No. 21-50327

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED,
*Plaintiffs-Appellants*,
v.

ANDREW J. BRUCK, ACTING ATTORNEY GENERAL OF NEW JERSEY,
*Defendant-Appellee.*

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

# BRIEF OF APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

Appellee does not oppose oral argument in this case to the extent it aids the Court's decisional process.

## JURISDICTIONAL STATEMENT

Appellants seek to appeal from an interlocutory order of the Western District of Texas severing and transferring claims against the New Jersey Attorney General[1] to the District of New Jersey. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. As set forth below, this Court lacks jurisdiction over this appeal and over Appellants' May 28, 2021 motion for injunction pending appeal.

## QUESTIONS PRESENTED

I. Whether this Court has jurisdiction over a district court's interlocutory and effectuated order transferring claims to an out-of-circuit district court.

II. Whether the district court clearly abused its discretion in severing the claims against the New Jersey Attorney General from Appellants' claims against the U.S. State Department and transferring them to New Jersey.

[1] On July 17, 2021, Andrew J. Bruck became Acting Attorney General of New Jersey. Consequently, his name was substituted for Gurbir S. Grewal in the caption. Fed. R. App. P. 43(c)(2).

## STATEMENT OF FACTS AND OF THE CASE

In 2018, Defense Distributed, a Texas-based company that operates a website available in all 50 States, announced plans to disseminate computer files online that would allow any individual with access to a 3D printer to produce their own firearms. ROA.140-41. Its plans would enable individuals to directly print weapons, even if they could not pass a background check. *See id.* And it would allow them to make firearms that could not be traced by law enforcement. *Id.* In response, on July 26, 2018, the New Jersey Attorney General sent Defense Distributed a cease-and-desist letter, warning that dissemination of these files for use by New Jersey residents would violate his State's "public nuisance and negligence law." ROA.189.

Days later, Appellants initiated this lawsuit challenging the cease-and-desist letter. ROA.129. Appellants later filed a First Amended Complaint, ROA.134, and a motion for a preliminary injunction, ROA.355. On January 30, 2019, the district court dismissed that complaint for lack of personal jurisdiction and dismissed the preliminary injunction request as moot. ROA.1748.

On February 5, 2019, Appellants—along with other plaintiffs—filed a new complaint against the Attorney General in the District of New Jersey. No. 3:19-cv-4753, Dkt. 1 (D.N.J.). In their operative Complaint, Appellants challenged both the cease-and-desist letter and a subsequent criminal statute enacted in November 2018, N.J. Stat. Ann. § 2C:39-9(*l*)(2), which prohibits the distribution of certain code

capable of producing firearms using a three-dimensional printer "to a person in New Jersey" who is not a licensed firearms manufacturer. No. 3:19-cv-4753, Dkt. 17 (D.N.J. Feb. 20, 2019) ("NJ Complaint"). The NJ Complaint specifically stated that the District of New Jersey "constitutes a proper venue for this action because a substantial part of the events or omissions giving rise to the claim occurred here." *Id.* ¶ 26. On the sole basis that Appellants first filed the claims in Texas and were still litigating there, the New Jersey court stayed this second case. No. 3:19-cv-4753, Dkt. 26 (D.N.J. Mar. 7, 2019), *appeal dismissed*, *Defense Distributed v. Att'y Gen. of N.J.*, 972 F.3d 193 (3d Cir. 2020).

Meanwhile, this Court reviewed the dismissal of the Texas complaint and found Appellants had sufficiently alleged personal jurisdiction as to their claims involving the cease-and-desist letter. *See Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020). After issuance of the mandate, Appellants did not reinitiate any request for preliminary relief against the New Jersey Attorney General in district court. Instead, in November 2020, two months after the mandate issued, Appellants filed a Second Amended Complaint. ROA.1853 ("Texas SAC"). The Texas SAC pursues claims against Section 2C:39-9(*l*)(2) for the first time in Texas; this statute was not mentioned in either prior version of the Texas complaint or in this Court's prior opinion in this case. *See id.* ¶¶ 141-61. The claims alleged in the Texas SAC against the New Jersey Attorney General were largely identical to those alleged in

the NJ Complaint. The Texas SAC also added claims against U.S. State Department ("USDOS") officials for the first time, both alleging breach of a 2018 settlement agreement, *see id.* ¶¶ 95-126, and asserting APA violations and constitutional claims involving then-existing federal regulations, *see id.* ¶¶ 184-215, 225-54.

The New Jersey Attorney General moved to sever and transfer claims against him to New Jersey, where Appellants' parallel action against him was still pending. ROA.1999. USDOS opposed, and Appellants largely relied on that opposition. ROA.2073, 2095. On April 19, 2021, the district court granted the motion, severing all the claims against the Attorney General from the claims against USDOS and transferring them under 28 U.S.C. § 1404(a). ROA.2461. The court found that severance-and-transfer will "save substantial judicial resources" because the claims are not intertwined in a meaningful way and because no other threshold jurisdictional issues would need to be decided in the District of New Jersey—allowing Appellants to seek immediate injunctive relief in that court. ROA.2466-71.

The next day, April 20, 2021, the case was transferred and docketed as Case No. 3:21-cv-9867 (D.N.J.). Appellants filed a notice of appeal, but did not move to stay the transfer. ROA.2478. The District of New Jersey subsequently granted the applications of Appellants' attorneys to appear *pro hac vice* in the case. No. 3:21-cv-9867, Dkt. 155 (D.N.J. May 21, 2021). On June 11, 2021, the District of New Jersey granted the New Jersey Attorney General's unopposed motion to consolidate

the case with Appellants' already-pending New Jersey action. No. 3:21-cv-9867, Dkt. 159 (D.N.J.). Appellants did not oppose the motion to consolidate, did not move for a stay, and did not move for a retransfer in the District of New Jersey.

On May 28, 2021, Appellants moved for an injunction pending appeal in this Court, relief they never sought in the district courts. The Attorney General opposed, noting this Court lacks jurisdiction. *See* Br. In Opp. To Inj. Pending Appeal at 7-9. In response, Appellants filed a purported "Notice of Mandamus" in the district court on June 21, Dkt. 163, but never filed a mandamus petition under Rule 21. On June 23, this Court *sua sponte* issued an administrative order purporting to stay the district court's April 19 transfer order. Judge Higginson dissented.[2]

Since then, Appellants' lawsuit against USDOS has changed in material ways, because jurisdiction over the code related to 3D printable firearms was transferred from USDOS to the Commerce Department. Those rules, although issued in January 2020, became effective May 26, 2021. *See* 86 Fed. Reg. 29,189-90, 29,196 (June 1, 2021). Appellants have not amended their complaint to assert any claims against the Commerce regulations; instead, they withdrew the preliminary injunction motion "in light of materially changed circumstances." Dkt. 166. USDOS has filed a motion to

[2] In a July 1, 2021 order, the District of New Jersey denied the Attorney General's request for a status conference, stating a conference was "unnecessary" in light of this Court's June 23 order. No. 19-4753, Dkt. 46. But the district court did not stay the case, which remains consolidated with the prior New Jersey action.

dismiss Appellants' claims for prospective relief as moot, and to transfer Appellants' claims for money damages to the Court of Federal Claims or dismiss them. Dkt. 162. Appellants are litigating those issues, and have urged the district court to "require evidentiary development" of related "questions of fact." Dkt. 168, at 20.

## SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to review the district court's interlocutory order severing and transferring claims to the District of New Jersey.

A. This Court lacks appellate jurisdiction over the order severing and transferring Appellants' claims against the New Jersey Attorney General because that order is not a final, appealable decision, nor is it an appealable interlocutory order under either 28 U.S.C. § 1292(b) or the collateral order doctrine. *See, e.g.*, *In re Rolls Royce Corp.*, 775 F.3d 671, 677 (5th Cir. 2014). The only possible means of review would thus be via mandamus.

B. Mandamus relief is unavailable, however, for three independent reasons. *First*, this Court lacks authority to issue mandamus in this case. The transfer to the District of New Jersey deprived this Court of jurisdiction, as this Court has no power to issue orders binding the transferee court. *See In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015). That is especially so where, as here, the transferee court has acted in this case. This Court's June 23, 2021 administrative stay does not change that fact, as the transfer had already been effectuated, immediately removing the case from this Court's jurisdiction. *Second*, Appellants cannot meet the threshold requirements for mandamus because they have other adequate means to attain the relief they seek; they can simply move the District of New Jersey to retransfer the case to the Western District of Texas. *See Persyn v. United States*, 935 F.2d 69, 72

(5th Cir. 1991). *Finally*, Appellants did not file the mandamus petition required by Rule 21 of the Federal Rules of Appellate Procedure.

II. On the merits, the district court did not clearly abuse its discretion in severing and transferring the claims against the New Jersey Attorney General.

A. The district court did not clearly abuse its discretion in finding that its severance-and-transfer order allows for more efficient judicial resolution of Appellants' claims. For one, severing and transferring the claims against the New Jersey Attorney General eliminates thorny threshold jurisdictional issues that exist only if this case were to remain in Texas, including whether there is jurisdiction for new claims against a New Jersey criminal statute. For another, the order allows for more efficient resolution of the merits by ensuring a single court can resolve both lawsuits Appellants filed to enjoin the same state statute.

B. The remaining factors support severance. As the district court determined, Appellants' separate suits against the New Jersey Attorney General and USDOS do not arise out of the same transaction or occurrence; different witnesses and documentary proof are required; and the legal challenges to the federal and state laws differ. Moreover, the claims against USDOS are likely moot.

C. The remaining factors likewise support transfer. New Jersey has a strong interest in having Appellants' claims relating to its criminal laws examined by local state or federal courts—courts that have expertise in interpreting them. That

is why no party has identified a single *Ex Parte Young* suit against a state defendant that was adjudicated outside of that official's state. Moreover, transfer eliminates the risk of any conflict between this Court and the Third Circuit.

D. Appellants' contrary claim that the New Jersey Attorney General is a necessary party to its litigation against USDOS is meritless. First, Appellants waived this claim by never raising it below. Second, Appellants are unable to assert the interests of an allegedly necessary third party. Finally, Appellants identify no interest that would actually be undermined by the Attorney General's absence.

## ARGUMENT

### I. This Court Lacks Jurisdiction To Review The District Court's Order.

Appellants purport to identify two bases for this Court to grant relief: appellate jurisdiction and mandamus jurisdiction. Neither holds up.

A. This Court Lacks Appellate Jurisdiction.

The transfer order is not reviewable on direct appeal because it is not a final order and none of the narrow exceptions to the final-order doctrine apply.

*First*, as this Court has repeatedly held, a severance-and-transfer order is not a final decision under 28 U.S.C. § 1291. *See, e.g.*, *In re Rolls Royce Corp.*, 775 F.3d 671, 676 (5th Cir. 2014); *Persyn v. United States*, 935 F.2d 69, 72 (5th Cir. 1991); *Ellis v. Barr*, 837 F. App'x 313, 314 (5th Cir. 2021) ("[W]e lack jurisdiction over Ellis's appeal of the district court's transfer and severance orders, as those orders are

neither final, appealable decisions nor qualifying interlocutory orders nor reviewable collateral orders."); *see also* 15 Charles A. Wright & Arthur R. Miller et. al., Fed. Prac. & Proc.: Jurisdiction and Related Matters §§ 3914.12, 3855 (4th ed. 2021).

*Second*, such orders are not appealable under 28 U.S.C. § 1292(b). Although that provision allows a narrow avenue for discretionary appeals if the district court certifies certain requirements, "interlocutory review of transfer orders under 28 U.S.C. § 1292(b) is unavailable." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc); *see also Rolls Royce*, 775 F.3d at 676 (confirming "circuit precedent forecloses reviews of transfer orders under that statute" due to "[t]he Congressional policy against piecemeal appeals"); *Ellis*, 837 F. App'x at 314.

*Third*, Appellants' bald assertion that severance-and-transfer orders could be reviewed under the collateral order doctrine, Appellants' Br. 1, is directly contrary to precedent. *See Rolls Royce*, 775 F.3d at 676 ("[T]ransfer orders do not fall within the scope of [the collateral order] doctrine"); *In re Lieb*, 915 F.2d 180, 185 (5th Cir. 1990). This Court has held that an order is appealable under this doctrine only "if it is conclusive, resolves important questions that are separate from the merits, and is effectively unreviewable on appeal from final judgment." *Brinar v. Williamson*, 245 F.3d 515, 517 (5th Cir. 2001). And this Court has ruled that Section 1404(a) transfer orders do not suffice, finding that they are not "effectively unreviewable" because they can be reviewed by the transferee court. *See Persyn*, 935 F.2d at 73; Wright &

Miller § 3855 (agreeing that the "transferee may order retransfer if it concludes that the transferor's decision was clearly erroneous").

Against all this, Appellants' brief discussion of appellate jurisdiction musters only two inapposite cases. *See* Appellants' Br. 1-2. First, *In re Sepulvado*, 707 F.3d 550 (5th Cir. 2013), involved an inapposite type of "transfer." In *Sepulvado*, the Western District of Louisiana "transferred" a habeas petition *to the court of appeals* under 28 U.S.C. § 2244, which bars successive petitions unless authorized by the court of appeals. Contrary to Appellants' assertion, that opinion never mentions the collateral-order doctrine; instead, this Court enjoys jurisdiction over that "transfer" because it *is* the transferee court. Second, Appellant briefly mentions an out-of-circuit decision from 1973, *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973), to argue that a severance order is immediately appealable. But *Garber* involved unique circumstances that denied "a party his due process right to prosecute his own separate and distinct claims or defenses," *id.* at 716, and beyond those confines, the Second Circuit agrees a "district court's severance order … is not an appealable final judgment." *Verzani v. Costco Wholesale Corp.*, 387 F. App'x 50, 52 (2d Cir. 2010). And more importantly, *this* Court has rejected appellate jurisdiction for such claims, reasoning that where a court resolves a "joint transfer and severance motion" (as it did here), a collateral appeal is not available and "there are no other means for review of the district court's order but through mandamus." *Rolls Royce*, 775 F.3d at 677.

B. This Court Lacks Authority To Issue Mandamus.

This Court also cannot issue a writ of mandamus undoing the district court's order for three reasons. First, the transfer to the District of New Jersey removed the case from this Court's jurisdiction. Second, mandamus is inappropriate where (as here) other remedies exist. Finally, Appellants did not follow the requirements for seeking mandamus, which this Court has strictly applied in the past.

1. *This Court Lacks Authority To Issue Orders Binding A Lawsuit That Is Currently Before An Out-Of-Circuit Court.*

The first problem is that this Court lacks jurisdiction. This Court has found a Section 1404(a) "transfer to another circuit removes the case from our jurisdiction, and numerous circuits have stated that rule plainly." *Red Barn*, 794 F.3d at 484 (collecting cases). In other words, since Appellants did not move to stay the transfer order and the case is now in the District of New Jersey, the transferor court (the Western District of Texas) and its circuit (this Court) no longer maintain jurisdiction, and this Court cannot order the District of New Jersey to send a case back. In two rounds of briefing, Appellants adduced no precedents to the contrary, and nothing in this Court's June 23, 2021 administrative stay order changes this analysis.

Begin with this Court's clear prohibition on exercising mandamus jurisdiction to undo an effectuated transfer to an out-of-circuit court. This Court confronted this exact question in *Red Barn*, in which a plaintiff sought mandamus after a Louisiana

district court transferred the case to a district court in the Seventh Circuit. *Red Barn* found that because a transferor district court "lost its jurisdiction" after the transfer was effectuated, that district court (here the Western District of Texas) "is no longer capable of making a final decision that would be appealed to [this] Court." 794 F.3d at 484. As such, "[t]his is not just a case in which no appeal to the Fifth Circuit has been perfected; instead, it is a proceeding in which no appeal to this court can be taken, short of the purely speculative possibility that the [New Jersey] court transfers it back." *Id.; see also id.* (noting power to issue "mandamus … does not itself confer jurisdiction. We can issue a writ of mandamus only if we have jurisdiction."). It follows that this Court "lack[s] jurisdiction to order the transferee district court to return the case." *Id.*; *see also id.* (describing this rule as "uncontroversial"); *In re Southwest Mobile Homes, Inc.*, 317 F.2d 65, 66 (5th Cir. 1963) (agreeing that when "transfer was complete," the transferor court "lost jurisdiction," and it is "extremely doubtful whether this Court now has the power to compel the District Judge to vacate his order transferring the action"). Not only that, but a rule allowing "mandamus to undo a completed inter-circuit transfer risks provok[ing] a possible conflict between the Circuits." *Red Barn*, 794 F.3d at 484.

Any contrary holding would directly split with the conclusion of other courts of appeals. *See id.* at 484 n.4 (collecting cases from majority of circuits); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516-17 (10th Cir. 1991)

("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, including the power to review the transfer."). Judge Learned Hand's decision in *Drabik v. Murphy*, 246 F.2d 408 (2d Cir. 1957), is instructive. There, a party filed for reconsideration in the Southern District of New York after that court had transferred a case to Louisiana. *Id.* at 409. But the Second Circuit found reconsideration unavailable: the transferor "already lost all jurisdiction over the action because the transfer was then complete." *Id.* That "service of the plaintiff's motion for reargument was [made] before the papers had been lodged with the clerk of the [Louisiana district court] did not stay the transfer, or preserve the jurisdiction" of the transferor district court. *Id.* Because any circuit's power is territorially limited to those districts within its borders, it likewise loses jurisdiction when a case is transferred beyond its domain.[3]

That proves fatal to claims of jurisdiction here. The April 20, 2021 transfer and docketing of this case in the District of New Jersey resulted in a loss of the

[3] The same principle applies in other commonplace scenarios, such as when Rule 67 settlement funds "have been physically transferred" to an out-of-circuit transferee court. In those circumstances, courts of appeals "have no authority to order a district court in another circuit to take a specific action (say, returning the funds)." *Alstom Caribe, Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 117 (1st Cir. 2007). The same is true for certain remand orders to state courts: "[a]t the moment of mailing—the jurisdictional event—the remand order became unreviewable" by the district court and the circuit. *Agostini v. Piper Aircraft Corp.*, 729 F.3d 350, 356 (3d Cir. 2013); *Arnold v. Garlock*, 278 F.3d 426, 438 (5th Cir. 2001) ("Once [a] remand order is certified and mailed … the matter remanded is removed from federal jurisdiction.").

transferor court's and this Court's jurisdiction. Although Appellants filed a notice of appeal—much like the speedy reconsideration motion in *Drabik*—Appellants never sought to stay the transfer. *See* Appellants' Reply Br. in Support of Mot. for Inj. Pending Appeal at 11 ("This Court is not being asked to enjoin anything about the interlocutory transfer or severance rulings below."). And filing a "notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by either the district court or the appellate court." *United States v. Hitchmon*, 602 F.2d 689, 691 (5th Cir. 1979) (en banc); *see also Butler v. Denka Performance Elastomer*, 806 F. App'x 271, 275 n.5 (5th Cir. 2020) ("[G]enerally, filing a notice of appeal strips the district court of jurisdiction, but this rule is inoperative for nonappealable orders."); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 928 (5th Cir. 1983) (even where appeal is proper, finding that the district court still has residual jurisdiction to "enforce its judgment so long as the judgment has not been stayed"). The effectuation of the transfer order thus deprived this Court of jurisdiction immediately.

Indeed, this is an especially strong example of why mandamus jurisdiction is foreclosed in such circumstances: the District of New Jersey has already exercised jurisdiction over this case. After the transfer was effectuated, on June 11, 2021, the District of New Jersey consolidated the transferred case with Appellants' pending

substantially identical case. *See In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1013 (5th Cir. 1977) (recognizing an order granting consolidation involves the exercise of jurisdiction). Thus, any mandamus effort by this Court to seek return of the case to Texas would require the New Jersey court to vacate its own consolidation order—a decision that lies solely within the domain of the Third Circuit, not this Court. That would create irreconcilable conflict with another court. *See Mobil Oil Exploration Co. v. FERC*, 814 F.2d 998, 1001 (5th Cir. 1987) (recognizing that if parties seek to file a matter in two courts of appeals, "[b]oth courts cannot have jurisdiction"); *West Gulf Mar. Ass'n v. ILA Deep Sea Local*, 751 F.2d 721, 728 (5th Cir. 1985) ("[C]omity requires federal district courts … to exercise care to avoid interference with each other's affairs.").[4]

Nothing in Appellants' sparse discussion of jurisdiction resolves this problem. While Appellants baldly assert that this Court can issue a writ of mandamus, neither of the two cases they cite says so. *See* Appellants' Br. 2. *Volkswagen* involved a

[4] This also bears directly on the dicta in *Red Barn* describing a "potential" for issuing a writ of mandamus to a transferor district court to make a non-binding request for retransfer. This Court cautioned that even such a request must be reserved for an "extreme case" since it can "provok[e] a possible conflict between the Circuits." 794 F.3d at 484-85 (citation omitted). But the State knows of no examples in which this Court actually took that step, let alone after a transferee court consolidated the action with another pending before that court. And in any event, Appellants never requested such relief, and a case cannot be "extreme" where one member of this panel already suggested that a transfer would be within the district court's discretion.

transfer between two Texas district courts within the Fifth Circuit, meaning that this Court retained jurisdiction no matter the outcome. Additionally, unlike in this case, transfer was *denied*, ensuring the "transferor court" (and thus this Court) retained jurisdiction. 545 F.3d at 307-08. *Rolls Royce* likewise featured a denial of transfer, which kept jurisdiction in the transferor court. 775 F.3d at 677. In other words, neither decision raised any of the jurisdictional problems implicated here, so citing them does not help Appellants overcome theirs.

Nor is Appellants' response strengthened by their selective reliance on Wright & Miller. Appellants recite a single sentence: "[i]f the transfer was made from a district in one circuit to a district in another, only the court of appeals in the circuit of the transferor can review the decision." Wright & Miller § 3855. But Appellants misread that line, which merely confirms the uncontroversial fact that circuits can only review the decisions of district courts within their borders. Indeed, that treatise *refutes* Appellants' position, explaining a transfer "is not immediately appealable," that the "circuit court of the transferee court" can eventually "review the transferee district's ruling on a motion to retransfer," and mandamus is not the proper remedy. *Id.* (observing "the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review").

Appellants' suggestion that jurisdiction could be allowed because the district court "retain[ed] jurisdiction over the action's remaining claims against the State Department" is illogical. Reply Br. in Support of Mot. for Inj. Pending Appeal at 1. Indeed, this Court has already foreclosed such an argument, specifically instructing that a decision on an intertwined severance-and-transfer motion is not appealable on an interlocutory basis. *See Rolls Royce,* 775 F.3d at 676-77. And that makes sense: "[s]everance under Rule 21 creates two separate actions or suits … Where a single claim is severed out of a suit, it proceeds as a discrete, independent action." *United States v. O'Neil*, 709 F.2d 361, 368 (5th Cir. 1983); *see also Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 441, n.17 (7th Cir. 2006) (collecting cases). The suits thus have distinct jurisdictional properties. *See O'Neil*, 709 F.2d at 368 (noting that, after severance, "a final, appealable judgment in either one of the resulting two actions" can exist "notwithstanding the continued existence of unresolved claims in the other"). Whatever happens in the suit against USDOS does not somehow provide the district court with jurisdiction over the severed and transferred action against the New Jersey defendant, and so this Court does not enjoy jurisdiction either.

Finally, this Court's June 23, 2021 administrative stay order does not change the jurisdictional analysis. Because Appellants never moved to stay the transfer, the transfer was fully effectuated on April 20, 2021, when the case was docketed in the District of New Jersey. This was the event that deprived this Court of jurisdiction.

*See Red Barn*, 794 F.3d at 484 (holding that court of appeals lost jurisdiction when the case was transferred to a district in the Seventh Circuit); *Drabik*, 246 F.2d at 409. Simply put, because the transfer is the jurisdictional event, that loss of jurisdiction cannot be reversed 64 days later by the transferor court or by its circuit. Indeed, this Court has said the same in a related context. In *Erly Industries v. M/V CHADA NAREE*, 226 F.3d 641, 2000 WL 1029002 (5th Cir. 2000), the district court entered an order staying the action pending arbitration one week after the parties had filed a notice of appeal. *Id.* at *1. This Court held that since the district court was "divested of jurisdiction upon the filing of notice of appeal," its stay was "unenforceable." *Id.* at *2. So too here: once the district court and therefore this Court were "divested of jurisdiction," an order purporting to stay that action has no effect.

In other words, without jurisdiction to review the transfer order, all this Court can do is "announce" that lack of jurisdiction and "dismiss[] the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). While the All Writs Act allows courts of appeals to act "in aid of their respective jurisdictions," *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966), it "does not enlarge that jurisdiction," *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). As Chief Justice Burger explained, where a motions panel "was without jurisdiction over the appeal from the District Court's order," that "panel was necessarily without authority to grant [a] stay," too. *Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., AFL-CIO*, 473 U.S. 1301, 1306 (1985)

(Burger, C.J.) (vacating motions panel's stay order). That limitation has all the more force where, as here, a stay would grant an appellant "more extensive relief than it had sought from the District Court," *id.*, and risks having derivative impacts on a transferee court's subsequent actions in the case. As such, the June 23, 2021 administrative stay order has no jurisdictional effect.

2. *Appellants Cannot Obtain Mandamus Because They Have Other Adequate Means Of Seeking Relief.*

There is a second problem: even if this Court could exercise authority over a lawsuit presently in the District of New Jersey, it still cannot exercise mandamus authority where Appellants have another adequate way to seek relief. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (the first requirement of the three-part mandamus test is that petitioner must have "no other adequate means to attain the [desired] relief"). The requirement that a petitioner have no other adequate means to obtain the requested relief is a strict one, as it is designed to ensure that litigants cannot use the writ as "a substitute for the regular appeals process." *Id.* at 380-81; *see also, e.g.*, *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987) ("Mandamus cannot be used as a substitute for appeal even when hardship may result.") (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)).

Federal courts have made clear the extraordinarily stringent nature of this test. It is a "bedrock principle of mandamus jurisprudence that the burdens of litigation

are normally not a sufficient basis for issuing the writ" if an issue can be reviewed in another way later in the case. *In re al-Nashiri*, 791 F.3d 71, 80 (D.C. Cir. 2015) (denying mandamus where "adequate remedy exists" in the form of appellate review of Guantanamo detainee's capital charges after military commission trial). In fact, the Supreme Court has held that the burden of undergoing a criminal trial "of several months' duration" does not suffice given Congress's determination "that only final judgments should be reviewable." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). Ultimately, the burdens of litigating a case will not justify mandamus if another form of review exists at another stage.

That is dispositive because Appellants have another adequate means of relief: seek retransfer in the District of New Jersey. Appellants can "make a motion in the transferee court that the case be 'retransferred'—that is, sent back to the original court." Wright & Miller § 3855. While the transferee court will typically approach that question with deference, "the transferee may order retransfer if it concludes that the transferee's decision was clearly erroneous." *Id.* And "the circuit of the transferee court may … review the transferee district's ruling on a motion to retransfer the case to the original district." *Id.*; *see also SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 177, 178 n.7 (2d Cir. 2000) (holding that the transferee's circuit "may review a ruling by the transferee court denying retransfer" and that any "court of appeals reviewing the denial of a retransfer motion would not be limited by the law of the

case, as announced by the transferor district court," and collecting circuit cases); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 772 n.9 (3d Cir. 1984) (adopting same rule with respect to Section 1406 transfers, and noting "the transferor court's disposition of the original motion to transfer would not necessarily be res judicata"). On this basis, other circuits have denied mandamus relief. *See, e.g.*, *Cain v. Graf*, 161 F.3d 17, 1998 WL 654987 (10th Cir. 1998) (denying mandamus for transfer order where opportunity to move for retransfer "afford[s] plaintiff an adequate means of relief other than mandamus"); *In re Dalton*, 733 F.2d 710, 717 (10th Cir. 1984); *Gulf Research & Dev. v. Harrison*, 185 F.2d 457, 460 (9th Cir. 1950); *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869-70 (2d Cir. 1950).

In fact, this Court has already held that such relief is possible in determining that transfer orders did not meet the "effectively unreviewable" requirement of the collateral order doctrine. In *Persyn*, the Court held that a transfer of venue to the Court of Federal Claims "is not effectively unreviewable" because that transferee court could agree or decline to send the action back, a decision that could ultimately be appealed. 935 F.2d at 73; *Shugart v. Hawk*, 39 F.3d 320, 1994 WL 612547 (5th Cir. 1994) (dismissing appeal where ability to "obtain review of the transfer order" in the transferee court meant that it was not "effectively unreviewable"). That applies with equal force in the mandamus context. Simply put, Appellants want to be able to challenge a decision of a transferor court in the transferor's circuit *and* challenge

a decision of a transferee court not to retransfer in that circuit. But mandamus is not a windfall; it exists only where it is the sole path forward.

The only cases Appellants cite in arguing that mandamus review of transfer orders is "well-established" despite these adequate alternatives, Appellants' Br. 2, cannot help them. Again, *Volkswagen* and *Rolls Royce* held that mandamus relief was available to assess the *denial* of a motion to transfer, but that posture is considerably different: there is no option of asking the transferee court to consider the order anew because there is no transferee court at all. While the transferee court may well decide to defer to the transferor's decision (a decision that itself will be reviewable in the transferee circuit), the mere "possibility" of any "other adequate means" to obtain relief is "reason alone" to deny mandamus. *In re Gibson*, 423 F. App'x 385, 389 (5th Cir. 2011). Appellants' ability to seek retransfer in New Jersey is an "adequate means to obtain the requested relief" that forecloses mandamus.

3. *Appellants Have Not Properly Petitioned For Mandamus.*

There is one final problem: the Federal Rules prevent this Court from granting Appellants' passing "request that the Court treat this filing as a petition for a writ of mandamus." Appellants' Br. 2. Appellants have failed to meet the explicit

requirements of FRAP 21 for a mandamus petition, a fact they nowhere deny.[5] But that proves fatal. As this Court has put it, Rule 21's requirements are mandatory, and noncompliance requires denial. *See EEOC v. Neches Butane Prod. Co.*, 704 F.2d 144, 152 (5th Cir. 1983) (holding that absent "extraordinary" circumstances, "a mandamus petitioner may not fail to comply with [R]ule 21 without providing an adequate excuse"). Appellants have not attempted to provide any excuse; nor could they, as Appellants have capable counsel. Thus, Appellants "should not be able to petition for a writ of mandamus without writing any petition … and without paying any attention at all to the directly applicable federal rule of appellate procedure." *Id.*; *see also id.* at 152 (declining to treat appeal as mandamus petition); *Mut. Fire Ins. v. Booth*, 24 F.3d 240 (5th Cir. 1994) (declining to treat appeal as mandamus petition absent adequate excuse); *United States v. Henderson*, 915 F.3d 1127, 1132 (7th Cir. 2019) ("Ordinarily we will not construe an appeal as a petition for mandamus if the appellant 'failed to apply for [the] writ in accordance with the requirements of [Rule] 21(a).'"). That is enough to resolve this appeal.

[5] For instance, Appellant's brief is styled as "Brief for Appellants," rather than a petition for writ of mandamus, and it does not name the district court. Further, the brief contains 12,828 words, far exceeding the 7,800-word limit for mandamus petitions. Fed. R. App. P. 21(d)(1). Finally, that Appellants belatedly sent a copy of their brief to the district court *after* the State raised these deficiencies in responsive briefing hardly qualifies as providing proper notice to that court, let alone an act sufficient to transform an appeal into a compliant mandamus petition.

## II. The District Court's Severance-And-Transfer Order Was Not A Clear Abuse Of Discretion.

The standard for obtaining a writ of mandamus relating to a joint severance-and-transfer order is extraordinarily high, and Appellants cannot satisfy it. A court cannot order mandamus "on the mere ground that [the district court] may be erroneous." *Volkswagen*, 545 F.3d at 309 (quoting *Will v. United States*, 389 U.S. 90, 98 n.6 (1967)). Instead, the petitioner must show a "clear and indisputable" right to issuance of the writ. *Cheney*, 542 U.S. at 381. Appellants must thus prove that the district court's decision to sever and transfer the claims against the Attorney General was a "clear abuse of discretion." *Rolls Royce*, 775 F.3d at 677 (citation omitted). It is not enough to show that there are clearly erroneous factual findings or conclusions of law; mandamus could only be justified "when such errors produce a patently erroneous result … that clearly exceeds the bounds of judicial discretion." *Volkswagen*, 545 F.3d at 310; *see also id.* ("[I]n no case will we replace a district court's exercise of discretion with our own.").

It is especially difficult to establish a clear abuse of discretion in this context because the district court has "wide discretion to sever a claim against a party into separate cases," *Rolls Royce*, 775 F.3d at 680, and "broad discretion in deciding whether to order a transfer" under Section 1404(a), *see Volkswagen*, 545 F.3d at 31. The court's severance inquiry is guided by whether (1) "the claims arise out of the

same transaction or occurrence," (2) "the claims present some common questions of law or fact," (3) "settlement of the claims or judicial economy would be facilitated" by severance; (4) "prejudice would be avoided if severance were granted," and (5) "different witnesses and documentary proof are required for the separate claims." *Rolls Royce*, 775 F.3d at 680 n.40. The Section 1404(a) inquiry is guided by a series of public and private interest factors. *Volkswagen*, 545 F.3d at 31.

Appellants fall far short of showing that the joint severance-and-transfer order is an "extreme" case or a clear abuse of discretion.

### A. The District Court Did Not Clearly Abuse Its Discretion In Finding Judicial Efficiency Supported Its Severance-And-Transfer Order.

First, a joint severance-and-transfer inquiry is primarily "focused on judicial efficiency." *Rolls Royce*, 775 F.3d at 680. Appellants agree the district court properly gave the greatest weight to judicial efficiency; they simply disagree with the court's conclusion. *See* Appellants' Br. 31-32. But the district court's order promoted efficiencies both regarding threshold jurisdictional questions and on the merits, and is consistent with the court's considerable discretion.

#### 1. *The Order Below Promotes Judicial Efficiency Because Further Litigation On Jurisdictional Issues Would Only Exist In Texas.*

The district court correctly recognized that litigating claims against this New Jersey official in Texas will lead to an unnecessary and substantial use of the Texas

court's resources to adjudicate issues relating to personal jurisdiction, which is not the case if the claims are heard in the District of New Jersey.

First, Appellants have not established personal jurisdiction for their newly-pled claims against Section 2C:39-9(*l*)(2), an issue that would have to be litigated were the case to remain in Texas, but not if transferred to New Jersey. Last year, this Court held that personal jurisdiction was sufficiently alleged as to claims arising out of the Attorney General's cease-and-desist letter, which warned Appellants not to violate New Jersey's common law of public nuisance. *See Grewal*, 971 F.3d at 489. But specific personal jurisdiction must be established on a claim-by-claim basis, *Seiferth v. Helicopteros Atuneros*, 472 F.3d 266, 275 (5th Cir. 2006), and it has never been established for Appellants' challenge to Section 2C:39-9(*l*)(2). As Appellants concede, "Plaintiffs had not formally pleaded their [Section 2C:39-9(*l*)(2)] claims" in the complaint this Court previously reviewed. Appellants' Br. 35. The district court rightly found no basis to read this Court's prior decision to "appl[y] to any un-pleaded claims regarding § 2C:39-9(*l*)(2)." ROA.2470.[6]

[6] It makes no difference that Appellants referenced Section 2C:39-9(*l*)(2) in a 2018 motion for preliminary injunction, *see* Br. 34-35, because this Court's prior ruling was based solely on the claims in the complaint, and never referenced that separate motion. *See Grewal*, 971 F.3d at 490. Appellants did not refer to it in briefing, and the court did not rule on the motion because it was moot. In fact, Appellants' briefing repeatedly emphasized the constitutional injury they alleged was "attribute[ed] … to the letter's threat itself." Reply Br., No. 19-50723, at 7 n.2.

That this Court's prior holding was cabined to the claims regarding the cease-and-desist letter alone is clear from the text and reasoning of this Court's opinion. This Court stressed that jurisdiction was properly alleged in the previous complaint because those claims were "based on Grewal's cease-and-desist letter." 971 F.3d at 492. In doing so, this Court distinguished the claims in *Stroman Realty v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), as "more a product of Arizona's regulatory scheme than it was the cease-and-desist letter itself. Not so for the plaintiffs' claims here, many of which are based on injuries stemming solely and directly from Grewal's cease-and-desist letter." *Id*. at 492. But a challenge to Section 2C:39-9(*l*)(2) is one against New Jersey's "regulatory scheme" regarding 3-D printable guns, and not one "based on" a cease-and-desist letter that predated the law's enactment and never mentioned it. Moreover, while the Court noted that the cease-and-desist letter "does not cabin [its] request by commanding the plaintiffs to stop publishing materials to New Jersey residents" only, *id*. at 492, Section 2C:39-9(*l*)(2) is explicit in its geographic scope, prohibiting distribution "to a person in New Jersey who is not registered or licensed as a manufacturer."

Appellants' heavy reliance on their own factual allegation that the Attorney General mentioned Defense Distributed's founder during the bill signing, 971 F.3d at 493, does not help them. Although Appellants brush by this, this Court's previous opinion flatly *rejected* the idea that minimum contacts could be established from the

bill-signing remarks, noting "the broadcast event the plaintiffs reference took place in New Jersey," and this action did not "represent direct contacts with Texas." *Id.* at 492. Instead, the Court repeatedly referenced only the "intentional mail[ing] of the cease-and-desist letter into Texas" as the nexus of minimum contacts, noting that it was "specifically the cease-and-desist letter delivered into Texas" that "gave rise to distinct tort causes of action." *Id.* at 494-95. The prior opinion thus refutes, rather than supports, claims of jurisdiction over the then-un-pleaded claims against a New Jersey statute that limits dissemination only to persons in New Jersey.

Litigating this issue will certainly require significant judicial resources, and is likely to result in a dismissal for lack of jurisdiction. Indeed, Appellants do not even attempt to demonstrate personal jurisdiction exists over the Section 2C:39-9(*l*)(2) claims, resting upon their assertion that this Court's prior ruling established personal jurisdiction over claims not yet pled at the time. But subsequent decisions of this Court only confirm that this challenge to a New Jersey state statute limiting dissemination exclusively to New Jersey residents does not belong in federal court in Texas. *See Bulkley & Assocs., LLC v. Dep't of Indus. Rels.*, 1 F.4th 346 (5th Cir. 2021) (holding that California agency's instruction to Texas company to "remedy violations of California law" does not establish minimum contacts simply because the company would have to "chang[e] its policies in Texas"). Said another way, in enacting a law that limits dissemination "to a person in New Jersey," no New Jersey

officials "availed themselves of Texas law," since the statute only affects Appellants if they "unilaterally cho[o]se to transact with [New Jersey] residents." *Id.* The court acted within its discretion in finding this case is best handled in New Jersey.

Second, further litigation over personal jurisdiction will be necessary in Texas regardless, because the Court only previously evaluated jurisdiction at the motion-to-dismiss stage. A higher level of proof is needed after that, which the Texas court would have to evaluate. *See Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 399 (5th Cir. 2009) (noting that an "adverse jurisdictional ruling at the pre-trial stage did not foreclose either defendant from holding [the plaintiff] to its ultimate burden at trial of establishing contested jurisdictional facts by a preponderance of the evidence"); *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 778 (5th Cir. 2018) (same). This Court acknowledged there was a fact dispute over whether the cease-and-desist letter sought to prevent Appellants' dissemination nationwide or to New Jersey residents alone, but found "at this stage of the litigation, we are required to resolve all factual disputes in favor of the plaintiff." 971 F.3d at 493 n.6. As Judge Higginson added, "[i]f, in fact, Grewal attempted to prevent the distribution of the files only within the state of New Jersey," there would be no jurisdiction, a dispute the panel left for the district court. *Id.* at 497 n.1 (Higginson, J., concurring). Not only that, but Defense Distributed has subsequently confirmed that it could simply restrict the distribution of its files to New Jersey internet service

provider addresses. *See* ROA.3740 (April 30, 2021 declaration admitting "Defense Distributed made the April 2021 Files unavailable to residents of and persons in the State of New Jersey who do not possess a federal firearms license"). The severance-and-transfer order eliminates the need to resolve this fact dispute entirely.

Third, if the case remained in Texas, that court would have to adjudicate the Attorney General's argument that Texas's long-arm statute does not allow personal jurisdiction with respect to *any* of Appellants' claims. That statute allows courts to exercise jurisdiction over a "nonresident" who "does business" in Texas if that nonresident "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state" or "commits a tort in whole or in part in this state." Tex. Civ. Prac. & Rem. Code Ann. § 17.042. This Court has questioned whether an out-of-state public official sued in his official capacity meets these definitions, especially because an official's "faithful enforcement of allegedly unconstitutional [state] statutes" is not "doing business." *Stroman*, 513 F.3d at 482-83. Although this Court found the issue waived in the prior appeal, 971 F.3d at 496, the question would require resolution after Appellants' amendment of their complaint to add a new challenge to a New Jersey criminal statute. *See, e.g.*, *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011) (a defendant may raise new defenses to an amended complaint, including defenses that were waived in response to the *initial* complaint, where the amendment "changes the theory or scope

of the case"). Here too, transfer eliminates the need to weigh in on this threshold statutory question.

The district court thus correctly concluded that severance-and-transfer to New Jersey (where all agree jurisdiction is proper) spares the litigants and the court the considerable time and expense needed to litigate whether jurisdiction is proper in Texas. ROA.2470. Moreover, the transfer means "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(*l*)(2) claims in this Court." ROA.2476. The significant burden on judicial resources to resolve threshold jurisdictional issues, and Appellants' ability to more promptly seek relief in New Jersey, more than justifies the district court's decision—especially on clear-abuse-of-discretion review.

2. *The Order Below Promotes Judicial Efficiency In Resolving The Merits Of This Case.*

The district court also recognized that adjudicating the claims in New Jersey would promote judicial efficiency on the merits. The issue was whether efficiency is best served by hearing the case in conjunction with a disanalogous action against USDOS (pending in Texas) or in conjunction with a substantially-identical challenge against the same state law (pending in New Jersey). The district court did not clearly abuse its discretion in finding the latter overwhelmingly more efficient.

The district court rightly concluded that few efficiencies would be served by hearing claims against a New Jersey official and USDOS together. *See* ROA.2468. The Court need only glance at the Texas SAC's Table of Contents to see that claims against the federal defendants diverge from those against the New Jersey Attorney General. And while Appellants contend repeatedly that their tortious-interference claim against the New Jersey Attorney General shares much in common with their contract claims against USDOS, *see* Appellants' Br. 27-29, 39, that state law claim is barred by sovereign immunity, and thus is no reason to keep this suit in Texas. *See* ROA.2467; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (*Ex Parte Young* does not apply to any claims for relief against state officials under state law); *Williams v. Reeves*, 981 F.3d 437, 439 (5th Cir. 2020) (Jones, J., dissenting) ("Federal courts ... have no business interpreting and enforcing state law against state government."). Few efficiencies inure from keeping this case in Texas.

Moreover, although both cases partially sound in First Amendment law, any efficiency to be gained by that overlap has now been erased by a new development: the challenged USDOS regulations *are no longer in effect*, as a result of the transfer of jurisdiction over printable gun files from USDOS to the U.S. Commerce Department. *See* 86 Fed. Reg. 29,189-90 (June 1, 2021) (change effective May 26, 2021). Indeed, Appellants withdrew their preliminary injunction motion against USDOS, citing "changed circumstances." Dkt. 166. While Appellants are pursuing

damages for *breach of contract* and insist some residual regulations may apply, Appellants' Br. 21, 23 n.2, the heartland of their challenges to USDOS regulations will likely never be adjudicated in the district court, negating any efficiencies with their separate claims against the New Jersey Attorney General. To the contrary, Appellants are now embroiled in disputes with USDOS over whether those claims are moot and whether they belong in the Court of Federal Claims, issues Appellants insist require "evidentiary development." Dkt. 168, at 20. Those issues do not concern the New Jersey defendant whatsoever, and the severance-and-transfer order ensures that the parties to *this* case can immediately litigate these distinct claims without waiting for resolution of those separate procedural questions.

On the other hand, there are considerable efficiencies to be gained via transfer to New Jersey in light of the existing suit there. In the NJ Complaint, Appellants joined with other plaintiffs in asserting the same constitutional challenges to New Jersey law. Indeed, the other plaintiffs in the New Jersey action argued to the Third Circuit that they need to be able to proceed with the New Jersey suit because they were "completely absent" in the Texas case, and proceeding there alone would put them "out of court entirely," thus ensuring the validity of Section 2C:39-9(*l*)(2) will eventually be tested in the Third Circuit too. *See* Appellants' Supp. Br., Nos. 19-1729, 19-3182, 2020 WL 469953, at *8-9 (3d Cir. Jan. 27, 2020). Allowing Appellants as well as the New Jersey plaintiffs to pursue the very lawsuit they

voluntarily chose to file together in New Jersey is the correct result, as it *avoids* the expenditure of resources in having "the same issues to be litigated in two places," *Rolls Royce*, 775 F.3d at 680. Now, all the same constitutional claims by a number of the same parties against the same defendant over the same law will be litigated in a single forum. That is the paragon of judicial economy.[7]

In response, Appellants argue repeatedly that the severance-and-transfer order produces inefficiencies because of this Court's familiarity "with these dense factual issues." Appellants' Br. 34; 54-56. As the district court explained, there is no basis to argue "the District of New 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." ROA.2472; *see id.* ("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.'"). Indeed, the District of New Jersey and Third Circuit are also familiar with this factual history as a result of Appellants' parallel New Jersey action. *See Defense Distributed v. Att'y Gen. of N.J.*,

[7] Appellants now claim they never wanted to file the New Jersey action, and only did so because they could not establish personal jurisdiction in the Texas court. Br. 47. But Appellants never dismissed their New Jersey action even after this Court reversed the personal jurisdiction decision, and that suit includes other plaintiffs who vociferously asserted their need to pursue these claims in the New Jersey court.

972 F.3d 193, 196-97 (3d Cir. 2020). And the "complex factual or procedural history" Appellants emphasize is "dominated by questions of personal jurisdiction, which will be eliminated if the claims against the NJAG are transferred to the District of New Jersey." ROA.2472. In short, the District of New Jersey is well-suited to handle both this case and the nearly-identical one already pending there.

B. The District Court Did Not Clearly Abuse Its Discretion In Finding The Remaining Factors Favored Severance.

As to the first factor under Rule 21, Appellants' separate suits against the Attorney General and USDOS do not arise out of the same transaction or occurrence. *See Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc.*, 756 F.3d 825, 835 (5th Cir. 2014) (explaining the test for same "transaction or occurrence" is whether "the same operative facts serve[] as the basis for both claims"). As the district court noted, Appellants' action against USDOS is based on that federal agency's performance of a 2018 Settlement Agreement it reached with Defense Distributed—a settlement agreement that has nothing to do with New Jersey's laws or its Attorney General. ROA.2467-68. In the same vein, the claims against the New Jersey Attorney General have nothing to do with USDOS; they are based on the state official's cease-and-desist letter and the Legislature's subsequent enactment of Section 2C:39-9(*l*)(2), in which federal defendants played no role. ROA.2467.

Appellants' arguments to the contrary misunderstand the legal test. For one, their high-level description of the two actions as involving restrictions on publishing their files, Appellants' Br. 39, is entirely beside the point. While both claims involve Defense Distributed's products, that is hardly decisive—otherwise, *every* lawsuit involving regulation of a product could be conjoined. Instead, it is the specific laws enforced and actions taken by each defendant that give rise to the individual claims, so these are the relevant facts. *See, e.g.*, *Birmingham Fire Ins. Co. of Pa. v. Winegardner & Hammons, Inc.*, 714 F.2d 548, 551 (5th Cir. 1983) (suits against different insurance companies arose from different operative facts because, even though both resulted from the same hurricane strike, the companies "issued two different policies" which were not "interrelated nor mutually dependent"); *Ormet Primary Aluminum Corp. v. Ballast Tech., Inc.*, 436 F. App'x 297, 300 (5th Cir. 2011) (claims are from discrete operative facts where one "arose out of the botched docking and unloading of" a ship and the other "arose out of [defendant's] failure to pay for storage services provided by [plaintiff]" related to the same ship). The mere fact that Appellants wish to act in contravention of separate federal regulations and New Jersey statutes does not create a common nucleus of facts. *See Republic Health Corp. v. Lifemark Hosps. of Fla., Inc.*, 755 F.2d 1453, 1455 (11th Cir. 1985) ("the fact that all of [plaintiff's] claims 'at bottom' related to [plaintiff's] efforts to build

a hospital does not constitute a sufficient logical relationship" under same logical-relationship test).

For another, Appellants' attempt to establish common facts across the breach-of-contract claim against USDOS and the tortious-interference claim against the New Jersey Attorney General, Appellants' Br. 39, runs into two problems. The most obvious is that this tortious-interference claim is barred by New Jersey's immunity, *see supra* at 33, meaning that the only even potentially overlapping claim is one no federal court can adjudicate anyway. And regardless, these claims do not arise from the same occurrence. The former is about whether USDOS failed to perform obligations under a settlement agreement. The latter concerns whether New Jersey's decision to join nineteen states to challenge USDOS rules under the APA in the Western District of Washington constitutes tortious interference. As the district court highlighted, "the Washington Suit challenged the State Department's violations of the APA, not the separate settlement agreement." ROA.2467; *see also* ROA.1882 ¶ 98 (Appellants agreeing that the Washington Action "never sought relief against the Settlement Agreement"). And as the district court in the Washington Action put it, the plaintiff-States' "claim had nothing to do with the facts or law at issue between the existing parties" to the litigation resolved by the Settlement Agreement. *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1256 (W.D. Wash. 2018). Especially given that identical and explicit finding by the Washington district court,

the court below appropriately held that these claims lack a common nucleus of operative facts—and it certainly did not clearly abuse its discretion in doing so.

As to the second factor, Appellants' claim that their constitutional challenges present "common questions of law" runs into a number of problems. *See* Appellants' Br. 41. As a threshold matter, it is likely the district court will never resolve any constitutional questions as to the federal defendants; the USDOS regulations Appellants challenge are no longer in effect. *See supra* at 33-34 (noting the parties are litigating questions of mootness). In any event, the purported legal overlap is overstated. As to the First Amendment, the claims require separate analyses. While Appellants are pursuing a prior-restraint challenge against USDOS based on then-existing federal regulations' requirement of a license to publish printable gun files, *see* ROA.1875 ¶ 82, the crux of their claim against the Attorney General is that Section 2C:39-9(*l*)(2) is a content-based limit on speech, *see* ROA.1893 ¶¶ 142-46. Moreover, USDOS and New Jersey statutes define differently which files come within their reach, with New Jersey's definition more limited to files that could automatically be converted to 3D guns. *Compare* 22 C.F.R. §§ 121.1, 120.10, *with* N.J. Stat. Ann. § 2C:39-9(*l*)(2). And the governmental interests differ as well. Given the distinctions in both Appellants' First Amendment theories and the laws, the

district court correctly found that trying the claims together "would hardly serve the interests of judicial economy." ROA.2468.[8]

Next, the fourth factor in the severance inquiry—whether "prejudice would be avoided if severance were granted"—favors severance. *Rolls Royce*, 775 F.3d at 680 n.40. As the district court explained, prejudice to Appellants would "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 [him]." ROA.2470. Indeed, all the threshold issues outlined above will delay Appellants' ability to seek injunctive relief in this district, whereas they can seek immediate relief in the District of New Jersey. Appellants have no answer to this.

Finally, the fifth factor supports severance because proving these distinct sets of underlying operative facts requires "different witnesses and documentary proof." *Rolls Royce*, 775 F.3d at 680 n.40. As the district court found, while "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 the federal defendants "'largely turn on internal agency communications and potentially testimony from

[8] There are likewise dissimilarities across their Due Process claims. Appellants' claims against the New Jersey Attorney General include allegations of void-for-vagueness and overbreadth, ROA.1927 ¶¶ 288-89, which have nothing to do with their grievances that USDOS failed to issue certain letters and promulgate certain federal regulations, ROA.1920 ¶¶ 250-54.

agency officials.'" ROA.2468-69. Appellants do not dispute this. *See* Appellants' Br. 42. And while they assert the "evidence Plaintiffs will supply" will be similar across claims, *id.*, they fail to show these materials are relevant to proving their claims, as opposed to merely background information. This one-sentence argument fails to undermine the finding that this factor weighs in favor of severance, let alone demonstrate a clear abuse of discretion in the district court's ultimate conclusion.

### C. The District Court Did Not Clearly Abuse Its Discretion In Finding The Remaining Factors Favored Transfer To The District of New Jersey.

The district court granted a transfer under 28 U.S.C. § 1404(a), which allows for a transfer "to any other district or division where it might have been brought or to any district or division to which all parties have consented."[9] Here, the relevant public and private factors overwhelmingly favor a transfer.

#### 1. *The Public Interest Factors Favor Transfer.*

To determine whether transfer is proper under Section 1404(a), courts weigh a number of public factors, including: "(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)

[9] Appellants do not dispute the district court's finding "that venue is proper" in the District of New Jersey, where Appellants have already sued the Attorney General. ROA.2464. Appellants acknowledged that New Jersey "constitutes a proper venue for this action because a substantial part of the events or omissions giving rise to the claim occurred here" in that suit. No. 3:19-cv-4753, Dkt. 17, ¶ 26.

the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Volkswagen*, 371 F.3d at 203. The district court sensibly found that the latter three factors weigh in favor of transfer (after finding the first factor neutral).

Starting with the second and third factors, the district court recognized that, as a general matter, States have an interest in not defending challenges to their laws in faraway forums. The district court relied on Judge Higginson's concurrence in the prior appeal, which pointed to these particular concerns as reason to grant a Section 1404(a) transfer in this case. ROA.2472. As the district court explained, "New Jersey has a strong interest in having Plaintiffs' claims relating to § 2C:39-9(*l*)(2), a New Jersey criminal statute, 'examined by local state or federal courts—courts that have expertise interpreting its laws.'" *Id.* (quoting *Grewal*, 971 F.3d at n.3 (Higginson, J., concurring)). In fact, in all "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." *Id.* (quoting *Grewal*, 971 F.3d at 499 n.3 (Higginson, J., concurring)).

That decision makes sense: "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.'" *Id.* Indeed, the Supreme Court and this Court have made these same points in the past. *See, e.g.*, *Leroy v. Great W. United Corp.*, 443

U.S. 173, 186 (1979) ("[F]ederal judges sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's probable enforcement of that law, than are judges sitting elsewhere."); *Stroman*, 513 F.3d at 487 (noting all States' "strong interest in not having an out-of-state court evaluate the validity of its laws," as out-of-state courts lack "special expertise interpreting [the state's] laws," and a contrary rule would "diminish the independence of the states"). A district court decision following guidance provided by Judge Higginson's concurrence and prior teachings of the Supreme Court and this Court is not a clear abuse of discretion—especially when the record reveals *no case* in which an *Ex Parte Young* challenge has occurred outside the defendant's state.

Appellants' assertion that New Jersey's interest in having this challenge to its state laws heard by local courts is somehow "diminished" misreads this Court's prior ruling. *See* Appellants' Br. 53. The prior opinion did not analyze the weight accorded to New Jersey's sovereign interests—and understandably so, because this was unnecessary for finding that Appellants' allegations sufficed for personal jurisdiction over their claims relating to the cease-and-desist letter. *See Grewal*, 971 F.3d at 495-96. Moreover, the panel's finding that the Attorney General "asserted a pseudo-national executive authority" was specific to the allegations surrounding the cease-and-desist letter, and does nothing to undermine New Jersey's compelling interests with respect to Section 2C:39-9(*l*)(2), which only limits dissemination of

covered files to persons in New Jersey. *See id.* at 493. The district court did not clearly abuse its discretion in faithfully adhering to the explicit scope of this Court's prior ruling.[10]

As to the fourth public factor, the district court rightly found a transfer "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." ROA.2473. The district court previously acknowledged that Section 2C:39-9(*l*)(2) is susceptible to more than one reading, and that the most reasonable one eliminates or at least mitigates the constitutional issues Appellants assert. *See* ROA.437-41, 1371-73. Allowing Appellants to litigate claims against Section 2C:39-9(*l*)(2) in Texas—potentially in both Texas *and* New Jersey—risks the untenable scenario of federal circuits conflicting over the meaning and validity of the same state criminal law. That risk is not hypothetical: Appellants and certain additional plaintiffs filed a

[10] Appellants get no further with their argument that Texas, not New Jersey, has a stronger interest in the suit against the Attorney General. Br. 51-53. This argument was never presented to the district court and should be deemed waived. *See Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010); ROA.2073, 2095. In any event, a Section 1404(a) transfer does not mean Texas does not have *any* interests as the place of the alleged wrong; it simply means New Jersey has greater sovereign interests in the interpretation and evaluation of its laws by its local courts, as courts have repeatedly found. Nor does the Attorney General's decision to seek a stay of Appellants' New Jersey action undermine New Jersey's interest in having such issues decided at home. *See* Br. 54. As the district court found, "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." ROA.2473.

complaint in the District of New Jersey with nearly identical legal challenges, which they said would need to be resolved *in addition to* the instant suit. Should the same constitutional claims against the same state law also be litigated in Texas, a split between the Third Circuit and this Court is highly possible.

Not only does transfer eliminate that risk, but the Third Circuit can "certify questions regarding § 2C:39-9(*l*)(2) to New Jersey state courts, and thus avoid any conflict in the interpretation of the state statute," a tool unavailable here. ROA.2473; *see* N.J. Court Rule 2:12A-1. While Appellants respond that this is an illegitimate concern because Section 2C:39-9(*l*)(2) "is unambiguous," and no need to interpret its meaning could arise, Appellants' Br. 56, Appellants previously argued just the opposite to this Court—that the text *is* ambiguous with respect to which of their files fall within the state law's coverage. *See* Mot. for Inj. Pending Appeal at 17; ROA.1927 ¶ 288. Appellants cannot have it both ways, and the district court acted within its discretion in finding that a transfer avoids conflicts over these questions.[11]

[11] Even if a judgment in the Texas court could have res judicata effect as to the additional plaintiffs to the New Jersey action who are not parties here, this "would not prevent an inter-circuit conflict on the meaning of § 2C:39-9(*l*)(2) that arises when New Jersey state courts in future actions adopt a meaning of § 2C:39-9(*l*)(2) in conflict with [the district court's] interpretation." ROA.2473. And Appellants' suggestion that a transfer itself risks a circuit split is meritless, Br. 56-57, because (as explained above) the analysis of the legality of USDOS regulations need not be the same as the analysis as to Section § 2C:39-9(*l*)(2).

2. *The Private Interest Factors Also Favor Transfer.*

The private interest factors point in the same direction. Here, courts consider "(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." *Volkswagen*, 371 F.3d at 203. The district court found that the second and fourth factors favored transfer, while the first and third are neutral. ROA.2474-76. These determinations were correct, and at the very least do not reflect a clear abuse of discretion.

As to the first two factors, Appellants' complaint that the district court failed to consider the location of their evidence ignores that neither Appellants nor USDOS identified *any* sources of proof based in Texas in their district court briefs. *See* Appellants' Br. 44-46; ROA.2073, 2095. That court was not obligated to conduct an independent search for supposed Texas-based evidence elsewhere on the docket when no party's brief raised this as a basis to deny transfer. Similarly, Appellants erroneously assert that the New Jersey Attorney General did not identify non-party witnesses for whom process may be needed. Appellants' Br. 47-49. In fact, the district court found the "state officials" who enacted Section 2C:39-9(*l*)(2) are "based in New Jersey," and their testimony may be "necessary in resolving Plaintiffs' claims." ROA.2475.

Under the fourth factor, Appellants repeat the flawed arguments that a transfer will lead to a less efficient use of judicial resources because there will be multiple suits in different jurisdictions. Appellants' Br. 49-51. But as the district court noted, "Plaintiffs are the ones who chose to file multiple lawsuits against the NJAG and … their claims against the Federal Defendants are not so intertwined with those against the NJAG as to warrant the claims being tried together." ROA.2476. And as discussed above, transfer will save resources because the claims against the Attorney General can take place in a single forum, where "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." ROA.2476. Meanwhile, unrelated procedural disputes between Appellants and USDOS can go on in Texas, and need not delay resolution of claims against New Jersey. Therefore, the court did not clearly abuse its discretion in finding that this factor favors transfer, and that transfer was warranted.

D. The Attorney General Is Not A Necessary Party.

Against all this, Appellants feature an argument that the New Jersey Attorney General is a necessary party to the suit against USDOS under Federal Rule of Civil Procedure 19(a)(1)(B)(i) and that this precludes severance. But that runs into three problems: Appellants never raised this claim below and therefore waived it;

Appellants have no right to raise this on the allegedly necessary party's behalf; and Appellants are wrong.

First, Appellants waived the claim that the New Jersey Attorney General is a necessary party to the action against USDOS under Rule 19(a)(1)(B)(i). *See* Appellants' Br. 26-30; *Celanese*, 620 F.3d at 531 ("[A]rguments not raised before the district court are waived and will not be considered on appeal"). Appellants (through USDOS) only brought to the district court an argument under subsection (B)(*ii*), which concerns whether proceeding with a party's absence will create a "substantial risk of incurring … inconsistent obligations" for any "existing party." Fed. R. Civ. P. 19(a)(1)(B)(ii). The district court considered and rejected that argument, and Appellants abandoned it on appeal. *See* Appellants' Br. 30. That argument has nothing to do with whether the *absent* party's interests are impaired—the concern behind subsection (B)(i)—an argument that no one brought to the district court. In other words, arguments under subsections (B)(i) and (B)(ii) are materially different, such that raising one does not put a court on notice of the other. *See, e.g.*, *Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 355 (5th Cir. 1997) (concluding argument regarding a specific subsection of a statute was waived, where arguments below concerned different subsections of the statute). The district court cannot clearly abuse its discretion by failing to address an issue Appellants never presented.

Second, even if the argument were not waived, Appellants cannot assert this specific provision of Rule 19—whose goal is "protecting the person whose joinder is in question," Fed. R. Civ. P. 19 committee note—against the New Jersey Attorney General. "It is the absent party," not Appellants, "that must 'claim an interest'" under Rule 19(a)(1)(B)(i). *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 683 (2d Cir. 1996) (alterations omitted); *see also id.* (explaining that where absent party "has clearly declined to claim an interest in the subject matter of this dispute," defendant's "self-serving attempts to assert interests on behalf of [the absent party] cannot be the basis for [defendant's] necessary party argument"). And this Court has held that when an absent party's choice to "forgo intervention indicates that it did not deem its own interests substantially threatened by the litigation," that party is not necessary under Rule 19. *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 201 (5th Cir. 2017) (citation and alterations omitted); *see also In re Cty. of Orange*, 262 F.3d 1014, 1023 (9th Cir. 2001) (holding party advocating joinder "cannot claim that the [absent parties] have a legally protected interest in the action unless the [absent parties] themselves claim that they have such an interest"); *Davis Co. v. Emerald Casino, Inc.*, 268 F.3d 477, 483-84 (7th Cir. 2001) (holding Rule 19 did not require joinder because "it is the absent party that typically must claim such an interest").

Finally, this argument is meritless in substance, as it is based on the theory that because the New Jersey Attorney General claimed an interest in the USDOS regulations by challenging them in the Western District of Washington litigation, it is now a necessary party in Appellants' separate suit against USDOS. Appellants' Br. 28. But Appellants do not seriously believe this, because *every* attorney general who participated in the Washington action would have to be joined in the Texas action, something Appellants never attempted to do. And this approach would have radical ramifications, suggesting that if one party sues the United States for going too far in certain regulations in a federal district court, they become a Rule 19 necessary party any time another party sues the United States for not going far enough in another court. No precedent supports that view.

But there is an even narrower reason why Appellants' necessary party analysis fails. Appellants' theory is that they will obtain a ruling allowing them "to publish information on 3D-printed firearms free of State Department regulation," which would affect the New Jersey Attorney General. Appellants' Br. 29. Appellants, however, *are already* free of USDOS regulation as a result of the recent regulatory change. So to the extent the Attorney General has an interest in preventing that change, it already occurred, and no further impairment could result from his absence in the case. Nor could an adjudication of the merits of Appellants' challenge to USDOS regulations impair the New Jersey Attorney General's ability to defend New

Jersey laws, given the divergence in text, justification, and impact of federal regulations and the state statute. *See supra* at 39-40; ROA.2469 ("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."); *Boone v. General Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir. 1982) (finding risk of multiple suits does not *per se* jeopardize absent party's rights). There is thus simply no interest that Appellants can identify that would actually be impaired or impeded by the New Jersey Attorney General's absence. And they cannot otherwise prove that the district court clearly abused its considerable discretion. *See Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986) ("Rule 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be.").

## CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction. In the alternative, it should deny a writ of mandamus.

Respectfully submitted,

/s/ Angela Cai

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Dated: July 19, 2021

/s/ Angela Cai
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I hereby certify that on July 19, 2021, I filed the foregoing Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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