Nos. 19-1729 & 19-3182

In the United States Court of Appeals
for the Third Circuit

Defense Distributed, Second Amendment Foundation, Inc., Firearms Policy Coalition, Inc., Firearms Policy Foundation, Calguns Foundation, California Association of Federal Firearms Licensees, Inc., and Brandon Combs,

Plaintiffs - Appellants,

v.

Gurbir Grewal, Attorney General of the State of New Jersey,

Defendant - Appellee.

Appeal from the United States District Court for the
District of New Jersey; No. 3:19-CV-4753

Appellants' Response to
Appellee's Motion for Summary Action

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Argument

Grewal's motion for summary affirmance is late, impossible to grant, incomplete, and meritless. It is an obvious delay tactic that, unfortunately, the rules do little to disincentivize. It should be denied as soon as possible so that this action's important First Amendment issues can finally be litigated on the merits.

I. The motion is too late.

Local Rule 27.4 envisions requests for summary action arriving *before the appellants' brief*, during an appeal's infancy. 3d Cir. L.A.R 27.4(b) (2011). But Grewal filed this motion for summary action on October 16, well *after* the Appellants' Brief was filed (October 7) and *more than six months after* the appeal was docketed (April 4). This is not even Grewal's *first* request for summary action. He requested a different summary action *more than five months ago*, with a motion about jurisdiction (filed April 14) that the Court rightly refused to decide summarily. Whatever judicial advantage the summary process might yield at an appeal's inception vanishes where, as here, the appeal has matured to the point of already involving a full decisional process.

Federal circuits use the tried-and-true briefing process for good reason. Having each side advance their position in one fell swoop—appellants in an appellants' brief and appellee in the appellee's brief—is both efficient and fair. The summary process is an extraordinary departure from normalcy that makes sense only

if it can be done in advance—*before* the main appellate events are underway. Disrupting the customary process midstream, after Appellants laid their principal cards on the table, is both inefficient for the Court and unfair to Appellants.

II. The October 9, 2019 Order forecloses summary affirmance.

Grewal's April 14 motion for summary dismissal argued that appellate jurisdiction was lacking and kicked off an exchange of letter briefs (five total), the last of which was submitted on October 9. Critically, the Court then determined that this case's jurisdictional issue will be resolved *by a merits panel with full briefs*:

> Neither appeal will be submitted to a motions panel for possible dismissal due to a jurisdictional defect at this time. The issue of jurisdiction is referred to the merits panel. The parties are advised that this order does not represent a finding of jurisdiction. As in all cases, the panel of this Court that reviews the appeals on their merits will make a final determination of jurisdiction. The parties should address jurisdiction in their briefs.

Order of October 9, 2019 at 1.[1] Because of the resulting procedural posture, Grewal's motion cannot possibly be granted.

The key is that Grewal's latest motion seeks summary *affirmance*. But the Court cannot resolve the merits until *after* it addresses jurisdiction; and jurisdiction, the Court has already determined, requires full briefs and a merits panel. The Court

[1] Grewal did not challenge this Order. Doing so requires a process he did not invoke. *See* 3d Cir. L.A.R 27.5, 27.6 (2011). So its validity must be assumed when evaluating the instant motion.

has already ordered the appeal to cross the full-process bridge for jurisdiction's sake. As a result, a summary merits ruling *beforehand* is procedurally impossible.

III. The motion is incomplete.

On the merits, summary action is warranted only if an appeal presents "no substantial question." 3d Cir. L.A.R 27.4(b). The Appellants' Brief presents "nine reasons to reverse the district court's decision." Appellants' Br. at 27. "All nine are full-fledged independent arguments, all nine have direct support in Third Circuit precedent, and all nine warrant reversal as to all of the Plaintiffs." *Id.*

Thus, to warrant summary affirmance, Grewal's motion had to show that zero of the Appellants' Brief's nine questions are "substantial." But Grewal did not even try to cover all nine. His motion totally ignores at least five dispositive arguments. Even if Grewal's cherrypicked criticisms are right (none are, *see infra* Part IV), all of these other case-dispositive issues remain "substantial" by default.

A. The motion never addresses *Rolo* (3d Cir. 1991), which warrants reversal independently of the stay debate.

One of this appeal's most "substantial" questions centers on *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991). The Appellants' Brief presents it in the Summary of the Argument as follows:

> [R]egardless of whether any stay is upheld, the Court should reverse with *Rolo v. General Development Corp.*, 949 F.2d 695, 703-04 (3d Cir. 1991). There, as here, "the district court abused its discretion when it deferred consideration of the preliminary injunction application for

> an indeterminate period in the face of affidavits tending to show that irreparable injury would occur in the interim." *Id.*

Appellants' Br. at 28; *see also id.* 2, 20-23 (the error was preserved below).

The *Rolo* question is developed in full in Part IV. There the Appellants' Brief shows that the *Rolo* issue must be dealt with regardless of whether the stay is upheld. Moreover, the Brief shows that *Rolo* warrants reversal and an opinion ordering the district court to immediately exercise jurisdiction over the Plaintiffs' motion for a preliminary injunction. The argument's "substantial" nature speaks for itself, and to save the Court time in light of pressing matters (Appellants' pending motion for an injunction pending appeal), is reproduced here in full:

> **VI. No matter what, the district court must decide the motion for a preliminary injunction on its merits.**
>
> The district court's denial of the Plaintiffs' motion for a preliminary injunction warrants reversal for two reasons. First, the denial must be reversed because it is part and parcel of the decision to abstain. Since the decision to abstain must be reversed for the reasons set forth above, so too must the associated denial of the motion for a preliminary injunction.
>
> Second, and regardless of whether or not any stay is proper, the district court's denial of the Plaintiffs' motion for a preliminary injunction should be reversed because of *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991). There the Court held that, even if a district court is right to stay an action, it cannot to do so without first adjudicating a pending motion for a preliminary injunction on its merits. *Id.* at 703-04. *Rolo* is on all fours. Its holding translates directly to this case:
>
> > [T]he record does not reflect that the district court gave any consideration to the merits of the application for a preliminary

> injunction or formulated any view as to whether the [Plaintiffs] will be irreparably injured if pendente lite relief is not granted. Accordingly, the issue before us is *whether the district court abused its discretion when it deferred consideration of the preliminary injunction application for an indeterminate period in the face of affidavits tending to show that irreparable injury would occur in the interim and when it did so without considering whether that injury will in fact occur*. *Our answer is in the affirmative*. If a district court decides to stay proceedings for an indeterminate period and a party has competent and specific evidence tending to show that it will be unable to secure effective relief when the stay is terminated, the party in such jeopardy, in the absence of extraordinary circumstances, is entitled to have a motion for pendente lite relief considered on its merits. It seems to us that, in the absence of such circumstances, a denial of that consideration is no less an abuse of discretion than it would be for a district court to deny a motion for a preliminary injunction without consideration of its merits on the ground that there will ultimately be a trial and the desirability of injunctive relief can be considered at that time on the basis of a fuller record.
>
> . . . Because the district court did not address the merits of the [Plaintiffs'] application and the defendants have not formally responded to it, we will vacate the [order denying the preliminary injunction] and remand with instructions that the district court address the [Plaintiffs'] motion for a preliminary injunction *without delay*.

Id. at 703-04 (emphasis added).

If anything, this case warrants reversal more than *Rolo*, which involved only a prospect of future irreparable harm. *See id.* Here, in contrast, the irreparable harm is happening now. Grewal's censorship is inflicting irreparable constitutional harm upon Defense Distributed, SAF, and the CodeIsFreeSpeech.com publishers today, and has been doing so ever since they sought the preliminary injunction.

> For these reasons, the Plaintiffs are entitled to an immediate ruling on the merits of their motion for a preliminary injunction no matter what. *See Rolo*, 949 F.2d at 703

Id. at 51-53. Grewal never addresses this argument. Regardless of how every other issue fares, the appeal's *Rolo*'s question is "substantial." This omission alone defeats the motion.

B. The motion never addresses four key stay questions.

In addition to missing *Rolo*, Grewal's motion for summary affirmance also fails to confront four critical questions pertaining to the first-filed rule. According to Grewal, summary affirmance is warranted on the theory that "a federal judge can always exercise her discretion to avoid duplicative litigation within the federal court system." Mot. at 8. But that arguments' key premise—the existence of "duplicative litigation"—is challenged by two arguments in the Appellants' Brief that Grewal's motion never confronts. Actions are "duplicative" only if both are *ongoing*, which is not true here. *See* Appellants' Br. at 38-39. And actions are "duplicative" only if their issues overlap *currently*, which is not true here either. *Id.* at 38-40. Grewal's motion also fails to confront two other arguments in Appellants' Brief that challenge his logic. Even in instances of "duplicative litigation," courts cannot abstain where, as here, the plaintiff at issue seeks to halt irreparable harm. *Id.* at 40-43. And even in instances of "duplicative litigation," an *en banc* decision of this Court holds that the Grewal's mechanical timing rule is not the true abstention test. *Id.* at 44-45.

1. The need for both cases to be *ongoing* is a substantial question Grewal says nothing about.

In issue two, the Appellants' Brief challenged Grewal's duplicative-litigation premise with an argument about the "lack of an 'ongoing' prior action." Appellants' Br. at 38-39. The first-filed rule considers litigation "duplicative" only if both actions are *ongoing*. But *Defense Distributed II* was not ongoing when the district court abstained and is not ongoing now. So for the first-filed rule's purposes, *Defense Distributed II* is over and there is no "duplicative litigation" occurring. *Id.* (citring *IFC Interconsult, AG v. Safeguard Int'l Partners*, 438 F.3d 298, 306 (3d Cir. 2006), and *Bass v. Butler*, 258 F.3d 176, 179 (3d Cir. 2001)). Yet Grewal's motion never addresses this point at all. Issue two is case-dispositive and "substantial."

2. The need for duplication to exist *at present* is substantial question Grewal says nothing about.

In issue three, the Appellants' Brief again challenged Grewal's duplicative-litigation premise with an argument about the "need to evaluate case parallels *at present*." Appellants' Br. at 39-40. The first-filed rule considers cases "duplicative" only if the same issues are being litigated *currently*. But the instant action and *Defense Distributed II* are not duplicative currently (the latter appeal is about personal jurisdiction; not the merits), and Grewal's hypothetical future forecasts of possible future overlaps do not suffice. *Id.* (citing *Kelly v. Maxum*

Specialty Ins. Grp., 868 F.3d 274, 285 (3d Cir. 2017)). Yet Grewal's motion never addresses this either. Issue three is case-dispositive and "substantial."

3. The need to account for alleged irreparable harm is a substantial question Grewal says nothing about.

In issue four, the Appellants' Brief challenged Grewal's contention that "a federal judge *can always exercise her discretion* to avoid duplicative litigation within the federal court system." Mot. at 8 (emphasis added). To the contrary, even when all of the first-filed rule's other requirements are met, courts do *not* have discretion to avoid a case if doing so exposes the plaintiff to alleged irreparable harm. Appellants' Br. at 40-43 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014), *NOPSI v. Council of the City of New Orleans*, 491 U.S. 350, 366 (1989), *Ohio Civil Rights Com'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986), *Harman v. Forssenius*, 380 U.S. 528, 537 (1965), *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 214 (3d Cir. 1993), *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 542 (3d Cir. 2017), and *Zahl v. Harper*, 282 F.3d 204, 210 (3d Cir. 2002)). Grewal never addresses this point. Issue four is case-dispositive and "substantial."

4. The need to account for where relief can be afforded most expeditiously and effectively is a substantial question Grewal says nothing about.

In issue five, the Appellants' Brief again challenged Grewal's point that "a federal judge *can always exercise her discretion* to avoid duplicative litigation within the federal court system." Mot. at 8 (emphasis added). To the contrary,

avoidance is only allowed if, among other requirements, one action will clearly afford relief *more expeditiously and effectively than another*. But the action below can afford relief *equally as well* as *Defense Distributed II* and should therefore proceed without delay. Appellants' Br. at 44-45 (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 189 F.2d 31 (3d Cir. 1951) (en banc), and *Univ. of Md. at Balt. v. Peat Marwick Main & Co.*, 923 F.2d 265, 276 n.16 (3d Cir. 1991)). Yet Grewal's motion never addresses this point. Issue five is case-dispositive and "substantial."

This motion's failure to grapple with all of the appeal's dispositive issues might be understandable if, as the rules contemplate, it had been filed *before* the Appellants' Brief. But since Grewal filed well *afterwards*, in full view of all nine questions presented, there is no excuse for his omissions. The motion is fatally incomplete.

IV. The motion's cherrypicked arguments are invalid.

A. The question regarding the CodeIsFreeSpeech.com publishers is substantial.

The overall question presented in this appeal is "whether the district court erred by refusing the preliminary injunction and staying the action in its entirety." Appellants' Br. at 2. "The appeal presents that question as to both (i) the five Plaintiffs that are not parties to the Texas action [the CodeisFreeSpeech.com publishers], and (ii) the two Plaintiffs that are parties to the Texas action [Defense Distributed and SAF]." *Id.* at 2.

Arguments unique to the CodeisFreeSpeech.com publishers occupy the leadoff position for a reason. The appeal is plenty strong with arguments common to all Plaintiffs. But the district court's decision as to the CodeisFreeSpeech.com publishers is especially indefensible:

> The CodeIsFreeSpeech.com publishers have nothing to do with *Defense Distributed II*. The decision below relies on conclusions about what *Defense Distributed II*'s pendency means for litigants that are parties to *both* the instant action *and Defense Distributed II*. But the CodeIsFreeSpeech.com publishers and their claims below play no role whatsoever in Defense Distributed II. They are total strangers to it. Legally, the Texas action's pendency means absolutely nothing to the CodeIsFreeSpeech.com publishers and cannot possibly justify a stay of their claims, which are freestanding and distinct.

Id. at 32. There is very strong support for this argument in both Supreme Court and Third Circuit precedent. *See id.* at 32-36 (supporting the argument with *Chavez v. Dole Food Co., Inc.*, 836 F.3d 205 (3d Cir. 2016) (en banc), *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102 (1968), *Complaint of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37 (3d Cir. 1980), *Trent v. Dial Med. of Flo., Inc.*, 33 F.3d 217 (3d Cir. 1994), *University of Md. at Balt. v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), *Yang v. Tsui*, 416 F.3d 199 (3d Cir. 2005), *Timoney v. Upper Merion Tp.*, 66 F. App'x 403 (3d Cir. 2003), *Gwynedd Props., Inc. v. Lower Gwynedd Township*, 970 F.2d 1195 (3d Cir. 1992), *Emrick v. Bethlehem Steel Corp.*, 624 F.2d 450 (3d Cir. 1980), and *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997)).

Yet Grewal treats the issue as though it is unprecedented. The sole paragraph he devotes to the CodeIsFreeSpeech.com publishers cites no legal authority at all:

> Grasping at straws, Appellants make a number of other arguments. First, they attempt to make much of the fact that their lawsuit in New Jersey involves some additional plaintiffs who are not present in the Texas lawsuit. But Judge Thompson did not abuse her discretion in concluding that this fact did not require her to change her calculus. The additional plaintiffs voluntarily joined in the new lawsuit brought by the original Texas litigants. Under Appellants' theory, they are entitled to bring this lawsuit simultaneously in 94 different federal district courts, as long as they can find a new plaintiff to join with them in each federal judicial district. That cannot be the law. When a district court exercises its discretion to stay a case because it is duplicative, the court is permitted to take into account the fact that any additional plaintiffs voluntarily joined, and are acting in concert with, the original plaintiffs in the earlier-filed case.

Mot. at 7 (no citation omitted). This effort fails for many reasons.

The most striking part of Grewal's position is a conclusion he freely yields. Grewal *does not deny* that the district court's stay logic regarding *Defense Distributed II* has no application at all to the CodeIsFreeSpeech.com publishers. Grewal just deems that failure irrelevant by calling them "additional" plaintiffs. But Article III knows of no such thing as second class "additional" plaintiffs. A federal court's obligation to exercise the jurisdiction conferred upon it is "virtually unflagging" for all litigants—not just the ones that happen to appear first in the caption. *See, e.g.*, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

Accordingly, the Appellants' Brief goes to great lengths in explaining that, as a matter of law, the district court was required to conduct its analysis on a party-by-party and claim-by-claim basis. Appellants' Br. at 31-37. The district court committed plain error by treating all Plaintiffs' claims *en masse*, all at once. *Id.* Grewal thinks "[t]hat cannot be the law." *Id.* But courts have long known that it *is* the law, and have so held many times over.

The Supreme Court dictated this method of analysis in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975) ("[W]hile respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone."), and *Provident Tradesmens Bank*, 390 U.S. at 126-27. This Court followed suit in *Gwynedd Properties*, 970 F.2d 1195 (performing a claim-by-claim analysis), and *Emrick*, 624 F.2d 450 (same). Circuits nationwide do so too. *E.g.*, *Batterman v. Leahy*, 544 F.3d 370, 373 (1st Cir. 2008) ("there is no way to avoid claim by claim analysis"). Grewal ignores these cases despite the first brief having argued them all.

It is no answer for Grewal to say that the CodeIsFreeSpeech.com publishers "voluntarily joined in the new lawsuit brought by the original Texas litigants." Mot. at 7. The "joinder" suggestion is flat wrong; all of this action's Plaintiffs sued

Grewal in the first instance. App. 10. More importantly, all of Plaintiffs' claims are distinct, in that all seven assert completely independent and freestanding Section 1983 claims. If Defense Distributed and SAF had never sued Grewal below, the CodeIsFreeSpeech.com publishers' claims would maintain all of the legal attributes they have currently; and vice versa. *See* Appellants' Br. at 17, 35-36.

Hence, all of the claims in this case are completely distinct and self-sustaining. Yet as Grewal tacitly admits, the stay logic regarding *Defense Distributed II* does not apply at all to the CodeIsFreeSpeech.com publishers. In such circumstances, well-established precedent requires treating all of the parties and claims separately:

> For example, *Complaint of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37 (3d Cir. 1980), rejected abstention because, even though the two cases were "attacking" the same issue, "[n]either the parties nor the requested relief were identical in the two proceedings." *Id.* at 41. Likewise, *Trent v. Dial Medical of Florida, Inc.*, 33 F.3d 217 (3d Cir. 1994), held that cases are sufficiently parallel to warrant abstention if they involve "identical parties and claims," but not if one case has claims that are legally "distinct" from the other. *Id.* at 223-24. And *University of Maryland at Baltimore v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), refused abstention because, as to the second action's plaintiff, "at least some of their claims are distinct from" the first action's claims. *Id.* at 273.

Appellants' Br. at 34. Grewal's motion answers none of these arguments.

For these reasons, Grewal has failed to show that the CodeIsFreeSpeech.com publishers' leadoff issue is "insubstantial." This alone warrants denying the motion.

B. The question regarding due process failures is substantial.

In issue eight, the Appellants' Brief argues that reversal is warranted because the district court denied due process by (1) "making the stay decision without giving Plaintiffs notice" and (2) "making the stay decision without affording the Plaintiffs an adequate opportunity to respond." Appellants' Br. at 49-51. The motion's attempt to sweep this under the rug flatly contradicts the record. Mot. at 8.

The record of proceedings below clearly shows the due process deprivation. The Plaintiffs were *never* notified that the decision would occur at the status conference and *never* given a chance to prepare a substantive response. Appellants' Br. at 4951. Yet Grewal boldly reads the record to show the opposite:

> Appellants also argue that Judge Thompson failed to accord them adequate notice and due process before issuing the stay. Not so. . . . The NJAG's letter to the District Court made it plain that it was seeking a stay of proceedings, A968-69 (Dkt. 20), and Appellants filed their response the next day, App. 970-73 (Dkt. 21). At the hearing, Appellants argued their procedural objections as well as their objections to the stay on the merits. App. 992-1003. . . . Appellants had ample opportunity to and did indeed present their arguments in opposition to the stay. App. 995-1003.

Mot. at 7. The cited pages do not support the motion's point. They disprove it.

1. The Plaintiffs never filed a substantive response.

Grewal cites Appendix pages 970-973 as proof that Plaintiffs "filed their response" to the stay motion. *Id.* But there is no substantive response to the stay motion on those pages or anywhere else because the Plaintiffs were never afforded

time to supply one. The only thing Plaintiffs had time to file was an *objection to the procedure by which Grewal sought the stay*. The cited filing itself makes this perfectly clear:

> Yesterday, Defendant Gurbir Grewal submitted a "letter to seek a status conference tomorrow, March 4, 2019, and to request a stay of all proceedings in this case." Doc. 20 at 1. Grewal did not confer with the Plaintiffs about this submission. Plaintiffs hereby set forth their position.
>
> First, the letter seeks a status conference. Plaintiffs do not object to the procedure by which Grewal seeks a status conference, and would gladly participate in any status conference the Court sets. But for the reasons set forth below, no status conference is warranted.
>
> Second, the letter requests a stay. ***Plaintiffs object to the procedure by which Grewal seeks the stay. This request should have to comply with the orthodox rules governing an application for relief, which have not been complied with here.***
>
> . . . [T]his application is subject to Local Civil Rule 7.1(d)(1): "No application will be heard unless the moving papers and a brief, prepared in accordance with L.Civ.R. 7.2, and proof or acknowledgment of service on all other parties, are ***filed with the Clerk at least 24 days prior to the noticed motion day***." ***The application for a stay with the Document 20 letter violates all of these rules.***
>
> ***Plaintiffs object to Grewal's application being heard in violation of those rules. No action should be taken on the application unless and until both (1) Grewal presents the application in compliance with the applicable procedural rules, and (2) the Plaintiffs are afforded an adequate opportunity to present a substantive response.***

App. 970-973 (emphasis added).

After filing this objection, Plaintiffs had no reason to think that Grewal's letter would be treated as a legitimate motion that would be both argued and determined at the "Status Conference." The order setting the status conference said nothing of substance: "Status Conference set for 3/7/2019 2:00 PM before Judge Anne E. Thompson in Courtroom 4W." App. 974. Even if Grewal's filing were treated like a real motion, no response deadline had arrived yet. The status conference at which the stay decision occurred was held just ***four days*** after Grewal's initial letter raising the possibility. Appellants' Br. at 19-21. But by surprise, the argument was held and the decision made then anyhow. This course of events violated basic due process norms.

2. The Plaintiffs were forced to argue at the status conference *over protest,* without notice or time to prepare.

Grewal cites Appendix pages 992-1003 as proof that, at the status conference, Plaintiffs "had ample opportunity to and did indeed present their arguments in opposition to the stay." Mot. at 7. This assertion is patently false.

It is true that the Plaintiffs made some substantive arguments at the hearing. But they did so *under protest*, having objected to the district court's demand that they argue the issue immediately without advance notice. Grewal's assertion that Plaintiffs had an "ample opportunity" to argue contradicts the transcript. Repeatedly and expressly, at no less than five distinct points, Plaintiffs protested the fact that they had to argue the stay issue despite the lack of notice and time to prepare:

> App. 993: "Procedurally, first we submit that this is a status conference. This event now is not an occasion to decide whether or not to grant the stay."
>
> App. 993: "In the filing that we have given the Court, this is Document 21, we explain that the way that the Attorney General has presented this request does not comply with the rules. We have not been afforded an opportunity to respond like we usually would, and so the Court shouldn't address this argument."
>
> App. 993: "[I]f they want to actually present this argument as a motion, like they would under Rule 12, they're perfectly free to do so and we should be afforded an opportunity to respond. But to do so by letter violates the Court's procedural rules."
>
> App. 993: "[T]hat's our first argument is that we shouldn't address this now. And we have lodged that objection."
>
> App. 994: "I have a lot to say about the merits of the stay argument you just heard, and you know, we'll be glad to go brief that in full. If the Court wants it today, I can give you a preview of what I think [are] seven reasons that you're not going to rule in their favor and grant that stay. But, procedurally, it's critically important that we receive due process here and not be thrown into the fray unfairly."

On this record, the due process argument pressed as issue eight is "substantial."

C. The admission of "no federalism concerns" makes the decision below *more* erroneous—not less.

Doctrinally, Grewal's motion does *not* dispute that the district court's decision constitutes an act of abstention. It speaks mostly in terms of the "first-filed rule" and a "stay" decision. But as Appellants' Brief explains (at 29-30), these are not mutually exclusive labels. The case that Grewal invoked for his motion below rightly treats the first-filed rule as a species of abstention and a stay as just one of its

remedial outcomes. *See Chavez v. Dole Food Co., Inc.*, 836 F.3d 205 (3d Cir. 2016) (en banc) (invoked at App. 968-69, 991).

Grewal disputes *how* abstention works in the context of two federal actions, as opposed to the context of one state case and one federal case. Grewal argues that this case's federal-federal context makes abstention *more* appropriate than it would be in the federal-state context. Mot. at 5-6. But legally, that approach is backwards.

In abstention law's federal-state context, the federal court's obligation to exercise jurisdiction is virtually unflagging and counterbalanced by *both* practical concerns *and* federalism. But in the federal-federal context, the instant federal court's obligation to exercise jurisdiction is *still* virtually unflagging and is counterbalanced by *only* practical concerns. *See generally* 17A Charles A. Wright & Arthur R. Miller et al., Federal Practice & Procedure § 4247 (3d ed. West 2019). The resulting abstention bar is not *lower* in the federal-federal context. It is *higher*.

Grewal cannot merely rely on abstention law's "general principle . . . to avoid duplicative litigation." Mot. at 5. Over the decades, abstention law has developed a variety of limiting rules that strictly cabin the circumstances in which abstention is allowed. Grewal assumes that these limiting rules apply only to state-federal context and not to the federal-federal context. But that is an unprincipled distinction that this Court has never upheld. To the contrary, this Court has repeatedly held that the limiting rules apply with full force where, as here, both cases are in federal court.

The leading case is this Court's en banc decision in *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 189 F.2d 31 (3d Cir. 1951) (en banc), *aff'd*, 342 U.S. 180 (1952). It is cited to show that "[t]he first-filed abstention rule turns *not* on a static timing test of which action started first, but on a dynamic test of whether one action will clearly afford relief *more* expeditiously and effectively than another." Appellants' Br. at 44-45. If its holding applies to the federal-federal context, Appellants prevail because *Defense Distributed II* can*not* "clearly afford relief more expeditiously and effectively than" the instant case. *Kerotest*, 189 F.2d at 34-35. And indeed, *Kerotest* applies. It was a federal-federal case. *Id.* at 31.

Kerotest is not alone in bridging the supposed state-federal/federal-federal gap that Grewal's motion posits. Many other cited decisions do so as well.[2] But for purposes of defeating a motion for summary action, Grewal's need to overrule one of the Court's seminal *en banc* decisions is enough to make the issue "substantial."

[2] Another example is *Complaint of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37 (3d Cir. 1980). It is cited to show that the "'first-filed' abstention rule does not apply when the instant action's plaintiff is a total stranger to the predecessor action with distinct claims." Appellants' Br. at 33-34. If *Chatterjee*'s holding applies to the federal-federal context, Appellants would prevail because even though *Defense Distributed II* and this case are "attacking" the same issue, "[n]either the parties nor the requested relief [are] identical in the two proceedings." *Chatterjee*, 636 F.2d at 41. It too does, indeed, apply. *Chatterjee* was a federal-federal case. *Id.* at 38.

Conclusion

The motion for summary action should be denied as soon as possible.

October 24, 2019

Respectfully submitted,

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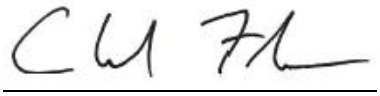

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