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

Petition for Panel Rehearing and Rehearing *En Banc* by the CodeIsFreeSpeech.com Publishers

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Rule 35 Statement

I. The question of appellate jurisdiction is exceptionally important.

This case presents an exceptionally important question about appellate jurisdiction over orders refusing preliminary injunctions and staying actions. Contradicting prior precedent, a divided panel held that no such jurisdiction exists and made several other impactful errors along the way.

Appellate jurisdiction should always be accurately defined, honoring Article III and Congress's allocation of judicial power with exactitude. This is particularly true of preliminary injunction decisions, which recur frequently and necessitate swift appellate attention because of irreparable harm. The instant First Amendment case exemplifies the issue's importance.

For more than two years, New Jersey Attorney General Gurbir Grewal has censored the Plaintiffs/Appellants in clear violation of the Constitution. He imposes an illegal regime of both civil and criminal enforcement actions that stops these citizens from merely *speaking* about Second Amendment issues he disdains. If Plaintiffs dare to utter the banned words, Grewal will jail them.

Plaintiffs sued under 42 U.S.C. § 1983 to stop this ongoing infliction of irreparable constitutional harm and sought a preliminary injunction. When the district court refused the injunction and stayed the case, Plaintiffs appealed under the statute covering orders "refusing . . . injunctions." 28 U.S.C. § 1292(a)(1).

Originally, the panel held 2-1 that no appellate jurisdiction exists. Its perfunctory decision failed to even cite the correct jurisdictional statute and drew a dissent from Judge Phipps. So Plaintiffs moved for rehearing and forced the majority to withdraw the dismissal. Yet instead of rectifying the error, the majority doubled down. In a far more damaging decision, the majority again held that no appellate jurisdiction exists. Judge Phipps dissented again, in great detail, precisely because the issues are exceptionally important to the Court's jurisprudence.

II. The panel's 2-1 jurisdictional dismissal conflicts with both *Rolo* (3d Cir. 1991) and *Victaulic* (3d Cir. 2007).

The majority opinion holds that the Court lacks appellate jurisdiction over district court orders that "stayed the proceedings until [a separate action in a Texas federal court] was resolved and dismissed the injunction motion." Majority at 3. But as Judge Phipps' dissent shows, that result conflicts with two prior Third Circuit decisions: (1) *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), which held that an "order refusing to reach the merits of the application for a preliminary injunction is appealable under § 1292(a)(1)," *id.* at 702–03, and (2) *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007), which held that § 1292(a)(1) gives the Court jurisdiction over "an appeal from the (implicit) denial of the preliminary injunction," *id.* at 231–32. The result here simply cannot be reconciled with *Rolo* and *Victaulic*. The conflict is clear and direct.

Rolo and *Victaulic* should have been followed not just as a matter of course, but because they correctly construe Section 1292(a)(1) to supply jurisdiction here. Intra-circuit conflicts are the paradigm justification for rehearing *en banc*. The Court should grant it here to re-establish *Rolo* and *Victaulic* as true Third Circuit law.

III. Two other critical errors warrant either panel or *en banc* rehearing.

The majority's decision also warrants either panel or *en banc* rehearing for separate reasons. To say that the instant refusal to enjoin Grewal's censorship is meaningless, the majority holds that (1) federal law bans the speech at issue because (2) this Circuit is bound by an out-of-circuit district court's nationwide injunction. But federal law does not ban the speech at issue under that district court judgment or otherwise. And before this Court holds once and for all that nationwide injunctions all across the country bind the Third Circuit, it should at least have the issue briefed and argued. So far it has not. The majority's erroneous drive-by holding should not be what resolves these highly important issues.

Local Rule 35.1 Statement of Counsel: My reasoned and studied professional judgment is that (1) the panel decision contradicts *Rolo* and *Victaulic*, and (2) the appeal involves questions of exceptional importance—appellate jurisdiction over preliminary injunction refusals, whether federal law bans the speech at issue, and whether nationwide injunctions bind the Third Circuit—such that *en banc* rehearing is necessary both to maintain uniformity of decisions and to correct a grave error.

Statement of the Case

In this free speech case, seven Plaintiffs sued a state official engaged in unconstitutional censorship, App. 7–90, and moved for a preliminary injunction to stop the ongoing infliction of irreparable harm, App. 91–964. The state official, New Jersey Attorney General Gurbir Grewal, tried to avoid an injunction by seeking a stay of all proceedings. App. 968–69, 974, 988–92. All seven Plaintiffs pressed for the preliminary injunction and all seven opposed the stay request. App. 970–73, 975–980, 992–1003. Judge Anne Thompson presided.

In two orders, the district court refused to issue the injunction without regard to its merits and stayed the action indefinitely. App. 3–4, 1004–06. It did so because of another case in the Western District of Texas. Grewal is a party to the Texas action, as are two of the Plaintiffs; but the five instant Plaintiffs are not.

All seven Plaintiffs timely appealed from both district court orders, and the two appeals were consolidated. Plaintiffs invoked the Court's interlocutory appellate jurisdiction over orders refusing injunctions. *See* 28 U.S.C. § 1292(a)(1).

In the Appellants' Brief, Plaintiffs argued that the district court erred by refusing the preliminary injunction and staying the action as to both (i) the five Plaintiffs that are not part of the Texas action, and (ii) the two Plaintiffs that are. By motion in this Court, Plaintiffs sought an injunction pending appeal against Grewal's ongoing censorship. Grewal moved for summary affirmance.

In November 2019, a 2-1 panel dismissed the appeals for lack of jurisdiction over Judge Phipps' dissent. It held that circuit courts *lack* jurisdiction over both orders staying a case indefinitely and orders refusing a preliminary injunction. The holding was cursory and did not even cite the right statute, § 1292(a)(1). It held that jurisdiction is missing "because the challenged orders are not appealable under 28 U.S.C. § 1291." November 2019 Op. at 2.

Plaintiffs sought rehearing successfully, convincing the Court to withdraw that opinion and carry on the appeal. But now the panel majority has doubled down, reaching the same result as to § 1292(a)(1) in an even more damaging opinion, with Judge Phipps again dissenting. Rehearing is warranted again.

Argument

Plaintiffs/Appellants Firearms Policy Coalition, Inc., Firearms Policy Foundation, The Calguns Foundation, California Association of Federal Firearms Licensees, Inc., and Brandon Combs respectfully request that the Court grant rehearing *en banc* of this appeal. These parties are referred to collectively as the "CodeIsFreeSpeech.com publishers" and constitute five of the action's seven Plaintiffs/Appellants. *See* Appellants' Br. at 17 (on the case's procedural posture).

I. The panel's denial of appellate jurisdiction warrants rehearing *en banc*.

A. 28 U.S.C. § 1292(a)(1) supplies appellate jurisdiction.

Appellate jurisdiction here arises from the district court's denial of Plaintiffs/Appellants motion for a preliminary injunction. *See* App. 94–964 (motion). The district court denied that motion both impliedly and expressly.

First, the district court issued an order that "STAYED" the action indefinitely, impliedly denying Plaintiffs' then-pending motion for a preliminary injunction:

> ORDERED that all proceedings in this action are STAYED until the action in the Western District of Texas (Civil Docket No. 18-637) is resolved and no other motions for relief and/or appeals are viable.

App. 4 (March 7, 2019). Second, the district court confirmed the stay's implication and "DISMISSED" the motion for a preliminary injunction:

> IT APPEARING that on March 7, 2019, the Court ordered that all proceedings in this action are stayed until the related action in the Western District of Texas (Civ. Dkt. No. 18-637) is resolved and no other motions for relief and/or appeals are viable (Order at 1–2, ECF No. 26),
>
> IT IS on this 28th day of August, 2019,
>
> ORDERED that Plaintiffs' Amended Motion for Preliminary Injunction (ECF No. 18) is DISMISSED without prejudice. Plaintiffs may refile this Motion once the stay has been lifted in this action.

App. 1018 (Aug. 28, 2019). Plaintiffs filed timely notices of appeal from both orders, App. 12, 1019, and this Court properly consolidated the appeals.

28 U.S.C. § 1292(a)(1) supplies interlocutory appellate jurisdiction over all district court orders "refusing . . . injunctions." 28 U.S.C. § 1292(a)(1) (with exceptions not at issue). Both orders at issue did exactly that. Thus, just as the Appellants' Brief and Supplemental Brief explained, jurisdiction exists under §1292(a)(1).

B. The majority held that § 1292(a)(1) does not supply jurisdiction.

The appeal was heard by a panel consisting of Judges McKee, Shwartz, and Phipps. Judges McKee and Shwartz formed a majority and held that "the District Court's stay and dismissal orders are not appealable" and "dismiss[ed] for lack of appellate jurisdiction." Majority at 4. The majority's eighteen-page opinion resolves the questions presented squarely, albeit erroneously.

First, the majority held that the "District Court did not expressly deny Plaintiffs' motion for a preliminary injunction." Majority at 8–11. Even though the district court's order plainly "used the word 'dismiss,'" the majority second-guessed the text and held that that "the Court was simply removing from its docket a motion that would not be acted on soon." *Id.* at 10–11 (citations omitted).

Then the majority applied the three-pronged "test from *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981), to determine" that "the stay [was not] a practical denial of an injunction." *Id.* at 8–9. On the first prong of the test, the majority held that "[t]he orders here do not have the 'practical effect of refusing an injunction'" because the stay order merely "postpone[d] . . . resolution of an action seeking injunctive relief," and the dismissal order "was simply removing from [the] docket a motion that would not be acted on soon." *Id.* at 9–10. On the second prong, the majority held that "the stay order does not impose 'serious, perhaps irreparable consequence[s]" because "[o]rders . . . based on a district court's 'discretionary power over the scope of the action' and that 'relat[e] primarily to convenience in litigation' . . . do not affect the merits of an appellant's claims." *Id.* at 14. And on the third, the majority held that "an immediate appeal is not necessary to challenge the [district court's] ruling . . . because Plaintiffs could receive a ruling on their preliminary injunction motion if they discontinue the Texas action." *Id.* at 17–18.

Judge Phipps dissented with a ten-page opinion. Point by point, he disagreed with the majority's holdings in every relevant respect:

> In dismissing these appeals for lack of jurisdiction, the Majority Opinion misapplies well-established standards for appellate jurisdiction under 28 U.S.C. § 1292(a)(1). This consolidated case involves appeals of two orders – one that had the practical effect of refusing a motion for a preliminary injunction, the other that expressly dismissed that motion. Precedent permits appellate review of orders with the practical effect of denying a motion for a preliminary injunction. And the text of § 1292(a)(1) allows interlocutory appeals of orders refusing such motions. Yet the Majority Opinion rejects appellate jurisdiction over appeals from both orders. By so doing, District Court's underlying basis for those orders – its application of the first-filed rule – will never be subject to meaningful appellate review.

Dissent at 1. He therefore would have upheld "appellate jurisdiction to evaluate both orders under § 1292(a)(1)." Dissent at 10.

C. The majority's holding conflicts with *Rolo* (3d Cir. 1991).

In *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), this Court held that § 1292(a)(1) provided appellate jurisdiction over an order that is indistinguishable from the orders at issue here. *Rolo* is inescapable. All material facts match. No relevant distinction exists. Everything that made *Rolo*'s order appealable is true of the orders below. It should have been followed here.

An important part of *Rolo*'s holding addresses the panel's postponement notion—the idea that no appeal lies if there is a hypothetical chance that a new injunction motion might result in a new injunction order. As noted, the majority held that the instant orders do *not* have the "practical effect of refusing an injunction"

because "the District Court simply 'postpone[d] . . . resolution of an action seeking injunctive relief' until Plaintiffs finished their litigation in Texas." Majority at 9 (citation omitted). This reasoning—drawn from dicta in *Cohen v. Board of Trustees*, 867 F.2d 1455, 1464 (3d Cir. 1989) (en banc)—was expressly rejected in *Rolo*. In the preliminary injunction context, postponement arguments do not stop § 1292's application. *Rolo* holds this unambiguously:

> The defendants misread the dictum they rely upon from *Cohen v. Board of Trustees*, 867 F.2d at 1464. As we there stated, an order granting or denying a stay which does no more than postpone or accelerate resolution of an action seeking injunctive relief is not appealable under § 1292(a)(1) as a grant or denial of an injunction. The May Order in this case, however, does far more. Assuming the Rolos's allegations to be true, *the district court's refusal to consider the application for a preliminary injunction effectively denied them the ultimate relief that they seek*. . . .The Rolos here moved under Rule 65(a) for an order directed to a party, enforceable by contempt, and designed to protect the relief they sought. *The district court's refusal to entertain that motion under the circumstances there alleged had precisely the same effect on the Rolos as would an order expressly denying that motion. Accordingly, our conclusion that we have jurisdiction under § 1292(a)(1) is consistent with the Cohen case.*

Rolo 949 F.2d at 702–03 n.5 (emphasis added).

Hence, the fact that Judge Thompson's orders were denied *without prejudice* does *not* exclude them from § 1292. Just as in *Rolo*, Judge Thompson's repeated and express "refusal to consider the [Plaintiffs'] application for a preliminary injunction effectively denied them the ultimate relief that they seek." *Rolo*, 949 F.2d

at 703 n.5. So under *Rolo*, each "order refusing to reach the merits of the application for a preliminary injunction is appealable." *Id.* at 703.

Judge Phipps agreed that the majority's result thwarted *Rolo*. Dissent at 3–4. Standing alone, this clear conflict in circuit precedent warrants rehearing *en banc*.

D. The majority's holding conflicts with *Victaulic* (3d Cir. 2007).

In *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007), the Court again held that § 1292(a)(1) supplies appellate jurisdiction over an order that is indistinguishable from the orders at issue here. *Id.* at 231–35. This precedent is in accordance with *Rolo*, is controlling, and should have been followed here.

Victaulic's holding turns on whether an order has the "practical effect" of denying an injunction. The *Victaulic* order "did not explicitly deny an injunction"; "dismissal of four counts of the complaint" was all that it spoke of. Nonetheless, *Victaulic* held that § 1292(a)(1) applied because the order's "practical effect" was to deny a preliminary injunction:

> By moving for a preliminary injunction, Victaulic demonstrated that one of its chief goals was to end Tieman's (admitted) violation of the covenant not to compete. Thus, the dismissal had the practical effect of refusing an injunction.

Id. at 231.

The "practical effect" that sufficed in *Victaulic* exists here. "By moving for a preliminary injunction" below—not just an injunction via final judgment—every Plaintiff demonstrated that ending Grewal's ongoing constitutional violations

immediately was "one of its chief goals." *Id.* Judge Thomson's orders therefore "had the practical effect of refusing an injunction." *Victaulic Co.*, 499 F.3d at 231.

The majority's result is wrong. *Rolo* and *Victaulic* are correct and controlling for the reasons explained by Judge Phipps' dissent and Plaintiffs' briefs. The Court should rehear the appeal *en banc* to resolve the conflict and embrace *Rolo* and *Victaulic*'s definition of appellate jurisdiction under § 1292(a)(1).

E. The majority's holding is especially wrong as to the Plaintiffs that play no role whatsoever in the Texas case.

In the instant action, all five of the CodeIsFreeSpeech.com publishers are plaintiffs, *see* App. 11–13, all five have standing, *see* App. 45–51, all five assert the complaint's Section 1983 claims in full, *see* App. 51–64, and all five moved for the preliminary injunction that Judge Thomson's stay order effectively refused, *see* App. 94–143. But in the Texas case, these five litigants are completely absent. They are not plaintiffs, defendants, or anything else. The case is not a class action or anything like it. The CodeIsFreeSpeech.com publishers play no role whatsoever in the Texas case and cannot control its fate. Yet according to the majority, this does not matter because the CodeIsFreeSpeech.com publishers' "claims effectively are being pursued" in Texas. Majority at 13–14 & n.7 (citations omitted).

At every key turn, Judge Phipps' dissent rightly highlights how egregious the majority's error is with respect to the CodeIsFreeSpeech.com publishers:

The Majority Opinion finds no irreparable injury here, however. It relies on the fact that appellants "could have withdrawn their action in Texas and pursued the New Jersey action." Maj. Op. at 15. But ***that explanation is at best incomplete*** as only two of the seven appellants sued in Texas. . . .

. . .

It is not an answer that by the terms of the Stay Order appellants can choose for themselves to proceed in New Jersey by dropping the Texas litigation. *See* Maj. Op. at 17-18 ("An appeal is not the only means of effectively challenging the orders, because Plaintiffs could receive a ruling on their preliminary injunction motion if they discontinue the Texas action." (internal quotation marks, alterations, and citation omitted)). ***Five appellants are not parties to the Texas case, and they have no such choice.*** But even if the remaining two appellants dismissed the Texas suit, that would not allow for a challenge to the Stay Order – by its own terms, the order would have expired then. In the meantime, the damage from the delay would have already been done without a meaningful opportunity for appellate review. *See Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456, 464 (7th Cir. 2014) ("The past cannot be recreated. Time runs in only one direction – and it's forward, not backward."). Thus, regardless of the choice available to two of the seven appellants, under today's ruling, the possibility of meaningful appellate review of the Stay Order is not merely postponed; it is eliminated.

It is true, as the Majority observes, that the Stay Order does not necessarily preclude forever the injunctive relief that appellants seek. But in my view ***such cold consolation – especially for the five appellants who are not parties to the Texas litigation and whose remedy, in the words of the District Court, is "to be patient," App. 1006 – does not suffice*** to satisfy the third *Carson* element. Instead of hinging on the continued availability of ultimate relief, that third consideration depends on the ability to meaningfully challenge the order that currently denies preliminary injunctive relief. *See Carson*, 450 U.S. at 86 ("In the instant case, unless the District Court order denying the motion to enter the consent decree is immediately appealable, petitioners will lose their opportunity to 'effectually challenge' an interlocutory order that denies them injunctive relief."); *see also* [*Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975)] ("[E]ach passing day may constitute a separate and cognizable

> infringement of the First Amendment."). Appellants here lack such an ability absent interlocutory appeal.

Dissent at 5 (emphasis added).

"[C]old consolation," indeed. After more than eighteen months of litigation without any merits judgment, preliminary or otherwise, the majority decision's mistreatment of the CodeIsFreeSpeech.com publishers warrants rehearing.

II. Two other critical errors warrant either panel or *en banc* rehearing.

The appeal also requires rehearing because of the majority opinion's unprecedented and disruptively incorrect holding about federal export control law and the First Amendment. The majority holds that an injunction against Grewal's censorship does not matter on the theory that, "under federal law, Defense Distributed cannot disseminate its files" because the State Department's "temporary modification of federal regulations permitting Defense Distributed to disseminate their files is currently vacated, and the federal government is enjoined from enforcing the final rule." Majority at 15-16.

With this holding—that current federal law does *not* let Defense Distributed publish the speech at issue—the majority unwittingly ventured into extraordinarily complex areas of free speech law, did not perform a complete analysis of the pertinent issues, and got the result grievously wrong. This erroneous holding's regulatory, statutory, and constitutional implications go well beyond this case. Two distinct aspects require correction either via panel rehearing or rehearing *en banc*.

A. The majority opinion injects chaos into federal free speech law.

Substantively, the majority's holding is wrong because federal law does not ban the speech at issue under the Washington district court's decisions or otherwise. Constitutional protections such as the First Amendment guarantee the Plaintiffs' right to engage in the speech at issue, as does a Settlement Agreement with the State Department. Judge Phipps' dissent is completely correct on this point:

> The Majority Opinion also dismisses the possibility of irreparable injury by reference to a nationwide injunction issued by a District Judge in the Western District of Washington. *See* Maj. Op. at 15-16 (citing *Washington v. U.S. Dep't of State*, -- F. Supp. 3d --, 2020 WL 1083720, at *11 (W.D. Wash. Mar. 6, 2020)). That injunction – issued by a court with territorial jurisdiction over six counties – enjoins a final rule that would provide authorization under a statute, 22 U.S.C. § 2778(h), for some of the speech that the seven appellants seek to engage in. But here appellants seek to vindicate constitutional rights. Thus, even supposing both statutory and regulatory prohibitions on appellants' proposed speech, those alone do not extinguish appellants' First Amendment rights.

Dissent at 6 (footnote omitted).

Even more vividly, a visit to defcad.com disproves the majority instantly. *See Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018) ("[T]he files . . . can be emailed, mailed, securely transmitted, or otherwise published within the United States."); 15 C.F.R. § 734.18; 22 C.F.R. § 120.54

The majority's conclusion about federal law is also inapposite. Grewal is harming the Plaintiffs uniquely—regardless of what censorship other officials may engage in—because the speech crime he wields stops the Plaintiffs from publishing

via the internet (the federal government's only concern) *and via all other methods*, such as physically mailing USB thumb drives into New Jersey. Plaintiffs used to publish via the mail but stopped because Grewal threatens to jail them for it. *See* Appellants' Br. at 9–15; Appellants' Motion for Injunction Pending Appeal at 11.

B. The majority opinion holds that a single district court's nationwide injunctions bind every court in the nation.

Finally, rehearing is warranted because the majority held that this Circuit is bound by an out-of-circuit district court's nationwide injunction. Op. at 15–16. To conclude that, "under federal law, Defense Distributed cannot disseminate its files," the majority treats the Western District of Washington's nationwide injunction as though it were conclusive and binding as a matter of law. *Id.* But that novel and far-reaching proposition is not well-established, to say the least. *See, e.g.*, *Dept. Homeland Sec. v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring); *CASA de Maryland v. Trump*, 2020 WL 4664820, at *23–29 (4th Cir. 2020); *San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020).

The Court should not stake out a definitive position on this issue—whether a single district court's nationwide injunction binds every Circuit in the land—without at least having it briefed and argued by the parties and given the benefit of an *en banc* proceeding's full scrutiny. As it stands, the majority's capricious treatment does not give this momentous issue the respect it deserves.

Conclusion

The Court should grant the petition, vacate the panel decision and the judgment rendered thereupon, and assign these cases to the calendar for rehearing *en banc* with supplemental briefs and argument.

September 8, 2020

Respectfully submitted,

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Certifications

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