final defense: that this petition concerns only a purported abuse of discretion. "[A]ny asserted error in the lower courts' factbound analysis of the equities here would not warrant this Court's review." BIO 15. This claim mischaracterizes the petition, and the abuse of discretion standard itself.

In reviewing the denial of preliminary injunctions, appellate courts review legal conclusions de novo. They state as much directly, *e.g.*, *Di Biase* v. *SPX Corp*., 872 F.3d 224, 229 (4th Cir. 2017), and occasionally offer that "[t]he district court abuses its discretion when it makes an error of law." *Hernandez* v. *Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (citation omitted). The Fifth Circuit has used both formulations. See *Affiliated Prof'l Home Health Care Agency* v. *Shalala*, 164 F.3d 282, 285 (5th Cir. 1999) (per curiam) ("conclusions of

law are reviewed de novo" on preliminary injunction appeal) (citation omitted); *Aransas Project* v. *Shaw*, 775 F.3d 641, 663 (5th Cir. 2014) (court abuses discretion where it "relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction") (internal quotation marks omitted).

Stated simply, courts lack discretion to commit errors of law.

Accordingly, this is not an abuse of discretion case. *First*, Petitioners' main grievance on appeal was not the District Court's fact-finding, but its erroneous application of mere intermediate scrutiny to a content-based prior restraint on public speech. By refusing to perform a merits analysis, the Court of Appeals abjured its judicial duty to review the District Court's erroneous legal conclusion. Of course, whether a lower court properly applied the standard of review is not the most salient factor for certiorari. But by raising the point, Respondents have only offered another argument for granting the petition.

Second, the defects in the panel majority's opinion do not inhere in mis-balancing the relevant preliminary injunction factors properly found, but in the commission of three serious errors of law: (1) refusing to perform the required merits analysis and, thus, failing to evaluate the most critical factor altogether; (2) diminishing the Constitution's status as the ultimate expression of the public interest; and (3) upholding a content-based prior restraint on speech.

None of these errors are subject to an abuse of discretion standard. Addressing them would, in fact, "change the bottom-line conclusion that the district court did not abuse its discretion in denying the preliminary injunction." BIO 22. At least four dissenting Fifth Circuit judges seemed to think that a merits analysis would alter the other prongs and altogether yield a preliminary injunction.

IV. This Case Is Well-Suited for This Court's Review.

The primacy of First Amendment rights requires no annotation. It should not be surprising that this Court would review an appellate court's decision to affirm the denial of a First Amendment injunction. Less than a week after the Brief in Opposition's filing, this Court granted exactly such a petition. See *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, No. 16-1140, 2017 U.S. LEXIS 6883 (Nov. 13, 2017).

Respondents nonetheless urge this Court to deny the petition, not despite the lower court's abdication of its duty to consider the merits, but because of it. Were this practice to become common, appellate review would itself be undermined. Courts would simply decline to reach the merits of disfavored arguments rather than risk reversal. But this Court's "judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution. . . ." U.S. Const. art. III, § 2, cl. 1 (emphasis added). And on its face, a decision allowing the use of export controls as a content-based prior restraint on public speech, lacking any of

the required safeguards, presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

In the event that this Court would prefer to review an appellate decision addressing the merits of Petitioners' claim, Pet. 40-41, the decision below should be summarily vacated and the case remanded with instructions to provide just such a decision. Petitioners, and the public, are at least entitled to a merits decision from the appellate court that addresses the First Amendment, and affords the Constitution its proper role in the public sphere.[1]

[1] In a footnote, Respondents claim the government is "developing" "proposed rules," and "[i]f the proposed rules are adopted," they "may" impact the prior restraint. BIO 11 n.6. But Respondents have been "developing" such a proposal since 2010 with no attendant change to the ITAR. See 75 Fed. Reg. 76935, 76938 (December 10, 2010) (hypothesizing how "parts and components controlled under a revised USML Category I" could be limited to those fitting particular firearms). ITAR reform promises are perennial. And of course, the last proposed rules made matters significantly *worse*. Pet. 12. The parties can argue the voluntary cessation doctrine if and when Respondents cease their censorship, now in its *fifth year*. Granting this petition, even if only to require the lower court's merits analysis, may prod Respondents to constructive action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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