IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2492

SMITH & WESSON BRANDS, INC.; SMITH & WESSON SALES COMPANY; and SMITH & WESSON INC.,

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; NEW JERSEY DIVISION OF CONSUMER AFFAIRS,

Defendants-Appellees.

EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

On Appeal from the United States District Court for the District of New Jersey, No. 20-CV-19047

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August 10, 2021

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INTRODUCTION

Plaintiffs-Appellants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson Inc. ("Smith & Wesson") respectfully request that this Court enjoin the proceedings of the New Jersey Superior Court in *Grewal v. Smith & Wesson Sales Co., Inc.*, No. ESX-C-000025-21 and stay that court's enforcement of an administrative subpoena issued by the New Jersey Attorney General (the "Subpoena") and document production deadline, pending Smith & Wesson's appeal of the District Court's decision to determine threshold constitutional issues, as Supreme Court precedent demands. *See NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). At 11:51 a.m. today, Smith & Wesson notified opposing counsel by e-mail that it would file motions for a temporary stay and a stay pending appeal; Defendants-Appellees do not consent. Judge Restrepo has denied Smith & Wesson's request for a temporary stay.

In October 2020, the Attorney General served the unconstitutional Subpoena on Smith & Wesson. Among other infirmities, the Subpoena constitutes viewpoint discrimination because: (1) it was issued only because of Smith & Wesson's public stance on Second Amendment issues, which are directly contrary to the Attorney General's views, and (2) its purpose is to chill Smith & Wesson's participation in a public debate. Such targeted efforts by the state to curb protected speech are prohibited by the U.S. Constitution. *See, e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). Smith & Wesson promptly filed a

complaint in federal court, which set forth in great factual detail, supported by the public record, how the Subpoena is the culmination of a targeted campaign against the company. Despite Smith & Wesson properly filing in federal court, the District Court recently dismissed the case on *Younger* abstention grounds. *Younger v. Harris*, 401 U.S. 37 (1971).

In the meantime, a New Jersey trial court has ordered Smith & Wesson to respond fully to the Subpoena. But the state court's opinion failed to address the majority of Smith & Wesson's constitutional arguments, and improperly limited the holding of *NAACP* and its progeny to freedom of association cases. Smith & Wesson's merits appeal is currently pending in the New Jersey Appellate Division and, on August 9, the New Jersey Supreme Court denied a stay pending appeal of the Production Orders. With the agreement of the Attorney General, Smith & Wesson made its first document production, consisting only of public documents, yesterday. Smith & Wesson has not yet produced private corporate documents that are responsive to the Subpoena.

Without an injunction pending appeal under well-established precedent under § 1983 and the All Writs Act, Smith & Wesson faces irreparable harm because it will be forced to comply with an unconstitutional subpoena or suffer a contempt ruling, all without having the merits of its constitutional objections ever heard. Indeed, averting such harms is "[t]he very purpose of § 1983" – *i.e.*, "to interpose

the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Forcing compliance with the Subpoena and the Attorney General's viewpoint-based investigation would violate Smith & Wesson's First Amendment rights because it will chill protected speech. No harm will befall the Attorney General or the public interest if an injunction pending appeal is granted because all documents targeted by the Subpoena have been preserved and the parties have entered into an agreement that expressly tolls the limitations period.[1] Indeed, the public interest is served by vindicating First Amendment and other constitutional rights.

FACTUAL AND PROCEDURAL HISTORY

I. The Attorney General's Office Targeted Smith & Wesson for Investigation on the Basis of Viewpoint.

This action concerns an investigation and issuance of a subpoena by the Attorney General due to Smith & Wesson's public advocacy for Second Amendment rights. The campaign was initiated by New Jersey's recently departed Attorney General, Gurbir Grewal, and the Attorney General's Office, through the Acting Attorney General, has continued that mission. Smith & Wesson's detailed

[1] This Court has jurisdiction under 28 U.S.C. § 1291 because Smith & Wesson appeals from an order abstaining under *Younger*, *see Lui v. Comm'n, Adult Entm't, Del.*, 369 F.3d 319 (2004), and this appeal involves the denial of a preliminary injunction, 28 U.S.C. § 1292(a)(1); *see also Helfant v. Kugler*, 484 F.2d 1277, 1283 (3d Cir. 1973); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 730-31 (9th Cir. 2017).

Complaint outlined a pattern of conduct demonstrating the Attorney General's viewpoint. For example, the former Attorney General announced that he fiercely opposes "open carry" and "concealed carry" policies, taking sides in the public firearms debate by asserting that any "[p]ublic carrying of firearms is dangerous to our residents and to law enforcement." Declaration of Courtney G. Saleski, Esq. ("Saleski Decl."), Ex. 21. He also publicly vowed to "turn up the heat" on firearms manufacturers. *Id.*, Ex. 5. The Attorney General has issued "reports" that, without justification, falsely tied Smith & Wesson to "gun crimes." *See id.*, Exs. 20, 24, 25. His Office signed onto an anti-Second Amendment agenda, partnering with groups like Giffords Law Center. *Id.*, Ex. 22. And he hired large law firms to act as "Special Firearms Counsel" to pursue firearms manufacturers on a contingency basis, thus creating a bounty system. *Id.*, Exs. 23, 26. In short, the Attorney General is using "the investigative and enforcement powers of the State" to advance the interests of anti-Second Amendment activists.

Smith & Wesson, on the other hand, is an iconic company that is known for its steadfast support of Second Amendment rights. *Id.*, Ex. 16. In doing so, Smith & Wesson has publicly opposed those, like the Attorney General, who seek "the imposition of onerous and unnecessary regulations adversely impacting citizens' Second Amendment rights." *Id.* And Smith & Wesson has taken the public position that the Supreme Court's 2008 ruling in *District of Columbia v. Heller*, "confirming

the broad rights of citizens to possess firearms" is "settled law," a position directly at odds with the Attorney General's publicly stated position. *Id.*

In October 2020, after a series of acts directed at Smith & Wesson because of its viewpoint, the Attorney General served the Subpoena. *Id.*, Ex. 2. Although purportedly issued under New Jersey's Consumer Fraud Act ("CFA"), the Subpoena seeks documents relating primarily to opinions or value judgments on matters of current public debate – *e.g.*, (1) whether firearms enhance safety; (2) whether concealed carry of firearms enhances one's "lifestyle"; and (3) whether "novice, untrained [c]onsumers" can effectively use a Smith & Wesson firearm for personal or home defense. *Id.*, Ex. 2. Smith & Wesson served timely, detailed objections to the Subpoena, *id.*, Ex. 3, and contemporaneously filed its Complaint in the District Court, asserting constitutional and other claims, because the Subpoena targets protected opinion speech. *Id.*, Ex. 4.

In February 2021, seeking to side-step a determination on the threshold constitutional issues prior to enforcement of the Subpoena – and after two months of litigating in federal court – the Attorney General filed a summary proceeding and moved to enforce the Subpoena in state court, asking the court to rule "irrespective of the merits" of the federal case. *Id.*, Ex. 4, at 2. In retaliation for Smith & Wesson's federal suit, the Attorney General demanded that Smith & Wesson "be held in contempt of Court for failing or refusing to obey the [Subpoena]" and be restrained

"from engaging in the advertisement or sale of any merchandise until it fully responds to the Subpoena." *Id*. (He later withdrew that draconian request for relief.) Since the Attorney General's view of "advertising" encompasses any "opinion" on Second Amendment issues, the Attorney General seeks a ban on all of Smith & Wesson's protected speech until the company produces the requested documents. The Attorney General also moved to dismiss the federal case, arguing that the District Court should abstain under *Younger*. *Id.*, Ex. 9. Smith & Wesson's Amended Complaint explains that the Attorney General's proceedings in state court, and the draconian sanctions requested, were a punitive response to Smith & Wesson's decision to petition for relief in federal court. *Id.*, Ex. 5.[2]

Smith & Wesson asked the state court to quash the Subpoena or stay the proceedings in deference to the federal court, noting that the federal case was filed first, and the federal court is the appropriate forum to decide issues of federal constitutional law. *Id.*, Ex. 6. The state court held a hearing on May 27, 2021. *Id.*, Ex. 11. The Attorney General all but admitted that there is no basis for the Subpoena. When asked to articulate an "anchor" to justify the Subpoena requests – *i.e.*, "specific statements [or] specific products" that may have violated the CFA – the Assistant Attorney General explained that the entire investigation is grounded in

[2] In March 2021, Smith & Wesson moved in federal court for a temporary restraining order and preliminary injunction but withdrew that motion after the state court set a briefing and hearing schedule that eliminated the exigency facing Smith & Wesson. Saleski Decl., Ex. 8.

speculation and hypotheticals, stating that "it's not appropriate to disclose here, because (a) it's our investigative thinking and our strategy, and (b) we don't have all of the arguments yet." *Id.*, Ex. 11, at 37:16-23. He vaguely stated that "we have concerns that there might be a violation of the regulation. We haven't conclusively determined that yet, nor have we conclusively determined that there's a statutory violation." *Id.* at 38:13-22. The Attorney General did not "yet know what advertisements will be at issue, let alone which specific statements might violate the CFA," *id.* at 11:17-19, even though advertisements are public.

II. The State Court Enforced the Subpoena Without Addressing Most of Smith & Wesson's Constitutional Arguments, and the District Court Abstained.

On June 30, 2021, the state court declined to stay the enforcement action and ordered Smith & Wesson to fully comply with the Subpoena (the "Production Orders"). *Id.*, Exs. 12, 13. However, the state court erred in significant ways. First, it ignored the majority of Smith & Wesson's constitutional objections, in contravention of the Supreme Court's ruling in *NAACP v. Alabama*, which holds that threshold constitutional issues must be resolved before any production of documents can be compelled. 357 U.S. at 460-61. Instead, the court limited *NAACP's* holding to cases involving freedom of association. Saleski Decl., Ex. 12 at 8-9. But *NAACP* explained that free speech is one of the "indispensable liberties" that can be threatened by "varied forms of governmental action." 357 U.S. at 461. The state court similarly failed to address the "chilling effect" of the Attorney

General's conduct on Smith & Wesson's First and Second Amendment rights. *See generally* Saleski Decl., Ex. 12.

Second, the state court improperly rejected Smith & Wesson's argument that the Subpoena targets constitutionally protected opinion-based statements, which by law cannot be fraudulent. *Id.* at 11. The state court found that the Subpoena sought information that has "the capacity to mislead or which address product attributes and are measurable by research," *id*., but the court gave no indication as to *how* such opinions were misleading or could be measured.

Third, the state court failed to address the constitutional invalidity of the one alleged basis for the Subpoena, New Jersey's Hazardous Products Regulation, which would unconstitutionally compel speech by forcing Smith & Wesson to provide disclosure regarding New Jersey's laws. Fourth, the court refused to follow New Jersey's "first-to-file" rule, which requires a subsequently filed action to be stayed when it involves the same or similar issues as an earlier-filed action. *Sensient Colors Inc. v. Allstate Ins. Co*., 193 N.J. 373, 387 (2008). The state court held that "special equities" – *i.e.*, the purported "tactical maneuver" by Smith & Wesson to file a federal lawsuit – justified setting aside the rule. Saleski Decl., Ex. 12, at 8. But filing suit to vindicate one's constitutional rights, as Smith & Wesson did, should never be labeled a "tactical maneuver." *Id.* at 8.

After the New Jersey Appellate Division denied Smith & Wesson's stay request, on July 30, 2021, the company filed a motion for a temporary restraining order and preliminary injunction in the District Court. *Id.*, Ex. 15. Smith & Wesson requested that the court stay the Production Orders so that the threshold constitutional claims could be heard in federal court. *Id.*, Ex. 15. The District Court held a hearing on August 2, 2021. The court abstained under *Younger*, finding that the state-court proceedings involved orders in furtherance of the state court's ability to perform its judicial functions. Saleski Decl., Ex. 1. The court dismissed the Amended Complaint, denied Smith & Wesson's application for a temporary restraining order and preliminary injunction, and denied Smith & Wesson's request for a stay of its decision pending appeal. *Id.*, Exs. 1, 17. Smith & Wesson exhausted its stay requests in New Jersey state court; yesterday, the New Jersey Supreme Court refused to stay the production orders pending appeal. *Id.*, Ex. 18.

ARGUMENT

I. An Injunction Pending Appeal Is Just Because the State Court Failed to Address Almost All of Smith & Wesson's Constitutional Arguments as It Was Required to Do.

This Court has the authority to enjoin and stay enforcement of the state court's Production Orders under the All Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283. *In re Diet Drugs Prod. Liab. Litig.*, 369 F.3d 293, 305 (3d Cir. 2004). The Anti-Injunction Act authorizes federal courts to issue an injunction to stay state-court proceedings (1) when expressly authorized by Act of

Congress, (2) where necessary in aid of the federal court's jurisdiction, or (3) to protect or effectuate the federal court's judgments. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d 99, 103 (3d Cir. 2002). Here, an injunction staying enforcement of the Production Orders is proper under the first two scenarios because Congress expressly authorized federal courts to stay state-court proceedings in actions under 42 U.S.C. § 1983, and an injunction is necessary to aid the Court's jurisdiction.

Federal courts have a "virtually unflagging obligation" to hear cases within their jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In *Sprint Communications, Inc. v. Jacobs*, the Court held that *only* three "exceptional circumstances" can justify *Younger* abstention: (1) ongoing state criminal prosecutions, (2) quasi-criminal civil enforcement proceedings, or (3) pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions. 571 U.S. 69, 78, 81 (2013). "*Younger* extends . . . no further." *Id.* at 82. Even if one of those circumstances is met, a party seeking abstention must satisfy all of three additional *Middlesex* factors: (1) an ongoing state judicial proceeding, (2) the implication of an important state interest in the state proceeding, and (3) an adequate opportunity to present constitutional arguments in the state proceedings. *PDX N., Inc. v. Comm'r N.J. Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 879 n.3 (3d Cir. 2020) (citing

Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)).

To obtain a preliminary injunction, four elements are required: (1) likelihood of success on the merits, which only requires a "reasonable chance, or probability of success"; (2) the movant is likely to suffer irreparable harm; (3) the balance of equities tips in the movant's favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "If a plaintiff proves both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest favors preliminary relief." *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017) (internal quotation marks omitted). A court need only determine that the moving party would likely succeed on just one claim to issue injunctive relief. *Trefelner ex rel. Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 590 (W.D. Pa. 2009). The injunction and stay factors are the same on appeal except that the appellate court reviews the likelihood of success on appeal. *See Coffelt v. Fawkes*, 765 F.3d 197, 201 (3d Cir. 2014); *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (applying injunction standard). Smith & Wesson meets each of these factors.

A. Smith & Wesson Will Suffer Irreparable Harm Absent an Injunction and a Stay of the State Court's Production Orders.

Smith & Wesson will suffer immediate and irreparable harm if this Court does not enjoin the state-court proceedings and stay enforcement of the Subpoena. Smith

& Wesson produced public documents on August 9 and will produce non-public documents in short order. Saleski Decl., Ex. 4. The only option is to comply with an unconstitutional Subpoena or face the specter of contempt.

The issuance of the Subpoena constitutes classic viewpoint discrimination in violation of the Constitution because it was issued with the purpose of chilling disfavored viewpoints. *See Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432, 436 (3d Cir. 2019); *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 254-55 (1957). The Subpoena's categories are borne out of viewpoint discrimination. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Supreme Court has recognized that the *mere threat* of prosecution often discourages citizens from engaging in free speech. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). Indeed, investigations may chill speech regardless of whether the government's efforts are ultimately successful. *Id.*

At bottom, the Attorney General's actions are designed to force Smith & Wesson to tailor its political and commercial messages through threat of prosecution for entirely lawful conduct. *See* Saleski Decl., Ex. 16 ¶ 20. Such constitutional infringements "will often alone constitute irreparable harm." *Ass'n for Fairness in Bus., Inc. v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000).

B. Smith & Wesson Is Likely to Succeed on Appeal.

1. The District Court Should Not Have Abstained Under *Younger*.

Smith & Wesson has a reasonable probability of success on appeal because the District Court erred in its *Younger* analysis. A state-court order to produce documents, without a contempt ruling, is not the sort of order contemplated by *Younger* to be "uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78. The *Sprint* Court pointed to two such orders: a finding of contempt and an order to post bond. *Id*. at 78 (citing *Juidice v. Vail*, 430 U.S. 327 (1977), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)). But no such "unique" order has issued in this case. *See Malhan v. Sec., U.S. Dept. of State*, 938 F.3d 453, 463 (3d Cir. 2019) ("Orders of [this] type are very much 'unique.'"). The District Court supported its holding by citing to *Juidice*, 430 U.S. at 335. But that case spoke of the federal plaintiff's *past* "disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court." *Id*. at 335. There has been no disobedience of a court order and no contempt finding here. Thus, there is no support for the theory, as the District Court suggested, that abstention is warranted if contempt might be found in the *future*. *See* Saleski Decl., Ex. 1. Nor does such a holding make sense because every judicial proceeding carries with it the *possibility* of a contempt finding. *Weston Capital Advisors, Inc. v. PT Bank Mutiara, Tbk*, 738 F. App'x 19, 21 (2d Cir. 2018). The District Court's

application renders *Younger* abstention virtually boundless, a reversible error that contravenes the holding in *Sprint*.

The District Court also erred in holding that the *Middlesex* factors were satisfied. Contrary to the District Court's holding, Smith & Wesson has not had an adequate opportunity to present its arguments in the state-court proceedings. Saleski Decl., Ex. 1. And even if the state court's summary (*i.e.*, expedited) proceeding were an appropriate forum in theory, the state court did not reach the merits on the majority of Smith & Wesson's constitutional arguments before issuing the Production Orders. *Id.*, Exs. 12, 13. Moreover, the relief sought in the District Court – enjoining the Attorney General's investigation – goes beyond the relief available to Smith & Wesson in the state court; there, Smith & Wesson could only request that the Subpoena be quashed. This constitutes a separate and independent reason for the District Court not to have abstained.

2. Smith & Wesson Is Likely to Succeed on Its First Amendment Viewpoint-Discrimination Claim.

Smith & Wesson has a reasonable chance of success on its First Amendment viewpoint-discrimination claim because the public record demonstrates that the Attorney General's Office has targeted the company's speech on the basis of its viewpoint.[3] Viewpoint discrimination is "presumed to be unconstitutional";

[3] For purposes of brevity, Smith & Wesson only highlights some of the merits arguments that will be addressed in this appeal.

curtailing speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" is forbidden. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). "[V]iewpoint discrimination is impermissible in any forum," and "[g]overnment actors . . . cannot restrict speech because they disapprove of the ideas expressed." *Ne. Pa. Freethought Soc'y*, 938 F.3d at 432, 436.

As set forth above, the Attorney General Office's views on the Second Amendment and firearms manufacturers have been publicized for years. The Subpoena was merely one step in the Attorney General's campaign. The Attorney General then initiated the state-court enforcement action, requesting sanctions and that Smith & Wesson be put out of business in New Jersey. The Subpoena and the enforcement action in New Jersey state court serve the same goal as the Attorney General's other previous actions and statements: silencing Smith & Wesson's views in the marketplace of ideas. The District Court erred by refusing to protect Smith & Wesson's First Amendment rights. *See NAACP*, 357 U.S. at 460-61; *Ne. Pa. Freethought Soc'y*, 938 F.3d at 432, 436.

2. Smith & Wesson Is Likely to Succeed on Its Prior Restraint Claim.

The Attorney General is seeking a proactive ban on Smith & Wesson's speech; such an order would be an impermissible prior restraint. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986). Prior restraint is subject to a "heavy

presumption" that it is constitutionally invalid. *Bantam Books, Inc v. Sullivan*, 372 U.S. 58, 70 (1963). This "most extraordinary remed[y]" is permitted *only* "where the evil that would result [from the speech] is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers). Here, no such "evil" exists. To the contrary, the speech at issue pertains to fundamental constitutional rights, and the Attorney General has not identified a single purportedly fraudulent statement made by Smith & Wesson, much less the sort of "findings that adequately disclose the evidentiary basis" that justifies a prior restraint. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34 (1982). The sledgehammer of a prior restraint on *all* of Smith & Wesson's speech in New Jersey is hardly the "least intrusive measure."

3. The Attorney General's Retaliatory Actions Are a Violation of Smith & Wesson's Constitutional Rights.

Establishing the Attorney General's retaliation requires a showing that (1) Smith & Wesson engaged in constitutionally protected conduct, (2) the Attorney General engaged in retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link existed between the protected conduct and the retaliatory action. *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 752 (3d Cir. 2019). All three elements are satisfied here.

Smith & Wesson's Second Amendment advocacy—i.e., "expression of editorial opinion on matters of public important" — is "entitled to the most exacting

degree of First Amendment protection." *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 374-76 (1984). So, too, is the instant legal challenge to the Subpoena. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) (discussing the right to petition). The Attorney General's enforcement action would deter companies of ordinary firmness because the investigation seeks to force Smith & Wesson either to comply with an unconstitutional Subpoena or face a ban on all of its protected speech and business activities in New Jersey. *See Miller v. Mitchell*, 598 F.3d 139, 152 (3d Cir. 2010). The causal connection exists because, after Smith & Wesson filed its federal action, the Attorney General filed the enforcement action in state court and has affirmatively declined to explain the basis of the "fraud" investigation even though it is purporting to investigate public advertisements. This demonstrates that the Attorney General's "motive in bringing a prosecution is likely retaliatory, rather than a good faith effort to enforce the law." *Id.* at 153.

4. The Subpoena Is Premised Upon a Regulation That Unlawfully Compels Speech.

Smith & Wesson also has a reasonable chance of success because the Attorney General has presented only one fig leaf to justify his investigation: the New Jersey Hazardous Products Regulation, N.J.A.C. 13:45A-4.1(b). Enforcement of that regulation violates the First Amendment by compelling speech. "[F]orced speech that requires the private speaker to embrace a particular government-favored message" is unconstitutional. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 188

(3d Cir. 2005). The Attorney General has argued that Smith & Wesson is required to inform consumers that New Jersey law requires a permit to carry a concealed weapon under the regulation. But enforcement of that requirement would constitute (1) speech; (2) to which Smith & Wesson objects, and that (3) is compelled by the government – which is all that is required to succeed on a constitutional challenge to compelled speech. *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019). Moreover, compelled speech is not permissible simply because the government's message is "factual." *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988).

Even if Smith & Wesson's marketing and advertising is purely commercial speech, the Attorney General's suppression of it still cannot pass intermediate scrutiny. The government can only restrict non-misleading commercial speech if (1) the government's interest is substantial, (2) the regulation directly advances the interest asserted, and (3) the regulation is no more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564, 566 (1980). The Attorney General cannot show that any of the opinion-based marketing statements at issue in the Subpoena are false or fraudulent, which they are not. *See Tatum v. Chrysler Grp. LLC*, No. 10-4269, 2011 WL 1253847, at *4 (D.N.J. Mar. 28, 2011) (statements that a car was "very safe" constituted "classic examples of non-actionable opinion"); *Bubbles N' Bows LLC v.*

Fey Pub. Co., No. 06-CV-5391, 2007 WL 2406980, at *9 (D.N.J. Aug. 20, 2007) (explaining that "vague and ill-defined opinions" cannot be construed as a misrepresentation). A more narrowly drawn and less burdensome method is obvious: modification of New Jersey's online permit form, required for every firearm purchase, to include the required statement. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996). Yet New Jersey has not pursued that option.

5. Smith & Wesson Is Likely to Succeed on Its Second Amendment Claims.

While the Second Amendment is often invoked to protect individual citizens' rights, *see District of Columbia v. Heller*, 554 U.S. 570 (2008), the Third Circuit has held that "[c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment." *United States v. Marzzarella*, 614 F.3d 85, 91-92 n.8 (3d Cir. 2010). The Second Amendment extends to firearms manufacturers and sellers. *Id.*; *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011).

Here, the Attorney General partnered with anti-Second Amendment activists intent on damaging Smith & Wesson's brand, reputation, and financial vitality. The investigation, Subpoena, and now a retaliatory enforcement action are forcing Smith & Wesson to expend substantial financial resources and are chilling its speech. Saleski Decl., Ex. 16 ¶ 22. And the Attorney General's Subpoena targets politically charged issues like concealed carry of firearms. Such an attack on opinion runs

directly counter to the foundational principles of protection of persons and their homes, as enshrined in the Second Amendment and recognized by *Heller*. The Attorney General cannot impose his value judgments on those who do not share his views because the "enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Just as "the First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," *United States v. Stevens*, 559 U.S. 460, 470 (2010), the Second Amendment reflects the same judgment regarding the benefits of owning firearms.

6. Smith & Wesson Is Likely to Succeed on Its Fourth Amendment Claim.

The Subpoena violates the Fourth Amendment because it constitutes an unreasonable search and seizure. The Subpoena is overbroad and overly burdensome, seeks information related to opinions, demands information about lawful, constitutionally protected conduct, and is unrelated to any legitimate investigative purpose. Saleski Decl. Ex. 5. The Attorney General has not met his burden to satisfy these threshold requirements. *See See v. City of Seattle*, 387 U.S. 541, 544-45 (1967). He does not have unfettered subpoena power; the Fourth Amendment prohibits "investigations premised solely upon *legal* activity" because they are forbidden "fishing expeditions." *Major League Baseball v. Crist*, 331 F.3d 1177, 1182, 1187 (11th Cir. 2003). That is particularly true when First Amendment

rights are implicated; in such cases, Fourth Amendment restrictions must be applied with "scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978).

C. A Stay of the State Court Order Will Not Harm the Attorney General.

At the very most, a full hearing on Smith & Wesson's constitutional objections would cause the Attorney General mere inconvenience. In his federal and state-court papers, the Attorney General has failed to identify any harm to consumers to justify immediate production. Although he speculates that consumers *may* be misled in the meantime, that is pure conjecture. No harm accrues to his case from a short delay, Smith & Wesson's advertisements are not misleading, and a tolling agreement between the parties shields the Attorney General's ability to bring claims under the CFA. Thus, the balance of equities tips overwhelmingly in Smith & Wesson's favor.

D. An Injunction Furthers the Public Interest.

"In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights." *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997). Although the Attorney General has speculated that New Jersey citizens might be misled by Smith & Wesson's national advertisements, he has cited no advertisements. An injunction pending appeal would prevent the violation of Smith & Wesson's constitutional rights while its claims are adjudicated. *See GJJM Enters., LLC v. City of Atl. City*,

293 F. Supp. 3d 509, 521 (D.N.J. 2017).

CONCLUSION

Smith & Wesson respectfully requests that this Court enjoin the state-court proceedings and stay enforcement of the Production Orders pending appeal.

Respectfully submitted,

Dated: August 10, 2021

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WORD COUNT CERTIFICATION

I certify that this Emergency Motion for an Injunction Pending Appeal complies with the word limit requirements in Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,199 words.

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