

No. 26-

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IN THE  
**Supreme Court of the United States**

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DEFENSE DISTRIBUTED, *et al.*,

*Petitioners,*

*v.*

JENNIFER DAVENPORT,  
ATTORNEY GENERAL OF NEW JERSEY,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**APPENDIX VOLUME II**

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**TABLE OF APPENDICES**

*Page*

**Volume I**

|                                                                                                                                                                                        |      |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| APPENDIX A — OPINION OF THE<br>UNITED STATES COURT OF APPEALS<br>FOR THE THIRD CIRCUIT, FILED<br>FEBRUARY 12, 2026.....                                                                | 1a   |
| APPENDIX B — OPINION OF THE<br>UNITED STATES DISTRICT COURT<br>FOR THE DISTRICT OF NEW JERSEY,<br>FILED SEPTEMBER 29, 2023.....                                                        | 39a  |
| APPENDIX C — ORDER OF THE<br>UNITED STATES DISTRICT COURT<br>DISTRICT OF NEW JERSEY, FILED<br>SEPTEMBER 29, 2023.....                                                                  | 99a  |
| APPENDIX D — SUR PETITION<br>FOR REHEARING OF THE UNITED<br>STATES COURT OF APPEALS FOR THE<br>THIRD CIRCUIT, FILED APRIL 10, 2026 . . .                                               | 101a |
| APPENDIX E — PLAINTIFFS’ SECOND<br>AMENDED COMPLAINT OF THE<br>UNITED STATES DISTRICT COURT<br>FOR THE WESTERN DISTRICT OF<br>TEXAS, AUSTIN DIVISION, FILED<br>NOVEMBER 10, 2020 ..... | 103a |

*Table of Appendices*

*Page*

**Volume II**

|                                                                                                                                      |      |
|--------------------------------------------------------------------------------------------------------------------------------------|------|
| APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, SIGNED APRIL 19, 2021 .....      | 217a |
| APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 1, 2022.....                           | 239a |
| APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED APRIL 13, 2022..... | 284a |
| APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED JULY 22, 2022.....  | 286a |
| APPENDIX J — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 16, 2022 .....                     | 288a |

*Table of Appendices*

|                                                                                                                                                          | <i>Page</i> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| APPENDIX K — OPINION OF THE<br>UNITED STATES COURT OF APPEALS<br>FOR THE FIFTH CIRCUIT, FILED<br>DECEMBER 15, 2022 .....                                 | 292a        |
| APPENDIX L — MEMORANDUM ORDER OF<br>THE UNITED STATES DISTRICT COURT<br>FOR THE DISTRICT OF NEW JERSEY,<br>FILED APRIL 26, 2023 .....                    | 311a        |
| APPENDIX M — PLAINTIFFS’ THIRD<br>AMENDED COMPLAINT OF THE<br>UNITED STATES DISTRICT COURT<br>FOR THE DISTRICT OF NEW JERSEY,<br>FILED MAY 5, 2023 ..... | 314a        |
| APPENDIX N — MEMORANDUM OPINION<br>OF THE UNITED STATES DISTRICT<br>COURT FOR THE DISTRICT OF NEW<br>JERSEY, FILED JUNE 14, 2023 .....                   | 394a        |
| APPENDIX O — ORDER OF THE<br>UNITED STATES DISTRICT COURT<br>FOR THE DISTRICT OF NEW JERSEY,<br>FILED JUNE 14, 2023 .....                                | 404a        |
| APPENDIX P — TEXT ORDER OF THE<br>UNITED STATES DISTRICT COURT<br>FOR THE DISTRICT OF NEW JERSEY<br>[LIVE], DATED NOVEMBER 2, 2023 .....                 | 406a        |

217a

**APPENDIX F — ORDER OF THE UNITED STATES  
DISTRICT COURT, WESTERN DISTRICT OF TEXAS,  
AUSTIN DIVISION, SIGNED APRIL 19, 2021**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

1:18-CV-637-RP

DEFENSE DISTRIBUTED AND SECOND  
AMENDMENT FOUNDATION, INC.,

*Plaintiffs,*

v.

GURBIR S. GREWAL, *et al.*,

*Defendants.*

Signed April 19, 2021

**ORDER**

Before the Court is Defendant Gurbir S. Grewal, the Attorney General of New Jersey's ("NJAG") motion to sever and transfer venue to the United States District Court for the District of New Jersey. (Dkt. 121). Having considered the parties' briefs, the record, and the relevant law, the Court finds that the motion should be granted.

**I. BACKGROUND**

Plaintiffs Defense Distributed and the Second Amendment Foundation, Inc. ("Plaintiffs") bring

*Appendix F*

seventeen claims against Defendants United States Department of State (the “State Department”), Michael R. Pompeo, former United States Secretary of State, Directorate of Defense Trade Controls, Sarah Heidema, Director of the Office of Defense Trade Controls, Mike Miller, the United States Department of State’s Deputy Assistant Secretary of State for Defense Trade in the Bureau of Political-Military Affairs, (collectively, “Federal Defendants”), and Gurbir Grewal, the NJAG (together with Federal Defendants, “Defendants”). Plaintiffs brings this suit against Defendants based on alleged federal and state law violations. (*See* 2d Am. Compl., Dkt. 117).

Before joining Federal Defendants to this lawsuit, Plaintiffs claims as to the NJAG revolved around the NJAG’s 2018 cease-and-desist letter warning Defense Distributed that its dissemination of printable gun files to New Jersey residents constituted a violation of New Jersey law. (2d Am. Compl., Dkt. 117, at 38–40). Plaintiffs also filed a lawsuit against the NJAG in the District of New Jersey (the “New Jersey Suit”), alleging substantially similarly causes of action. *Defense Distributed v. Att’y Gen. of N.J.*, No. 3:19-cv-4753, Dkt. 17 (D.N.J. Feb. 2, 2019). That action was stayed pending the resolution of this first-filed action. *Def. Distributed v. Att’y Gen. of N.J.*, 972 F.3d 193, 196–97 (3d Cir. Aug. 25, 2020). This Court previously dismissed Plaintiffs’ claim against the NJAG for lack of personal jurisdiction. (Order, Dkt. 100, at 15; Final J., Dkt. 101). Plaintiffs appealed this Court’s decision to the Fifth Circuit, which found that personal jurisdiction existed over the NJAG for the claims alleged in Plaintiffs’ first amended complaint, namely because

*Appendix F*

Plaintiffs’ alleged injuries are “directly attributable to the cease-and-desist letter” the NJAG sent to Defense Distributed asking them to “to cease and desist from publishing printable-gun computer files for use by New Jersey residents.” (Cease-and-Desist Letter, Dkt. 117–8); *Def. Distributed v. Grewal*, 971 F.3d 485, 496 (5th Cir. 2020), *cert. denied sub nom. Grewal, Att’y Gen. Of NJ v. Def. Distributed, Et Al.*, No. 20-984, 141 S. Ct. 1736, 209 L. Ed. 2d 504, 2021 WL 1163750 (U.S. 2021).

Plaintiffs’ second amended complaint, filed after the Fifth Circuit issued its mandate, added the Federal Defendants to this action based on their alleged failure to comply with the terms of a 2018 settlement agreement between Defense Distributed and the State Department to resolve litigation in this district regarding federal regulation of printable gun files. (*See* 2d Am. Compl., Dkt. 117, at 25). Under the terms of the settlement, the State Department agreed to promulgate rules creating an exception to various regulations for Defense Distributed’s publication of printable gun files. (*Id.* at 25–28; Settlement Agreement, Dkt. 117–1). In their second amended complaint, Plaintiffs also complain of the NJAG’s role in challenging actions taken by the State Department pursuant to the settlement agreement that would have allowed Defense Distributed to evade compliance with federal regulations regarding the international traffic of arms. (*Id.* at 19–39).

On July 30, 2018, the NJAG, along with other state attorneys general, initiated an action in the United States Court for the Western District of Washington (the

*Appendix F*

“Washington Suit”), claiming that certain actions taken by the State Department to fulfill its settlement agreement with Defense Distributed violated the Administrative Procedures Act (“APA”). (Dkt. 117, at 30); *State of Washington et al., v. United States Department of State et al.*, No. 2:18-cv-1115-RSL (W.D. Wash. 2018). The United States Court for the Western District of Washington granted summary judgment to the NJAG and the other state attorneys general on their APA claims, and vacated the State Department’s actions that violated the APA. (Dkt. 117, at 32–33); *Washington v. United States Dep’t of State*, 420 F. Supp. 3d 1130, 1148 (W.D. Wash. 2019), *appeal dismissed sub nom. State v. Def. Distributed*, No. 20-35030, 2020 U.S. App. LEXIS 22900, 2020 WL 4332902 (9th Cir. July 21, 2020). The Ninth Circuit dismissed Defense Distributed’s appeal of the decision, as well as its motion for reconsideration en banc. (*Id.* at 34); *State v. Def. Distributed*, No. 20-35030, Dkt. 32 (9th Cir. Jan. 5, 2021). Plaintiffs now allege that the NJAG’s successful legal challenge to the State Department’s unlawful actions constitutes tortious interference. (Dkt. 117, at 80–82). In their second amended complaint, Plaintiffs also bring new claims against NJAG based on New Jersey’s passage of Senate Bill 2465, a portion of which criminalizes the manufacturing of printable guns in New Jersey (“§ 2C:39-9(1)(2)”). (2d Am. Compl., Dkt. 117, at 40–44, 79–80).

The NJAG now moves to sever the claims against him and transfer those claims to the United States District Court for the District of New Jersey, where Plaintiffs have filed the New Jersey Suit alleging the same claims against the NJAG. (Mot. Transfer, Dkt. 121, at 9–10).

*Appendix F*

Plaintiffs filed two responses in opposition to the NJAG's motion, (Dkts. 124, 135), and Federal Defendants also filed a response, (Dkt. 136). The NJAG filed a reply in support of their motion, (Dkt. 141).

**II. LEGAL STANDARD****A. Motion to Sever**

District courts have broad discretion when deciding a motion to sever. *Anderson v. Red River Waterway Comm'n*, 231 F.3d 211, 214 (5th Cir. 2000). Generally, courts consider the following factors when evaluating a motion to sever under Federal Rule of Civil Procedure 21: “(1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims.” *Paragon Office Servs., LLC v. UnitedHealthcare Ins. Co.*, 2012 U.S. Dist. LEXIS 138217, 2012 WL 4442368, at \*1 (N.D. Sept. 26, 2012).

When a motion to sever is combined with a motion to transfer, however, this analysis is “collapsed into an inquiry into the relative merits of convenience versus judicial economy.” *In re Rolls Royce Corp.*, 775 F.3d 671, 680 (5th Cir. 2014). Where an action may have been brought against defendants in the proposed transferee court, “the claims against those defendants may be severed and

*Appendix F*

transferred while the other claims are retained in the original court.” *Balthasar Online, Inc. v. Network Sols., LLC*, 654 F. Supp. 2d 546, 549–50 (E.D. Tex. 2009).

**B. Motion to Transfer**

Section 1404 provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). As such, “[t]he threshold question in applying the provisions of § 1404(a) is whether the suit could have been brought in the proposed transferee district.” *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004).<sup>1</sup> If so, the Court turns to consideration of “all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.” *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (quoting 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3847, at 370 (1986)).

The relevant factors include matters of both private and public interest. *Volkswagen AG*, 371 F.3d at 203; *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004). The private-interest factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure witnesses’

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1. Plaintiffs have already filed the New Jersey Suit against the NJAG in the United States District Court for the District of New Jersey and do not contest that venue is proper there. *See Def. Distributed v. Grewal*, D.N.J. No. 3:19-CV-4753, 2019 WL 462758.

*Appendix F*

attendance; (3) the willing witnesses' cost of attendance; and (4) all other practical problems that make the case's trial easy, expeditious, and inexpensive. *Volkswagen AG*, 371 F.3d at 203 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)). The public-interest factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having local issues decided at home; (3) the forum's familiarity with the governing law; and (4) the avoidance of unnecessary conflict-of-law problems involving the application of foreign law. *Id.* No single factor is dispositive. *Id.*

The Court must also "give some weight to the plaintiffs' choice of forum." *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 63 n.6 (2013), 134 S. Ct. 568, 187 L. Ed. 2d 487. However, the plaintiff's venue choice "is neither conclusive nor determinative. *In Re: Horsehoe Entertainment*, 337 F.3d 429, 434 (5th Cir. 2003). Rather, the party seeking transfer must show "good cause": a moving party, in order to support its claim for a transfer, must satisfy the statutory requirements and clearly demonstrate that a transfer is "[f]or the convenience of parties and witnesses, in the interest of justice." *Humble Oil & Refining Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963). Thus, when the transferee venue is "not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008). But when the movant demonstrates that the transferee venue is clearly more convenient, "it has shown good cause and the district court should therefore grant the transfer." *Id.*

### III. DISCUSSION

#### A. Motion to Sever

The NJAG argues that Plaintiffs' claims against him should be severed because all the Rule 21 factors "weigh heavily in favor of severance." (Dkt. 121, at 24). The Federal Defendants respond that severance is inappropriate because the NJAG is properly joined and a necessary party to this action, and "Plaintiffs claims against State and Grewal are closely related." (Dkt. 136, at 5, 9). With regard to severance, Plaintiffs do not offer their own rebuttal but rather state that they "agree with and adopt the State Department's response." (Dkt. 135, at 2). Given that the NJAG does not argue that Defendants are improperly joined in this action, the Court will not address Federal Defendants' arguments on this point and will instead examine whether the factors elucidated in Rule 21 favor severance, with an emphasis placed on "judicial efficiency." *In re Rolls Royce Corp.*, 775 F.3d at 680.

First, the parties dispute whether the claims against the NJAG and the Federal Defendants arise out of the same transaction or occurrence. The parties' disagreement centers around whether the NJAG's filing of the Washington Suit, which successfully challenged certain actions taken by the State Department to comply with the settlement agreement, is part of the same transaction as the settlement agreement Plaintiffs claim Federal Defendants have failed to comply with as a result of the injunction issued in the Washington Suit. Indeed,

*Appendix F*

Counts Fourteen and Sixteen complain of the NJAG's role in the State Department's failure to comply with the settlement agreement. (Dkt. 117, at 78, 80). Yet the parties all acknowledge that the Washington Suit, joined by 19 other state attorneys general, did not challenge the settlement agreement itself but rather certain actions taken by the State Department that violated with APA. The Federal Defendants even argue that all of Plaintiffs' nine claims against the NJAG relate to the 2018 settlement agreement, including Plaintiffs' claims regarding the New Jersey Senate's passage of a criminal statute, § 2C:39-9(l) (2), arguing that the NJAG's actions "are part of a series of related steps all targeting Plaintiffs." (Dkt. 136, at 7).

"Transactions or occurrences satisfy the series of transactions or occurrences requirement of Rule 20(a) if there is some connection or logical relationship between the various transactions or occurrences." *Americans for Fair Patent Use, LLC v. Sprint Nextel Corp.*, 2011 U.S. Dist. LEXIS 2947, 2011 WL 98279, at \*3 (E.D. Tex. Jan. 12, 2011). A relationship between transactions or occurrences is "logical" if there is some common nucleus of operative facts or law. *Hanley v. First Investors Corp.*, 151 F.R.D. 76, 79 (E.D. Tex. 1993). There is no strict rule for determining what constitutes the same transaction or occurrence. *Guedry v. Marino*, 164 F.R.D. 181, 184 (E.D. La. 1995) (citing *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) ); *Corkern v. Hammond City*, 2012 U.S. Dist. LEXIS 92760, 2012 WL 2597561, at \*2 (E.D. La. July 5, 2012) ("transaction or occurrence" requirement is not a rigid test under joinder rules).

*Appendix F*

Here, Plaintiffs' claims against the Federal Defendants and the NJAG do not arise from the same transaction or occurrence, or series of transactions or occurrences. Instead, the occurrences that form the bases of Plaintiffs' claims against the NJAG and the Federal Defendants involved different parties and occurred in different places and at different times. Plaintiffs claims against the NJAG largely stem from the 2018 cease-and-desist letter, and other comments made by the NJAG, attempting to curb the dissemination of printable gun files to New Jersey residents, as well as New Jersey's recent passage of § 2C:39-9(l)(2), a criminal statute regarding printable gun files. (*See* 2d Am. Compl., Dkt. 117, at 70–86). While Plaintiffs also allege in Count Sixteen that the NJAG committed tortious interference, the NJAG rightly points out that this claim is likely barred by sovereign immunity. (Dkt. 141, at 5) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)). In any event, the Washington Suit challenged the State Department's violations of the APA, not the separate settlement agreement between Defense Distributed and the State Department. As such, Plaintiffs have not "identified any transaction or occurrence that factually connects all of the Defendants in a relevant or material way." *Tompkins v. Able Planet Inc.*, 2011 U.S. Dist. LEXIS 153068, 2011 WL 7718756, at \*2 (E.D. Tex. Feb. 17, 2011).

Second, the Court finds that the claims against the NJAG and the Federal Defendants do not involve common issues of fact and law that would council against severance. Although the Federal Defendants are correct that many

*Appendix F*

of Plaintiffs' claims involve the legal question of whether Defense Distributed's actions are protected by the First Amendment, this is not the case for *all* of Plaintiffs' claims as the Federal Defendants seem to suggest. (Dkt. 136, at 8). In addition, the distinct facts underlying Plaintiffs' claims against Federal Defendants and the NJAG demonstrate that severance would likely promote judicial economy, rather than hamper it. Indeed, Plaintiffs' claims against the Federal Defendants revolve around a 2018 settlement agreement regarding Defense Distributed's compliance with federal regulations, a settlement agreement to which the NJAG was not a party. (*See* 2d Am. Compl., Dkt. 117, at 49–70). Plaintiffs' claims against the NJAG, in contrast, stem from the enforcement actions taken by the NJAG to prevent Defense Distributed from providing printable gun files to New Jersey residents. (*See* 2d Am. Compl., Dkt. 117, at 70–86). Any factual overlap between the claims against the NJAG and the Federal Defendants stemming from the Washington Suit will have a miniscule effect on resolving Plaintiffs' claims and would hardly serve the interests of judicial economy. *See In re Rolls Royce Corp.*, 775 F.3d at 681 (“While judicial economy is not the sole consideration for a district court facing a severance-and-transfer motion, it retains a cardinal role.”).

These findings also apply to the final factor, which the Court finds similarly weighs in favor of severance since all of Plaintiffs' claims against the NJAG will rely on evidence distinct from those claims against the Federal Defendants. While the claims against the NJAG will require discovery into “the meaning of New Jersey laws and the intent of the NJAG's cease-and-desist letter,” the claims against

*Appendix F*

the Federal Defendants “largely turn on internal agency communications and potentially testimony from agency officials related to the agency’s implementation of the Settlement Agreement.” (Dkt. 121, at 25). In support of their position on this factor, the Federal Defendants state that “there will be substantial overlap in the witnesses and documentary proofs presented for each claim.” (Dkt. 136, at 13). Having offered no support for their conclusory statement, the Court rejects the Federal Defendants’ one-line argument and finds that this factor weighs in favor of severance.

The Court similarly finds that the NJAG is not a necessary party to this action, as asserted by the Federal Defendants. (Dkt. 136, at 9). While Federal Defendants posit that the NJAG must remain in this action to avoid the potential for “inconsistent obligations,” the Federal Defendants offer no concrete examples of how this could be so. The fact that the NJAG, joined by other state attorneys general, successfully challenged unlawful actions by the State Department pursuant to its settlement agreement with Plaintiffs does not mean that inconsistent outcomes in Texas and New Jersey with regard to unrelated claims would subject Federal Defendants to “inconsistent obligations.” Indeed, Plaintiffs claims against the NJAG largely revolve around the interpretation of New Jersey law, and this Court sees no reason to cabin its analysis to the parties present in the Washington Suit—a lawsuit regarding APA violations by the State Department, not enforcement actions by the NJAG.

Third, judicial economy, the paramount concern in a motion to sever brought along with a motion to transfer,

*Appendix F*

would be best served by severing the NJAG's claims from those against the Federal Defendants. Although Plaintiffs and Federal Defendants contend that the Fifth Circuit has already ruled that this Court has jurisdiction over the NJAG for Plaintiffs' claims challenging New Jersey's newly-enacted criminal statute, this is simply not the case and this Court would undoubtedly have to determine whether jurisdiction exists over the NJAG with regard to the newly-added claims. (Dkt. 135, at 3). While Plaintiffs are correct that they referred to § 2C:39-9(1)(2) in their motion for preliminary injunction, they ignore the fact that the Fifth Circuit's opinion did not assess any claims against the NJAG regarding this criminal statute. (Mot. PI, Dkt. 67, at 3). Plaintiffs selectively quote from the Fifth Circuit's opinion to argue that it addressed then un-pleaded claims arising from § 2C:39-9(1)(2), when in reality those passages reveal that the Fifth Circuit relied on Plaintiffs' factual allegation that the NJAG verbally threatened Defense Distributed with criminal sanctions. (Dkt. 100, at 4) ("[P]laintiffs allege these actions by Grewal . . . threatening Defense Distributed with criminal sanctions at a live press conference."). Nowhere does the Fifth Circuit state that its decision applies to any un-pleaded claims regarding § 2C:39-9(1)(2), and the Court reminds Plaintiffs that specific jurisdiction must be established for each claim. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 (5th Cir. 2006) ("[S]pecific jurisdiction must be established for each claim"). The NJAG's concerns regarding this Court's jurisdiction over him with regard to the § 2C:39-9(1)(2) claims do not reflect an attempt to create "jurisdictional carveouts," as Plaintiffs insist, but rather an accurate

*Appendix F*

understanding of how specific jurisdiction operates. This Court will thus save substantial judicial resources by severing the NJAG from this action and transferring the claims against him to a Court that clearly has personal jurisdiction over the NJAG with regard to the claims stemming from the criminal statute. Severing the NJAG from this action would further preserve judicial resources by allowing a New Jersey court to make determinations regarding the propriety of the NJAG's enforcement actions and the interpretation of § 2C:39-9(1)(2).

The fourth factor likewise weighs in favor of severance because prejudice to Plaintiffs and the Federal Defendants may be avoided by severing the claims against the NJAG and transferring them to a court that clearly has personal jurisdiction over all of Plaintiffs' claims against the NJAG. The Federal Defendants argue that it would suffer prejudice in having to litigate "the claims against it for allegedly failing to carry out activities under the settlement agreement without the presence of" the NJAG. (Dkt. 136, at 13). While Federal Defendants would clearly like to blame NJAG for their failure to abide by their settlement agreement with Plaintiffs, their failure to do so stems from their inability to carry out the settlement agreement in such a way that did not violate the APA, not the NJAG's actions that form the basis of Plaintiffs' claims against him. This factor thus weighs in favor of severance.

Based on the foregoing, the Court finds that the NJAG's motion to sever should be granted.

*Appendix F***B. Motion to Transfer**

The NJAG also moves to transfer the now-severed claims against him to the United States District Court for the District of New Jersey, where Plaintiffs have brought the same causes of action against him. The Court will address the public and private factors relevant to transfer under 28 U.S.C. § 1404(a) below.

**1. Public Interest Factors**

To determine whether to transfer Plaintiffs' claims against the NJAG under § 1404(a), this Court must balance four public interest factors: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). The NJAG asserts that transfer is warranted largely because of "New Jersey's strong interest in not having an out-of-state court determine the validity of its laws and the public interest in avoiding conflicting judgments on novel issues of constitutional law." (Dkt. 121, at 12). The Federal Defendants respond that because the NJAG successfully sought a stay of the later-filed New Jersey action brought by Plaintiffs' against him, the public interest factors weigh against transfer. Plaintiffs "agree with and adopt" the Federal Defendants' response, while adding a handful of additional arguments challenging the NJAG's arguments regarding the risk of conflicting rulings and interest in judicial economy. (Dkt. 135, at 2, 4).

*Appendix F*

The first factor is neutral, as both the District of New Jersey and the Western District of Texas are among the busiest judicial districts in the country. (Dkt. 121, at 14; *see also* Low Decl., Dkt. 121–1). Evaluating the second and third factors together, the Court finds that they weigh in favor of transfer, as New Jersey has a strong interest in having Plaintiffs’ claims relating to § 2C:39-9(1)(2), a New Jersey criminal statute, “examined by local state or federal courts—courts that have expertise interpreting its laws.” *Def. Distributed v. Grewal*, 971 F.3d 485, 499 n.3 (5th Cir. 2020 Higginson, J., concurring) (quoting *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008)) (“From my review of cases against government officials who attempt to enforce a state law, so for no personal or commercial profit, the litigation has taken place in the governmental official’s state.”). In addition, New Jersey courts have greater “familiarity with New Jersey’s overall statutory framework regulating firearms and the public policies those laws promote” and “have been the primary fora for deciding legal challenges to New Jersey firearms laws.” (Dkt. 121, at 13).

The Federal Defendants respond that this Court has previously examined “complex First Amendment issues” and is “the most familiar with the lengthy procedural history and law” of this case. (Dkt. 136, at 17). While this Court has previously evaluated a First Amendment claim regarding printable gun files, Plaintiffs’ First Amendment claims make up only two of Plaintiffs’ seventeen causes of action in this case. (*See* Dkt. 117). Furthermore, the Federal Defendants have not suggested, and the Court is unaware of any reason to believe that, the District of New

*Appendix F*

Jersey is not well equipped to evaluate “complex First Amendment issues,” especially given that it has heard challenges to New Jersey firearms laws for over ten years. (Dkt. 121, at 13). Furthermore, the “lengthy procedural history and law” to which the Federal Defendants refer was dominated by questions of personal jurisdiction, which will be eliminated if the claims against the NJAG are transferred to the District of New Jersey.

The fourth factor—avoiding unnecessary problems of conflict of laws—likewise weighs in favor of transfer. The NJAG argues that transfer to the District of New Jersey averts the potential for “conflicting rules and a possible split” between circuits regarding the interpretation of a New Jersey criminal statute and on constitutional issues. (Dkt. 121, at 14–15). Plaintiffs respond, without support, that the NJAG’s arguments on the fourth factor should be disregarded because “they are not matters of venue.” (Dkt. 135, at 4). The Court finds this argument curious as the risk of rulings that create conflicts is explicitly part of the venue analysis. *See In re Volkswagen AG*, 371 F.3d at 203 (“The public concerns include . . . the avoidance of unnecessary problems of conflict of laws.”). Plaintiffs further argue, again without citing to any authority, that “the Court should disregard the concern for conflicting rulings because preclusion doctrines solve for that completely.” (Dkt. 135, at 4). While Plaintiffs contend that “Grewal has no answer to this,” the NJAG rightly responds that “preclusion rules would only prevent the parties in this and the New Jersey action from re-litigating these issues, but would not prevent an inter-circuit conflict on the meaning of § 2C:39-9(1)(2) that arises when New

*Appendix F*

Jersey state courts in future actions adopt a meaning of § 2C:39-9(1)(2) in conflict with this Court’s interpretation.” (Reply, Dkt. 141, at 10). Furthermore, the District of New Jersey’s ability to certify questions regarding § 2C:39-9(1)(2) to New Jersey state courts, and thus avoid any conflict in the interpretation of the state statute, weighs in favor of transfer. (Dkt. 141, at 9).

Lastly, Plaintiffs claim that because the NJAG successfully sought a stay of the New Jersey Suit pending the resolution of the instant action, he is estopped from arguing in favor of transfer. (Dkt. 135, at 4–5). The Court is once again perplexed by this argument. While Plaintiffs are correct that “a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory,” the NJAG sought a stay because this action was filed first, not on the basis that this Court is the proper venue for the claims against him. (Dkt. 135, at 5) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 742–43, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)); *Def. Distributed v. Att’y Gen. of N.J.*, No. 3:19-cv-4753, Dkt. 20 (D.N.J. Feb. 2, 2019). The NJAG’s two arguments are thus entirely compatible, especially given that at that time he sought the stay of the New Jersey Suit, Plaintiffs had not added their § 2C:39-9(1)(2) claims and the NJAG was actively challenging personal jurisdiction in this Court. Plaintiffs unsubstantiated arguments must be rejected. The NJAG’s arguments regarding the risk of conflicting rulings are thus not estopped, and the fourth factor weighs in favor of transfer.

*Appendix F*

Having found that the first public interest factor is neutral and the remaining factors weigh in favor of transfer, the Court next addresses the private factors pertinent to a motion to transfer venue under 1404(a).

**2. Private Interest Factors**

The private interest factors this Court must evaluate to determine whether to transfer a case under 28 U.S.C. § 1404(a) include: “(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.” *In re Volkswagen AG*, 371 F.3d at 203.

The NJAG argues that the first three factors favor transfer because Plaintiffs’ § 2C:39-9(1)(2) claim and Commerce Clause claim “turn on the meaning and intent of New Jersey state laws and on the intent of the NJAG’s cease-and-desist letter, and the sources of proof relevant to these issues (including any non-party witnesses) are all in New Jersey.” (Dkt. 121, at 15–16). The Federal Defendants respond that the NJAG has failed to meet his burden on the first three factors, as a “generalized reference to out-of-state witnesses does not suffice.” (Dkt. 136, at 15). The Federal Defendants cite to *Hammers v. Mayea-Chang*, 2019 U.S. Dist. LEXIS 213039, 2019 WL 6728446, at \*7 (E.D. Tex. 2019) for the proposition that the NJAG must “specify the format, relevance, or identity of particular documents or physical evidence” located in a different district. (Dkt. 136, at 15). The NJAG asserts

*Appendix F*

that the fact that the sources of proof are located in New Jersey “is obvious from the nature of the claims” since they challenge actions by state officials. (Dkt. 141, at 10). While the Court agrees that any documentation relevant to the preparation of the cease-and-desist letter and the enactment of § 2C:39-9(1)(2) are invariably located in New Jersey, because the NJAG did not specifically identify the “type of documents” or “the format of their storage (e.g. electronic or physical),” the Court finds that the first factor is neutral. *Hammers*, WL 6728446, at \*8.

In *Hammers*, the court noted that although witnesses are sources of proof in a sense, their availability is properly evaluated under the second factor. *Id.* at \*9. There, the court denied transfer where the moving party had made reference to first responder witnesses to the car accident at issue, yet the non-moving party disputed that any of those witnesses lived within the jurisdiction of the transferee court and there was no other evidence before the court that would allow it to “determine what and how important their testimony will be.” *Id.* Here, in contrast, there is no such dispute—indeed, the state officials who prepared the cease-and-desist letter and passed § 2C:39-9(1)(2) are “necessarily based in New Jersey” and their testimony is likely necessary in resolving Plaintiffs’ claims related to the state criminal statute. (Dkt. 141, at 10).

The Federal Defendants also point out that the NJAG failed to carry his burden on the first three factors by not considering the evidence to be presented by Plaintiffs, or the impact of transfer on Federal Defendants. First, while Plaintiffs may plan to present evidence more conveniently

*Appendix F*

located in Texas, their decision to initiate a lawsuit in New Jersey against the NJAG belies any assertion that they will suffer prejudice in presenting evidence there. Second, the Federal Defendants have not elucidated how their ability to present evidence in support of their claims is hampered by the transfer of claims against the NJAG to New Jersey. Indeed, even if the Federal Defendants plan to blame their failure to fulfill the terms of the settlement agreement on the Washington Suit, information about that lawsuit is publicly available and does not require the presence of the NJAG. As such, the second factor weighs in favor of transfer. Because neither party has briefed the Court on the cost of attendance for willing witnesses, the third factor is neutral.

With regard to the fourth factor, the NJAG contends that transfer to New Jersey “would obviate the need to adjudicate threshold jurisdictional issues undecided by the Fifth Circuit and thus make this litigation more expeditious and less expensive.” (Dkt. 121, at 16). The Federal Defendants respond that transfer would require Plaintiffs to litigate their claims in both Texas and New Jersey. (Dkt. 136, at 16). Yet Plaintiffs are the ones who chose to file multiple lawsuits against the NJAG and, as discussed above, their claims against the Federal Defendants are not so intertwined with those against the NJAG as to warrant the claims being tried together. In addition, as the NJAG points out, Plaintiffs may more immediately seek relief against the NJAG in New Jersey rather than having to engage in further factual discovery and briefing regarding jurisdiction over the NJAG for Plaintiffs’ § 2C:39-9(1)(2) claims in this Court. Accordingly, the fourth factor weighs in favor of transfer.

*Appendix F*

Based on the foregoing, the Court finds that because all the relevant factors are neutral or weigh in favor of transfer, the NJAG's motion to transfer the claims against him to the United States District Court for the District of New Jersey should be granted.

**IV. CONCLUSION**

For the reasons given above, **IT IS ORDERED** that NJAG's Motion to Sever and Transfer Venue, (Dkt. 121), is **GRANTED**.

**IT IS ORDERED** that Plaintiffs' claims against the NJAG are **SEVERED** and shall be **TRANSFERRED** the United States District Court for the District of New Jersey.

**IT IS FINALLY ORDERED** that the NJAG's Unopposed Motion for Oral Argument, (Dkt. 144), is **MOOT**.

**SIGNED** on April 19, 2021.

/s/ Robert Pitman  
ROBERT PITMAN  
UNITED STATES DISTRICT JUDGE

239a

**APPENDIX G — OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT,  
FILED APRIL 1, 2022**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 21-50327

DEFENSE DISTRIBUTED; SECOND  
AMENDMENT FOUNDATION, INCORPORATED,

*Plaintiffs—Appellants,*

versus

ANDREW J. BRUCK, ACTING ATTORNEY  
GENERAL OF NEW JERSEY, IN HIS OFFICIAL  
AND INDIVIDUAL CAPACITIES,

*Defendant—Appellee.*

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:18-CV-637

Filed April 1, 2022

Before JONES, ELROD, and HIGGINSON, *Circuit Judges.*

EDITH H. JONES, *Circuit Judge:*

Since 2013, Appellants (collectively, “Defense Distributed”) have been challenging publication restraints

*Appendix G*

imposed by the U.S. State Department, federal courts, and the State of New Jersey after Defense Distributed published to the Internet computer assisted design (“CAD”) files for a single-round plastic pistol. Although Defense Distributed is still prevented from publishing,<sup>1</sup> the CAD files it published remain available to this day on countless other websites internationally. Defense Distributed has yet to secure a court decision condemning what appear to be flagrant prior restraints.<sup>2</sup>

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1. To be more precise, Defense Distributed published the CAD files to the Internet for a few months from December 2012—May 2013 before the State Department claimed that to do so violated International Traffic in Arms Regulations (“ITAR”). *See Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 455 (5th Cir. 2016); *id.* at 461-63 (Jones, J., dissenting). The company also published to the Internet for five days in 2018 during a litigation hiatus. Further, it has published the files by hosting them at a public library in Austin, Texas, and by distributing USB drives and SD cards through the Postal Service. To date, the CAD files are still not available on the internet free from all prior restraint. As the Supreme Court declared, a “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976). These Appellants’ First Amendment freedoms have been restrained for years.

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

*Appendix G*

The instant combined appeal and motion for mandamus relief stems from a district court order severing the case against one defendant, the Attorney General of New Jersey (NJAG),<sup>3</sup> and transferring it to a federal court in New Jersey. We conclude that mandamus relief is appropriate in this unusual case. Accordingly, we direct the district court to request retransfer from its counterpart in New Jersey and order other relief in accordance herewith.

**BACKGROUND**

Two previous opinions of this court describe the litigation history surrounding Defense Distributed’s publication of then-novel CAD files for a pistol that can theoretically be “printed” from a computer affixed to the proper equipment. *See Defense Distributed v. Grewal*, 971 F.3d 485, 488-90 (5th Cir. 2020); *Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 454-58 (5th Cir. 2016); *id.* at 461-66 (Jones, J., dissenting). We quote from the more recent opinion:

Plaintiff Defense Distributed is a Texas company operated for the purpose of promoting popular access to firearms. To carry out this purpose, it produces and makes accessible information related to the 3D printing of firearms and publishes and distributes such information to the public. Plaintiff Second

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3. Gurbir Grewal was New Jersey’s Attorney General when this suit was filed. He is succeeded by Andrew Bruck. For convenience, we refer to this defendant as the NJAG.

*Appendix G*

Amendment Foundation, Inc. (“SAF”) is a nationwide, non-profit membership organization that “promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution’s right to privately own and possess firearms and the consequences of gun control.” Across the nation, SAF members seek the digital firearms information created by Defense Distributed, circulate their own digital firearms information by utilizing Defense Distributed’s facilities, and republish digital firearms information independently.

Defense Distributed began distributing files related to the 3D printing of firearms in December 2012. It did so by publishing files to its defcad.org and defcad.com websites and letting visitors freely download them. It also distributed digital firearms information via mail and at a brick-and-mortar public library in Austin, Texas. Defense Distributed’s efforts were initially met with opposition from the United States Department of State.<sup>4</sup> But, after a period of litigation, the parties reached a settlement agreement that granted Defense Distributed a license to publish its files.

Shortly thereafter, nine Attorneys General,

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4. *See Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016); *id.* at 462-76 (Jones, J., dissenting).

*Appendix G*

including New Jersey Attorney General Grewal, filed suit on behalf of their respective states in the Western District of Washington to enjoin the State Department from authorizing the release of Defense Distributed's files. They argued that the State Department's license to Defense Distributed constituted an *ultra vires* about-face that violated the Administrative Procedure Act and jeopardized the states' statutory and regulatory schemes for firearms. The Western District of Washington quickly issued a temporary restraining order, followed closely by a nationwide preliminary injunction.<sup>5</sup>

Just before the Attorneys General sued in Washington, Defense Distributed and SAF brought the instant action in the Western District of Texas challenging select enforcement actions taken by the state Attorneys General. Of relevance to this appeal, Plaintiffs alleged these actions by Grewal: (1) sending a cease-and-desist letter threatening legal action if Defense Distributed published its files; (2) sending letters to third-party internet service providers based in California urging them

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5. The Attorneys General later filed a motion for summary judgment, which the district court granted in part. *Washington v. U.S. Dep't of State*, 420 F. Supp. 3d 1130 (W.D. Wash. 2019). On appeal, the Ninth Circuit found that the case was moot and thus dismissed for lack of jurisdiction. *Washington v. Defense Distributed*, Nos. 20-35030 & 20-35064, 2020 U.S. App. LEXIS 22900, 2020 WL 4332902 (9th Cir. July 21, 2020).

*Appendix G*

to terminate their contracts with Defense Distributed; (3) initiating a civil lawsuit against Defense Distributed in New Jersey;<sup>6</sup> and (4) threatening Defense Distributed with criminal sanctions at a live press conference. Further, these actions, coupled with the injunctive orders issued in the Washington litigation, have caused Defense Distributed to cease publication of its materials. The Plaintiffs asserted, *inter alia*, that these actions infringed the exercise of their First Amendment freedoms and constituted tortious interference with the State Department's settlement agreement.

Grewal moved to dismiss for lack of personal jurisdiction.<sup>7</sup> The Plaintiffs, meanwhile, sought a preliminary injunction. After holding a hearing and considering the parties' arguments, the court granted Grewal's motion and dismissed the action without prejudice.

*Defense Distributed v. Grewal*, 971 F.3d at 488-89 (footnotes in original). Defense distributed appealed.

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6. That lawsuit was removed to federal court before being administratively terminated in light of the nationwide injunction issued in Washington. The Plaintiffs have likewise sued in New Jersey, raising the same claims asserted in the case at bar. *See Defense Distributed v. Grewal*, D.N.J. No. 3:19-CV-4753. That case is currently stayed pending resolution of this one.

7. The other state Attorneys General also moved to dismiss, and the district court granted their motions. On appeal, the Plaintiffs challenge only the judgment related to Grewal.

*Appendix G*

This court held that the NJAG is amenable to personal jurisdiction in Texas courts. *Id.* at 488. Accordingly, the court reversed and remanded for further proceedings. *Id.*

Following our remand to the district court, Defense Distributed amended its complaint to join the State Department as a defendant for its alleged failure to comply with a Settlement Agreement reached with Defense Distributed in 2018. Shortly after, the NJAG moved to sever Defense Distributed's case against him and transfer that portion of the case to a New Jersey federal court. The State Department opposed severance, as did Defense Distributed. Nonetheless, the district court obliged the NJAG by written order both severing and transferring the case against him.

Defense Distributed immediately noticed an appeal from the severance-and-transfer order and followed with an alternate request for mandamus relief against the district judge. This court imposed a temporary stay of the case pending appeal. The New Jersey district court also stayed all proceedings pending this appeal.

**DISCUSSION****I. Appellate jurisdiction**

We pretermitt Defense Distributed's resort to the collateral order doctrine as a basis for appellate jurisdiction in this interlocutory appeal<sup>8</sup> because, in this

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8. *In re Rolls Royce Corp.* asserted that our circuit has held that transfer orders do not fall within the scope of the collateral

*Appendix G*

circuit, mandamus is the prescribed vehicle for reviewing rulings on transfers of cases pursuant to 28 U.S.C. § 1404(a). *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc); *In re Rolls Royce Corp.*, 775 F.3d 671, 676-77 (5th Cir. 2014).

The twist in this case is the transfer to a district court outside the Fifth Circuit, a court over which this court exercises no control. This court lacks power to order a return of the case to our circuit. But *In re Red Baron Motors, Inc.*, 794 F.3d 481 (5th Cir. 2015), explained the path to a cognizable mandamus remedy. *Id.* at 483-84. The All Writs Act, 28 U.S.C. § 1651, empowers courts to issue writs of mandamus *if* the courts also have appellate jurisdiction, “although no appeal has been perfected.” *Roche v. Evaporated Milk Ass’n.*, 319 U.S. 21, 25, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943). Because of the transfer, the Texas transferor court can no longer enter an appealable order in the case. *In re Red Baron*, nevertheless, approved that “several circuits, where appropriate, have endorsed the method of directing the transferor district court to request that the transferee district court return the case.” *Id.* at 484 (collecting cases). To be sure, to avoid friction with sister circuits, the court held that “if we even have the power to reverse such a transfer, we should exercise it only if faced with ‘a very extreme case.’” *Id.* (citing *In re*

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order doctrine. 775 F.3d 671, 676 (5th Cir. 2014) (citing *Brinar v. Williamson*, 245 F.3d 515, 517 (5th Cir. 2001)). However, other cases seem to apply the doctrine to transfer orders. *See In re Sepulvado*, 707 F.3d 550, 552 (5th Cir. 2013); *In re Bradford*, 660 F.3d 226, 229 (5th Cir. 2011). We need not weigh into a potential intra-circuit split.

*Appendix G*

*Sw. Mobile Homes, Inc.*, 317 F.2d 65, 66-67 (5th Cir. 1963)). But intercircuit friction was reduced where the transferee court there, as here, stayed proceedings pending our appellate panel's decision. *Id.* The court concluded by requiring a party seeking relief from a transfer order to exercise diligence. *Id.* at 485. Because the petitioner had waited three months to file its mandamus petition, the writ was denied. *Id.*

In this case, of course, the notice of appeal was filed the day after the district court's order and mandamus relief formally sought within thirty-nine days while briefing was underway. Because *In re Red Baron* sets the standard, we have jurisdiction to consider the mandamus petition.

The NJAG asserts four objections to our jurisdiction. He asserts that *In re Red Baron* did not hold what we just stated it held; that other circuits would not allow a writ of mandamus where a case is transferred to another circuit; and that Defense Distributed was not diligent. Finally, he contends that because Defense Distributed may eventually challenge the transfer order in courts of the Third Circuit, the availability of appellate review disentitles him to an equitable writ. We find none of these arguments persuasive.

First, *In re Red Baron* denied the writ only for lack of petitioner's diligence. That conclusion would have been inappropriate had the panel concluded that mandamus is not available to challenge an out-of-circuit transfer order. The court's entire discussion of the writ, and a limitation where intercircuit friction may occur, would have been

*Appendix G*

unnecessary. Instead, the court weighed the approaches of other circuits, noting that in particular cases a circuit court exercised jurisdiction to vacate a completed intercourt transfer. *See In re Red Baron*, 794 F.3d at 484 n.6. This discussion would also be extraneous had the court simply been uttering *dicta* rather than explaining its rationale. And of course, the court noted that several circuits have authorized mandamus relief in these circumstances. *Id.* Finally, there is no “assuming *arguendo*” language that couches the court’s ruling on mandamus in hypothetical terms.<sup>9</sup> In short, *In re Red Baron*’s procedural holding is not predicated on *dicta*.

Second, other circuits have adopted the same approach. *See, e.g., In re Howmedica Osteonics Corp.*, 867 F.3d 390, 399-400, 411 (3d Cir. 2017) (asserting jurisdiction to vacate intercourt transfer order); *In re Warrick*, 70 F.3d 736, 739-40 (2d Cir. 1995) (asserting mandamus jurisdiction and distinguishing *In re Drabik*, 246 F.2d 408 (2d Cir. 1957), as not justifying denial of all relief “in these circumstances”); *A.C. Nielsen Co. v. Hoffman*, 270 F.2d 693, 695 (7th Cir. 1959) (concluding that the court has mandamus jurisdiction over intercourt transfer order). Each of these circuits has applied mandamus to decide the propriety of intercourt transfers. Although the

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9. The court refers to the “potential availability” of the writ, but then cites the Supreme Court’s substantive standard for granting or denying mandamus as applicable to show that the writ sought by petitioners in *In re Red Barn* was not “appropriate under the circumstances.” *In re Red Baron*, 794 F.3d at 484-85, 485 n.7 (quoting *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 381, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004)).

*Appendix G*

Tenth Circuit held that a completed intercircuit transfer divested it of appellate jurisdiction, *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516-17 (10th Cir. 1991), that court went on to recognize that “technically,” the district court should have deferred effectuating the transfer so that the parties could seek certification or “file a mandamus petition.” *Id.* at 1520 n.9. *See also In re Nine Mile Ltd.*, 673 F.2d 242 (8th Cir. 1982)(mandamus ordered where district court erroneously transferred papers to consummate Section 1404 case transfer before appeal could be filed in transferor district). Thus, the balance of circuit court authority, in addition to the cases cited by *In re Red Baron*, favors jurisdiction in this case.

Third, the AG questions the diligence of Defense Distributed because of its failure to seek an immediate stay in the district court or file an immediate mandamus petition. Nothing in applicable precedent, however, mandates the particular method by which a party disadvantaged by an out-of-circuit transfer must bring that issue to the circuit court. Defense Distributed filed its notice of appeal the day after the district court’s transfer order and promptly sought relief in this court. The defendants and district court were immediately placed on notice of Defense Distributed’s intent to challenge the transfer in this court, and the actual transfer order was not docketed until the following day. It sought mandamus relief in briefing to this court, filed thirty-nine days after the court’s order.<sup>10</sup> The Appellants’ diligence comports

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10. The NJAG’s contention that Defense Distributed cannot seek mandamus due to technical noncompliance with FRAP Rule 21 is frivolous. Defense Distributed’s briefing, procedurally and

*Appendix G*

with this court's emphasis on "diligence" in *In re Red Baron* and with the timing of filings in *In re Howmedica*, 867 F.3d at 400.

Fourth, it is inaccurate to assert, as the NJAG does, that Defense Distributed has adequate available alternatives for appellate court review of the district court's order, which render a mandamus remedy unavailable. Unlike *In re Red Baron*, this case encompasses severance as a necessary condition of the transfer.<sup>11</sup> On appeal, the Third Circuit could not review the severance order, much less attempt to consolidate the case against the NJAG with the case still pending in Texas against the State Department. Therefore, on its face, this tandem order is effectively unreviewable in the transferee circuit.

Moreover, if the potential Third Circuit appeal were (arbitrarily) limited to the transfer order alone, a premier procedural treatise notes that review in the transferee court seems illusory given the application of comity and law-of-the-case principles. *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE [HEREAFTER, WRIGHT & MILLER] § 3846 (4th ed. 2021); *id.* at § 3855 (similar). The likelihood of securing a retransfer by the transferee district court seems equally constrained. But even if these propositions

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substantively, stated clearly the relief requested and grounds for seeking mandamus relief.

11. The *Red Baron* district court transferred an entire case, with two defendants one of which objected strenuously, to Indiana. 794 F.3d at 483.

*Appendix G*

are arguable, *see SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 178 n.7 (2d Cir. 2000) (collecting cases), the *SongByrd* decision, like that of other courts, acknowledges the availability of mandamus review in the Fifth Circuit. *Id.* at 176-77, 176 n.5.<sup>12</sup>

Finally, the fact that the district court here granted the transfer, rather than denying it, makes no difference. In this circuit, neither *In re Rolls Royce* nor *In re Volkswagen* limited writs of mandamus according to whether the district courts granted or denied transfer.<sup>13</sup> And in *Howmedica*, the Third Circuit applied mandamus to vacate the order granting transfer to the Central District of California. *In re Howmedica*, 867 F.3d at

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12. *See also Hill v. Henderson*, 195 F.3d 671, 676-77, 338 U.S. App. D.C. 456 (D.C. Cir. 1999) (“Transfer orders under § 1404 are not final appealable orders, nor, generally speaking, reviewable collateral orders. Commonly, however, courts of appeal in the circuit of origin entertain mandamus petitions to review such orders . . . . A possible explanation for finding transfer orders nonreviewable in the transferee circuit is that such orders are usually effectively subject to immediate review via mandamus in the circuit of the transferring court.”) (citations omitted); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773 (3d Cir. 1984) (concluding that “mandamus review is appropriate” over a transfer order after deciding it did not fall within the collateral order doctrine, and recognizing the general rule that “the Plaintiff could petition the transferor appellate court for a writ of mandamus blocking the transfer”) (citation omitted).

13. In *In re Volkswagen*, the en banc court emphasized that review of a transfer order following final judgment was not an “adequate remedy,” and observed that “venue transfer decisions are rarely reviewed.” 545 F.3d at 319.

*Appendix G*

411. Whatever the possibility of review in the transferee circuit, this has not been regarded as sufficiently effective to preclude writs of mandamus in the transferor court.<sup>14</sup>

## II. Mandamus

A writ of mandamus is “a drastic and extraordinary remedy reserved for really extraordinary cases.” *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017). This court will grant a petition for a writ of mandamus only if the petitioner satisfies three conditions. First, the petitioner must show that there are “no other adequate means to attain the relief he desires.” *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L.Ed.2d 459 (2004). Second, the court “must be satisfied that the writ is appropriate under the circumstances.” *Id.* at 381, 124 S. Ct. 2576. And third, the petitioner must show a “clear and indisputable right to the writ.” *Id.*

Defense Distributed easily satisfies the first two conditions for mandamus relief. As we just explained, the Third Circuit transferee court cannot, under normal appellate standards, exercise appellate review over either the severance or transfer orders of this Western District of Texas. *E.g., In re Red Baron*, at 484-85.

Second, granting the writ would be “especially appropriate where the issues implicated have importance

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14. This court’s decision in *Persyn v. United States*, 935 F.2d 69 (5th Cir. 1991), offers no help to the NJAG. The court there explicitly stated that seeking retransfer is *not* an adequate alternative to appellate review where, as here, both courts have subject-matter jurisdiction. *Id.* at 73.

*Appendix G*

beyond the immediate case.” *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019) (quoting *In re Lloyd’s Register N. Am., Inc.*, 780 F.3d 283, 294 (5th Cir. 2015); and *In re Volkswagen*, at 319 (internal quotation marks omitted). Before this court are “issues that implicate not only the parties’ interests but those of the judicial system itself.” *United States v. Bertoli*, 994 F.2d 1002, 1014 (3d Cir. 1993). Preeminent are questions about the abridgement of the Plaintiffs’ first amendment rights to publish their materials. Also critical, however, are tactics suggesting the abusive manipulation of federal court procedures in order to delay or altogether avoid meaningful merits consideration of Plaintiffs’ claims.

What the parties most strenuously debate is whether Defense Distributed has shown a clear and indisputable right to the writ or a clear abuse of discretion by the district court. *See Cheney* at 381, 2576; *see also In re Volkswagen*, at 308. “A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392 (1996) (*citing Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990) (“a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”)). We conclude that the district court clearly abused its discretion by applying the wrong legal standard for evaluating the NJAG’s conjoined severance and transfer motions and by egregiously misinterpreting Defense Distributed’s claims. Moreover, even if the motions are evaluated wholly independently, the transfer motion cannot stand if the severance motion was wholly unjustified. *See*,

*Appendix G*

*e.g., Chrysler Credit Corp. v. Country Chrysler*, 928 F.2d 1509 (10th Cir. 1991); *In re Nine Mile Ltd.*, 673 F.2d at 242 (because transfer order was procedurally incorrect, mandamus ordered district court to request return of the case from the transferee court).

**A. Joint Severance and Transfer**

To explain this conclusion, we remind that the Federal Rules of Civil Procedure were enacted to ensure “the just, speedy and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. To be more precise, Fed. R. Civ. P. 21, which authorizes severance of parties, and 28 USC § 1404(a), governing transfers among federal district courts, “are [both] designed to facilitate just, convenient, efficient and less expensive determination.” *In re Nintendo of America, Inc.*, 756 F.3d 1363, 1365 (Fed. Cir. 2014). Although a district court has broad discretion to sever parties that were otherwise properly joined by a Plaintiff,<sup>15</sup> “[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers v Gibbs*, 383 U.S. 715, 724, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966).

On two occasions, this court has discussed standards for joint severance and transfer motions brought by a defendant or defendants, the effect of which would require

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15. *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994).

*Appendix G*

a Plaintiff to split its case into two different federal courts. In a well-known opinion, this court noted that “our jurisprudence suggests that the severance inquiry is different—and more focused on judicial efficiency—when it is combined with a section 1404 motion to transfer than when the severed case would remain in the original judicial district.” *In re Rolls Royce*, 775 F.3d at 680.<sup>16</sup> The court quoted at length Judge Alvin Rubin’s opinion explaining the problems that can arise in a case involving multiple defendants when claims against one or some defendants are severed and transferred while claims against the remaining defendant are retained in the original court. *Id.*, (quoting *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148-49 (5th Cir. 1984)). Judge Rubin’s list of parameters that should inform this type of proposed transfer bears repeating:

But before thus putting asunder what the Plaintiff has joined, the court must weigh carefully whether the inconvenience of splitting the suit outweighs the advantages to be gained from the partial transfer. It should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would

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16. Judge Higginbotham’s opinion in *Rolls Royce* has been cited frequently for its application of sever/transfer considerations when one of the parties has a forum selection clause. However, the court’s discussion about severance and transfer orders in multidefendant cases draws from *Liaw Su Teng* and other non-forum selection clause cases and is thus more broadly applicable here.

*Appendix G*

require the same issues to be litigated in two places. [See Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 Rutgers L.Rev. 607 (1961); Masington, *Venue in the Federal Courts—The Problem of the Inconvenient Forum*, 15 U.Miami L.Rev. 237 (1961); Note, 46 Cornell L.Q. 318 (1961)]. That being the situation here, the district court should not have severed the claims if there were any alternative. Manifestly, the Plaintiffs will suffer some inconvenience if they are forced to litigate their claims in two courts, half the world apart from each other, with not only the consequent added expense and inconvenience but also the possible detriment of inconsistent results. A single forum is also most suitable for determining possible counter-and cross-claims. The public also has an interest in facilitating a speedy and less-expensive determination in one forum of all of the issues arising out of one episode.

*Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148-49 (5th Cir. 1984), *overruled on other grounds*, *In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987).

Several points made in Judge Rubin's opinion are common to this species of joint severance and transfer motions. A court must "weigh carefully" the comparative inconvenience of splitting the suit versus the advantages to be gained from a partial transfer. It should not sever if the defendant not transferred is "so involved" in the

*Appendix G*

controversy transferred to another court that partial transfer would require the same issues to be litigated in two places. “Manifestly,” Plaintiffs are disadvantaged by the expense and inconvenience of having to litigate in two disparate fora and by the possibility of inconsistent results. And the public has an interest in the comparative speediness and cost-savings from utilizing a single forum for the issues arising out of one episode. *See also* 15 Wright & Miller, § 3845, at 86 (echoing these factors).

Other courts have agreed with *Liaw Su Teng*, and specified that in analyzing severance and transfer motions, “[b]efore effecting such a severance, a judge should weigh the convenience to the parties requesting transfer against the potential inefficiency of litigating the same facts in two separate forums.” *White v. ABCO Eng’g Corp.*, 199 F.3d 140, 144 (3d Cir. 1999). Previously, the Third Circuit, explicitly endorsing Judge Rubin’s view, denied severance and transfer where the defendant not transferred was more than “indirectly connected” to the Plaintiff’s dispute with the defendant seeking transfer. *Sunbelt Corp. v. Noble, Denton and Assoc., Inc.*, 5 F.3d 28, 34 (3d Cir. 1993). The Second Circuit, which pioneered using severance and transfer as a permissible strategy of case management, nonetheless held it appropriate only “where the administration of justice would be materially advanced....” and where a defendant in one district is only “indirectly connected” to the claims that will be transferred to the other district. *Wyndham Assoc. v. Bintliff*, 398 F.2d 614, 618-19 (2d Cir. 1968).<sup>17</sup>

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17. WRIGHT & MILLER explains that severance and transfer of claims or parties enabled courts to avoid the rule that “[i]n suits against multiple defendants, transfer is proper only to a district

*Appendix G*

The district court here quoted *Rolls Royce*, but it misperceived and thus misapplied this court's explanation about "judicial efficiency." In the above cases, courts were not deciding ordinary Rule 21 severance motions, in which parties or claims may be split while the disputes are maintained before the same court. Severance and transfer requires two courts to engage in the work of one, prompting serious concerns about duplication of judicial resources, the consistency of rulings, and litigation costs. The circuit courts that discussed severance and transfer motions in this context have uniformly indicated an aversion to granting such motions at the expense of needless duplication of judicial effort. The rule emanating from *Rolls Royce* and *Liaw Su Teng* is that in most multidefendant cases—other than those involving forum selection clauses—severance and transfer makes sense only where the administration of justice would be materially advanced and a defendant in one district is not "so involved" in the transferred controversy that the same issues would have to be litigated twice.<sup>18</sup>

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in which all of them are subject to personal jurisdiction and in which venue is proper for an action against all of them." WRIGHT & MILLER § 3845, at 85. The treatise also endorses the cautious use of such orders. *Id.* at 86-87.

18. See also *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26, 80 S. Ct. 1470, 1474, 4 L. Ed. 2d 1540 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that Sec. 1404(a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers").

*Appendix G*

Consequently, the district court erred legally in finding that the State Department is only indirectly connected to claims pled against the NJAG<sup>19</sup> and in failing to find that the administration of justice would not be materially advanced by transfer.

The direct connection between the Plaintiffs' claims against these two defendants contradicts the district court's artful dissection of Defense Distributed's Second Amended Complaint. The court ignored the major components of the lawsuit and the overarching connection alleged between the State Department and the NJAG. Both government entities have suppressed legal speech by prohibiting the publication of the company's digital firearms files on the internet and into New Jersey. That the First Amendment protects all of the Plaintiffs' publications underlies all of their other claims.<sup>20</sup> The Plaintiffs' assertion of seventeen separate claims reflects the consequences of that suppression and the tortuous path they have been forced to pursue for redress. Yet, contrary to common sense and heedless of a potential for disparate constitutional rulings if the case against the NJAG remains transferred, the court belittled the First Amendment issues. According to the district court, not

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19. The district court found the factual overlap between the claims pled against each defendant is "minuscule;" and that the claims have no "logical connection" because the defendants' actions occurred "in different places and at different times."

20. The First Amendment claims, moreover, are complex factually and legally, as they involve questions about compelling interest, narrow tailoring, and numerous types of digital firearms information that Defense Distributed has created.

*Appendix G*

*all* of Plaintiffs' claims involve the First Amendment. The court overlooked Plaintiffs' claims that directly involve both Defendants in the settlement agreement breach and in censorship under the Second Amendment and Due Process clause. And the larger point is that *none* of Plaintiffs' claims would exist if they had been allowed to publish the various digital firearms files continuously since 2013. The First Amendment is the *sine qua non* of this case.

The other larger point ignored by the district court is that the principal claims against both defendants are temporally and factually intertwined to the extent that litigation in separate courts would largely overlap. A paraphrase of the facts alleged in the Second Amended Complaint is demonstrative. Just when the Plaintiffs, after several years of litigation, thought they had obtained relief from a signed settlement agreement with the State Department, the NJAG loudly led a bevy of states in opposition. Within a span of about six months, he filed suit in Washington state, even more remote from New Jersey than Texas, and forced the joinder of Defense Distributed as a defendant there. He evidently thought the parties' fates were legally and factually connected when he sought and obtained an injunction expressly to prevent the State Department from completing the settlement with Plaintiffs. The NJAG kept up public pressure against the settlement with threats of civil and criminal punishment against Plaintiffs' president Cody Wilson personally. At this time, the State Department opted not to complete the settlement. Accordingly, the State Department did not modify relevant federal regulations, disavowed the license

*Appendix G*

and exemption from regulations it had promised Defense Distributed, and refused to appeal adverse decisions by the Washington federal court. The extent to which the NJAG's campaign influenced the State Department's alleged breaches is relevant to the claims against both defendants. At the same time, the NJAG's seminal place in the litigation is a major, though far from the only facet of his conduct that was designed to derail the settlement and independently to restrain Plaintiffs' exercise of free speech. Plaintiffs' essential claims for First Amendment violations, breach of the settlement agreement, and the NJAG's interferences cannot be understood by a factfinder without investigating and telling the whole story. Similarly, having to tell the same story in two courts would abuse Plaintiffs and the judicial process.<sup>21</sup>

Also plain from the complaint is that the subsidiary claims are dependent upon the primary claims identified above. To cite one instance, Defense Distributed pleads that the State Department violated the Administrative Procedure Act in various aspects of its settlement agreement breach. The Washington State litigation was also based on alleged violations of the Administrative Procedure Act. The State Department's noncompliance may have been caused by the mere fact of the Washington State litigation or by the imperative of complying with that court's injunctive decrees or by the NJAG's public campaign against the settlement. Sorting out cause and

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21. The NJAG interjects that a sovereign immunity defense precludes any tortious interference claim asserted by Plaintiffs. Plaintiffs dispute the assertion. This merits defense has no place in our analysis.

*Appendix G*

effect for these claims demands a single factfinder and judicial resolution.

The district court also erred legally by failing to conclude that the administration of justice would *not* be materially advanced by transfer of the case against the NJAG to New Jersey. *See Rolls Royce*, 775 F.3d at 680. The burden rests on the NJAG as the movant to demonstrate that proposition, and he did not succeed. First, the public interest in achieving a single court's ruling on Plaintiffs' First Amendment claims cannot be overstated. Government instigated censorship of constitutionally protected speech is abhorrent to self-government; courts have a duty to prevent illegal censorship. But severance and transfer enhances the risk of conflicting rulings, which would seriously injure the Plaintiffs and throw the law in this important constitutional area into national disarray for several years.

Second, because of the complex factual interactions among Plaintiffs and these Defendants, discovery and trial for the principal claims will require many of the same witnesses. No efficiency exists from conducting two fact-based litigations half a continent apart. On the other hand, no efficiency is gained by having two courts decide the separate subsidiary claims against each Defendant. Such claims are largely legal in nature, overlapping in several instances, and best resolved on briefing to a single court that has gained familiarity with the intricacies of Plaintiffs' dozens of digital firearms files and background materials that could be published to the internet and in New Jersey. There is no obvious efficiency advantage,

*Appendix G*

much less materially enhanced judicial economy from forcing Defense Distributed's case into two separate cases.

The necessity of denying severance conjoined with transfer is confirmed by proper application of *Rolls Royce* and *Liaw Su Teng*. In addition, the district court's separate and independent Rule 21 severance and Section 1404 transfer analyses are plagued with error and therefore alone justify the rebuke of mandamus. We turn first to severance.

**B. Severance**

In the Fifth Circuit, the accepted basis for Rule 21 severance analysis considers five factors: (1) whether claims arise out of the same transaction, occurrence, or series of transactions or occurrence; (2) whether the claims present common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims." See *Rolls Royce*, 775 F.3d at 680; *Paragon Office Servs., LLC v. UnitedHealthcare Ins. Co.*, 2012 U.S. Dist. LEXIS 138217, 2012 WL 4442368, (N.D. Tex. Sept. 26, 2012); *Parker v. Louisiana Dep't of Pub. Safety & Corr.*, 2019 U.S. Dist. LEXIS 176879, 2019 WL 5103811 (M.D. La. Oct. 11, 2019); *Calhoun v. WA DHS Child Support Div.*, 2018 U.S. Dist. LEXIS 97383, 2018 WL 2865315 (N.D. Tex. June 11, 2018); *Pounce v. Dlorah, Inc.*, 2015 U.S. Dist. LEXIS 118233, 2015 WL 5178401 (N.D. Tex. Sept. 4, 2015); *Cty. of Travis v. Purdue*

*Appendix G*

*Pharma, LP*, 2018 U.S. Dist. LEXIS 51522, 2018 WL 1518848 (W.D. Tex. Mar. 28, 2018).

First, as has been explained, the district court misconstrued the Second Amended Complaint. Relevant to the severance factors, it erroneously found that there was no common transaction or occurrence or series of transactions or occurrences giving rise to the Plaintiffs' claims against the Defendants. The district court compounded its error by stating that "the parties all acknowledge that the Washington Suit" had nothing to do with the settlement agreement between Defense Distributed and the State Department. This assertion is contradicted by the record. As the NJAG put it in his complaint in the Washington lawsuit, "in sum, the Government's covert agreement to deregulate the CAD files by way of the Settlement Agreement—which culminated in the enactment of the "temporary modification" on July 27, 2018—are final agency decisions that not only failed to comply with procedural requirements, but that have far-reaching implications for national security and the safety and security of the State and people of Washington." The district court for the Western District of Washington also stated that at the heart of its decision to grant a TRO, as requested by the NJAG, was the manner in which the State Department entered into and followed through on its settlement agreement with Defense Distributed. *State v. United States Dep't of State*, 315 F. Supp. 3d 1202, 1205 (W.D. Wash. 2018). Defense Distributed's claims against both Defendants fundamentally concern the State Department's settlement agreement and the NJAG's efforts after it was signed to prevent its meaningful

*Appendix G*

implementation. The interference claims against the NJAG cannot be proven without initial proof that the settlement agreement was breached. These transactions and occurrences both perpetuated the violation of Plaintiffs' First Amendment rights. The occurrences and transactions involved in Plaintiffs' principal claims are thus logically, factually, and temporally inextricable.<sup>22</sup>

The district court also misapplied the second factor of the severance analysis in determining that Plaintiffs' claims do not involve common issues of law or fact. The court put the matter exactly backward, as it stated that although "many of Plaintiff's claims" arise from alleged First Amendment violations, "this is not the case for *all* of Plaintiffs' claims...." To the contrary, a court is required to determine whether "there is at least one common question of law," not whether all of the claims in a case involve the same question of law. *Acevedo v. Allsup's Convenience*

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22. The district court asserted that the claims against the NJAG largely stem from the 2018 cease-and-desist letter, public comments by the NJAG directed at dissemination of Plaintiffs' materials in New Jersey, and the law that criminalizes such dissemination. This is correct only to the extent that it highlights the similarity in Plaintiffs' First Amendment claims against both Defendants, which, though based on different facts, center on the same publishable materials and demand uniform resolution.

Further, although we need not consider whether the NJAG is a necessary party to the litigation in the court below, *see* Fed. R. Civ. P. 19, he and his officials are plainly material witnesses to the Washington litigation, and the State Department's assertions that its settlement may have been motivated by actions of the NJAG cannot be discounted.

*Appendix G*

*Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010). Further, the district court incorrectly analyzed “judicial economy” as applied to joint severance and transfer motions: according to *Rolls Royce* and *Liaw Su Teng*, severance is inappropriate where two parties are as inextricably entwined in the litigation as these defendants.

The NJAG’s and district court’s other assertions about the efficiency benefits from severance ring particularly hollow in light of the course of the litigation. For example, bifurcation and transfer of the case, the district court states, would be an economical act since there is already a case in New Jersey dealing with separate claims against the NJAG by Defense Distributed. But Defense Distributed brought that case as a self-protective measure only after the district court below had (erroneously) dismissed the NJAG from suit in the Western District of Texas. The district court cannot claim judicial efficiency is furthered when its decision directly caused the inefficient filing of that second suit. Nor is the timing of the district court’s severance/transfer order persuasive, as it followed directly on the heels of this court’s decision upholding jurisdiction in the Western District of Texas. Judicial economy is also less than credibly asserted by the NJAG, who chose to travel to the West Coast to pursue its campaign against Defense Distributed while simultaneously defending this case and pursuing litigation and other measures in New Jersey. The multiplication of venues has disserved judicial economy. At this point, after essentially seven years of litigation in Texas and at least two other venues over Defense Distributed’s publications,

*Appendix G*

to split this case into two parallel litigation tracks before two courts is beyond inefficient.<sup>23</sup>

The above discussion also shows why the court erred in regard to the final relevant factor involved in its severance analysis: finding no prejudice to Defense Distributed by splitting its case.<sup>24</sup> *See Acevedo*, 600 F.3d at 521. The court’s legal and factual errors so permeate its severance order as to render it a clear abuse of discretion.

### C. Transfer Order

Because the severance order was a clear abuse of discretion, the district court likewise “lacked authority

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23. The final factor in severance analysis, whether the claims require different witnesses and sources of proof, is neutral. Plaintiffs will have to make the same proof in two proceedings about the protected nature of its information, while there is only some overlap between the witnesses for defendants.

24. The district court embroiders its reasoning on prejudice by implying that Plaintiffs’ challenge to NJ Stat. Sec 2C:39-9(1) (2), a claim explicitly pled in their Second Amended Complaint, would fail for lack of personal jurisdiction over the NJAG. We do not agree. Plaintiffs’ original allegations included threats by the NJAG to prosecute Defense Distributed and Cody Wilson to the maximum extent allowed by state law. That the legislature added a particular device to enhance such prosecution, in the form of a criminal statute passed during the pendency of this case, is comprehended in the scope of the original complaint and the briefing in the district court and this court. And finally, as we noted in the previous opinion, the NJAG waived personal jurisdiction by not asserting that defense. *Def. Distributed v. Grewal*, 971 F.3d at 496.

*Appendix G*

. . . to transfer a portion of the single action . . . for one purpose while retaining jurisdiction over the remainder.” *Chrysler Credit Corp.*, 928 F.2d at 1519; *In re Nine Mile Ltd.*, 673 F.2d at 244. But even setting aside severance as impermissible, any transfer of this case, in whole or in part, constitutes an abuse of the district court’s discretion.

A party seeking a transfer under Section 1404(a) “must show good cause” by “clearly demonstrat[ing] that a transfer is ‘[f]or the convenience of parties and witnesses, in the interest of justice.’” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (quoting 28 U.S.C. § 1404(a)) (emphasis added). “When the transferee venue is not clearly more convenient than the venue chosen by the Plaintiff, the Plaintiff’s choice should be respected.” *Id.* When a defendant is haled into court, some inconvenience is expected and acceptable. Assuming that jurisdiction exists and venue is proper, the fact that litigating would be more convenient for the defendant elsewhere is not enough to justify transfer. In other words, the standard is not met by showing one forum is more likely than not to be more convenient, but instead the party must adduce evidence and arguments that clearly establish good cause for transfer based on convenience and justice. *See e.g. id.* 314-315.

Courts are required to assess four private interest factors and four public interest factors pertinent to a transfer motion. *See In re Volkswagen*, 545 F.3d at 315. The private interest factors are: “(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses;

*Appendix G*

(3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* The public interest factors are discussed below. As with its discussion of Rule 21 severance, the district court abused its discretion factually and legally in weighing the transfer factors against the standard.

Regarding the first private interest factor, the movant has the burden to establish good cause, which requires an actual showing of the existence of relevant sources of proof, not merely an expression that some sources likely exist in the prospective forum. *In re Volkswagen*, 545 F.3d at 315. Here, however, the district court erred by uncritically accepting the NJAG’s conclusory assertions that “the sources of proof relevant to these issues (including any non-party witnesses) are all in New Jersey.” *Defense Distributed*, 1:18-cv-00637, Dkt. 121, at 15-16, 2021 U.S. Dist. LEXIS 81707 (W.D. Tex.); *See e.g. Hammers v. Mayea-Chang*, 2019 U.S. Dist. LEXIS 213039, 2019 WL 6728446, at \*7 (E.D. Tex. Dec. 11, 2019). The NJAG’s conclusory assertions lack that necessary proof, while the Plaintiffs identified proof, documents, and witnesses that are located in Texas and support maintaining Texas as the forum.<sup>25</sup> Weighing the first factor as “neutral” in the face

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25. For example, Defense Distributed provided details on how its activities, including research, design, development, manufacturing, and publishing, occurred in and around Austin, and how it also published the same computer files with digital firearms information at a brick-and-mortar public library in Austin, Texas by hosting the computer files in formats that patrons could access via computer workstations. The computer servers on

*Appendix G*

of the NJAG's lack of proof and Plaintiffs' proffer abused both logic and the court's discretion. Additionally, the district court legally erred by introducing a "prejudice" consideration into the first factor. The first private interest factor does not ask whether a transfer would "prejudice" the non-moving party, but which forum provides easier access to sources of proof. *Volkswagen*, 545 F.3d at 315.

Access to compulsory process for non-party witnesses is the gravamen of the second private interest factor. *See e.g. Garrett v. Hanson*, 429 F. Supp. 3d 311, 318 (E.D. Tex. 2019). Neither the NJAG nor the district court identified any witness who is subject to compulsory process in New Jersey but not in Texas. Yet the court inexplicably weighed this factor not as neutral but in favor of transfer. "To show good cause[, however] means that a moving party . . . clearly demonstrates" the appropriateness of transfer. Where there is no demonstration by the movant, let alone a clear one, the court cannot weigh a factor against the non-movant and in favor of transfer. Besides lacking support in the record, the district court's weighing of this factor in favor of New Jersey does not "reflect[] the appropriate deference to which the Plaintiff's choice of venue is entitled," *In re Volkswagen*, 545 F.3d at 315.<sup>26</sup>

The fourth private interest factor addresses "all other practical problems that make trial of a case easy,

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which Defense Distributed hosts these files for publication to the internet are also located in Texas.

26. The third private interest factor, concerning the cost for willing witnesses, is agreed to be neutral, as the district court found.

*Appendix G*

expeditious and inexpensive.” *In re Volkswagen*, at 315. The district court weighed this factor in favor of the NJAG because absent transfer, it would have to decide whether it has personal jurisdiction over the NJAG to adjudicate Defense Distributed’s allegedly newly raised claim challenging the constitutionality of NJ Stat. § 2C:39-9(1)(2). But as we discussed above that issue is not so novel as to require a separate analysis of personal jurisdiction. The district court itself previously recognized that “the instant action concern[ed]” The NJAG’s “criminal enforcement actions,” such as “threatening to enforce a criminal law against Defense Distributed.” 364 F.Supp. 3d, at 686.<sup>27</sup>

The public interest factors bearing on transfer are: “(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.” *See In re Volkswagen*, at 315. No party disputes that the first factor is neutral.

As an initial matter, the district court erroneously treated the second and the third factors together. The district court reasoned that because some of Plaintiffs’ claims against the NJAG implicate New Jersey’s criminal law, § 2C:39-9(1)(2), the District of New Jersey has a

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27. And this court noted that Plaintiffs’ claims encompass the “criminal actions” that the NJAG threatened “at a live press conference.” *Defense Distributed*, 971 F.3d at 489. Appellants’ brief to this court confirms that Section 2C:39-9(1)(2) was the sole legal basis for the threats.

*Appendix G*

greater interest in testing the constitutionality of that statute and is better equipped than Texas courts to evaluate it. The two factors, however, are distinct in the law for good reason.

The second public interest factor, which focuses on the local interest in having localized interests decided at home, “most notably regards not merely the parties’ significant connections to each forum writ large, but rather the significant connections between a particular venue and the events that gave rise to a suit.” *In re Apple Inc.*, 979 F.3d 1332, 1345 (Fed. Cir. 2020). Important considerations include the location of the injury, witnesses, and the Plaintiff’s residence. *See Volkswagen*, 545 F.3d at 317-18; *Zurich Am. Ins. Co. v. Tejas Concrete & Materials Inc.*, 982 F. Supp. 2d 714, 727 (W.D. Tex. 2013). Indeed, “[t]he place of the alleged wrong is one of the most important factors in venue determinations.” *Watson v. Fieldwood Energy Offshore, LLC*, 181 F. Supp. 3d 402, 412 (S.D. Tex. 2016).

Texas’s “local interest in having [the] localized interests” this case implicates “decided at home” cannot be overstated. *Volkswagen*, 545 F.3d at 315. The controversy over New Jersey’s statute is not “localized” to New Jersey. The AG has “projected himself across state lines and asserted a pseudo-national executive authority” in Texas by seeking “to bar Defense Distributed from publishing its materials anywhere,” chilling its speech, and reducing “Texans’ access to [its] materials.” *Grewal*, 971 F.3d at 492-95. In these circumstances, the aggressor state’s interest is considerably diminished because the Texas

*Appendix G*

court's ruling will have no direct effect on New Jersey's citizens. If § 2C:39-9(l)(2) were declared unconstitutional in this litigation, that ruling would preclude the NJAG's enforcing the statute against these Plaintiffs. At least the NJAG would not necessarily be prevented from enforcing the law in New Jersey. Thus, the strength of New Jersey's interest in having this case decided at home is considerably less than that of Texas citizens whose primary recourse, as targets of this litigation in Texas, is a suit in Texas. And Texas courts have a significant interest in assessing the constitutionality and extraterritorial impact of New Jersey's criminal law<sup>28</sup>, especially a law that criminalizes speech.

The familiarity of the forum with the law that will govern the case was also improperly weighed in favor of New Jersey. "Federal judges routinely apply the law of a State other than the State in which they sit...." This court is "not aware of any exceptionally arcane features of Texas, [New Jersey, or constitutional law,] that are likely to defy comprehension by a federal judge sitting in [Texas]." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 67-68, 134 S. Ct. 568, 584, 187 L. Ed. 2d 487 (2013). Moreover, New Jersey courts' familiarity with New Jersey law produces no meaningful efficiency rendering New Jersey a more convenient forum. Defense Distributed pursues no claims arising under New Jersey law. Plaintiffs' challenge to Section 2C:39-9(l)

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28. The New Jersey statute applies extraterritorially because it criminalizes "distribution" of speech into the state, and "distribute" is defined to include any act of "mak[ing] available via the internet or by any other means." N.J. Stat. 2C:39-9(l)(2).

*Appendix G*

(2) is founded in the First Amendment and the extreme breadth of this criminal law, which purports to render illegal any speech that reaches the state *from other states*. Plaintiffs lodge other claims against the NJAG predicated on other federal constitutional provisions. Thus, the Texas court's superior familiarity with Defense Distributed's Texas law claims, and the fact that the New Jersey court would be bound to Texas law concerning such claims, *see Country Chrysler*, 928 F.2d at 1516, more than offsets any efficiencies that might be gained from New Jersey courts' familiarity with New Jersey law.

The last public interest factor seeks to avoid "unnecessary problems of conflict of laws [or in] the application of foreign law." *Volkswagen*, 545 F.3d at 315. There are no risks of such a conflict here. Defense Distributed brought primarily federal law claims; and the state law claims involve Texas law, not New Jersey law.

The district court repeatedly weighed the transfer factors against Plaintiffs by asserting that they could not be disadvantaged by transfer because they had "voluntarily" instituted additional litigation in New Jersey covering similar issues against the NJAG. This is incredible. Plaintiffs filed suit in New Jersey only because this district court had erroneously closed the door to their suit in Western District of Texas. The currently stayed litigation in New Jersey has no legitimate bearing against Plaintiffs' original choice of forum.

Correctly assessed, the NJAG did not carry its burden to clearly demonstrate that transfer is clearly

*Appendix G*

more appropriate than the Plaintiffs' choice of forum. The district court erred legally and factually in virtually every aspect of this issue, and its decision, which has unnecessarily lengthened this litigation even more, represents a clear abuse of discretion for which mandamus is an appropriate remedy.

**CONCLUSION**

For the foregoing reasons, we conclude that the district court's order severing and transferring of the claims against the NJAG to the District of New Jersey was a clear abuse of discretion giving rise to an appropriate exercise of the court's mandamus power.

A writ of mandamus shall issue herein directing the district court to:

(1) Vacate its order dated April 19, 2021 that severed Defense Distributed's claims against the NJAG and transferred them to the United States District Court for the District of New Jersey;

(2) 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.

The petition for writ of mandamus is hereby GRANTED.

*Appendix G*

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

“Countless expressions can be found in the jurisprudence to support the black-letter proposition that mandamus is an extraordinary remedy for extraordinary causes.” *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (Rubin, J.). The Supreme Court cautioned long ago that “[m]andamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . reserved for really extraordinary causes.” *Ex parte Fahey*, 332 U.S. 258, 259-60, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947). As we have said,

In recognition of the extraordinary nature of the writ, we require more than showing that the court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion. And even reversible error by itself is not enough to obtain mandamus. Rather, we limit mandamus to only “clear abuses of discretion that produce patently erroneous results.”

*In re Lloyd’s Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008)).

Today, the majority uses that extraordinary remedy to reverse a district court’s discretionary transfer order, ruling that it was a clear abuse of discretion.<sup>1</sup> This

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1. If it takes us more than half a year to explain what the district court did wrong, it is doubtful the court’s error was a *clear* abuse of discretion. See *Volkswagen*, 545 F.3d at 311.

*Appendix G*

district court's interest-of-justice *grant* of transfer is not extraordinary cause, and compelling it to be undone is our indisputable error, for many reasons.

First, Plaintiffs-Appellants Defense Distributed, the Second Amendment Foundation and Conn Williamson (hereafter DDSA) never properly requested the mandamus relief the majority has issued. *Compare* FED. R. APP. P. 21(a), *with* Notice of Appeal, *Defense Distributed*, No. 21-50327 (5th Cir. Apr. 23, 2021), *and* Brief of Appellants, *Defense Distributed*, No. 21-50327 (5th Cir. June 17, 2021). And as DDSA acknowledged in oral argument, they could not point to any reviewing court that has ever, before today, deployed mandamus authority to compel a trial court to undo a Section 1404(a) discretionary, interest-of-justice, joint severance and transfer *grant*. Oral Argument at 4:48, *Defense Distributed*, No. 21-50327 (5th Cir. Aug. 3, 2021).<sup>2</sup>

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2. The majority cites four cases from three of our sister circuits in which a § 1404(a) transfer was reversed on mandamus. None reversed a grant of joint severance and transfer, and each is further distinguishable. In *In re Warrick*, the reversal was based on the fact that the district court completely failed to consider one of the § 1404(a) factors and transfer would have unavoidably brought about dismissal of the claim. 70 F.3d 736, 740-41 (2d Cir. 1995). In *In re Nine Mile Ltd.*, the Eighth Circuit reversed the transfer grant only so that the district court could rule on the pending motion to reconsider transfer and the petitioner could seek review of that decision prior to actual transfer of the case. 673 F.2d 242, 243-44 (8th Cir. 1982). In *Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, there were two defendants, one of which was not subject to personal jurisdiction in the transferee court. 5 F.3d 28, 29, 33 (3d Cir. 1993). The Third Circuit denied the request

*Appendix G*

A second obstacle is that our court has no authority to compel a federal district court in New Jersey to return a case it received and docketed on April 20, 2021, above all when, over seven weeks later, *unopposed by DDSA*, that district court took the additional step of consolidating the case it received with its pre-existing, parallel litigation, which DDSA itself filed in 2019. *See In re Red Baron Motors, Inc.*, 794 F.3d 481, 484-85 (5th Cir. 2015). Here is the pertinent chronology: After the district court granted the motion to transfer, DDSA did not, in district court, seek a stay or reconsideration. Nor did DDSA immediately seek mandamus of the district court's transfer order, *see* Notice of Appeal, *Defense Distributed v. Grewal*, No. 21-50327 (5th Cir. Apr. 23, 2021), and, in its initial filings in this court, DDSA explicitly disclaimed intention to "enjoin anything about the interlocutory transfer or severance rulings below," Appellants' Reply in Support of Appellants' Motion for a Preliminary Injunction, *Defense Distributed*, No. 21-50327 (5th Cir. June 21, 2021). DDSA did not ask the New Jersey district court to return the case to the Western District of Texas, nor did they oppose consolidation with the pre-existing New Jersey case. Hearing no opposition from DDSA, the New Jersey district court then consolidated the cases in that court. That was over half a year ago.

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of the defendant who *was* subject to personal jurisdiction in the transferee court to sever the case and transfer only as to it. *Id.* at 33-34. In *In re Howmedica Osteonics Corp.*, reversal of transfer as to some defendants was based on a forum selection clause, and the court severed the parties and affirmed the transfer only as to those defendants not subject to the forum selection clause. 867 F.3d 390, 397-98, 411 (3d Cir. 2017).

*Appendix G*

Third, even if all we order of our district court is a *request* to transfer the case back to Texas—so that we can resolve a constitutional showdown between New Jersey law and 3D-printed weaponry—and assuming our court can sua sponte reconfigure an appellant’s notice of appeal into a non-conforming mandamus petition, still, here, the district judge painstakingly applied the *Volkswagen* transfer factors, which we set forth with the (short-lived) promise (“we stress”) that “in no case will we replace a district court’s discretion with our own.” 545 F.3d at 312. The district court’s *Volkswagen* analysis is so comprehensive and well-reasoned as to show that had transfer been *refused*, a writ for mandamus to *compel* transfer would be well supported by the settled precedent of this court, *see Lloyd’s*, 780 F.3d 283, *In re Rolls Royce Corp.*, 775 F.3d 671 (5th Cir. 2014); *In re Radmax, Ltd.*, 720 F.3d 285 (5th Cir. 2013); *Volkswagen*, 545 F.3d 304, which other courts follow and scholars credit, *see In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018) (citing *Lloyds*); *In re Hudson*, 710 F.3d 716, 717-18 (7th Cir. 2013) (Posner, J.) (citing *Volkswagen*); *In re Apple, Inc.*, 602 F.3d 909, 911-12 (8th Cir. 2010) (citing *Volkswagen*); *In re: Apple*, No. 2021-181, 2021 U.S. App. LEXIS 33788, 2021 WL 5291804, at \*2 (Fed. Cir. Nov. 15, 2021); *In re: Hulu, LLC*, No. 2021-142, 2021 U.S. App. LEXIS 22723, 2021 WL 3278194, at \*2 (Fed. Cir. Aug. 2, 2021); 55 JOHN BOURDEAU ET AL., C.J.S. MANDAMUS § 97 (2021).

Notably, severance is not only discretionary and tied to case management prerogatives, but it is not itself subject to review through a writ of mandamus. At

*Appendix G*

all. See *In re Rolls Royce*, 775 F.3d at 676. And though *Rolls Royce* held that a district court's ruling on a joint transfer and severance motion may be reviewed through mandamus, neither DDSA nor the majority opinion cites any mandamus case, ever, reversing a grant of a joint severance and transfer motion. Constructed for DDSA, the novel argument—opposite to indisputable—appears to be that New Jersey is a necessary party because the United States Department of State somehow was its pull-toy, allegedly breaching a settlement agreement whose provisions plaintiffs could not specify at oral argument as having been breached, much less that New Jersey caused the federal government to breach. Manifestly, New Jersey has no role in United States weapons export regulations.

Several additional points highlight *our* usurpation.

First, the district court here transferred to a court whose intercession these same plaintiffs had already sought, had argued on appeal in the Third Circuit to maintain, and thereafter had kept pending for over two years. In other words, the transfer was to a receiving court which had pre-existing jurisdiction over these plaintiffs' claims, at their initiation and insistence.

Second, that transfer was back to a court within the only federal circuit authorized to certify questions of interpretation of New Jersey law to the Supreme Court of New Jersey, which could interpret that law to avoid, not force, a novel and difficult constitutional showdown. See N.J. COURT RULES 2:12A-1. Notably, the Supreme Court recently reversed our court when we tried to

*Appendix G*

force resolution of a different First Amendment collision without deferring first to one of our states' highest court's prerogative to interpret its own law. *McKesson v. Doe*, 141 S. Ct. 48, 208 L. Ed. 2d 158 (2020).<sup>3</sup>

A third related, especially serious point is that removing discretion to grant transfer undermines our court's mandamus transfer precedent, which, hitherto, we have used to *require* comity, not *defy* it. And it does so imprudently, forcing a constitutional collision that may well be avoidable through certification of questions of state law, which we cannot do but the receiving circuit can. Hereafter, as to other transfer grants, our mandamus, discordantly, will reduce or remove trial judge discretion

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3. The intimation is made that transfer should be undone, in part, because New Jersey has intentionally delayed this litigation. As noted, we have not acted promptly ourselves, on a case docketed in another circuit nearly a year ago and as to a point of law the majority now, with no precedent, says is so obvious as to be indisputable. Regardless, sufficient answer to innuendo is that this litigation, over whether governments have authority to regulate 3D printable weaponry, commonly known as “ghost guns,” has spanned three circuits for over a decade, without any court of original jurisdiction—courts with actual fact-finding authority over lawyers before them—even hinting of bad faith, much less making findings to support our ire. In fact, to my knowledge, the defendants have prevailed in every district court so far, not to mention twice in this court, *Defense Distributed v. U.S. Dep’t of State*, 947 F.3d 870 (5th Cir. 2020); *Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016), and before the Third and Ninth Circuits, *see Defense Distributed v. Att’y Gen of N.J.*, 972 F.3d 193 (3d Cir. 2020); *State v. U.S. Dep’t of State*, 996 F.3d 552 (9th Cir. 2021).

*Appendix G*

to avoid adjudicating the constitutionality of other states' laws.

Finally, we commit not just an error we told our district courts in *Volkswagen* would not occur, but another one we took pains earlier in this litigation to cabin against. See *Defense Distributed v. Grewal*, 971 F.3d 485, 496 (5th Cir. 2020). Hereafter, state attorneys general, including those within our own circuit, may not only be hailed into federal courts across the country to defend *their* state laws, but then, if a trial judge assesses interests of justice to favor transfer—say for consolidation with related claims already pending in a co-equal court whose circuit has certification authority—that is indisputable error.<sup>4</sup>

Consistent with the New Jersey Attorney General's express and emphatic *denials*, twice to our panel, that it seeks to enforce New Jersey law in Texas, the record is devoid of enforcement measures, such as a takedown order or criminal prosecution, against DDSA. Indeed, the parties point to no prosecution even in New Jersey using New Jersey's new law, yet the majority rules today that mandamus lies to force New Jersey to defend its new law for the first time in Texas. Because this precedent, now binding as indisputable, does injury to state sovereignty and comity, not to mention district court case management

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4. Cf. Response Brief of Defendant-Appellee Ken Paxton in His Official Capacity as Attorney General of Texas at 10-11, *Twitter v. Paxton*, 26 F.4th 1119 (9th Cir. 2022) (No. 21-15869) (“Where, as here, the Attorney General of a sovereign State is sued for actions to enforce that State’s law in that State, there is ‘only one obvious locus’ for any constitutional challenge: *in that State*.”).

*Appendix G*

discretion, it is small comfort that there is a pending dismissal motion filed by the Department of State which, if granted, may lead to re-transfer, albeit after further, up-down delay protracted by us.

Also specific to this case, it is small comfort that the most we compel is a *request*, which the New Jersey federal district court no doubt will seriously consider, informed by comity and state law priorities set forth by the Supreme Court, as well as by its own assessment of whether litigation resolving New Jersey law should be decided in Texas as well as delayed and encumbered by the national security interests implicated in the federal government's overseas export munitions restrictions, which are at the heart of the litigation in the Western District of Texas.

Mandamus rulings announce law inflexibly. Here, without precedent, our court, seemingly impatient for the last half decade, to force a difficult First (Second?) Amendment clash over government regulation of 3D printable "ghost" weapons, supplants district courts' long-standing, fact-specific case management discretion to transfer litigation for consolidation with an existing case in another circuit, in derogation of state sovereignty, comity and constitutional avoidance principles, contrary to instruction given to us by the Supreme Court just last year.

284a

**APPENDIX H — ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE WESTERN  
DISTRICT OF TEXAS, AUSTIN DIVISION,  
FILED APRIL 13, 2022**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

1:18-CV-637-RP

DEFENSE DISTRIBUTED AND SECOND  
AMENDMENT FOUNDATION, INC.,

*Plaintiffs,*

v.

ANDREW J. BRUCK, ACTING ATTORNEY  
GENERAL OF NEW JERSEY, IN HIS OFFICIAL  
AND INDIVIDUAL CAPACITIES, *et al.*,

*Defendants.*

Filed April 13, 2022

**ORDER**

Before the Court is the Judgment and Mandate of the United States Court of Appeals for the Fifth Circuit remanding Plaintiffs' Notice of Appeal, (Dkt. 146). (Judgment, Dkt. 171).

285a

*Appendix H*

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

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

**SIGNED** on April 13, 2022.

/s/ Robert Pitman  
ROBERT PITMAN  
UNITED STATES DISTRICT JUDGE

286a

**APPENDIX I — ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE WESTERN  
DISTRICT OF TEXAS, AUSTIN DIVISION,  
FILED JULY 22, 2022**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

1:18-CV-637-RP

DEFENSE DISTRIBUTED AND SECOND  
AMENDMENT FOUNDATION, INC.,

*Plaintiffs,*

v.

ANDREW J. BRUCK, ACTING ATTORNEY  
GENERAL OF NEW JERSEY, IN HIS OFFICIAL  
AND INDIVIDUAL CAPACITIES, *et al.*,

*Defendants.*

Filed July 22, 2022

**ORDER**

Before the Court are Plaintiffs Defense Distributed and Second Amendment Foundation's (together, "Plaintiffs") Motion for Preliminary Injunction, (Dkt. 174), and Motion to Grant as Unopposed or Set a Hearing, (Dkt. 175).

On April 1, 2022, the judgment and mandate of the Fifth Circuit was entered in this matter. (Dkt. 171). In

*Appendix I*

its order, the Fifth Circuit determined that a portion of this case was improperly severed and transferred to the District of New Jersey. (*Id.* 4). The Court directed the undersigned to “request retransfer from its counterpart in New Jersey.” (*Id.* at 4). The undersigned did so by notice filed on April 13, 2022. (Dkt. 172). As of the date of this order, the case has not been retransferred to this Court. Accordingly, the New Jersey Attorney General is not currently a party to this case.

Given the unusual procedural posture of this case, the Court remains mindful of the limits on its jurisdiction. (*See* Dkt. 171, at 8 (“[The Fifth Circuit] lacks power to order a return of the case to our circuit.”); *see also In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015) (“It seems uncontroversial in this situation that a transfer to another circuit removes the case from our jurisdiction.”)). Absent contrary authority, the Court understands that it lacks jurisdiction to consider claims against the New Jersey Attorney General in this matter. Having no power to adjudicate these motions, the Court must dismiss them.

Accordingly, **IT IS ORDERED** that Plaintiffs’ Motions for Preliminary Injunction, (Dkt. 174), and to Grant as Unopposed or Set a Hearing, (Dkt. 175), are **DISMISSED**.

**SIGNED** on July 22, 2022.

/s/ Robert Pitman  
ROBERT PITMAN  
UNITED STATES DISTRICT JUDGE

288a

**APPENDIX J — OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT,  
FILED SEPTEMBER 16, 2022**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 22-50669

DEFENSE DISTRIBUTED; SECOND  
AMENDMENT FOUNDATION, INCORPORATED,

*Plaintiffs—Appellants,*

versus

ANDREW J. BRUCK, ATTORNEY GENERAL OF  
NEW JERSEY, IN HIS OFFICIAL CAPACITY,

*Defendant—Appellee.*

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:18-CV-637

Filed September 16, 2022

Before ELROD, GRAVES, and Ho, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellants' motion to expedite  
the instant appeal is GRANTED. The Clerk is directed

*Appendix J*

to schedule this appeal for oral argument before the next available randomly designated regular merits panel.

IT IS FURTHER ORDERED that all pending motions are CARRIED WITH THE CASE.

JAMES C. HO, *Circuit Judge*, joined by ELROD, *Circuit Judge*, concurring:

In *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), we held that the Western District of Texas was wrong to sever the case against the Attorney General of New Jersey and transfer it to the District of New Jersey. Our decision was accompanied by a well-reasoned dissent from a distinguished colleague. But it is now the law of the circuit as well as the case.

We can think of no substantive reason—and none has been offered to us—why this case should nevertheless proceed in New Jersey rather than Texas, other than disagreement with our decision in *Defense Distributed*. The Attorney General of New Jersey confirmed as much during oral argument.

So we respectfully ask the District of New Jersey to honor our decision in *Defense Distributed* and grant the request to return the case back to the Western District of Texas—consistent with the judiciary’s longstanding tradition of comity, both within and across the circuits, as repeatedly demonstrated by district courts nationwide.

Federal courts across America have repeatedly granted requests to return cases back to the original

*Appendix J*

transferring court, whether the request comes from a fellow Article III court or even from a litigant. Examples of such judicial courtesy include, but are far from limited to, federal courts governing New Jersey and Texas. *See, e.g., In re United States*, 273 F.3d 380, 382 n.1 (3rd Cir. 2001) (“We are most appreciative of Judge Campbell’s accommodation, which enabled this court to consider the matter and prevented an unseemly tension between federal jurisdictions.”); *CCA Glob. Partners, Inc. v. Yates Carpet, Inc.*, 2005 WL 8159381, \*2 (N.D. Tex. 2005) (“This Court will not stand in the way of another district court attempting to correct what it believes to have been an error made while the case was under its jurisdiction. Thus, this Court finds that in the interest of justice, the case should be transferred back to the Eastern District of Missouri.”).<sup>1</sup>

This tradition of inter-circuit courtesy should surprise no one. After all, it’s an easy tradition to respect. These cases originated elsewhere, and only ended up in the transferee court as a result of mistake. So the act of

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1. *See also, e.g., In re Nine Mile Ltd.*, 692 F.2d 56, 57–58 (8th Cir. 1982) (request granted returning case from the District of South Carolina to the Northern District of Iowa), *overruled on other grounds by Mo. Housing Development Comm’n v. Brice*, 919 F.2d 1306, 1311 (8th Cir. 1990); *Fine v. McGuire*, 433 F.2d 499, 500 & n.1 (D.C. Cir. 1970) (request granted returning case from the District of Maryland to the District of Columbia); *United States v. Petty*, 2022 WL 1590609, \*3 (W.D.N.Y. 2022) (granting request to return case to the Western District of Pennsylvania); *Tlapanco v. Elges*, 2017 WL 4329789, \*3 (S.D.N.Y. 2017) (case stayed in the Eastern District of Michigan pending reconsideration of transfer); *Herman v. Cataphora Inc.*, 2013 WL 275960, \*2 (N.D. Cal. 2013) (transferring case back to the Eastern District of Louisiana).

*Appendix J*

courtesy costs the transferee court nothing. In sum, there's every reason in the world for district courts across the country to avoid, as the Third Circuit has put it, "unseemly tension between federal jurisdictions." *In re United States*, 273 F.3d at 382 n.1.

So we're unsurprised that such courtesy appears to be routine practice in district courts nationwide. In fact, we're unaware of any district court anywhere in the nation to have ever denied such a request. The parties admit they have not found any. We see no reason why this case should be the first.

\* \* \*

We respectfully ask the District of New Jersey to return the case to the Western District of Texas as requested, and thereby join its sister district courts nationwide in this act of inter-district comity, mutual respect, and courtesy.

292a

**APPENDIX K — OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT,  
FILED DECEMBER 15, 2022**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 22-50669

DEFENSE DISTRIBUTED; SECOND  
AMENDMENT FOUNDATION, INCORPORATED,

*Plaintiffs—Appellants,*

versus

ANDREW J. BRUCK, ATTORNEY GENERAL OF  
NEW JERSEY, IN HIS OFFICIAL CAPACITY,

*Defendant—Appellee.*

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:18-CV-637

Filed December 15, 2022

Before SMITH, BARKSDALE, and HAYNES, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge*:\*

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\* Judge Haynes concurs in the judgment only.

*Appendix K*

Plaintiffs Defense Distributed and the Second Amendent Foundation produce, and make accessible, information related to the 3D printing of firearms. The U.S. Government and various states have imposed restraints on the publication of that information. Since 2013, plaintiffs have challenged those restraints in federal courts as violating the First Amendment.

The instant case involves publication restraints that the defendant, first as Acting Attorney General, then as Attorney General, of New Jersey (“NJAG”), has placed on these plaintiffs.

The case has had a long journey through the justice system: This is the plaintiffs’ third appeal to the Fifth Circuit. Plaintiffs initially filed in the Western District of Texas and included claims against the U.S. Department of State and NJAG. In the first appeal, we reversed the district court’s decision that the NJAG was not subject to the court’s personal jurisdiction. *Def. Distributed v. Grewal*, 971 F.3d 485, 488 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1736, 209 L. Ed. 2d 504 (2021).

On remand, the district court severed the claims against the State Department and NJAG and transferred the claims against NJAG to the District of New Jersey per 28 U.S.C. § 1404. On appeal, we held that that decision was a clear abuse of discretion and ordered the district court to vacate its sever-and-transfer order. Because the case against NJAG now resided in New Jersey, we ordered the district court to request that the New Jersey district court transfer the case back to the Western District of Texas.

*Appendix K*

*Def. Distributed v. Bruck*, 30 F.4th 414, 421 (5th Cir. 2022). The New Jersey district court refused. *Def. Distributed v. Platkin* (“*Platkin-D.N.J.*”), Civ. Ac. No. 19-04753 (FLW), 2022 U.S. Dist. LEXIS 133319, 2022 WL 2967304, at \*1 (D.N.J. July 27, 2022).<sup>1</sup> In response, plaintiffs moved, in the Western District of Texas, for a preliminary injunction against the publication restraints imposed by NJAG. The district court entered a short order holding that it lacked jurisdiction to consider claims against NJAG and dismissed the preliminary-injunction motion. Plaintiffs appealed. Because this court no longer has the power to hear the case or grant the relief requested, we affirm that dismissal.

**I.**

Defense Distributed is a company that “produces and makes accessible information related to the 3D printing of firearms and publishes and distributes such information to the public.” *Bruck*, 30 F.4th at 422 (quoting *Grewal*, 971 F.3d at 488). The U.S. Government and individual states have not looked kindly upon plaintiffs’ distributing that information to the public. Accordingly, they have placed publication restraints on plaintiffs after “Defense Distributed published to the Internet computer assisted design (‘CAD’) files for a single-round plastic pistol.” *Id.* at 421. Since 2013, plaintiffs have been

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1. The New Jersey district court rejected plaintiffs’ request for reconsideration and second motion to transfer. *See Def. Distributed v. Platkin*, No. 19-cv-4753, 2022 U.S. Dist. LEXIS 194017, 2022 WL 14558237, at \*6 (D.N.J. Oct. 25, 2022).

*Appendix K*

engaged in substantial litigation focused on removing those publication restraints.<sup>2</sup> We have noted in *dictum* that the governments' actions "appear to be flagrant prior restraints." *Id.*

After initial litigation, the State Department "reached a settlement agreement that granted Defense Distributed a license to publish its files." *Id.* at 422. Next, a case was filed in the Western District of Washington by the attorneys general of nine states "to enjoin the State Department from authorizing the release of Defense Distributed's files" under the settlement agreement. *Id.* Separately and concurrently, Defense Distributed and associated plaintiffs challenged the enforcement actions of certain states' attorneys general, including NJAG. *Id.*

In the present case, plaintiffs initially sued in 2018 in the Western District of Texas to enjoin NJAG. They filed an amended complaint joining the U.S. Department of State as a defendant, alleging that the Department breached the settlement agreement. The district court initially dismissed the claims against NJAG, holding that the court did not have personal jurisdiction. *See Grewal*, 971 F.3d at 488-90.

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2. "Defense Distributed published the CAD files to the Internet for a few months from December 2012-May 2013 before the State Department claimed that to do so violated [the Department's] International Traffic in Arms Regulations ('ITAR')." *Bruck*, 30 F.4th at 421 n.1 (first citing *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 455 (5th Cir. 2016); and then citing *U.S. Dep't of State*, 838 F.3d at 461-63 (Jones, J., dissenting)).

*Appendix K*

Plaintiffs then sued in New Jersey, raising similar claims against NJAG and adding five plaintiffs<sup>3</sup> to the action against NJAG. *Platkin-D.N.J.*, 617 F. Supp. 3d 213, 2022 U.S. Dist. LEXIS 133319, 2022 WL 2967304, at \*3. On appeal, our circuit held that the district court had improperly dismissed NJAG for want of personal jurisdiction grounds. *Grewal*, 971 F.3d at 496.

On remand, the district court granted NJAG's motion to sever the claims against him and transferred that portion of the case to the District of New Jersey. Plaintiffs did not attempt to stay that transfer, *see Bruck*, 30 F.4th at 425, and, as a result, the case was consolidated with the other lawsuit filed by plaintiffs in New Jersey. *Platkin-D.N.J.*, 2022 U.S. Dist. LEXIS 133319, 2022 WL 2967304, at \*4.

Plaintiffs appealed again, and we held that the sever-and-transfer order was a clear abuse of discretion. *Bruck*, 30 F.4th at 433. Nevertheless, because the transfer had already occurred to a court outside the jurisdiction of the Fifth Circuit, we could not order its return. *Id.* at 423-24. Instead, relying on *In re Red Baron Motors, Inc.*, 794 F.3d 481 (5th Cir. 2015) (per curiam), we issued a writ of mandamus to vacate the joint sever-and-transfer order and directed the district court to request that the transferee district court return the case. *Bruck*, 30 F.4th at 423-24, 436-37. We then stated that the district court, post-return, should “reconsolidate Defense Distributed’s

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3. The Firearms Policy Coalition, Inc., the Firearms Policy Foundation, the Calguns Foundation, the California Association of Federal Firearms Licensees, Inc., and Brandon Combs, an officer and founder of several of the organizational plaintiffs.

*Appendix K*

case against the NJAG back into the case still pending against the State Department” and should decide the merits of a preliminary injunction expeditiously. *Id.* at 437.

Despite principles of comity and the desire to prevent “unseemly tension between federal jurisdictions,” *In re United States*, 273 F.3d 380, 382 n.1 (3d Cir. 2001), the New Jersey district court refused to transfer the case back, relying heavily on the dissenting opinion in *Bruck. Platkin-D.N.J.*, 617 F. Supp. 3d 213, 2022 U.S. Dist. LEXIS 133319, 2022 WL 2967304, at \*10-12, \*16 (repeatedly citing *Bruck*, 30 F.4th at 437-40 (Higginson, J., dissenting)).

So plaintiffs have sought relief against NJAG in our circuit again, moving for a preliminary injunction in the remaining case against the State Department. The district court found it lacked jurisdiction because NJAG had been terminated from the case against the State Department in this circuit. Because NJAG was not a party to the suit, the district court found it had no power to adjudicate.

Plaintiffs appealed. In the meantime, two judges on the motions panel in this case requested that the New Jersey district court return the case that our court has held to be erroneously transferred. *Def. Distributed v. Platkin*, 48 F.4th 607, 607 (5th Cir. 2022) (per curiam) (Ho, J., joined by Elrod, J., concurring). On October 25, 2022, the New Jersey district court responded to a motion for reconsideration and a second motion to transfer filed by plaintiffs, denying the requests. *Platkin*, 2022 U.S. Dist. LEXIS 194017, 2022 WL 14558237, at \*6.

*Appendix K***II.**

The key question centers on “[n]ot favoritism, nor even corruption, but *power*.” *Patchak v. Zinke*, 138 S. Ct. 897, 910, 200 L. Ed. 2d 92 (2018) (plurality opinion) (citation omitted) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)). Specifically, the question is whether the district court has the power to adjudicate plaintiffs’ request for a preliminary injunction, regardless of the transfer. We have jurisdiction to review denials of preliminary injunctions under 28 U.S.C. § 1292(a)(1). “We review questions of law as to jurisdiction *de novo*.” *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5th Cir. 2006) (citations omitted).

“The twist in this case is the transfer to a district court outside the Fifth Circuit, a court over which this court exercises no control. This court lacks power to order a return of the case to our circuit.” *Bruck*, 30 F.4th at 423. Because of the transfer, the Western District of Texas “can no longer enter an appealable order in the case.” *Id.* at 424. In *Bruck*, we attempted to resolve the issue by ordering the district court to vacate its ruling and to request the transferee court to return the case. *Id.* at 423-24, 436. Nevertheless, the New Jersey transferee court has refused,<sup>4</sup> so plaintiffs remain in a bind.

As a result, plaintiffs have advanced two procedural theories to establish that the district court now has jurisdiction over their new request for a preliminary injunction against NJAG. One is that our court’s order

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4. See *Platkin-D.N.J.*, 2022 U.S. Dist. LEXIS 133319, 2022 WL 2967304, at \*35-36.

*Appendix K*

to vacate the district court's sever-and-transfer order automatically "revived" plaintiffs' claims against NJAG by operation of law. The second is that Federal Rule of Civil Procedure 15 allows plaintiffs to "refile" their claims against NJAG, and they did so when they requested leave to amend to add NJAG to the existing case against the State Department in the Western District of Texas.

We face a jurisdictional thicket. On the one hand, claims that we have found were wrongly severed from an existing case in this circuit are now being adjudicated improperly in New Jersey. That creates an erroneous absence of claims in the Western District of Texas and, concurrently, an errant presence of claims against NJAG in New Jersey. The breakdown in comity across courts only adds more thorns to this tangle.

Still, we cannot declare that claims in the New Jersey district court were duplicated or refiled in some fashion in Texas. Injunctive relief is not available under plaintiffs' novel theories.

**A.**

Plaintiffs allege that when we issued *Bruck*, the entry of the order vacating the district court's sever-and-transfer order automatically revived plaintiffs' claims against NJAG in the Fifth Circuit. Plaintiffs defend that contention by pointing to the black-letter-law definition of vacatur:

When a judgment has been rendered and later set aside or vacated, the matter stands precisely

*Appendix K*

as if there had been no judgment. The vacated judgment lacks force or effect and places the parties in the position they occupied before entry of the judgment, with the underlying case and the original pleadings intact.

47 AM. JUR. 2D *Judgments* § 676 (2009) (citations omitted).

Essentially, vacatur would reestablish the *status quo ante*: Vacated orders are immediately “null and void.” *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991). Before the severance and transfer, there was a case in the Western District of Texas, with claims against both NJAG and the Department of State. Afterward, to recreate the status quo, the case with claims against NJAG and the Department of State must be present again in the Western District of Texas.

Plaintiffs cite *Diece-Lisa Industries, Inc. v. Disney Enterprises, Inc.*, 943 F.3d 239 (5th Cir. 2019), as the most procedurally analogous case. They rely on it for the proposition that vacatur of a party-changing order automatically restores parties and claims to where they were before the vacated order. That contention is true in a typical, run-of-the-mill case, such as the intellectual property claims at issue in *Diece-Lisa*.<sup>5</sup> In a vacuum, the vacatur of a judgment restores the status quo.

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5. *Diece-Lisa* involved a suit by the owner of the “Lots of Hugs” trademark, used in stuffed bear toys, against subsidiaries of Disney for trademark infringement. The trademark owner alleged that Disney entities infringed on the trademark by using a “Lots-O’-Huggin’ Bear” (“Lotso”) character in *Toy Story 3* and associated merchandise. 943 F.3d at 243-44.

*Appendix K*

But plaintiffs fire a blank when extending *Diece-Lisa* to vacatur of a case that calls into question the territorial limitations of this circuit’s power. In *Diece-Lisa*, a district court misused judicial discretion to dismiss an amended complaint that added new defendants. *See id.* at 253-55. *Diece-Lisa* restored the status quo through vacatur by reinstating the defendants to the case so that the district court could properly rule on its jurisdiction over them and the validity of the claims against them. *See id.* At no point were claims against defendants removed from the court’s jurisdictional control. The addition of parties in *Diece-Lisa*’s vacated order, as compared to the improper subtraction of a party with a subsequent jurisdiction transfer here, is a distinction with a difference.

Indeed, transferring the case out of our territorial jurisdiction is the crux of the issue. In *Bruck*, we cited *Red Barn*, which stated 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 Baron*, 794 F.3d at 484 (citations omitted); *see also Bruck*, 30 F.4th at 423-24. “Once 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 Credit Corp. v. Country Chrysler*, 928 F.2d 1509, 1516-17 (10th Cir. 1991) (collecting cases). For that reason, in *Bruck*, the issuance of the mandamus merely ordered that the district court *request* the return of the case from New Jersey—nothing more. *Bruck*, 30 F.4th at 436-37; *see also Chrysler*, 928 F.2d at 1516-20.

*Appendix K*

There was a solution to the jurisdictional morass in which plaintiffs found themselves: They could have moved for a stay of the district court's transfer order before the case was transferred. Now, that is not necessarily fair to plaintiffs, who had little reason to believe that in the worst-case scenario, an outside transferee court would refuse a request to return an improperly transferred case. *See Platkin*, 48 F.4th at 608 (Ho, J., joined by Elrod, J., concurring) (“[W]e’re unaware of any district court anywhere in the nation to have ever denied such a request. The parties admit they have not found any.”).

As we have made clear, plaintiffs have acted with diligence, and “[n]othing in applicable precedent . . . mandates the particular method by which a party disadvantaged by an out-of-circuit transfer must bring that issue to the circuit court.” *Bruck*, 30 F.4th at 425. It is unfortunate that these otherwise valid claims cannot currently be heard in the court chosen by plaintiffs, given that a plaintiff is the “master of the claim.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Yet here, the failure to seek a stay appears fatal to their novel revival theory.

Plaintiffs attempt to get around that tricky territorial issue by positing that we do not need to “bring back to Texas the claims that are in New Jersey.” Instead, vacatur would “recreat[e] claims against [NJAG] in Texas.” The claims in New Jersey against NJAG can remain there and be dealt with separately. Plaintiffs, in essence, theorize that transferring the case to New Jersey created a new case there, with no impact on the transferred case in the Western District of Texas.

*Appendix K*

The contention is a reach. NJAG was marked as terminated on the docket sheet, and the physical (or electronic) transfer of the docket is not a mere formality. The transfer ended our control over the case. *Bruck*, 30 F.4th at 423; *see also In re Sw. Mobile Homes, Inc.*, 317 F.2d 65, 66 (5th Cir. 1963) (per curiam) (holding that once the transferee court has physically received the papers governing the case, the transferor court loses jurisdiction). Accordingly, “[a] court acting under § 1404(a) may not transfer part of a case for one purpose while maintaining jurisdiction for another purpose; the section ‘contemplates a plenary transfer’ of the entire case.” *Chrysler*, 928 F.2d at 1518-19 (quoting *In re Flight Transp. Corp. Sec. Litig.*, 764 F.2d 515, 516 (8th Cir. 1985)).

Note that “[t]he severed case is transferred in its entirety while the retained case remains in its entirety in the transferor court.” *Id.* at 1519 (citing 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3845 (4th ed. 2008)). That happened here. The case against NJAG was severed and transferred in its entirety to the District of New Jersey. Although this court has politely requested that the New Jersey district court return the case, we can do no more. That case exists in New Jersey, and the retained case against the U.S. Department of State, *sans* claims against NJAG, remains in the Western District of Texas.

Statutory authority goes nowhere, either. Section 1404(a) contains no allusions to any revival-of-claim

*Appendix K*

theories.<sup>6</sup> Plaintiffs have not shown a single example of any case in any circuit where a court recreated claims that were transferred to another district. We are unaware of any paradigmatic cases either.

We are sympathetic to plaintiffs' concerns, and a transfer, which this court has asked for from the New Jersey district court, would resolve the issue neatly. Nevertheless, under current statutory law and caselaw, the status quo before the erroneous sever-and-transfer order cannot be recreated. This court cannot reconstitute claims that exist elsewhere, and plaintiffs' novel revival theory does not currently have a legal basis.

**B.**

Plaintiffs alternatively allege that we have jurisdiction over their claims against NJAG because plaintiffs properly presented their claims by requesting leave to amend their complaint to re-add NJAG as a party to the case via Federal Rule of Civil Procedure 15(a)(2). Plaintiffs claim they properly asked for leave of court by mentioning the request in a footnote in their motion for a preliminary injunction after the district court had transferred the NJAG claims to New Jersey. They also assert that they asked again for leave of court to amend the pleadings to add NJAG as a party in their Motion to Grant as Unopposed or Set a Hearing.

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6. It states only, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a).

*Appendix K*

Plaintiffs aver that Rule 15 is well understood to permit a plaintiff to add defendants. And because the court's obligation to exercise jurisdiction is "virtually unflagging,"<sup>7</sup> the district court was required to adjudicate the point and then grant the leave to amend, as district courts should "freely give leave when justice so requires." Fed. R. Civ. P. 15(b)(2). Plaintiffs allege that the district court failed to provide an adequate reason to deny leave, and the record contains none. Additionally, plaintiffs contend that they properly served NJAG with the filings through the Electronic Case Files ("ECF") system, which plaintiffs claim is standard for parties that have waived objections to the absence of summons or service.

"Ordinarily, this [C]ourt reviews the denial of a motion for leave to file an amended complaint for abuse of discretion. However, where, as here, the district court's denial of leave to amend was based solely on futility, we apply a *de novo* standard of review . . . ." *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010) (citing *Wilson v. Bruks-Klockner Inc.*, 602 F.3d 363, 368 (5th Cir. 2010)) (emphasis added). "This [C]ourt may affirm the district court's dismissal 'on any grounds supported by the record.'" *Id.* at 153 (quoting *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006) (per curiam)).

Plaintiffs' argument is off target. As discussed above, the district court was correct that it did not have jurisdiction over NJAG after the transfer, and that

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7. *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 77, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)).

*Appendix K*

remains so: The transfer of the case files to the district court in New Jersey ended the power of this circuit over the transferred claims. *Bruck*, 30 F.4th at 433. Again, the sever-and-transfer order created two separate suits: one in New Jersey where NJAG was a party and one in Texas where NJAG was not.

*Bruck* delineated the path the case would need to take to proceed in Texas: The district court was to request the return of the case from New Jersey, and, upon transfer back to Texas, the case was to be reconsolidated with the case against the Department of State. *Id.* at 436-37. This court did not foresee any other alternative, and an attempt to refile the same case in the transferor forum would conflict with our first-to-file rule.

“Under the first-to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap.” *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999) (citations omitted). Courts “prophylactically refus[e] to hear a case raising issues that might substantially duplicate those raised by a case *pending* in another court.” *Id.* at 604. The rule is intended to “maximize” “the values of economy, consistency, and comity.”<sup>8</sup> *Id.* That prudential

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8. In *Cadle*, the court held that the district court with the second-filed action erred in dismissing the action without transferring it to the first-filed court to “decide whether the second suit filed must be dismissed, stayed, or transferred and consolidated.” 174 F.3d at 606 (quoting *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 920 (5th Cir. 1997)). The present case is distinguishable because plaintiffs did not properly present the case before the Western District of Texas the second time, and the

*Appendix K*

rule alone is reason enough to reject plaintiffs' refiling theory.

Additionally, nothing that occurred after the transfer made NJAG a party to the remaining suit in Texas against the Department of State. First, it is improbable that inserting a request to grant leave of court to amend a pleading inside a footnote in a preliminary injunction motion is proper or follows the local rules. *See* W.D. TEX. CIV. R. 7.<sup>9</sup>

Moreover, plaintiffs have pointed to no cases indicating that a court must allow a plaintiff to re-add a party to a complaint that was severed and transferred out of the jurisdiction. Plaintiffs' chosen cases do not address whether a court can, let alone must, allow a plaintiff whose case has been transferred out of the circuit to refile the same claims.

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same case was already transferred to New Jersey. Unlike in *Cadle*, the question presented is not how to proceed with "subsequentially filed cases involving substantially similar issues," 174 F.3d at 606 (quoting *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 948 (5th Cir. 1997)), but instead how to deal with the same case that has already been transferred out of the forum. It would defeat the rule's animating purpose of promoting judicial economy to force the Western District of Texas to transfer the same claims it already transferred to New Jersey every time the plaintiff moves to do so. It would create a procedurally recursive loop.

9. "When a motion for leave to file a pleading, motion, or other submission is required, an executed copy of the proposed pleading, motion, or other submission shall be filed as an exhibit to the motion for leave."

*Appendix K*

These alone decide the issue, without even going into the tenuous theory that continuously mentioning a previously terminated party in captions at the district court level without leave of court satisfies the rules for service of process. In response, plaintiffs point to at least four cases where NJAG added additional parties to an existing federal civil action and served the motion through the ECF system under Rule 5. Those examples are hollow. NJAG sought leave of court to intervene in each case instead of attempting unilaterally to re-add a previously terminated party.

As discussed above, the termination of a party is not a mere formality. It brings into question important prudential considerations, and endorsing plaintiffs' theory would encourage future plaintiffs dissatisfied with transfer decisions to bring duplicative cases continuously. Our circuit has never held that is permissible. Moreover, the district's local rules for properly presenting claims before the court are entitled to respect.

**III.**

So NJAG prevails. But there are prudential concerns with our ruling. As stated before, it is well established that a plaintiff is the "master of the claim." *Caterpillar*, 482 U.S. at 392. This court has already found that the claims against NJAG should be heard in the Western District of Texas. As a matter of fairness to plaintiffs, their claims against NJAG should be heard in Texas. They chose to file in the Fifth Circuit, and it took an erroneously granted sever-and-transfer motion to move their claims to New Jersey. *Bruck* remains the law of this circuit: Plaintiffs'

*Appendix K*

claims against NJAG should be heard in the Western District of Texas.<sup>10</sup>

Courts have incorrectly transferred cases out of their jurisdiction in the past; this case is not a new phenomenon. *See Platkin*, 48 F.4th at 607-08 (Ho, J., joined by Elrod, J., concurring) (collecting cases). Comity is an old concept as well: “[A] term of international law . . . [whose] best definition, in light of the derivation of the word, is ‘courtesy.’” Arthur March Brown, *Comity in the Federal Courts*, 15 HARV. L. REV. 589, 589 (1915).<sup>11</sup>

When faced with inter-circuit splits in jurisdiction, courts have returned the cases to the transferor district in the interest of comity. Neither side has been able to state a single case in which a transferee court did not transfer back a case that a transferor court requested. *See Platkin*, 48 F.4th at 608 (Ho, J., joined by Elrod, J., concurring).

Instead, the expectation is that circuit courts direct “the transferor district court to request that the transferee district court return the case.” *Bruck*, 30 F.4th at 424 (citing *Red Baron*, 794 F.3d at 484 (collecting

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10. The rule of orderliness means that “one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.” *Jacobs v. Nat’l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (citation omitted).

11. Comity is not a binding rule of law but “one of practice, convenience, and expediency.” *Mast, Foos, & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, 1900 Dec. Comm’r Pat. 285 (1900).

*Appendix K*

cases)). That tradition neatly balances the jurisdictional powers of the separate circuits with a culture of mutual respect between the sister circuits. The refusal of the District of New Jersey to retransfer is unprecedented in that regard.

The New Jersey court contends that the initial fault was in our decision to grant mandamus in *Bruck*. “[T]he purported lack of precedent with respect to this Court’s refusal to transfer is preceded by the lack of precedent as to the mandamus vacating the original severance and transfer order when jurisdiction had been divested.” *Platkin*, 2022 U.S. Dist. LEXIS 194017, 2022 WL 14558237, at \*4 (citations omitted). Still, regardless of the merits of *Bruck*, it took an error for the New Jersey court even to hear the case in the first place. The matter originated in the Western District of Texas and “only ended up in the transferee court as a result of mistake.” *Platkin*, 48 F.4th at 608 (Ho, J., joined by Elrod, J., concurring). More importantly, the effect of that decision permits a New Jersey district court functionally to nullify a Fifth Circuit decision.

The judgment is AFFIRMED.<sup>12</sup>

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12. Plaintiffs moved for an injunction pending appeal and to expedite the appeal and to expedite a ruling on the motion. A motions panel granted the motion to expedite the appeal and carried the remaining requests with the case. Those remaining requests are DENIED.

311a

**APPENDIX L — MEMORANDUM ORDER  
OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY,  
FILED APRIL 26, 2023**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Civil Action No. 19-4753 (MAS) (TJB)  
(consolidated with No. 21-9867)

DEFENSE DISTRIBUTED *et al.*,

*Plaintiffs,*

v.

MATTHEW J. PLATKIN, ATTORNEY GENERAL  
OF THE STATE OF NEW JERSEY,

*Defendant.*

**MEMORANDUM ORDER**

This matter comes before the Court upon Defendant Matthew J. Platkin, Attorney General of New Jersey's ("Defendant") Motion to Dismiss Plaintiffs Defense Distributed and Second Amendment Foundation, Inc.'s ("Plaintiffs") Second Amended Complaint (ECF No. 69) and Plaintiffs' Motion to Transfer (ECF No. 78). Before reaching these motions, the Court must address the state of the docket in this consolidated matter.

On June 11, 2021, Member Case 21-9867 (the "Member Case") was consolidated into Lead Case 19-4753 (the

*Appendix L*

“Lead Case”). (ECF No. 43.) As a result, on May 17, 2022, the Member Case was closed. (*See* ECF No. 55.) On July 27, 2022, all Plaintiffs in the Lead Case voluntarily dismissed the Lead Case, while preserving Plaintiffs’ claims asserted in the previously closed Member Case. (ECF No. 60.) Plaintiffs then moved to transfer the Member Case to the Western District of Texas. (ECF No. 64.) On October 25, 2022, this Court denied Plaintiffs’ Motion to Transfer and ordered Defendant to respond to Plaintiffs’ Second Amended Complaint in the Member Case. (ECF No. 66, 67.)

Pursuant to the Court’s inherent authority to control its docket, and pursuant to Plaintiffs’ voluntary dismissal of the Lead Case and the Court’s October 25, 2022 Order making the Second Amended Complaint in the Member Case the operative pleading in this matter,

**IT IS** on this 26<sup>th</sup> day of April 2023, **ORDERED** as follows:

1. This matter is deconsolidated, the Lead Case (Case No. 19-4753) is closed, and the Member Case (Case No. 21-9867) is reinstated.
2. Defendant’s Motion to Dismiss (ECF No. 69) and Plaintiffs’ Motion to Transfer (ECF No. 78) in the Lead Case are administratively terminated.
3. As the operative Second Amended Complaint in the Member Case (ECF No. 117) includes United States State Department Defendants that are

*Appendix L*

no longer parties to this action, **Plaintiffs are directed to file, within fourteen (14) days, a Third Amended Complaint in this Member Case**, removing any allegations or claims against State Department Defendants.

4. Defendant may refile its Motion to Dismiss in the Member Case, if it so chooses, after filing of a Third Amended Complaint by Plaintiffs.<sup>1</sup>
5. As the Motion to Transfer has already been fully brief in the Lead Case, the Court directs the Clerk's Office to file Plaintiffs' Motion to Transfer from the Lead Case (ECF No. 78), Defendant's Opposition (ECF No. 79), and Plaintiffs' Reply (ECF No. 80) on the Member Case docket (Case No. 21-9867).
6. The Clerk's Office is also directed to activate Plaintiffs Motion to Transfer in the Member Case upon docketing.

/s/ Michael A. Shipp

MICHAEL A. SHIPP

UNITED STATES DISTRICT JUDGE

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1. After the Third Amended Complaint is filed, the Court will decide Plaintiffs' Motion to Transfer before adjudicating any Motion to Dismiss filed by Defendant.

**APPENDIX M — PLAINTIFFS’ THIRD AMENDED  
COMPLAINT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW JERSEY,  
FILED MAY 5, 2023**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

No. 3:21-cv-09867-MAS-TJB  
Plaintiffs’ Third Amended Complaint

DEFENSE DISTRIBUTED,  
SECOND AMENDMENT FOUNDATION, INC.,

*Plaintiffs,*

v.

MATTHEW J. PLATKIN,  
ATTORNEY GENERAL OF NEW JERSEY,

*Defendant.*

[Tables Intentionally Omitted]

**I. Introduction**

1. This case concerns extraordinarily important questions of free speech regarding the First Amendment right to speak about the Second Amendment. Defense Distributed and the Second Amendment Foundation are peaceful, law-abiding organizations committed to preserving, protecting, and promoting America’s

*Appendix M*

individual right to keep and bear Arms in both traditional and modern contexts. At stake now is the modern right to speak about the Second Amendment by sharing computer files with digital firearms information. Even though federal free speech laws protect this freedom with full force, both the United States Department of State and the New Jersey Attorney General are breaking the law multiple times over with unprecedented acts of censorship.

2. The State Department can never abridge the freedom of speech—especially where, as here, the State Department made a legally-enforceable contract to protect Defense Distributed and the Second Amendment Foundation’s right to engage in the speech at issue by performing a series of administrative obligations. But instead of performing those critical protective obligations, the State Department violated administrative law in failing to comply. The claims against the State Department are pending elsewhere now, but still form part of the instant case’s factual background.

3. At issue here is the New Jersey Attorney General (“NJAG”), who is abridging Defense Distributed and the Second Amendment Foundation’s freedom of speech as well. He denies the right to share digital firearms information because he cannot stand to let people speak out in favor of the Second Amendment. Through a torrent of civil and criminal enforcement actions, the NJAG has punished and threatens to continue punishing Defense Distributed and the Second Amendment Foundation’s members for exercising their right to speak freely about firearms. Hence, Defense Distributed and the Second

*Appendix M*

Amendment Foundation sue Grewal to halt his censorship under 42 U.S.C. § 1983.

**II. Parties****A. Defense Distributed**

4. Plaintiff Defense Distributed is a private business corporation that is headquartered and has its principal place of business in Austin, Texas. It did so at all relevant times in the past.

5. Currently and at all relevant times in the past, most of Defense Distributed's activities, including research, design, development, manufacturing, and publishing occurred in and around Austin.

6. Currently and at all relevant times in the past, all of Defense Distributed's employees lived in or near Austin.

7. Currently and at all relevant times in the past, a public library that displayed Defense Distributed's publications from time to time has been in Austin, Texas.

8. Cody Wilson founded Defense Distributed.

9. Cody Wilson serves as Defense Distributed's Director.

*Appendix M***B. Second Amendment Foundation, Inc.**

10. Plaintiff Second Amendment Foundation, Inc. (“SAF”) is a non-profit membership organization incorporated under the laws of the State of Washington. SAF’s principal place of business is in Bellevue, Washington.

11. SAF promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution’s right to privately own and possess firearms and the consequences of gun control. Some SAF members seek to receive the computer files that Defense Distributed seeks to publish, and some SAF members seek to share their own computer files by utilizing Defense Distributed’s facilities. These SAF members seek to exchange this information because of its technical, scientific, artistic, and political value.

12. SAF brings this action on behalf of itself. SAF also brings this action on behalf of its members because at least one of its members would have standing to sue in his own right, the interests the suit seeks to vindicate are germane to the SAF’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

**C. The NJAG**

13. Defendant Matthew J. Platkin is the current New Jersey Attorney General. In that capacity, he is responsible for all of the New Jersey civil and criminal

*Appendix M*

enforcement efforts at issue. He is sued for declaratory and injunctive relief in his official capacity.

**III. Subject Matter Jurisdiction**

14. 28 U.S.C. § 1331 supplies the Court with original federal question jurisdiction over this action because it arises under the Constitution and laws of the United States.

15. 28 U.S.C. § 1332 supplies the Court with original diversity jurisdiction over this action because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States.

16. 28 U.S.C. § 1343 supplies the Court with original federal question jurisdiction over this action because it is an action to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution and statutes providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

17. 28 U.S.C. § 1367 supplies the Court with supplemental subject-matter jurisdiction over the action's state-law claims because the state-law claims are so related to claims in the action within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. The action's state-law claims do not raise novel or complex issues of state law. The action's state-

*Appendix M*

law claims do not substantially predominate over the claim or claims over which the district court has original jurisdiction.

18. This action seeks declaratory, injunctive, and other relief pursuant to the Constitution of the United States of America, 5 U.S.C. § 702, 5 U.S.C. § 705, 5 U.S.C. § 706, 28 U.S.C. § 1651(a), 28 U.S.C. § 2201, 28 U.S.C. § 2202, 42 U.S.C. § 1983, and 42 U.S.C. § 1988.

19. There exists an active, justiciable controversy amongst the parties about whether The NJAG's civil and criminal censorship actions violate Defense Distributed and SAF's rights under the Constitution and other federal laws. Declaratory relief will resolve this controversy and eliminate the burden imposed on Plaintiffs stemming therefrom.

**IV. Venue**

20. This Court constitutes a proper venue for this action because a substantial part of the events or omissions giving rise to the claims occurred here. *See* 28 U.S.C. § 1391(e)(1)(B).

21. This Court constitutes a proper venue for this action because a substantial part of the property that is subject of the action is situated here. *See* 28 U.S.C. § 1391(b)(2).

22. This action arises from actions that the NJAG took and intends to take against Defense Distributed's

*Appendix M*

activities in Austin, Texas and Defense Distributed's property in Austin, Texas. *See Def. Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020).

23. For the reasons explained at length already, Plaintiffs submit that the correct venue to which this case should be transferred is the United States District Court for the Western District of Texas. *See* Doc. 78-01.

**V. Facts****A. Digital Firearms Information is Speech.**

24. This action concerns digital firearms information. Digital firearms information is “digital” because it exists in the form of coded computer files, as opposed to analog media like printed books. It is “information” because it conveys knowledge without advocating action. It pertains to both entire firearms and individual firearm components, and addresses their physical properties, production methods, and uses.

25. Digital firearms information exists in a wide variety of computer file formats. Common formats include portable document format (.pdf) files, DWG (.dwg) files, Standard for the Exchange of Product Data (“STEP”) (.stp) files, stereolithography (.stl) files, Initial Graphics Exchange Specification (.igs) files, SoLiDworks PaRT (.sldprt) files, and SketchUp (.skp) files, as well as plain text (.txt) files with notes, instructions, and comments.

*Appendix M*

26. Digital firearms information includes, but is not limited to, what authorities refer to as “Computer Aided Design files” or “CAD files.” *See, e.g.,* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020). CAD files are used primarily for abstract design. Users with the requisite computer hardware, software, and expertise can employ CAD files to construct and manipulate complex two- and three-dimensional digital models of physical objects. These models serve a wide variety of important purposes apart from object fabrication. Examples include the computerized study of object properties, rendition of object images for product visualization, and parametric modeling of object families. According to authorities, CAD files are not ready for insertion into object-producing equipment such as computer numerically controlled machine tools and additive manufacturing equipment (e.g., 3D printers). *See, e.g., id.*

27. Digital firearms information also includes, but is not limited to, what authorities refer to as “Computer Aided Manufacturing files” or “CAM files.” *See, e.g.,* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020). Like CAD files, CAM files can be used to construct and manipulate the digital two- and three-dimensional models of physical objects that serve design purposes apart from production. According to authorities, unlike CAD files, CAM files

*Appendix M*

are ready for insertion into object-producing equipment such as computer numerically controlled machine tools and additive manufacturing equipment (*e.g.*, 3D printers). *See, e.g., id.*

28. With respect to 3D-printing processes in particular, CAD files and CAM files do not produce anything automatically. They are not functional software. They do not self-execute. They are mere information stores. To fabricate an object as designed in a CAD or CAM file, a user must know how and choose to orchestrate a process involving substantial additional software (to interpret and implement the files into the motions of a 3D print head), substantial additional hardware (*e.g.*, the computer running the software, the 3D printer), substantial physical labor, substantial amounts of time, and the requisite raw materials.

29. The physical laws governing 3D-printer fabrication processes apply to all objects, including firearms. Even with a perfectly accurate set of digital firearms information, the most powerful software, and a state-of-the-art 3D printer, the digital model of a firearm component does not fabricate the component on its own. Firearm component fabrication is not an automatic process. It occurs only if and when a person chooses to perform a complex series of actions entailing considered volition and judgment, such as adapting and tailoring the design, selecting suitable component materials, choosing an effective manufacturing process, and opting to personally complete an extensive set of fabrication steps with the requisite software, hardware, and raw materials.

*Appendix M***B. Defense Distributed’s Digital Firearms Information Publications.**

30. Defense Distributed exists to promote the Second Amendment’s individual right to keep and bear Arms. To that end, Defense Distributed has published, is publishing, and intends to continue publishing digital firearms information to the American public.

31. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing is an important expression of technical, scientific, artistic, and political matter. Each and every computer file at issue has these values in the abstract, apart from any application that the information’s recipient might choose to devote it to. Akin to blueprints, each computer file’s sole purpose is to supply information in the abstract. It is constitutionally protected speech in every respect.

32. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing includes, but is not limited to, what authorities refer to as “Computer Aided Design files” or “CAD files.” *See, e.g.,* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020).

33. The digital firearms information that Defense Distributed has published, is publishing, and intends to

*Appendix M*

continue publishing includes, but is not limited to, what authorities refer to as “Computer Aided Manufacturing files” or “CAM files.” *See, e.g., id.*

34. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing includes, but is not limited to, non-CAD and non-CAM files such as plain text (.txt) files with notes, instructions, and comments.

35. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing pertains to both entire firearms and to individual firearm components. A representative example of the digital firearms information that Defense Distributed has published concerns the single-shot pistol known as the “Liberator.”

36. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing does not and is not intended to advocate action. It especially does not advocate or intend to advocate any imminent action.

37. The digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing does not and is not intended to incite action. It especially does not incite or intend to incite any imminent action.

38. The digital firearms information that Defense Distributed has published, is publishing, and intends to

*Appendix M*

continue publishing does not and is not intended to produce action. It especially does not produce or intend to produce any imminent action.

39. None of the digital firearms information that Defense Distributed has published, is publishing, and intends to continue publishing involves “imminent” fabrication. The 3D-printing technologies at issue necessarily require a user to knowingly apply deliberate, focused will over the course of an extended period of time to fabricate an object.

40. Defcad.com (hereinafter “DEFCAD”) is a website for which Defense Distributed is and at all relevant times has been responsible. Via DEFCAD, Defense Distributed has published, republished, and facilitated the distribution of a wide variety of digital firearms information.

**1. Defense Distributed’s 2012–2013 Publications.**

41. From approximately December 2012 to May 2013, Defense Distributed published a substantial set of computer files with digital firearms information to DEFCAD by letting any site visitor download them directly for free. The computer files with digital firearms information published via DEFCAD during this period included the following:

- (a) files concerning a single-shot firearm known as the “Liberator”;

*Appendix M*

- (b) files concerning a firearm receiver for AR-15 rifles;
- (c) files concerning a magazine for AR-15 rifles;
- (d) stereolithography (.stl) files about firearm components;
- (e) Initial Graphics Exchange Specification (.igs) files about firearm components;
- (f) SoLiDworks PaRT (.sldprt) files about firearm components;
- (g) SketchUp (.skp) files about firearm components;
- (h) Standard for the Exchange of Product Data (“STEP”) (.stp) files about firearm components;
- (i) diagrams of firearm components;
- (j) renderings;
- (k) “read me” plain text files about firearm assembly methods;
- (l) “read me” plain text files about the National Firearms Act and the Undetectable Firearms Act; and
- (m) software licenses.

*Appendix M*

42. The computer files that Defense Distributed published to DEFCAD during this period were downloaded millions of times.

**2. Defense Distributed's July 2018 Publications.**

43. From the evening of July 27, 2018 until the afternoon of July 31, 2018, Defense Distributed published a substantial set of computer files with digital firearms information to DEFCAD by letting any site visitor download them directly for free. The State Department provided advance approval of these publications. The computer files with digital firearms information so published via DEFCAD during this period included the following:

- (a) files concerning a single-shot firearm known as the "Liberator";
- (b) files concerning an assembly of the AR-15 rifle and magazine;
- (c) files concerning an assembly of the AKM rifle and magazine;
- (d) stereolithography (.stl) files about firearm components;
- (e) Initial Graphics Exchange Specification (.igs) files about firearm components;

*Appendix M*

- (f) SoLiDworks PaRT (.sldprt) files about firearm components;
- (g) SketchUp (.skp) files about firearm components;
- (h) Standard for the Exchange of Product Data (“STEP”) (.stp) files about firearm components;
- (i) diagrams of firearm components;
- (j) renderings;
- (k) NC files concerning fire control pocket milling;
- (l) “read me” plain text files about firearm assembly methods;
- (m) “read me” plain text files about the National Firearms Act and the Undetectable Firearms Act; and
- (n) software licenses.

44. The computer files that Defense Distributed published to DEFCAD during this period were downloaded hundreds of thousands of times.

45. During this period, Defense Distributed also published the same computer files with digital firearms information at a brick-and-mortar public library in Austin, Texas by hosting the computer files in formats that patrons could access via computer workstations.

*Appendix M***3. Defense Distributed's August–November 2018 Publications.**

46. From approximately August 2018 to November 2018, Defense Distributed distributed a substantial set of computer files with digital firearms information via the mail by making its computer files available for shipment on physical storage devices. Defense Distributed did so by using an ecommerce platform on DEFCAD to facilitate the transaction and using the U.S. Postal Service as its means of delivering the information. After customers entered an order using DEFCAD's online ecommerce platform, Defense Distributed put the information on a USB drive or SD card and mailed the drive or card to customers via the U.S. Postal Service.

47. During this period, Defense Distributed also offered and advertised its mailed distribution of digital firearms information to potential recipients. These efforts included advertisements and offers on DEFCAD itself, participation in trade shows, and e-mail advertisements.

48. For anyone dealing with digital firearms information, the postal mail alternative to internet publication is not an adequate substitute. Internet communication of and about Defense Distributed's digital firearms information is essential for many reasons. Moreover, internet communication is important because it is the *only* way to ensure open source development and commitment to the public domain/ placement outside the bounds of intellectual property strictures.

*Appendix M***4. Defense Distributed's 2020-Present Publications.**

49. From March 27, 2020, to present, Defense Distributed published a substantial set of computer files with digital firearms information via DEFCAD. The computer files with digital firearms information published via DEFCAD during this period include original and legacy firearms models, CAD data, CAM data, blueprints and drawings.

50. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did not let DEFCAD visitors download files freely. In this publication period, Defense Distributed used DEFCAD to facilitate secure file transfer via electronic transmissions that comply with current federal law by, *inter alia*, utilizing secure end-to-end encryption.

51. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did not let DEFCAD visitors access the files at issue without any screening. In this publication period, Defense Distributed's screening procedures deemed certain DEFCAD visitors ineligible for file distribution.

52. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did not let DEFCAD make files available to persons outside the United States.

*Appendix M*

53. Unlike Defense Distributed's prior periods of publication on DEFCAD, Defense Distributed in this publication period did *not* make its files available to residents of and persons in the State of New Jersey who lack a federal firearms license.

54. As compared to Defense Distributed's prior methods of publication on DEFCAD, Defense Distributed's latest method of publication on DEFCAD substantially burdens Defense Distributed's exercise of free speech and would not be utilized but for the wrongful actions of the State Department and the NJAG.

55. Currently, Defense Distributed continues to publish a substantial set of computer files with digital firearms information via DEFCAD in the manner that it has done so since March 27, 2020. The number of files published in this manner to date is at least 16,354.

**5. Published files will always remain online.**

56. The computer files with digital firearms information that Defense Distributed published in the past will always be available on the internet, regardless of whether or not Defense Distributed itself continues to publish them. Without any coordination, many recipients of Defense Distributed's digital firearms information have persistently republished those same files online via their own websites. The independently-republished versions of Defense Distributed's files are not hidden in dark or remote recesses of the internet. Simple Google searches yield the republished Defense Distributed files with ease.

*Appendix M***6. Defense Distributed's Future Publications.**

57. To the extent that and as soon as it is legal to do so, Defense Distributed currently intends to publish the following computer files with digital firearms information online at DEFCAD by letting any site visitor download them directly for free:

- (a) The computer files that Defense Distributed published online via DEFCAD from December 2012 to May 2013. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (b) The computer files that Defense Distributed published online via DEFCAD from July 27, 2018, to July 31, 2018. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (c) The computer files that Defense Distributed published via the mail from late August 2018 through early November 2018. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (d) The computer files that Defense Distributed published online via DEFCAD from March 27, 2020, to present. These include CAD files, CAM files, and non-CAD and non-CAM files.
- (e) Computer files authored by Defense Distributed that Defense Distributed has not published before. These include CAD files, CAM files,

*Appendix M*

and computer files with other digital firearms information.

**C. The State Department's International Traffic in Arms Regulations.**

58. The Arms Export Control Act of 1976, 22 U.S.C. ch. 22 (the "AECA"), addresses the President's authority to control the import and export of defense articles and defense services.

59. The International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130 ("ITAR"), constitute AECA's primary implementing regulations.

60. The State Department administers the AECA and the ITAR. Within the State Department, primary responsibility for administering the AECA and the ITAR lies with the Directorate of Defense Trade Controls ("DDTC") in the Bureau of Political-Military Affairs.

61. The AECA provides that "no defense articles or defense services . . . may be exported or imported without a license for such export or import." 22 U.S.C. § 2778(b)(2). It provides for criminal penalties up to a \$1,000,000 fine and 20 years in prison for "[a]ny person who willfully violates any provision of this section ... or any rule or regulation issued under this section." *Id.* § 2778(c).

62. The AECA authorizes the President "to designate those items which shall be considered as defense articles and defense services for the purposes of

*Appendix M*

this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.” *Id.* § 2778(a)(1). The President, by executive order, has delegated to the State Department the authority to regulate under the AECA and to designate defense “articles” and “services” for inclusion on the United States Munitions List (“USML”). *See* Exec. Order No. 13,637, § 1(n)(i), 78 Fed. Reg. 16,129 (Mar. 8, 2013).

63. DDTC has from time to time promulgated regulations known as the International Traffic in Arms Regulations (“ITAR”). *See* 22 C.F.R. pts. 120-130 (2019). The ITAR make it unlawful to, *inter alia*, “export or attempt to export from the United States any defense article or technical data or to furnish or attempt to furnish any defense service for which a license or written approval is required” without such a license. *Id.* § 127.1(a)(1).

64. The ITAR’s definition of “export” includes the “actual shipment or transmission out of the United States, including the sending or taking of a defense article out of the United States in any manner.” *Id.* § 120.17(a)(1). The ITAR also provides that a “deemed export,” defined as “[r]eleasing or otherwise transferring technical data to a foreign person in the United States,” constitutes an “export.” *Id.* § 120.17(a)(2).

65. The ITAR also include, at 22 C.F.R. § 121.1, the USML, which enumerates the “articles, services, and related technical data [that] are designated as defense articles or defense services” for purposes of the AECA and

*Appendix M*

ITAR. Id. § 121.1(a). The USML organizes the designated items into twenty-one categories, encompassing various forms of weaponry, ammunition, explosives, military-type equipment and vessels, toxicological agents, classified data, and more. Each of the twenty-one categories includes as a designated item “[t]echnical data” and “defense services” that are “directly related to the defense articles” listed in that category. *See, e.g., id.* §§ 121.1(I)(i), (II)(k), (III)(e), (IV)(i), (V)(j), (VI)(g), (VII)(h). The ITAR define “technical data” to include “[i]nformation ... required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.” *Id.* § 120.10(a)(1).

#### **D. *Defense Distributed I*: Litigation**

66. “*Defense Distributed I*” refers to a federal civil action docketed in the United States District Court for the Western District of Texas, Austin Division as *Defense Distributed, et al. v. United States Department of State, et al.*, No. 1:15-CV-372-RP (W.D. Tex.), and in the United States Court of Appeals for the Fifth Circuit first as *Defense Distributed, et al. v. United States Department of State, et al.*, No. 15-50759 (5th Cir.) and later as *Defense Distributed, et al. v. United States Department of State, et al.*, No. 18-50811 (W.D. Tex.). *Defense Distributed I* yielded the following reported opinions:

- (a) *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015)
- (b) *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016) (panel opinion)

*Appendix M*

- (c) *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 461–76 (Jones, J., dissenting)
- (d) *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211 (5th Cir. 2017) (Elrod, Jones, Smith and Clement, JJ., dissenting from the denial of rehearing en banc)
- (e) *Def. Distributed v. United States Dep't of State*, 947 F.3d 870 (5th Cir. 2020).

67. The plaintiffs in *Defense Distributed I* were Defense Distributed, SAF, and an individual SAF member, Conn Williamson.

68. The defendants in *Defense Distributed I* match the former defendants in this case: the United States Department of State, the Secretary of State, the State Department's Directorate of Defense Trade Controls, the Acting Deputy Assistant Secretary of State for Defense Trade Controls in the Bureau of Political-Military Affairs, and the Acting Director of the Office of Defense Trade Controls Policy Division. They are referred to collectively as "the State Department."

69. *Defense Distributed I* concerned four categories of computer files defined by that action's pleadings: the "Published Files," the "Ghost Gunner Files," "CAD Files," and the "Other Files." Together, these categories of files are referred to as the "*Defense Distributed I* Files."

*Appendix M*

- (a) The “Published Files” category of *Defense Distributed I* Files consists of ten separate sets of files. It includes stereolithography (.stl) files about firearm components, Initial Graphics Exchange Specification (.igs) files about firearm components, SoLiDworks PaRT (.sldprt) files about firearm components, SketchUp (.skp) files about firearm components, Standard for the Exchange of Product Data (“STEP”) (.stp) files about firearm components, diagrams of firearm components, renderings, “read me” plain text files about firearm assembly methods, “read me” plain text files about the National Firearms Act and the Undetectable Firearms Act, and software licenses. From approximately December 2012 to May 2013, Defense Distributed published these files to DEF CAD for free download by the public.
- (b) The “Ghost Gunner Files” category of *Defense Distributed I* Files consists of software, data files, project files, coding, and models containing technical information for a machine, named the “Ghost Gunner,” that can be used to manufacture a variety of items, including gun parts.
- (c) The “CAD Files” category of *Defense Distributed I* Files consists of STEP (.stp) and stereolithography (.stl) files about a lower receiver to the AR-15 rifle.
- (d) The “Other Files” category of *Defense Distributed I* Files consists of files that contain technical

*Appendix M*

information, to include design drawings, rendered images, written manufacturing instructions, and other technical information that Defense Distributed intends to post to public forums on the Internet; provided, however, that this category only extends insofar as those files regard items that, as of June 29, 2018, were exclusively: (i) in Category I(a) of the United States Munitions List, as well as barrels and receivers covered by Category I(g) of the United States Munitions List that are components of such items; or (ii) items covered by Category I(h) of the United States Munitions List solely by reference to Category I(a), excluding Military Equipment.

70. *Defense Distributed I* began after the State Department used the AECA and ITAR regime to impose an illegal prior restraint on public speech concerning technical firearms data, including the *Defense Distributed I* Files. Under this regime, the State Department required that Defense Distributed obtain prior United States government approval before publication of the *Defense Distributed I* Files could occur on the internet and at other public venues.

71. The *Defense Distributed I* plaintiffs challenged the legality of the State Department's enforcement of the AECA/ITAR regime vis-à-vis the *Defense Distributed I* Files. In particular, they challenged the State Department's governance of the *Defense Distributed I* Files as ultra vires action not authorized by the statutes and regulations at issue, and as violations of the First, Second, and Fifth Amendments of the Constitution.

*Appendix M*

72. At a preliminary stage, the district court in *Defense Distributed I* denied the *Defense Distributed I* plaintiffs’ motion for a preliminary injunction. *Def. Distributed v. Dep’t of State*, 121 F. Supp.3d 680 (W.D. Tex. 2015).

73. An interlocutory appeal of the *Defense Distributed I* preliminary injunction denial was taken to the Fifth Circuit. A divided Fifth Circuit panel affirmed the district court’s decision. *Def. Distributed v. United States Dep’t of State*, 838 F.3d 451 (5th Cir. 2016). But it declined to reach the merits, ruling solely based on “the balance of harm and the public interest.” *Id.* at 461.

74. The merits of *Defense Distributed I*’s preliminary injunction were, however, reached by two important opinions. Judge Jones emphasized the protected nature of this speech in a panel dissent: “the State Department’s application of its ‘export’ control regulations to this domestic Internet posting appears to violate the governing statute, represents an irrational interpretation of the regulations, and violates the First Amendment as a content-based regulation and a prior restraint.” *Id.* at 463–64. (Jones, J. dissenting). The judges dissenting from the denial of rehearing en banc also reached the merits. *Def. Distributed v. U.S. Dep’t of State*, 865 F.3d 211 (5th Cir. 2017). Their opinion explained that the lower court’s “flawed preliminary injunction analysis permits perhaps the most egregious deprivation of First Amendment rights possible: a content based prior restraint.” *Id.* at 212.

*Appendix M***E. *Defense Distributed I*: Settlement Agreement**

75. After the *Defense Distributed I* interlocutory appeal concluded, the district court in *Defense Distributed I* ordered the parties to engage in settlement negotiations. The parties did so successfully and settled their dispute by agreement.

76. The *Defense Distributed I* settlement amounted to a victory for the plaintiffs. Press reports correctly understood that the State Department’s decision to settle “essentially surrenders” to the constitutional challenge *Defense Distributed* and SAF had been pressing all along; that the settlement “promises to change the export control rules surrounding any firearm below .50 caliber – with a few exceptions like fully automatic weapons and rare gun designs that use caseless ammunition – and move their regulation to the Commerce Department, which won’t try to police technical data about the guns posted on the internet”; and that, in the meantime, the settlement “gives [*Defense Distributed*] a unique license to publish data about those weapons anywhere [it] chooses.” Andy Greenberg, *A Landmark Legal Shift Opens Pandora’s Box for DIY Guns*, *Wired Magazine* (July 18, 2018), available at <https://bit.ly/2QK3is6>.

77. The *Defense Distributed I* settlement agreement is memorialized by the “Settlement Agreement”: a written contract that all sides executed validly on June 29, 2018. A copy of that instrument is attached to this complaint as Exhibit A. Among other things, the Settlement Agreement obligates the State Department to do the following:

*Appendix M*

## (a) Settlement Agreement Paragraph 1(a) - New Rule

Settlement Agreement Paragraph 1(a) requires the State Department to draft and fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising United States Munitions List (“USML”) Category I to exclude the *Defense Distributed I* Files. The pertinent text provides as follows: “Defendants agree to the following . . . : (a) Defendants’ commitment to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising USML Category I to exclude the technical data that is the subject of the Action.”

## (b) Settlement Agreement Paragraph 1(b) - Temporary Modification:

Settlement Agreement Paragraph 1(b) requires the State Department to announce, while the above-referenced final rule is in development, a temporary modification, consistent with International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the *Defense Distributed I* Files; and to publish the announcement on the Directorate of Defense Trade Controls website on or before July, 27, 2018. The pertinent text provides as follows: “Defendants agree to the following . . . (b) Defendants’ announcement, while

*Appendix M*

the above-referenced final rule is in development, of a temporary modification, consistent with the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that is the subject of the Action. The announcement will appear on the DDTC website, [www.pmddtc.state.gov](http://www.pmddtc.state.gov), on or before July 27, 2018.”

(c) Settlement Agreement Paragraph 1(c) - License

Settlement Agreement Paragraph 1(c) requires the State Department to issue a license to the *Defense Distributed I* plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). The pertinent text provides as follows: “Defendants agree to the following . . . (c) Defendants’ issuance of a letter to Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution ) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). For the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency,

*Appendix M*

and the Directorate of Defense Trade Controls has delegated authority to issue this approval.”

(d) Settlement Agreement Paragraph 1(d) -  
Acknowledgement

Settlement Agreement Paragraph 1(d) requires the State Department to acknowledge and agree that the temporary modification of USML Category I permits any United States person, to include Defense Distributed’s customers and SAF’s members, to access, discuss, use, reproduce, or otherwise benefit from the *Defense Distributed I* Files, and that the license issued to the *Defense Distributed I* plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files. The pertinent text provides as follows: “Defendants agree to the following . . . (d) Defendants’ acknowledgment and agreement that the temporary modification of USML Category I permits any United States person, to include DD’s customers and SAF’s members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the letter to Plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files.”

78. The Settlement Agreement binds all of the parties to *Defense Distributed I* and all of this action’s parties. Settlement Agreement paragraph 7 provides

*Appendix M*

that the “Settlement Agreement” shall be binding upon and inure to the benefit of Plaintiffs and Defendants, and the respective heirs, executors, successors, assigns and personal representatives, including any persons, entities, departments or agencies succeeding to the interest of obligations of the Parties.”

**F. Settlement Agreement Fulfillment Begins**

79. After the Settlement Agreement’s execution on July 27, 2018, the State Department began to fulfill—temporarily—certain of its Settlement Agreement obligations:

(a) Settlement Agreement Paragraph 1(a) - New Rule

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(a). It published in the Federal Register a notice of proposed rulemaking revising USML Category I to exclude the *Defense Distributed I* Files. *See* 83 Fed. Reg. 24,198 (May 24, 2018).

(b) Settlement Agreement Paragraph 1(b) - Temporary Modification

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(b). It made a temporary modification to USML Category I, pursuant to 22 C.F.R. § 126.2, to “exclude” the

*Appendix M*

*Defense Distributed I* Files from Category I. A copy of that instrument is attached to this complaint as Exhibit B.

(c) Settlement Agreement Paragraph 1(c) - License

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(c). It issued *Defense Distributed* a license—a letter issued by the State Department’s Acting Deputy Assistant Secretary for the Directorate of Defense Trade Controls—authorizing the Defendants to publish the Published Files, Ghost Gunner Files, and CAD Files for “unlimited distribution.” A copy of that instrument is attached to this complaint as Exhibit C.

(d) Settlement Agreement Paragraph 1(d) - Acknowledgement

By July 27, 2018, the State Department had taken steps to comply with the obligation imposed by Settlement Agreement Paragraph 1(d). It acknowledged and agreed that the temporary modification permits any United States person to access, discuss, use, reproduce, or otherwise benefit from the *Defense Distributed I* Files; and that the license issued to the *Defense Distributed I* plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files. *See Ex. A at 2.*

*Appendix M*

80. On June 29, 2018, the parties to *Defense Distributed I* filed a joint stipulation of dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The filing provided as follows: “Pursuant to Federal Rule of Civil Procedure 41 (a)( I )(A)(ii) and 41(a)( I )(B), and a settlement agreement among Plaintiffs (Defense Distributed, Second Amendment Foundation, Inc., and Conn Williamson) and Defendants (the United States Department of State, the Secretary of State, the Directorate of Defense Trade Controls, the Deputy Assistant Secretary, Defense Trade Controls. and the Director, Office of Defense Trade Controls Policy), the Plaintiffs and the Defendants hereby stipulate to the dismissal with prejudice of this action.”

81. On July 30, 2018, the *Defense Distributed I* district court entered an order providing that “the case is **DISMISSED WITH PREJUDICE**” and the “action is **CLOSED.**”

82. The State Department’s temporary fulfillment of the Settlement Agreement obligations lasted from July 27, 2018 until the afternoon of July 31, 2018. During that period, Defense Distributed engaged in the publication addressed *supra* at Part V.B.2 (“Defense Distributed’s July 2018 Publications”).

**G. The State Department Stopped Fulfilling the Settlement Agreement**

83. On July 30, 2018, the NJAG and a group of state attorneys general (hereinafter “the States”) initiated a civil action against the State Department, Defense

*Appendix M*

Distributed, SAF, and Conn Williamson. The States chose to sue in their forum of choice, the Western District of Washington's Seattle division, before Judge Robert Lasnik. The suit was docketed in the district court as *State of Washington et al., v. United States Department of State et al.*, No. 2:18-cv-1115-RSL.

84. The NJAG explained the nature of the States' involvement in this litigation by saying the following on the record: "The federal government is no longer willing to stop Defense Distributed from publishing this dangerous code, and so New Jersey must step up."

85. The States' *Washington* complaint alleged that, by issuing the Temporary Modification and license, the State Department had violated the Administrative Procedure Act (APA). The suit sought a preliminary nationwide injunction and a final judgment vacating the Temporary Modification and license. These claims went against the State Department alone.

86. The Settlement Agreement was never the subject of any claim in the *Washington* case. The States never claimed that the Settlement Agreement was illegal and never sought relief against the Settlement Agreement. Their only claims targeted two of the actions the State Department took in an attempt to fulfill the Settlement Agreement.

87. Nor were Defense Distributed and SAF the subject of any claim. The States asserted no cause of action and sought no relief against Defense Distributed or SAF.

*Appendix M*

The APA claim about the license went against the State Department alone, did not allege that Defense Distributed or SAF did anything wrong, and did not seek relief against them. Likewise for the APA claim about the Temporary Modification. It too went against the State Department alone, did not allege that Defense Distributed or SAF did anything wrong, and did not seek relief against Defense Distributed or SAF.

88. On July 31, 2018, the States obtained from the United States District Court for the Western District of Washington a temporary restraining order against the State Department: “The federal government defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the ‘Temporary Modification of Category I of the United States Munitions List’ and the letter to Cody R. Wilson, Defense Distributed, and Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued.”

89. A key concession occurred during the preliminary injunction proceedings: Both the State Department and the States conceded that there *is nothing inherently illegal about the computer files at issue*. Aside from concerns about Defense Distributed’s files being *on the internet*, the States and State Department took no issue with anyone’s right to distribute the very same computer files via other channels. At the preliminary injunction hearing, counsel for the States took the position that, apart

*Appendix M*

from internet publication, Defense Distributed had a right to distribute digital firearms information via the mail or otherwise “hand them around domestically” without violating any law. Counsel for the State Department agreed, stating that, “even if the Court were to grant plaintiffs every ounce of relief that they seek in this case, Defense Distributed could still mail every American citizen in the country the files that are at issue here.” In light of this concession, Defense Distributed engaged in the publication addressed *supra* at Part V.B.3 (“Defense Distributed’s August-November 2018 Publications”).

90. On August 27, 2018, the States obtained from the United States District Court for the Western District of Washington a preliminary injunction against the State Department: “The federal defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the ‘Temporary Modification of Category I of the United States Munitions List’ and the letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued until further order of the Court.” *Washington v. U.S. Dep’t of State*, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018).

91. Even though the State Department had a right to appeal the *Washington* case’s preliminary injunction decision, and even though it had preserved arguments that would have succeeded in having the district court’s judgment vacated or reversed, the State Department

*Appendix M*

refused to appeal. It let the deadline for that interlocutory appeal come and go without taking any appellate action. The State Department refused to appeal this preliminary injunction because of partisan politics and in spite of federal legal advisors that deemed an appeal legally necessary.

92. The rest of the *Washington* case's key decisions occurred on summary judgment. On the merits, the *Washington* district court accepted both of the States' APA claims. First, the *Washington* district court held that the State Department's issuance of the Temporary Modification was "without observance of procedure required by law," 5 U.S.C. § 706, because a Congressional notice requirement had not been met. *Washington v. U.S. Dep't of State*, 420 F. Supp. 3d 1130, 1141-43 (W.D. Wash. 2019). Second, the *Washington* district court held that the State Department's issuance of both the Temporary Modification and the license were "arbitrary and capricious," 5 U.S.C. § 706, because of insufficient explanation and evidentiary support in the administrative record. *Id.* at 1144-47. Neither of these claims are meritorious.

93. The *Washington* action's final judgment orders as follows: "The July 27, 2018, 'Temporary Modification of Category I of the United States Munitions List' and letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation were unlawful and are hereby VACATED." Part of the *Washington* district court's decision addressed the First Amendment implications of vacating the Temporary Modification and license. It held

*Appendix M*

the Constitution's First Amendment was "not relevant to the merits": "Whether or not the First Amendment precludes the federal government from regulating the publication of technical data under the authority granted by the AECA is not relevant to the merits of the APA claims plaintiffs assert in this litigation." *Washington v. U.S. Dep't of State*, 420 F. Supp. 3d 1130, 1147 (W.D. Wash. 2019). It also held that the First Amendment can be "abridged" so long as it is not "abrogated." *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018).

94. Defense Distributed and SAF demanded that the State Department appeal. The demand asserted that a failure to appeal constituted a breach of the Settlement Agreement. The demand occurred in a January 15, 2020, letter from counsel for Defense Distributed and SAF to the State Department. A copy of that instrument is attached to this complaint as Exhibit E.

95. Even though the State Department had a right to appeal the final judgment, and even though it had preserved arguments that would have succeeded in having the district court's judgment vacated or reversed, the State Department refused to appeal. It let the deadline for that appeal come and go without taking any appellate action. The State Department refused to appeal this final injunction because of partisan politics and in spite of federal legal advisors that deemed an appeal legally necessary.

*Appendix M*

96. Defense Distributed and SAF appealed the *Washington* action's final judgment. Defense Distributed's appellant's brief showed that the district court both lacked subject-matter jurisdiction because of multiple Article III shortcomings and was wrong on the merits because the APA cannot require abridgement of the First Amendment. So rather than be squarely defeated, the States moved to dismiss both appeals as moot. Defense Distributed and SAF responded jointly, opposing the dismissal request with several categories of argument. First, the response defeated the States' mootness suggestion on its own terms. Second, it showed that mootness-based dismissals cannot occur unless and until disputes regarding the district court's subject-matter jurisdiction are resolved. Third, the response showed that, if the case were moot, *Munsingwear* required vacatur of the district court's judgment.

97. The *Washington* action's Ninth Circuit panel accepted the mootness suggestion and dismissed the appeal. *Washington v. Def. Distributed*, No. 20-35030, 2020 WL 4332902 (9th Cir. July 21, 2020). Its order gives no meaningful indication of the mootness reasoning. It says nothing about the district court's jurisdiction. And it says nothing about *Munsingwear*, silently leaving the district court's judgment intact. A petition for rehearing en banc is now pending.

**1. The State Department disavowed the license.**

98. On or before August 2, 2018, the State Department disavowed the license it had originally issued to Defense Distributed and SAF in July 2018.

*Appendix M*

99. The State Department's disavowal of the July 2018 license constitutes final agency action.

100. The State Department's disavowal of the July 2018 license is reflected in an August 2, 2018, letter from counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit D.

101. The August 2, 2018, letter from counsel for the State Department established that, as of August 2, 2018, the State Department had decided to proceed as though the July 2018 license "had not been issued." This indicates the State Department's disavowal of the July 2018 license.

102. The August 2, 2018, letter from counsel for the State Department establishes that, as of August 2, 2018, the State Department had decided to proceed as though the license was a "nullity." This letter indicates the State Department's disavowal of the July 2018 license.

**2. After disavowal, the State Department refused to supply a license.**

103. After the State Department disavowed the license it had originally issued to Defense Distributed and SAF in July 2018, the State Department refused to supply Defense Distributed and SAF with the license that Settlement Agreement Paragraph 1(c) requires the State Department to supply.

104. The State Department's refusal to supply Defense Distributed and SAF with the license that

*Appendix M*

Settlement Agreement Paragraph 1(c) requires the State Department to supply entitles them to constitutes final agency action.

105. Defense Distributed and SAF demanded that the State Department issue a license in compliance with Settlement Agreement Paragraph 1(c) on January 15, 2020. They did so by transmitting a letter from counsel for Defense Distributed and SAF to counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit E.

106. Defense Distributed and SAF demanded that the State Department issue a license in compliance with Settlement Agreement Paragraph 1(c) on February 11, 2020. They did so by transmitting a letter from counsel for Defense Distributed and SAF to counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit F.

**3. The State Department disavowed the Temporary Modification.**

107. On or before August 2, 2018, the State Department disavowed the Temporary Modification that it had originally issued in July 2018.

108. The State Department's August 2018 disavowal of the July 2018 Temporary Modification constitutes final agency action.

109. The State Department's disavowal of the July 2018 Temporary Modification is reflected in the August

*Appendix M*

2, 2018, letter from counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit D.

110. The August 2, 2018, letter from counsel for the State Department establishes that, as of August 2, 2018, the State Department had decided to cease “implementing or enforcing” the July 2018 Temporary Modification. This letter indicates the State Department’s disavowal of the July 2018 Temporary Modification.

111. The August 2, 2018, letter from counsel for the State Department establishes that, as of August 2, 2018, the State Department had decided to proceed as though the July 2018 Temporary Modification “had not occurred.” This indicates the State Department’s disavowal of the July 2018 Temporary Modification.

112. The State Department removed the July 2018 Temporary Modification from its website on July 31, 2018. This removal indicates the State Department’s disavowal of the July 2018 Temporary Modification.

**4. After disavowal, the State Department refused to supply a Temporary Modification.**

113. After the State Department disavowed the July 2018 Temporary Modification, the State Department refused to supply Defense Distributed and SAF with the temporary modification that Settlement Agreement Paragraph 1(b) requires the State Department to supply.

*Appendix M*

114. The State Department's refusal to supply Defense Distributed and SAF with the temporary modification that Settlement Agreement Paragraph 1(b) requires the State Department to supply constitutes final agency action.

**5. The State Department failed to supply the required regulatory changes.**

115. The State Department refused to supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply.

116. The State Department's refusal to supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply constitutes final agency action.

117. The State Department's refusal to supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply constitutes a breach of the Settlement Agreement.

118. The State Department issued a new final rule that pertains to the Settlement Agreement in January 2020. *See* International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 Fed. Reg. 3819 (Jan. 23, 2020). It did so in conjunction with a new rule issued by the Commerce Department. *See* Control of

*Appendix M*

Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136, 4140-42, 4172 (Jan. 23, 2020). These new rules do not discharge the State Department's obligations under Settlement Agreement Paragraph 1(a) because they do not exclude *all* of the technical data that was the subject of *Defense Distributed I* from United States Munitions List ("USML") Category I. Separately, these new rules do not discharge the State Department's obligations under Settlement Agreement Paragraph 1(a) because they have been enjoined by the United States District Court for the Western District of Washington.

119. On April 29, 2020, Defense Distributed and SAF demanded that the State Department supply Defense Distributed and SAF with the regulatory results that Settlement Agreement Paragraph 1(a) requires the State Department to supply. They did so by transmitting a letter from counsel for Defense Distributed and SAF to counsel for the State Department. A copy of that instrument is attached to this complaint as Exhibit G.

## **H. The NJAG Censors Defense Distributed**

### **1. The NJAG Engages in Civil Censorship**

120. On July 26, 2018, the NJAG issued Defense Distributed a formal cease-and-desist letter. A copy is attached to this complaint as Exhibit H.

*Appendix M*

121. The NJAG's July 26, 2018, cease-and-desist letter commanded Defense Distributed to cease publishing its digital firearms information: "You are directed to cease and desist from publishing printable-gun computer files for use by New Jersey residents." It repeatedly declared Defense Distributed's publication of digital firearms information to be a violation of New Jersey law. It said that publication "violates New Jersey's public nuisance and negligence laws." It said that publication "violates our public nuisance law." It said that publication "constitute[s] a public nuisance." It said that publication "is negligent." It threatened to punish Defense Distributed for publishing any more digital firearms information: "If you do not halt your efforts to proceed with publication, I will bring legal action against your company before August 1, 2018." It ended by delivering another command backed by a threat of punishment: "As the chief law enforcement officer for New Jersey, I demand that you halt publication of the printable-gun computer files. Should you fail to comply with this letter, my Office will initiate legal action barring you from publishing these files before August 1, 2018."

122. On July 26, 2018, after sending the cease-and-desist letter, the NJAG issued a press release reiterating the threat: "Attorney General Grewal threatened Defense Distributed with 'legal action' if it fails to comply with his demand." The press release also took the position that "[p]osting this material online is no different than driving to New Jersey and handing out hard-copy files on any street corner."

*Appendix M*

123. On July 27, 2018, Defense Distributed responded to the NJAG's July 26, 2018, cease-and-desist letter with a letter of its own. The response letter explained that "all actions contemplated by Defense Distributed are fully protected by the First Amendment," and that the Attorney General's "attempts to prevent such action constitute an unconstitutional prior restraint and otherwise violate the United States Constitution." It also explained that Defense Distributed would attempt to restrict files made available on the internet to prevent download within New Jersey. Finally, it demanded that General withdraw his cease-and-desist command. He did not.

124. On July 30, 2018, the NJAG took coercive action against Defense Distributed by targeting its internet service providers.

125. DreamHost is a company that contracted to provide internet security services for Defense Distributed. DreamHost's Acceptable Use Policy formed part of the contract between Defense Distributed and DreamHost.

126. On July 30, 2018, the NJAG sent a letter to DreamHost. A copy is attached to this complaint as Exhibit I.

127. The NJAG's July 30, 2018, letter to DreamHost attempted to make DreamHost terminate its provision of services to Defense Distributed. It declared that, by planning to publish digital firearms files on a website, "Defense Distributed is plainly planning to use the Defcad Website in a way that violates DreamHost's Acceptable

*Appendix M*

Use Policy.” The letter declared that Defense Distributed’s publication of digital firearms files violated New Jersey law. It said that “posting them violates New Jersey’s public nuisance and negligence laws.” It said that “posting them would . . . be illegal.”

128. On July 30, 2018, the NJAG sent a copy of the July 26, 2018, cease-and desist letter to Cloudflare, Inc.’s legal department. Cloudflare, Inc., provides internet security services for Defense Distributed.

## **2. The NJAG Engages in Criminal Censorship**

129. On November 8, 2018, New Jersey armed the NJAG with Senate Bill 2465’s Section 3(l)2. S. 2465, 218th Leg., Reg. Sess. (N.J. Nov. 2018) (codified as N.J. Stat. 2C:39- 9(l)2)). The law is codified as Section (l)(2) of New Jersey Code of Criminal Justice 2C:39-9. Section (l)(2) creates the following speech crime:

1. Manufacturing or facilitating the manufacture of a firearm using a three dimensional printer. In addition to any other criminal penalties provided under law it is a third degree crime for:

. . .

(2) a person to distribute by any means, including the Internet, to a person in New Jersey who is not registered or licensed as a manufacturer as provided in chapter 58 of Title 2C of the New Jersey Statutes, digital

*Appendix M*

instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.

As used in this subsection: “three-dimensional printer” means a computer or computer-driven machine or device capable of producing a three-dimensional object from a digital model; and “distribute” means to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute.

N.J. Stat 2C:39-9(l)(2).

130. Section (l)(2) is a speech crime. It outlaws the sharing of digital firearms information. With the NJAG as its prime enforcer, New Jersey’s Section (l)(2) speech crime outlaws constitutionally protected speech that Plaintiffs would engage in but for the NJAG’s enforcement threats. Calling New Jersey’s Section (l)(2) speech crime his favorite new “tool,” the NJAG aims to jail Defense Distributed, SAF, the CodeIsFreeSpeech.com publishers, and anyone else that dares to exercise their right to share digital firearms information.

*Appendix M*

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

132. New Jersey's Section (l)(2) speech crime criminalizes every conceivable mode of communication. No meaningful form of human interaction survives. The keystone "distribute" term means "to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not, and includes an agreement or attempt to distribute." N.J. Stat 2C:39-9(l)(2). The law also specifies that it outlaws speech delivered "by any means," including "the Internet" and including standard postal "mail." *Id.*

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

134. Information's actual use is irrelevant to New Jersey's Section (l)(2) speech crime. Section (l)(2) lets the NJAG jail speakers regardless of whether or not

*Appendix M*

any actual danger or harm exists. The crime occurs if the information “**may** be used” in a proscribed way. *Id.* (emphasis added). Critically, the new speech crime also lacks any meaningful intent requirement.

135. New Jersey’s Section (l)(2) speech crime was enacted for the purpose of discriminating against and censoring Defense Distributed and SAF’s members, in particular.

136. At the Section (l)(2) speech crime’s signing ceremony, New Jersey Governor Phil Murphy linked the bill to the cease-and-desist letter that the NJAG issued to Defense Distributed:

The Attorney General has been a national leader in this fight. Last June he issued ***a cease and desist letter to the companies that deal in ghost guns, saying explicitly that New Jersey is off limits to them.*** He joined likeminded attorneys general in successfully stopping in federal court the release of blueprints that would have allowed anyone with a computer and access to a 3D printer the ability to build their own, untraceable firearm. This law that we’re going to sign today further backs up his efforts, and I thank him for all that he has done. Thank you, Gurbir.

137. At the Section (l)(2) speech crime’s signing ceremony, the NJAG said that the bill was a “stronger tool[]” that he could use to “stop” Defense Distributed

*Appendix M*

founder “Cody Wilson” and “his supporters” from “release[ing] these codes online”:

[T]oday, we’re . . . closing dangerous loopholes in our existing laws - loopholes that some companies and individuals have tried to exploit. This summer, for example, ***a Texan named Cody Wilson*** promised to publicly release computer files that would let anyone, even terrorists, felons, and domestic abusers, create firearms using a 3D printer. . . . And so back in July, we successfully challenged Cody Wilson in court. We obtained legal orders that temporarily halted the release of these codes. ***But his supporters are not relenting, they’re still trying to release these codes online.*** And so it’s clear that we need stronger tools to stop them . . . tools like the legislation crafted by Senator Cryan and that Governor Murphy is signing today.

138. At the Section (l)(2) speech crime’s signing ceremony, the NJAG said that Senate Bill 2465 was “right on point” to “address[] printable guns or ghost guns” and that it was enacted “to stop the next Cody Wilson, to fight the ghost gun industry”:

[E]arlier this year, we went after some of the biggest players in this industry. We told them that they were wrong on the law. We told them that they were, in fact, breaking the law here in New Jersey by selling those weapons here.

*Appendix M*

And we told them to stop. And some of them complied. But others did not, and so those investigations are ongoing at this time.

But in both of those cases, ***bad actors were trying to take advantage of loopholes because no law squarely addressed printable guns or ghost guns.*** So we had to rely on other laws, like our public nuisance law or our assault weapons law, to fight back. Now don't get me wrong: Those laws are important and they're great tools, and they helped us stop the spread of these dangerous, untraceable weapons. ***But a law right on point strengthens law enforcement's hand even more.***

And so today, there is no question that printable guns and ghost guns are deadly, and selling them in New Jersey is illegal. And that's why I'm so proud to support Governor Murphy's efforts and the legislature's efforts to close those loopholes, ***to stop the next Cody Wilson, to fight the ghost gun industry,*** and to regulate the next dangerous gun models before they spread into our communities.

139. At the Senate Bill 2465 signing ceremony, the NJAG threatened to "come after" "anyone who is contemplating making a printable gun" and "the next ghost gun company":

*Appendix M*

And here's my message today *to anyone who is contemplating making a printable gun or to the next ghost gun company* trying to sell their dangerous weapons into New Jersey: Your products are unlawful and if you break our laws *we will come after you*. And to anyone else who thinks of trying to find other loopholes in our laws, especially to sell dangerous firearms, we're just as committed to *stopping each of you*.

140. A press release further touted the NJAG's enforcement threats.

141. Defense Distributed knew of the Section (l)(2) speech crime passage on the day that it became law and witnessed the signing ceremony. At that time, Defense Distributed reasonably feared that the NJAG would commence enforcement of the new law against Defense Distributed, its officers, its employees, and/or its agents at any moment.

142. Hence, the NJAG is illegally censoring three distinct categories of Defense Distributed and SAF's speech. If not for the NJAG's unconstitutional actions, Defense Distributed and SAF would be freely exercising their First Amendment rights. These losses amount to irreparable harm in every instance.

143. Category one is the free and open publication of digital firearms information on the internet to persons in New Jersey. This right has been exercised in the past by Defense Distributed. If not for the NJAG's ongoing

*Appendix M*

censorship, this right would be exercised in the future by Defense Distributed and SAF and its members.

144. Category two is the free and open publication of digital firearms information via the mail to persons in New Jersey. This right has been exercised in the past by Defense Distributed. If not for the NJAG's ongoing censorship, this right would be exercised in the future by Defense Distributed.

145. Category three is the free and open offering and advertisement of digital firearms information to persons in New Jersey. This right has been exercised in the past by Defense Distributed. If not for the NJAG's ongoing censorship, this right would be exercised in the future by Defense Distributed and SAF and its members.

146. The NJAG's criminal censorship covers all three categories of conduct. Internet publications are covered because Section 3(l)(2) makes it a crime to distribute the banned "digital instructions" "by any means, including the Internet." N.J. Stat 2C:39-9(l)(2). Mailed publications are covered because the speech crime also defines "distribute" to mean "mail." And offers and advertisements are covered because Section 3(l)(2) defines "distribute" to mean "offer" and "advertise." *Id.*

147. The NJAG's civil censorship covers all three categories of conduct as well. His cease-and-desist order said to "halt publication" of any and all so-called "printable gun computer files." The civil lawsuits sought prior restraints against all manner of "distributing"

*Appendix M*

“printable-gun computer files.” And the threats against internet service providers targeted all “computer files” with digital firearms information.

148. The NJAG’s censorship of *non-internet speech* is completely unique. Neither the federal government nor any other state government seeks to censor the non-internet speech of Defense Distributed and SAF that the NJAG does. The resulting censorship of constitutionally protected speech is uniquely attributable to the NJAG alone.

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

## **I. Irreparable Harm**

### **1. The State Department’s illegal conduct causes irreparable harm.**

150. In the past, the State Department’s illegal conduct irreparably harmed Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal speech protections.

*Appendix M*

151. In the past, the State Department's illegal conduct irreparably harmed Defense Distributed and SAF by causing Defense Distributed and SAF to refrain from publishing digital firearms information that Defense Distributed and SAF had a right to publish, by causing Defense Distributed and SAF to refrain from receiving digital firearms information that Defense Distributed and SAF had a right to receive, and by causing Defense Distributed and SAF to refrain from republishing digital firearms information that Defense Distributed had a right to republish.

152. In the past, the State Department's illegal conduct irreparably harmed Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of First Amendment rights.

153. In the past, the State Department's illegal conduct irreparably harmed Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of Second Amendment rights.

154. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal speech protections.

155. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by causing Defense Distributed and SAF to refrain from publishing digital firearms information that Defense

*Appendix M*

Distributed and SAF have a right to publish, by causing Defense Distributed and SAF to refrain from receiving digital firearms information that Defense Distributed and SAF have a right to receive, and by causing Defense Distributed and SAF to refrain from republishing digital firearms information that Defense Distributed and SAF have a right to republish.

156. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of First Amendment rights.

157. At present, the State Department's illegal conduct irreparably harms Defense Distributed and SAF by chilling Defense Distributed and SAF's exercise of Second Amendment rights.

158. Absent relief from this Court, the State Department will continue to engage in the illegal conduct that has caused Defense Distributed and SAF irreparable harm in the past and is causing Defense Distributed and SAF irreparable harm at present.

**2. The NJAG's illegal conduct causes irreparable harm.**

159. In the past, the NJAG's illegal conduct irreparably harmed Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal law.

*Appendix M*

160. In the past, the NJAG's illegal conduct irreparably harmed Defense Distributed and SAF by causing them to refrain from publishing digital firearms information they have a right to publish, by causing them to refrain from receiving digital firearms information they have a right to receive, by causing them to refrain from republish firearms information they have a right to republish, and by chilling their exercise of First Amendment rights.

161. At present, the NJAG's illegal conduct irreparably harms Defense Distributed and SAF by abridging rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and other federal law.

162. At present, the NJAG's illegal conduct irreparably harms Defense Distributed and SAF by causing them to refrain from publishing digital firearms information they have a right to publish, by causing them to refrain from receiving digital firearms information they have a right to receive, by causing them to refrain from republishing firearms information they have a right to republish, and by chilling their exercise of First Amendment rights.

163. Absent relief from this Court, the NJAG will continue to engage in the illegal conduct that has caused Defense Distributed and SAF irreparable harm in the past and is causing Defense Distributed and SAF irreparable harm at present.

*Appendix M*

164. Defense Distributed refrains from freely and openly publishing digital firearms information via the internet to persons in New Jersey for fear of being punished by the NJAG. Once that threat ceases, Defense Distributed will resume engaging in this speech with persons in New Jersey and SAF's members in New Jersey will resume receiving it, benefitting from it, and republishing it.

165. Defense Distributed refrains from freely and openly distributing digital firearms information via the mail to persons in New Jersey for fear of being punished by the NJAG. Once that threat ceases, Defense Distributed will resume engaging in this speech and SAF's members will resume receiving it, benefitting from it, and republishing it.

166. Defense Distributed refrains from freely and openly offering and advertising its mailed digital firearms information to persons in New Jersey for fear of being punished by the NJAG. Once that threat ceases, Defense Distributed will resume making offers and advertisements about its mailed publications to persons in New Jersey.

167. SAF members have received and republished Defense Distributed's digital firearms information in the past. But now they refrain from freely and openly receiving and republishing Defense Distributed's files for fear of being prosecuted by states like New Jersey. Once those threats cease, SAF's members will continue to freely and openly receive and republish information from Defense Distributed.

*Appendix M*

168. Because of the NJAG's evident intention of enforcing Section (~)(2) against Defense Distributed and SAF, Defense Distributed and SAF have refrained from engaging in speech that Constitution and other federal law guarantees their right to engage in.

169. If Defense Distributed publishes its digital firearms information via the internet by making its computer files freely and openly available for download on a website, the NJAG will enforce New Jersey's Section (~)(2) speech crime against Defense Distributed. If SAF members publish or republish Defense Distributed's computer files via the internet by making them available for download on a website, the NJAG will enforce New Jersey's Section (~)(2) speech crime against them.

170. If Defense Distributed publishes its digital firearms information via the mail by making its computer files available for shipment on physical storage devices to persons in New Jersey, the NJAG will enforce New Jersey's Section (~)(2) speech crime against Defense Distributed. Likewise, if SAF members make Defense Distributed's computer files available for shipment on physical storage devices to persons in New Jersey, the NJAG will enforce New Jersey's Section (~)(2) speech crime against them.

171. If Defense Distributed engages in advertising and offering activities regarding its files to persons in New Jersey, the NJAG will enforce New Jersey's Section (~)(2) speech crime against Defense Distributed. Likewise, if SAF members engage in advertising and offering

*Appendix M*

activities regarding Defense Distributed's files to persons in New Jersey, the NJAG will enforce New Jersey's Section (~)(2) speech crime against them.

**VI. Former Causes of Action Against the State Department**

172. Although Plaintiffs maintain that their claims against the NJAG and State Department are equally viable and should be contained in the same action, the Court's order of April 26, 2023, requires the Plaintiffs to file an amended complaint removing allegations or claims against State Department defendants. So to comply with that order, the instant complaint no longer sues the State Department; but since the facts about the State Department's wrongdoing matter to the case against the NJAG, they continue to be pleaded for that purpose.

**VII. Causes of Action Against The NJAG.**

173. The NJAG denies Defense Distributed's right to publish digital firearms information in the form of computer files. He denies Defense Distributed's right to do so via the internet; he denies Defense Distributed's right to do so via the mail; he denies Defense Distributed's right to do so via brick-and-mortar public libraries; and he denies Defense Distributed's right to do so via any other means of publication. He also denies Defense Distributed's right to conduct secondary activities that accompany all of these publication methods, such as advertising. In each of these respects, the NJAG acts knowingly, intentionally, and selectively. Many people engage in the activities for

*Appendix M*

which Defense Distributed and SAF are being persecuted. But the NJAG does not target them as he targets Defense Distributed and SAF.

174. The NJAG's conduct subjects Defense Distributed and SAF to an unconstitutional abridgement of First Amendment freedoms; an unconstitutional infringement of Second Amendment rights; an unconstitutional violation of the right to equal protection of the laws; an unconstitutional deprivation of liberty and property without due process of law; an unconstitutional violation of the Commerce Clause, regulation by way of state laws that are preempted by federal law, and tortious interference with valid legal contracts.

**A. Count One: 42 U.S.C. § 1983—Freedom of Speech and of the Press**

175. Defense Distributed & SAF incorporate the preceding paragraphs.

176. The First Amendment of the Constitution of the United States forbids government actions abridging the freedom of speech or of the press. It applies to the NJAG by virtue of the Fourteenth Amendment of the Constitution of the United States.

177. The NJAG violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of First Amendment freedoms.

*Appendix M*

178. The NJAG violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of First Amendment freedoms.

179. The NJAG's conduct violates the First Amendment doctrine regarding prior restraints. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The NJAG's conduct constitutes a prior restraint of expression; as such, it is an unconstitutional abridgement of First Amendment's freedoms because The NJAG cannot carry the heavy burden of justifying a prior restraint and because the prior restraint does not operate under sufficient judicial superintendence.

180. The NJAG's conduct violates the First Amendment doctrine regarding content based speech restrictions. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). The NJAG's conduct imposes content-based speech restrictions; as such, the restrictions are an unconstitutional abridgement of First Amendment's freedoms because they do not serve a compelling governmental interest and are not narrowly drawn to serve any such interest.

181. The NJAG's conduct violates the First Amendment doctrine regarding content neutral speech restrictions. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Even if the NJAG's conduct is deemed to impose content-neutral speech restrictions, it is an unconstitutional abridgement of First Amendment's freedoms because it

*Appendix M*

does not serve a significant governmental interest and is not narrowly drawn to serve any such interest.

182. The NJAG's conduct violates the First Amendment doctrine regarding overbreadth. *See, e.g., City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987). The NJAG's conduct forbids a substantial amount of constitutionally protected speech and is not narrowly tailored to prohibit only constitutionally unprotected speech; as such, it is an unconstitutional abridgement of First Amendment's freedoms.

183. In each of these respects, The NJAG's conduct results in an unconstitutional abridgement of First Amendment freedoms both facially and as applied to these circumstances.

184. The NJAG's conduct proximately caused damages to Defense Distributed and SAF, to the persons with whom Defense Distributed and SAF have communicated, to the persons who desire to communicate with Defense Distributed and SAF, and to other persons wishing to engage in similar communications. The damages include, but are not limited to, the loss of First Amendment rights, the chilling effect on conduct protected by the First Amendment, and the substantial time and resources expended in defense of these rights.

185. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

*Appendix M***B. Count Two: 42 U.S.C. § 1983—Right to Keep and Bear Arms**

186. Defense Distributed & SAF incorporate the preceding paragraphs.

187. The Second Amendment of the Constitution of the United States forbids laws abridging the individual right to keep and bear Arms. It applies to the NJAG in his official capacity by virtue of the Fourteenth Amendment of the Constitution of the United States.

188. The NJAG violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of Second Amendment rights.

189. The NJAG additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to an unconstitutional abridgement of Second Amendment rights.

190. The NJAG's conduct violates the individual Second Amendment right to keep and bear Arms. *See District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010). The NJAG's conduct infringes the individual right to make and acquire Arms, which is part and parcel of the right to keep and bear Arms; as such, it is an unconstitutional abridgement of Second Amendment rights.

*Appendix M*

191. In each of these respects, The NJAG's conduct constitutes an unconstitutional abridgement of Second Amendment rights both facially and as applied to these circumstances.

192. The NJAG's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of Second Amendment rights, the chilling effect on conduct protected by the Second Amendment, and the substantial time and resources expended in defense of these rights.

193. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

**C. Count Three: 42 U.S.C. § 1983—Equal Protection**

194. Defense Distributed & SAF incorporate the preceding paragraphs.

195. The Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States forbids the several States from denying to any person within their jurisdictions the equal protection of the laws. It applies to the NJAG in his official capacity.

196. The NJAG violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed

*Appendix M*

and SAF to an unconstitutional violation of the Equal Protection Clause.

197. The NJAG additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to an unconstitutional violation of the Equal Protection Clause.

198. The NJAG's conduct violates the Equal Protection Clause's doctrine regarding selective enforcement. *See, e.g., Whren v. United States*, 517 U.S. 806 (1996). The NJAG took action against Defense Distributed-but not similarly situated persons engaged in publication of the Defense Distributed I Files-because the NJAG disagrees with the content of Defense Distributed's constitutionally protected speech and because the NJAG dislikes the persons involved in the speech; as such, the NJAG's conduct violates Defense Distributed and SAF's right to the equal protection of the laws.

199. In each of these respects, the NJAG's conduct constitutes an unconstitutional violation of the Equal Protection Clause both facially and as applied to these circumstances.

200. The NJAG's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, Defense Distributed and SAF's loss of Equal Protection Clause rights and the substantial time and resources expended in defense these rights.

*Appendix M*

201. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

**D. Count Four: 42 U.S.C. § 1983—Due Process**

202. Defense Distributed & SAF incorporate the preceding paragraphs.

203. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States forbids the several States from depriving any person of life, liberty, or property without due process of law. It applies to the NJAG in his official capacity.

204. The NJAG violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to a deprivation of liberty and property without due process of law.

205. The NJAG additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to a deprivation of liberty and property without due process of law.

206. The NJAG's conduct violates the Due Process Clause doctrine regarding vagueness. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012). The NJAG's conduct forbids expression without giving fair notice of what is forbidden; as such, it is an unconstitutional deprivation of liberty and property without due process of law.

*Appendix M*

207. The NJAG's conduct violates the Due Process Clause doctrine regarding overbreadth. *See, e.g., Coates v. City of Cincinnati*, 402 U.S. 611 (1971). The NJAG's conduct forbids a substantial amount of constitutionally protected speech; as such, it is an unconstitutional deprivation of liberty and property without due process of law.

208. The NJAG's conduct violates the Due Process Clause doctrine regarding deprivations of property. *See, e.g., Matthews v. Eldridge*, 424 U.S. 319 (1976). The NJAG's conduct deprives Defense Distributed and SAF of a license issued by the Secretary of State pursuant to federal law, and does so without supplying adequate pre-deprivation notice and an opportunity to be heard; as such, it is an unconstitutional deprivation of property without due process of law.

209. In each of these respects, The NJAG's conduct constitutes an unconstitutional abridgement of Due Process Clause rights both facially and as applied to these circumstances.

210. The NJAG's conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of Defense Distributed and SAF's Due Process Clause rights and the substantial time and resources expended in defense these rights.

211. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense

*Appendix M*

Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

**E. Count Five: 42 U.S.C. § 1983—Commerce Clause**

212. Defense Distributed & SAF incorporate the preceding paragraphs.

213. The Commerce Clause of Article I, Section 8 of the Constitution of the United States imposes a negative command, known as the dormant Commerce Clause, that limits the authority of the several States to enact laws burdening interstate commerce. It applies to the NJAG in his official capacity.

214. The NJAG violated 42 U.S.C. § 1983 by acting, under color of state law, to subject Defense Distributed and SAF to a deprivation of the right to be free of commercial restraints that violate the dormant Commerce Clause.

215. The NJAG additionally violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject Defense Distributed and SAF to a deprivation of the right to be free of commercial restraints that violate the dormant Commerce Clause.

216. The NJAG's conduct violates the dormant Commerce Clause doctrine regarding laws that directly regulate interstate commerce. *See, e.g., Granholm v. Heald*, 125 S. Ct. 1885 (2005). The NJAG's conduct directly regulates interstate commerce by projecting

*Appendix M*

New Jersey law into other states. The NJAG's conduct does not serve a compelling governmental interest. And The NJAG's conduct is not the least restrictive means of accomplishing any such interest. As such, it violates the Commerce Clause.

217. The NJAG's conduct violates the dormant Commerce Clause doctrine regarding laws that discriminate against interstate commerce. *See, e.g., Granholm*, 125 S. Ct. 1885. The NJAG's conduct discriminates against interstate commerce on purpose, on its face, and in effect. The NJAG's conduct does not serve a compelling governmental interest. And the NJAG's conduct is not the least restrictive means of accomplishing any such interest. As such, it violates the Commerce Clause.

218. The NJAG's conduct violates the dormant Commerce Clause doctrine regarding all laws that implicate interstate commerce. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The NJAG's conduct imposes burdens on interstate commerce that are clearly excessive in relation to putative local benefits; as such, it violates the Commerce Clause.

219. In each of these respects, The NJAG's conduct constitutes an unconstitutional abridgement of Due Process Clause rights both facially and as applied to these circumstances.

220. The NJAG's conduct proximately caused damages to Defense Distributed and SAF, the persons

*Appendix M*

they communicate with, and others. The damages include, but are not limited to, the loss of Dormant Commerce Clause rights in the past and the substantial time and resources expended in defense these rights.

221. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense Distributed and SAF declaratory relief, injunctive relief, and attorney fees and costs.

**F. Count Six: 42 U.S.C. § 1983—Arms Export Control Act**

222. Defense Distributed & SAF incorporate the preceding paragraphs.

223. The Supremacy Clause of the Constitution of the United States provides that the Constitution of the United States and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land. It applies to the NJAG by virtue of Article VI of the Constitution of the United States.

224. The federal government has exclusive authority to administer and enforce the provisions of the AECA and ITAR. Pursuant to that authority, the federal government entered into the Settlement Agreement with Plaintiffs and granted Plaintiffs a license to publish the Defense Distributed I Files.

225. The NJAG violated the AECA and ITAR by acting, under color of state law, to regulate conduct that

*Appendix M*

the federal government has expressly authorized pursuant to its authority under the AECA and ITAR. The NJAG therefore violated 42 U. S.C. § 1983 by acting, under color of state law, to regulate Defense Distributed and SAF pursuant to state laws that are preempted by federal law. “[I]f an individual claims federal law immunizes [the plaintiff] from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.” *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

226. In this respect, the NJAG’s conduct is preempted both facially and as applied to these circumstances.

227. The NJAG’s conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of immunity from preempted state regulation in the past and the substantial time and resources expended in defense these rights.

228. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense Distributed and SAF declaratory relief and injunctive relief, and attorney fees and costs.

**G. Count Seven: 42 U.S.C. § 1983—Communications Decency Act**

229. Defense Distributed & SAF incorporate the preceding paragraphs.

*Appendix M*

230. The Communications Decency Act, 47 U.S.C. § 230, immunizes service providers for information originating with a third-party user of the service. Defense Distributed is a provider and user of an “interactive computer service” within the meaning of 47 U.S.C. § 230 because it operates an interactive online service at DEFCAD.com.

231. Senate Bill 2465 violates Defense Distributed’s rights under 47 U.S.C. § 230(c)(1) because it treats them, providers of interactive computer services, as publishers or speakers of information provided by another information content provider. Specifically, Senate Bill 2465 treats Defense Distributed as a publishers or speaker because it makes it a crime to “distribute” the “information” at issue regardless of whether the information was “provided by another information content provider.”

232. Senate Bill 2465 is a “State . . . law that is inconsistent with” 230, in direct violation of 47 U.S.C. § 230(e)(3).

233. In this respect, the NJAG’s conduct is preempted both facially and as applied to these circumstances.

234. The NJAG’s conduct proximately caused damages to Defense Distributed and SAF, the persons they communicate with, and others. The damages include, but are not limited to, the loss of immunity from preempted state regulation in the past and the substantial time and resources expended in defense these rights.

*Appendix M*

235. Defense Distributed and SAF are therefore entitled to a judgment against the NJAG awarding Defense Distributed and SAF declaratory relief and injunctive relief, and attorney fees and costs.

**H. Count Eight: Tortious Interference with the Settlement Agreement**

236. Defense Distributed & SAF incorporate the preceding paragraphs.

237. The Settlement Agreement is an existing, valid contract between the Defense Distributed I Plaintiffs and the State Department.

238. The NJAG committed the tort of intentional interference with an existing contract by willfully and intentionally engaging in conduct that made the State Department's performance of the Settlement Agreement burdensome, more difficult, and of less or no value to the Defense Distributed I Plaintiffs. *See, e.g.*, Restatement (Second) of Torts § 766 (1979); *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000).

239. The NJAG's conduct proximately caused Defense Distributed to suffer substantial actual damages in excess of \$75,000 per year.

240. Plaintiff Defense Distributed is therefore entitled to a judgment against the NJAG awarding declaratory relief, injunctive relief, and attorney fees and costs.

*Appendix M***I. Count Nine: Tortious Interference with Existing Contracts**

241. Defense Distributed & SAF incorporate the preceding paragraphs.

242. Defense Distributed and DreamHost had an existing, valid contract for the provision of internet security services regarding Defense Distributed's website.

243. The NJAG committed the tort of intentional interference with an existing contract by willfully and intentionally engaging in conduct that made the performance of Defense Distributed's contract with DreamHost burdensome, more difficult, and of less or no value to Defense Distributed. *See, e.g.*, Restatement (Second) of Torts § 766 (1979); *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000). The NJAG's conduct proximately caused Defense Distributed to suffer substantial actual damages in excess of \$75,000 per year.

244. Defense Distributed and Cloudflare, Inc. have an existing, valid contract for the provision of internet security services regarding Defense Distributed's website.

245. The NJAG committed the tort of intentional interference with an existing contract by willfully and intentionally engaging in conduct that made the performance of Defense Distributed's contract with Cloudflare, Inc. burdensome, more difficult, and of less or no value to Defense Distributed. *See, e.g.*, Restatement

*Appendix M*

(Second) of Torts § 766 (1979); *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000). The NJAG's conduct proximately caused Defense Distributed to suffer substantial actual damages substantial actual damages in excess of \$75,000 per year.

246. Defense Distributed is therefore entitled to a judgment against the NJAG awarding declaratory relief, injunctive relief, and attorney fees and costs.

**VIII. Requests for Relief**

247. Defense Distributed and SAF request a judgment in their favor as to all claims against the NJAG awarding them all relief they are entitled to.

248. Defense Distributed and SAF request a judgment against the NJAG declaring that The NJAG unconstitutionally abridged Defense Distributed and SAF's First Amendment freedoms. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

249. Defense Distributed and SAF request a judgment against the NJAG declaring that the NJAG unconstitutionally infringed Defense Distributed and SAF's Second Amendment rights. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both

*Appendix M*

on a preliminary basis while this action is pending and permanently.

250. Defense Distributed and SAF request a judgment against the NJAG declaring that the NJAG unconstitutionally denied Defense Distributed and SAF the equal protection of the laws. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

251. Defense Distributed and SAF request a judgment against the NJAG declaring that the NJAG unconstitutionally subjected Defense Distributed and SAF to a deprivation of liberty and property without due process of law. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

252. Defense Distributed and SAF request a judgment against the NJAG declaring that the NJAG unconstitutionally violated Defense Distributed and SAF's dormant Commerce Clause rights. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

253. Defense Distributed and SAF request a judgment against the NJAG declaring that federal law

*Appendix M*

preempts and immunizes Defense Distributed and SAF from the NJAG's civil and criminal censorship. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

254. Defense Distributed and SAF request a judgment against the NJAG declaring that the NJAG's conduct constitutes tortious interference with the Settlement Agreement. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

255. Defense Distributed and SAF request a judgment against the NJAG declaring that the NJAG's conduct constitutes tortious interference with the contracts between Defense Distributed and DreamHost and Cloudflare, Inc. Defense Distributed & SAF request an injunction protecting Defense Distributed & SAF from such unlawful conduct in the future—both on a preliminary basis while this action is pending and permanently.

256. Defense Distributed and SAF request an award against the NJAG of costs, including reasonable attorney fees and costs, pursuant to 42 U.S.C. § 1988.

393a

*Appendix M*

257. Defense Distributed and SAF request any other relief against the NJAG to which they are entitled.

Date: May 3, 2023

Respectfully submitted,

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**APPENDIX N — MEMORANDUM OPINION  
OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY,  
FILED JUNE 14, 2023**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Civil Action No. 21-9867 (MAS) (TJB)

DEFENSE DISTRIBUTED *et al.*,

*Plaintiffs,*

v.

MATTHEW J. PLATKIN, ATTORNEY GENERAL  
OF THE STATE OF NEW JERSEY,

*Defendant.*

**MEMORANDUM OPINION**

SHIPP, District Judge

This matter comes before the Court upon Plaintiffs Defense Distributed and Second Amendment Foundation, Inc.’s (collectively, “Plaintiffs”) Motion to Transfer or Stay. (ECF No. 176.) Defendant Matthew J. Platkin, the Attorney General of New Jersey (“Defendant”) opposed (ECF No. 177), and Plaintiffs replied (ECF No. 178). The Court has carefully considered the parties’ submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons below, the Court denies Plaintiffs’ Motion to Transfer or Stay.

*Appendix N***I. BACKGROUND**

The Court adopts the factual background outlined in its First Transfer Opinion dated July 27, 2022 (First Transfer Op., ECF No. \*58<sup>1</sup>) and its Second Transfer Opinion dated October 25, 2022 (Second Transfer Op., ECF No. \*66). This is the fourth time Plaintiffs have asked the Court to transfer this case to the Western District of Texas, whether directly or through motions to reconsider. (See ECF Nos. \*56, \*61, \*64, 176.) Plaintiffs' efforts revolve around a writ of mandamus issued by the Fifth Circuit. (See ECF No. \*48.) Specifically, the Fifth Circuit's writ in *Defense Distributed v. Bruck* directed a Texas district court to "request" that the District of New Jersey return this case to Texas nearly a year after it was transferred and consolidated with another action in this District.<sup>2</sup> 30 F.4th 414, 436-37 (5th Cir. 2022).

In June 2022, Plaintiffs first moved to transfer this matter. (Pls.' First Transfer Mot., ECF No. \*56.) In July 2022, for the reasons outlined in a 36-page opinion, Chief Judge Wolfson denied Plaintiffs' transfer request. (See

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1. ECF numbers preceded by an asterisk refer to filings in the former lead-case, No. 19-4753, which has since been closed. (See ECF No. 175.)

2. As previously mentioned, the actions, Civ. No. 21-9867 and Civ. No. 19-4753, have since been deconsolidated after Plaintiffs voluntarily dismissed Civ. No. 19-4753. (ECF Nos. \*60, 175.) This deconsolidation of actions, however, has no bearing on whether this Court will find transfer more or less appropriate for the reasons articulated in Chief Judge Wolfson's Second Transfer Opinion. (See *generally* Second Transfer Op. 4-7.)

*Appendix N*

First Transfer Op.) The same day the denial was issued, Plaintiffs voluntarily dismissed their Complaint in Civ. No. 19-4753 and filed a Motion for Reconsideration of their denied transfer request. (Pls.' Recons. Mot., ECF No. \*60-61.) While the reconsideration motion was still pending, Plaintiffs filed a Second Motion to Transfer this matter to the Western District of Texas. (Pls.' Second Transfer Mot., ECF No. \*64.) In October 2022, Chief Judge Wolfson denied Plaintiffs' Motion for Reconsideration and Second Motion to Transfer. (Second Transfer Op.)

On January 23, 2023, after two Motions to Transfer and one Motion to Reconsider the denial of a transfer, Plaintiffs filed the instant Motion, labeled a Motion to Transfer, but substantively a Motion to Reconsider Chief Judge Wolfson's Second Transfer Opinion. (Pls.' Third Transfer Mot., ECF No. 176; *see* Pls.' Moving Br. 4, ECF No. 176-1 (asking the Court to "reconsider the prior transfer decisions").) It appears Plaintiffs' only reason for so moving is because a new judge has been assigned to the case. (Pls.' Moving Br. 4 (asserting that "in light of the case's reassignment, the Court should now reconsider the prior transfer decisions").)

## II. LEGAL STANDARD

Reconsideration under Local Civil Rule 7.1 is "an extraordinary remedy" that is rarely granted. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 215 F. Supp. 2d 482, 507 (D.N.J. 2002) (citations omitted). It requires the moving party to set forth the factual matters or controlling legal authorities it believes the Court overlooked when

*Appendix N*

rendering its decision. *See* L. Civ. R. 7.1(i). To succeed on a motion for reconsideration, a movant must show at least one of three factors: “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted [or denied] the motion [at issue]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citing *N. River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)).

A motion for reconsideration is not an opportunity to “ask the court to rethink what it ha[s] already thought through.” *Interfaith Cmty. Org.*, 215 F. Supp. 2d at 507 (alteration in original) (quoting *Oritani Sav. & Loan Ass’n v. Fid. & Deposit Co.*, 744 F. Supp. 1311, 1314 (D.N.J. 1990)). “Rather, the rule permits a reconsideration only when ‘dispositive factual matters or controlling decisions of law’ were presented to the court but were overlooked.” *Id.* (quoting *Khair v. Campbell Soup Co.*, 893 F. Supp. 316, 337 (D.N.J. 1995)).

### III. DISCUSSION

First, this Court must acknowledge the unprecedented nature of this case. As Chief Judge Wolfson recognized in the First Transfer Opinion, “Plaintiffs do not cite a single case in which a district court requested another district court to retransfer an action, let alone a case where such a request was granted.” (First Transfer Op. 33 n.25.) This Court remains unaware of any such case, and it remains notable that neither Plaintiffs nor the

*Appendix N*

*Bruck* majority opinion “cite[d] any mandamus case, *ever*, reversing a grant of a joint severance and transfer motion.” (*Id.* (emphasis in original) (citing *Bruck*, 30 F.4th at 438 (Higginson, J., dissenting))).

Second, and importantly in the instant matter, the Court doubts Plaintiffs’ propriety in bringing the present motion, as this Court’s stance on transferring this case was made clear through two different transfer motion denials and one denial of reconsideration. (*See* First Transfer Op. 36; Second Transfer Op. 11.) Plaintiffs had 84 days (12 weeks) to file a writ of mandamus with the Third Circuit between the filing of the Second Transfer Opinion and the reassignment of this case they chose not to seek such relief.<sup>3</sup> (*See generally* Second Transfer Op.) Instead, Plaintiffs now seek an impermissible second “bite at the apple” in the district court simply because the case has been reassigned.<sup>4</sup> *Compare Tischio v. Bontex*,

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3. Importantly, this fact is also a key reason the Court will not grant Plaintiffs a stay in this matter so that they can seek a writ of mandamus with the Third Circuit. *Infra* Footnote 8. Plaintiffs have already had ample time to seek such writ.

4. Plaintiffs contend that they are *required* to seek reconsideration of Chief Judge Wolfson’s decisions before petitioning the Third Circuit for a writ of mandamus because otherwise the Third Circuit will be unable to consider the writ with a new judge overseeing the case. (Pls.’ Moving Brief 4.) In making this argument, Plaintiffs rely on *In re Sch. Asbestos Litigation*. 977 F.2d 764 (3d Cir. 1992). There, the Third Circuit issued a writ to disqualify the presiding district judge and reassign the case to a new judge due to a conflict of interest. *In re Sch. Asbestos Litig.*, 977 F.2d at 798. The Third Circuit did not, however, issue a writ to the then-unknown newly assigned judge regarding future consideration of erroneously

*Appendix N*

*Inc.*, 16 F. Supp. 2d 511, 532 (D.N.J. 1998) (stating that reconsideration motions should not give the parties “an opportunity for a second bite at the apple”), *with* Pls.’ Moving Br. 4 (asserting that “in light of the case’s reassignment, the Court should now reconsider the prior transfer decisions,” but citing no changes in the law, new evidence, or overlooked matters). While the Court finds that it would be appropriate to deny Plaintiffs’ transfer request as an impermissible second attempt for reconsideration of Chief Judge Wolfson’s Second Transfer Opinion, out of an abundance of caution, the Court will consider the merits of Plaintiffs’ motion.

When a case in the Third Circuit is reassigned and a newly-assigned judge must reconsider an opinion authored by his or her predecessor, the new judge should apply the same standard they would have if they themselves had written the opinion being reconsidered. *See Onishi v. Chapleau*, No. 20-13001, 2022 U.S. Dist. LEXIS 59814, 2022 WL 980620 (D.N.J. Mar. 31, 2022) (applying traditional reconsideration standard after case had been reassigned); *Essex v. Atena, Inc.*, No. 17-13663, 2020 U.S. Dist. LEXIS 69151, 2020 WL 13560099 (D.N.J. Apr. 20, 2020) (using traditional reconsideration standard for a motion filed after movant’s first motion for reconsideration was denied and the case was subsequently reassigned). As

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denied motions because such writ would be premature before a new judge was assigned to the case. *Id.* at 771, 795. Here, such refusal to consider Plaintiffs’ writ is unlikely because unlike *In re School Asbestos Litigation*, the newly assigned judge is not unknown. Moreover, this case does not involve a judge who must be disqualified for a conflict of interest.

*Appendix N*

previously mentioned, for a plaintiff to succeed on a motion for reconsideration, they must show at least one of three factors: “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted [or denied] the motion [at issue]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Café*, 176 F.3d at 677 (citation omitted).

Plaintiffs do not identify any intervening change in the controlling law or any new evidence. (*See generally* Pls.’ Moving Br.) Instead, they assert only that Chief Judge Wolfson made a clear error of law in denying Plaintiffs’ Motion to Transfer.<sup>5</sup> (*Id.* at 2, 4.) Specifically, Plaintiffs argue that Chief Judge Wolfson should have granted transfer because: (1) “*Bruck* is the law of the case;” (2) “*Bruck* was rightly decided;” and (3) “apart from whether or not *Bruck* was rightly decided, comity principles compel” this Court to adhere to that decision. (Pls.’ Moving Br. 2.) Upon review of Chief Judge Wolfson’s decisions, however, the Court finds she made no clear error of law in denying Plaintiffs’ Motions to Transfer.

First, it is important to note that regardless of whether *Bruck* was rightly decided, it is not binding on this Court. The Fifth Circuit reiterated a similar point in its most recent opinion regarding Plaintiffs’ efforts

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5. Notably, Plaintiffs do not explain in detail how they allege Chief Judge Wolfson errs. Plaintiffs assert that “[t]o perform the requested reconsideration . . . the Court need not receive any additional briefing. Plaintiffs’ prior filings supply all of the reasons to grant the transfer requests.” (Pls.’ Moving Br. 5.)

*Appendix N*

to transfer this case, stating that “the issuance of the mandamus [in *Bruck*] merely ordered that the district court *request* the return of the case from New Jersey nothing more.” *Def. Distributed v. Platkin*, 55 F.4th 486, 492 (5th Cir. 2022).<sup>6</sup> As such, Plaintiffs’ argument that “*Bruck* is the law of the case” is rejected, and therefore, whether *Bruck* was rightly decided is irrelevant to this Court’s analysis.<sup>7</sup> (Pls.’ Moving Br. 2.) Accordingly, Chief Judge Wol Ison’s decision denying transfer on grounds that *Bruck* was rightly decided and that it was the law of this case was not a clear error of law.

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6. The Fifth Circuit also noted that “[t]here was a solution to the jurisdictional morass in which Plaintiffs found themselves: They could have moved for a stay of the district court’s transfer order before the case was transferred.” *Platkin*, 55 F.4th at 492. Yet, Plaintiffs took no such action, and even when the case was transferred to New Jersey, Plaintiffs failed to oppose Defendant’s motion to consolidate this matter. That consolidation helped tip the balance further toward denying transfer back to Texas. (*See* First Transfer Op. 8, 30.)

7. In fact, Third Circuit law does not favor the transfer of this case. In her First Transfer Opinion, Chief Judge Wolfson engaged in an extensive review of the private and public interest factors that the Court must weigh when deciding whether to transfer a case out of the District of New Jersey. (First Transfer Op. 21-33.) Upon analyzing Plaintiffs’ transfer request under Third Circuit law (and considering the Fifth Circuit’s opinion granting mandamus), Chief Judge Wolfson found that the relevant factors militated against transfer. (*Id.* at 26; Second Transfer Op. 7 (stating that the *Jumara* factors, “such as this Court’s familiarity with New Jersey law, New Jersey’s interest in the litigation, and lingering disputes regarding personal jurisdiction over the NJAG in the Texas District Court . . . weigh heavily against transfer.”).)

*Appendix N*

Second, regarding Plaintiffs’ comity doctrine argument, Chief Judge Wolfson reviewed an extensive list of the cases cited by Plaintiffs in contending that comity requires this Court to transfer this case to Texas and found that all such cases involved a prior *binding* order from another court. (First Transfer Order 33-35.) As just established, this case does not involve any binding order from another court. (*Id.* at 35.) In the Second Transfer Opinion, Chief Judge Wolfson again addressed comity, correctly noting that “this Court is not obligated to apply nonbinding out-of-circuit law in this case, and the doctrine of comity is not a valid means to achieve such a result.” (*Id.* at 9.) The Fifth Circuit itself recently noted that although it respects other federal courts, it “cannot embrace an argument [for comity] that would, in effect, allow the decision of an out-of-circuit district court to impel [it] toward ‘extraordinary’ relief that would be otherwise inappropriate.” *All. for Hippocratic Med. v. FDA*, No. 23-10362, 2023 U.S. App. LEXIS 8898, 2023 WL 2913725, at \*19 (5th Cir. Apr. 12, 2023). For these reasons, Plaintiffs’ contention that comity compels this Court to transfer this matter is rejected. Chief Judge Wolfson did not err in refusing to transfer this matter on comity grounds.

In sum, Plaintiffs do not present any changes in the law, new evidence, or persuasive arguments as to how Chief Judge Wolfson committed clear legal error in refusing Plaintiffs’ transfer request. As such, Plaintiffs’ motion to reconsider Chief Judge Wolfson’s Second Transfer Opinion is denied.

*Appendix N***IV. CONCLUSION**

For the foregoing reasons, and for the reasons stated in the First and Second Transfer Orders (ECF Nos. \*58, \*66), the Court denies Plaintiffs' Motion for Transfer or Stay.<sup>8</sup> The Court will enter an order consistent with this Memorandum Opinion.

s/ Michael A. Shipp  
Michael A. Shipp  
United States District Judge

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8. To warrant a stay of this action pending Plaintiffs' hypothetical petition for mandamus, Plaintiffs would need to show they meet the four-factor test for such stays. *See In re Citizens Bank, NA.*, 15 F.4th 607, 615 (3d Cir. 2021) (articulating test as (1) whether movant is "likely to obtain mandamus relief", (2) whether movant will suffer irreparable harm, (3) "whether a stay would substantially injure" the nonmovant, and (4) the public interest). Plaintiffs provided one sentence addressing these factors; the Court is unpersuaded. (Pls.' Moving Br. 5.) As described above, Chief Judge Wolfson's well-reasoned opinion does not indicate that Plaintiffs are likely to succeed. Additionally, Plaintiffs cite no caselaw in support of their contention that they will suffer irreparable harm. The only case they cite, *In re Citizens Bank*, involved harmful evidence set to be displayed at trial in a matter of weeks. 15 F.4th at 622. No such harm is alleged here. Instead, Plaintiffs' decision not to seek a petition for mandamus in the three months prior to this case's reassignment indicates that any harm they may face is not, in fact, immediate. Since "[O]le first two factors . . . are the most critical" and Plaintiffs have not carried their burden of proof on either, this Court denies their motion to stay. *Id.* at 616.

**APPENDIX O — ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT  
OF NEW JERSEY, FILED JUNE 14, 2023**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Civil Action No. 21-9867 (MAS) (TJB)

DEFENSE DISTRIBUTED *et al.*,

*Plaintiffs,*

v.

MATTHEW J. PLATKIN, ATTORNEY GENERAL  
OF THE STATE OF NEW JERSEY,

*Defendant.*

**ORDER**

This matter comes before the Court upon Plaintiffs Defense Distributed and Second Amendment Foundation, Inc.'s (collectively, "Plaintiffs") Motion to Transfer or Stay. (ECF No. 176.) Defendant Matthew J. Platkin, the Attorney General of New Jersey ("Defendant") opposed (ECF No. 177), and Plaintiffs replied (ECF No. 178). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1. Accordingly, for the reasons set forth in the accompanying Memorandum Opinion, and other good cause shown,

405a

*Appendix O*

**IT IS**, on this 14th day of June 2023, **ORDERED** as follows:

1. Plaintiffs' Motion to Transfer or Stay (ECF No. 176) is **DENIED**.

/s/ Michael A. Shipp  
**MICHAEL A. SHIPP**  
**UNITED STATES DISTRICT JUDGE**

406a

**APPENDIX P — TEXT ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT OF  
NEW JERSEY [LIVE], DATED NOVEMBER 2, 2023**

**Subject:** Activity in Case 3:21-cv-09867-MAS-TJB  
DEFENSE DISTRIBUTED et al v. GREWAL  
et al Order  
**Date:** Thursday, November 2, 2023 at 9:24:58 AM  
Central Daylight Time  
**From:** njdefiling@njd.uscourts.gov  
**To:** njdefiling@njd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended. \*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of New Jersey [LIVE]

**Notice of Electronic Filing**

The following transaction was entered on 11/2/2023 at 10:24 AM EDT and filed on 11/2/2023

407a

*Appendix P*

**Case Name:** DEFENSE DISTRIBUTED et al v.  
GREWAL et al

**Case Number:** 3:21-cv-09867-MAS-TJB

**Filer:**

**WARNING: CASE CLOSED on 09/29/2023**

**Document Number:** 190(No document attached)

**Docket Text:**

TEXT ORDER: This matter comes before the Court upon review of its docket. On September 29, 2023, the Court entered an Order directing Plaintiffs to file a Fourth Amended Complaint within 30 days (ECF No. [189]). No Fourth Amended Complaint was timely filed. Out of an abundance of caution, the Court will grant Plaintiffs fourteen additional days from the date of this Text Order to file a Fourth Amended Complaint. If Plaintiffs fail to do so, the remaining counts in Plaintiffs' Third Amended Complaint will be dismissed with prejudice. So Ordered by Judge Michael A. Shipp on 11/2/2023. (jdb)

**3:21-cv-09867-MAS-TJB Notice has been electronically mailed to:**

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408a

*Appendix P*

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**3:21-cv-09867-MAS-TJB Notice has been sent by  
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