

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEFENSE DISTRIBUTED, and
SECOND AMENDMENT FOUNDATION,

Plaintiffs,

vs.

GURBIR S. GREWAL, MICHAEL FEUER,
ANDREW CUOMO, MATTHEW DENN,
JOSH SHAPIRO, THOMAS WOLF,
Defendants.

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) Case No. 1:18-CV-637-RP
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TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE ROBERT PITMAN
TUESDAY JANUARY 15, 2019, 10 AM

FOR THE PLAINTIFF: JOSHUA M. BLACKMAN, ESQ.
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CONNIE K. CHAN, ESQ. (via phone)
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LORRAINE RAK, ESQ. (via phone)
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Proceedings recorded by mechanical stenography, transcript
produced using computer aided transcription.

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MORNING SESSION, JANUARY 15, 2019

(The following proceedings were had in
open court with all parties present at
the hour of 10:00 a.m.)

THE CLERK: Court calls A:18-CV-637, Defense
Distributed and Second Amendment Foundation, Inc., versus
Gurbir S. Grewal, and others, for Preliminary Injunction
Hearing.

THE COURT: If we can have announcements for the
record, starting with those that we have present in the
courtroom today.

MR. FLORES: Your Honor, for the plaintiffs, I'm
Chad Flores, and with me is Josh Blackman, and we'll be
presenting some of the argument. And we also have in court
representatives of both Defense Distributed and the Second
Amendment Foundation.

THE COURT: Thank you very much.

MR. LOW: Your Honor, on behalf of the defendant
New Jersey Attorney General's Office, Casey Low, Shelbi
Flood and Brian Nash with Pillsbury Winthrop Shaw Pittman,
and I'll be the one arguing.

THE COURT: Thank you very much, Mr. Low.

And who do we have on the line?

1 MR. GOLDSTEIN: Your Honor, Matthew Goldstein on
2 behalf of the plaintiffs.

3 MR. CABELLO: Good morning, Your Honor. David
4 Cabello on behalf of the Pennsylvania defendants.

5 RECORDED MESSENGER: No names are available.

6 MR. TABER: Good morning, Your Honor. This is Ken
7 Taber from Pillsbury Winthrop on behalf of the State of New
8 Jersey or the New Jersey AG, I should say.

9 MS. CHAN: Good morning, Your Honor, this is
10 Connie Chan on behalf of defendant Mike Feuer, City Attorney
11 of Los Angeles.

12 MR. WALSH: Morning, this is Michael Walsh also on
13 behalf of City Attorney Michael Feuer.

14 THE COURT: All right, anyone else on the line?

15 MS. RAK: Morning, Your Honor, this is Lorraine
16 Rak. I am with the New Jersey Attorney General's Office.

17 THE COURT: And, I'm sorry --I'm sorry.

18 MR. GREWAL: Good morning, Your Honor. This is
19 Gurbir Grewal, New Jersey Attorney General.

20 THE COURT: All right. Well, thank you very much
21 all of you for joining.

22 Anyone else on the line?

23 MR. FEIGENBAUM: Yes. You have Jeremy Feigenbaum.
24 I'm also from the New Jersey Attorney General's Office on
25 the line.

1 THE COURT: All right, anyone else? Last call.

2 All right, thank you all very much for joining,
3 whether you're here in the courtroom or on the line. I
4 appreciate the time you've taken to both brief the issues
5 that are before the Court and to prepare to make argument
6 today.

7 Let me start, just for the record, by confirming
8 what I believe I confirmed the other day on the phone but I
9 want to, for purposes of this hearing, to establish that
10 each of the parties has in the record everything that they
11 believed that they need in the record and to confirm that
12 there is no contested issue of fact that is relevant to the
13 motion before the Court today.

14 Mr. Flores, is that the case?

15 MR. FLORES: That's the case, Your Honor.

16 THE COURT: Okay, Mr. Low?

17 MR. LOW: That's correct, Your Honor.

18 THE COURT: Okay. Very good.

19 So with that, I want to take a little different
20 approach than I had anticipated having read -- reread the
21 pleadings in the case, and that is I would like to bifurcate
22 the issues that are before me today. First, I would like to
23 hear from you -- because, frankly, I need you to satisfy me
24 that I have jurisdiction to hear this matter. So I would
25 like to first give you the opportunity to take ten minutes

1 or so to address that issue, and then I will give you the
2 opportunity to respond, and then we'll take up the more
3 substantive elements of the motion.

4 So with that, who would like to address the
5 jurisdictional issue?

6 MR. FLORES: I will, Your Honor.

7 I can go from here?

8 THE COURT: Yeah, that would be great, if you
9 could.

10 MR. FLORES: Thank you, Your Honor.

11 I take it that personal jurisdiction is the issue
12 of concern?

13 THE COURT: It's greatest concern, but I do -- I
14 think you need to talk about subject-matter jurisdiction in
15 light of the pending injunction in Washington as well.

16 MR. FLORES: We'll be happy to do so.

17 On the question of personal jurisdiction, the
18 Court notes that we have four independent reasons why we
19 think that doesn't disrupt the Preliminary Injunction
20 request.

21 I would like to talk most about two today, one of
22 those is the merits of the question, essentially whether
23 minimum contacts actually exist and then talk about our
24 argument for judicial estoppel. And the reason I want to
25 put them in that order is both because we do have a

1 steadfast submission that minimum contacts here do exist. I
2 know they have a case they think is pretty good but I think
3 we have a better case; and also because by explaining the
4 merits of our position, if you disagree that minimum contact
5 here exists, I think that makes a clinching argument for why
6 judicial estoppel is going to solve the case for you.

7 So on the merits, we know as a matter of law that
8 conduct done outside of a state directed to the state can
9 satisfy the test. Now they say that Stroman is the case and
10 they point to Stroman and say they win, but that won't
11 suffice. You have two case. You have to compare Stroman
12 and the Supreme Court's decision in Calder. Stroman says no
13 jurisdiction, Calder says yes, jurisdiction.

14 They both entail activity occurring outside the
15 state. They both entail, essentially, documents being sent
16 into the state, and yet two different results obtain.

17 And they never acknowledge that Calder exists. We
18 know it's good law. It was good law when Stroman was
19 decided and it's good law now because of what the Supreme
20 Court held in Walden. Now, we have a way to make these two
21 results coincide harmoniously and it has to do with the
22 content of the messages.

23 If you look at the cease and desist letters that
24 are sent in Stroman, they were sent from out of the state
25 into the state, but the content of the letters concerned

1 matters out of state. These were real estate dealings and
2 so the states of Arizona and California sent letters into
3 Texas and they had letters that were sent into Texas were
4 about activities happening in California and about
5 activities happening in Arizona.

6 Not so here. The cease and desist letters here
7 sent by the defendant concern activities in Texas. Defense
8 Distributed is here. What they want to do is change what
9 people say here in Texas. They want to change what the
10 library here in Texas puts up. So the difference in the
11 content of the message is the way that you resolve those two
12 cases.

13 Another slight distinction, it's not a huge one
14 but it's a slight distinction, is that in Stroman you had
15 only cease and desist letters and nothing else, and in
16 Calder you had cease and desist letter -- or survey document
17 plus other activities. And here, of course, the other
18 activities are hugely substantial. We have actual lawsuits
19 being filed against my clients. We have the activities
20 against the website providers and additional statements. So
21 those two cases have to be reconciled, and we haven't heard
22 any argument from the other side about how to do that.

23 I think that argument is compelling and I think
24 it's the right argument, but I understand that Stroman seems
25 to point in the other direction. If you disagree, if you

1 think that this Court doesn't have personal jurisdiction
2 over the New Jersey Attorney General, then the judicial
3 estoppel argument is a lock.

4 Let's talk about the three things you have to do
5 for judicial estoppel. First, identify what the prior
6 position was; after that, determine whether it was
7 successfully asserted; and then determine if it's
8 inconsistent with the position being asserted here.

9 So to identify the prior position, we gave you the
10 citations to their prior pleadings but they've articulated
11 it for you quite clearly. They did it in two filings with
12 the exact same sentence. You can look at their preliminary
13 injunction response on Page 6. You can also look at their
14 Motion to Dismiss reply on Page 7.

15 Both of those documents articulate the position
16 that they took in Washington and here's what they say. They
17 say their position in Washington was that, quote, "Defense
18 Distributed has sufficient contacts with the State of
19 Washington." That's the position, the Defense Distributed
20 can be sued in Washington because they have the minimum
21 contacts of specific jurisdiction.

22 Did they succeed in asserting that there?
23 Absolutely they did. In the Washington case we disputed
24 personal jurisdiction but yet on Page 12 of the preliminary
25 injunction that they obtained, the court said there are no

1 jurisdictional problems and they can proceed.

2 Their whole theory in Washington is that we have
3 to be a party there because we're some sort of necessary
4 amicus or something and that's a necessary part of their
5 case. So us being there is absolutely a benefit for them
6 and they have successfully asserted it.

7 So then the only question is: Can you reconcile
8 that position that Defense Distributed can be sued in
9 Washington with the position they're taking here, that the
10 New Jersey Attorney General isn't subject to minimum
11 contact? And it's just not possible. The same comment is
12 at issue. The only reason that we are being sued in
13 Washington is because we put up the website and here the
14 defendant is being sued for taking it down.

15 They can't give you any cogent explanation of why
16 we could possibly have minimum contact there and the New
17 Jersey Attorney General don't have them here.

18 We have given the Court the Supreme Court's rule
19 on this that points back to the Wright-Miller treatise and
20 what it says is in order for the inconsistency part of the
21 test to be met, it doesn't have to be mirror images of the
22 same proposition, these just have to be inconsistent. And
23 5th Circuit precedence will tell you that this applies to
24 both factual inconsistencies and legal inconsistencies.

25 We've seen cases, for example, where courts will

1 hold that even if you don't outright say the statement is
2 inconsistent, if you necessarily but impliedly, implicitly,
3 if that's your position, then this doctrine applies. And it
4 applies here in spades.

5 They can't articulate a way for us to be sued
6 there but they can't be sued down here. And this is not
7 some kind of gotcha argument, Your Honor. This is true
8 gamesmanship. It is true forum shopping. This doctrine
9 exists precisely for cases like this where people are trying
10 to game the system so they can have a procedural advantage
11 and do something in one place but the opposite in another
12 place.

13 This case defines why the doctrine exists and they
14 haven't given you any compelling reason. They say two
15 things. Number one, they say their positions don't conflict
16 but we've defeated that notion. And then they cite one
17 case, a district court decision from out of circuit, that
18 they say proves there's no consistency but the case doesn't
19 prove that. The one case they cite is a case in which the
20 position didn't succeed. The person made an argument but
21 they didn't succeed with that argument in the other
22 proceeding. But the success has been established here.

23 So I think we're right about jurisdiction. I
24 think if you compare these two sets of contexts, if anything
25 we are not subject to jurisdiction in Washington because we

1 didn't direct our activity there. We didn't aim our
2 activity at Washington. All we did from here in Austin was
3 create a website. But in contrast, the defendant here, the
4 New Jersey Attorney General, absolutely directed his conduct
5 at Texas, absolutely aimed it at Texas. So if only one of
6 these can be sustained, it's this case.

7 The judicial estoppel doctrine here --

8 THE COURT: Haven't you just identified a
9 difference in the two? And isn't that what -- I mean,
10 you -- your own argument says that there are two different
11 things happening here, yet then you are saying they should
12 be estopped because of a position you took in what I think
13 you are conceding is a factually different circumstance.

14 MR. FLORES: I think they're different but one
15 encapsulates the other, Your Honor. They say this small
16 setup conduct doesn't establish jurisdiction, and here we
17 have even more. So these are very much not different
18 propositions.

19 I want to supply the Court with one additional
20 citation and this is on the question of whether judicial
21 estoppel applies to both factual and legal propositions.
22 There's a 5th Circuit authority directly on point, it's
23 called the Ecuador case. This is 708 F.3d 651, and that
24 stands for the proposition that it's not just questions of
25 fact, it's also questions of law that this doctrine applies

1 to. I don't understand that to be a contested proposition,
2 but I want to make sure the Court has that authority so
3 we're clear on exactly what the applicable law is.

4 Unless the Court has further questions about
5 personal jurisdiction --

6 THE COURT: No.

7 MR. FLORES: -- I would like to take standing. I
8 want to talk about the exact interests that are at issue
9 here and then show you how they spin out, both in the first
10 instance and then how they spin out because of what's been
11 happening in the Seattle action. So we have two categories
12 of harm that give us the right to the preliminary
13 injunction.

14 Number one is the category of harm that the Court
15 is focused on in the temporary restraining order proceedings
16 and that's the harm that is imminent that is going to happen
17 in the future if the New Jersey Attorney General takes
18 either civil-enforcement actions against us or
19 criminal-enforcement actions against us. And that would
20 suffice to establish standing, but I know the Court has been
21 thoughtful about that already.

22 The second additional and independent reason the
23 harm we're suffering is the chilling effect. We know under
24 5th Circuit precedent this is an independently actionable
25 harm. Even if the New Jersey Attorney General doesn't

1 actually drop the hammer on anyone, the chilling effect that
2 befalls both Defense Distributed and the Second Amendment
3 Foundation and anybody engaging in speech in this area will
4 suffice to confer the standing.

5 Let me talk about exactly what that standard
6 entails, right, the precedent we've given you from the
7 5th Circuit says that the fear of enforcement just has to be
8 not imaginary. And the fear of enforcement here is
9 absolutely not imaginary.

10 Recall the course of events. A cease and desist
11 letter was issued that said if you don't stop engaging in
12 the speech, I will sue you. And then we got sued, then we
13 got sued again. Then, after enacting a criminal law, the
14 defendant here went on a national broadcast, named the
15 founder of our company and said, quote, "We will come after
16 you." If ever there is a case in which the fear of
17 enforcement is not imaginary, it is this case.

18 Now the defendants say that that all changed
19 because of what happened in Washington. But remember the
20 order of events, Your Honor. We sued first. This is the
21 first-filed case.

22 When we filed this lawsuit and said the New Jersey
23 Attorney General is censoring us in violation of the
24 Constitution, we absolutely had standing. They're saying
25 something that happened afterward deprives the Court of

1 standing.

2 Doctrinally, they are wrong. This is not a
3 question of standing in the first instance, it's a question
4 of mootness. So the standard needs two things: number one,
5 it's their burden, not ours, to establish that the
6 Washington action somehow disrupts standing here; number
7 two, that is an extremely high --

8 RECORDED MESSENGER: John Kimbell.

9 MR. FLORES: -- the Supreme Court's decision in
10 2013 and the Already case says that they have to make it
11 absolutely clear that two things are true; number one, that
12 the current controversy is totally gone and they also have
13 to make it absolutely clear; number two, that it's not
14 likely to occur and they have done that here.

15 To do this analysis, Your Honor, you should
16 separate into two buckets. Bucket number one is the
17 Internet activity that's at heart of this part of the
18 dispute that is going on in the Washington case. This will
19 be the activity of putting the files at issue up on the
20 DEFCAD website.

21 I've got a lot of arguments about why the
22 Washington action doesn't take that part of our case out of
23 play, but there's an entire second bucket of activity, the
24 mailing of the files at issue. It is not at issue in the
25 Washington case. Every party there agrees. We say so, they

1 say so, the Department of State says so, the district courts
2 there says so. So whatever you think about what's happening
3 in Washington has no effect on a huge portion of our case to
4 which every cause of action applies to which the threat is
5 still absolutely eminent.

6 No matter what happens in that case, the threat
7 here is that they are going to jail us if we mail these
8 files, they are going to sue us civilly if we mail these
9 files. And that is an activity we have both done in the
10 past, we know exactly what those files entail. And that
11 activity stopped, not because of what's happening in the
12 Washington case, but because of the threats posed right here
13 by this defendant.

14 The other argument that you haven't heard from the
15 other side in this case is a 12(b)7 argument, Your Honor.
16 You haven't heard an argument from them that says this case
17 lacks a necessary party. That's probably the doctrine they
18 ought to be invoking if they really want to save this.
19 Their argument is: we've sued the New Jersey Attorney
20 General but there are other wrongdoers out there that are
21 playing some type of role in this wrongdoing. That's the
22 case they should have made a 12(b)7 motion and said join the
23 other states. But they didn't make that argument so that
24 can't warrant dismissal. And if they had made the argument,
25 the Court could bring them in, because, remember, this is

1 the first filed case. The first-filed doctrine says if
2 there are any disputes about which of the two courts ought
3 to be deciding issues, this Court's decision should go
4 forward and the others should not.

5 We've given the Court a citation to the Bishop
6 decision in our briefs. The Bishop decision stands for the
7 proposition that if we comply with some demand of a court or
8 individual party and we do under protest, that does not
9 result in mootness. So that is what is occurring here when
10 the New Jersey Attorney General said your activities are
11 illegal and to stop.

12 It is true that we have temporarily stopped
13 engaging in those activities but we are doing so under
14 protest. This case is the protest. If the court will issue
15 the preliminary injunction that we have requested,
16 absolutely, Defense Distributed will be able to engage in
17 speech that it could not do the moment before that
18 preliminary injunction was issued. The members of the
19 Second Amendment Foundation can do so as well, so the
20 standing here argument works across the board.

21 THE COURT: Can you identify, just for clarity for
22 me, what those actions would be that won't be enjoined by
23 the Washington court?

24 MR. FLORES: Sure, Your Honor. I have two parts
25 to the response. Number one, the Washington court doesn't

1 enjoin anything as to us. It enjoins the State Department.
2 It tells the State Department: Do something about your
3 regulations. That's number one.

4 Number two, mailing files is an easy example. The
5 mailing of files by Defense Distributed is totally not
6 covered there.

7 In addition, we have a second set of secondary
8 activities that are very important. This is advertising,
9 talking about the activities. Under New Jersey's new
10 criminal law, right, they'll throw us in jail if me and
11 someone from New Jersey agree that in the future we're going
12 to share these files. That's a crime under their law.
13 That's not an issue in the Washington case.

14 Your Honor, there are even Internet activities
15 that can occur here. If you go through the proper State
16 Department process and get the licenses involved there, you
17 can transfer these files, in certain circumstances, on the
18 Internet. That's under the federal law but not under the
19 state law.

20 Now, if the Court issues the preliminary
21 injunction that we would like it to, I can't, in good
22 conscience, go to my client and say put the files back up
23 online on DEFCAD. I should be able to but I'm probably
24 going to have to go up to the court in Washington and tell
25 it first that this is precisely why prior restraints are bad

1 and why they're virtually always unconstitutional. There's
2 a cloud of uncertainty.

3 The actual decision in Washington does not bind
4 us. The actual case in Washington does not put this in
5 issue but the chilling effect that we are suffering
6 nonetheless. So the relief we want here would be absolutely
7 real, concrete, particularized and visited not only on
8 Defense Distributed but also the members of Second Amendment
9 Foundation.

10 Recall, Your Honor, the content of the cease and
11 desist letter that we're talking about here. The cease and
12 desist letter that started all of this and that we're really
13 focused on didn't say to Defense Distributed: Stop engaging
14 in this speech because I, the New Jersey Attorney General,
15 think that the State Department committed an APA violation
16 and think that that was a bad regulation. It didn't cite
17 any federal law.

18 The cease and desist letter, the lawsuits actually
19 brought against us said stop engaging in the speech because
20 of the New Jersey Nuisance Law. Right? They are invoking
21 state law. They're running right into the heart of 1983.
22 They're using the color of state law, not the federal issue
23 in Washington, to shut down our speech. So that shows you
24 why this case is clearly an independent action against an
25 independent wrongdoing.

1 It can't be the case that if New Jersey alone had
2 engaged in the censorship campaign and we sued them we would
3 have standing, but if some other state also tries to censor
4 us as well that we somehow can't act against New Jersey.

5 Section 1983 is a constitutional tort. Black
6 Letter Tort Law tells you that we can proceed against the
7 wrongdoer directly and that will address our injuries there,
8 even if we have additional injuries that have to be
9 addressed elsewhere. And as I say, if they don't think that
10 we have all of the wrongdoers here, it's their burden to say
11 they're missing, it's their burden to bring them in, but
12 that's a question of substance and of the merits, it's not a
13 standing question.

14 I think that is all the argument I have for now.

15 THE COURT: Very helpful. Thank you.

16 Mr. Low?

17 MR. LOW: Thank you. Good morning, and may it
18 please the Court.

19 Your Honor, I think in terms of framing both the
20 jurisdictional and the standing arguments it's important to
21 remember what they are asking for as part of this
22 extraordinary relief they seek here today.

23 Plaintiffs are asking for an injunction, for you,
24 this Court, to find this New Jersey statute is
25 unconstitutional and that the plaintiff should be able to

1 both post on the Internet and send via the mail code for
2 people to print 3D guns, such as AR-15s, without
3 restriction.

4 That finding would be extraordinary on multiple
5 levels but the first one and simplest one is the fact that
6 this concerns a New Jersey statute regarding activity that
7 would be, in that effect, aimed at New Jersey, affecting New
8 Jersey citizens, being enforced by the New Jersey Attorney
9 General's Office so the connection with Texas is attenuated
10 at best.

11 Their argument, main two arguments here, I'll
12 address in the same order. The first is that they say that
13 the -- there's personal jurisdiction on the merits because
14 they say under the Calder decision you can determine that
15 there's harm being felt in Texas, that all of a sudden means
16 that this Court would have jurisdiction over New Jersey.

17 Now that's a generous reading of the Calder
18 decision. I would first like to point out that this
19 argument was first made in a reply brief. That's why
20 there's not briefing from us arguing against Calder.

21 But they ignore, also, that there's subsequent
22 opinion, Walden from the United States Supreme Court
23 explained how Calder works.

24 Calder was a defamation case where the National
25 Inquirer was sending defamatory articles into a state and

1 the Court felt that that was sufficient for harm to have
2 occurred and then aimed at that state to be sued there.

3 This is entirely different. This is a situation
4 where the New Jersey Attorney General has told someone who
5 happens to live in Texas that if they commit a crime in New
6 Jersey, they may be prosecuted in New Jersey. That's not
7 aiming activity at the State of Texas. At best, that's
8 sending a cease and desist letter to someone who just
9 happens to be in a different state to tell them if you
10 commit a crime in the state of New Jersey, you're going to
11 be subject to jurisdiction and prosecution here.

12 That's not enough under the U.S. Supreme Court
13 decision in Walden. Walden says it has to be more than
14 attenuated context. It shouldn't turn on it just happened
15 to be where the plaintiff or defendant lives at that time.
16 The person who claims that, there's jurisdiction in their
17 own state. It has to be purposeful availment laws of the
18 state that the plaintiffs are seeking to assert jurisdiction
19 under.

20 There's no purposeful availment here because
21 there's no effort by the New Jersey Attorney General to say
22 we should, under the state laws of Texas, have some right of
23 relief in this state or you are violating the state's laws
24 in Texas or anything like that. There's no transaction of
25 business here. There's no activity here other than the

1 cease and desist letter, which is why we rely on the very
2 indistinguished case of Strong (phonetic), because sending a
3 cease and desist letter to someone who happens to be in
4 another state is not sufficient to transact business or
5 purposeful availment of that particular state's laws.

6 So under the case that we would have cited had we
7 had the opportunity to rebut it, Walden, which is much newer
8 from the United States Supreme Court, controls this and I'm
9 happy to give the Court the cite if it needs it.

10 The judicial estoppel argument's very similar in
11 that estoppel is something where you take a position in the
12 court that -- and you take the exact 180 opposite position
13 later, either in that court or another court, in which they
14 are irreconcilable. There's no way to say one's true and
15 then the other is true.

16 The most famous one is when someone sues like a
17 5th Circuit case saying that this product harmed me and it
18 was produced by 3M and then in the next case say that same
19 exact product was produced by GE. That's just
20 irreconcilable.

21 what they are saying is by taking the position in
22 Washington court that the Defense Distributed and the
23 plaintiffs are subject to jurisdiction in that court that
24 somehow binds the New Jersey Attorney General from saying
25 New Jersey is not subject to jurisdiction in Texas. I don't

1 see how those are irreconcilable.

2 I can stand here today and still say, yes, by them
3 trying to ship things to Washington the plaintiffs are
4 subject to jurisdiction in Washington. But that doesn't
5 mean the New Jersey Attorney General's Office has anything
6 to do with Texas. Those are two separate questions.
7 There's no estoppel that one could apply to the other, not
8 to mention that they don't cite a case ever in which
9 judicial estoppel has allowed one to back in to undermining
10 the due-process protection of personal jurisdiction.

11 Judicial estoppel is applied in a lot of different
12 realms, it may be law and fact, but it's never been applied,
13 that I can find, to allow a plaintiff to claim the defendant
14 has purposefully availed themselves to a state's laws when
15 they haven't even said anything about that state. The term
16 "Texas" doesn't even come out of the mouths of anyone in the
17 Washington action to then say that the New Jersey Attorney
18 General will be subject to jurisdiction in Texas.

19 Because the other thing, in terms of the standard
20 is, they cited three elements of judicial estoppel that's
21 inconsistent, that you successfully articulate and went on
22 and thus that's estoppel. That's not it. You also have to
23 show an unfairness to the plaintiff in this case that would
24 permit them to claim that judicial estoppel must be bound on
25 the New Jersey Attorney General's Office.

1 That type of situation would have occurred had my
2 client come to this Court and sought relief and said, you
3 know, we think you should do something regarding plaintiffs,
4 and then when they seek relief against my client we say, Oh,
5 wait, we're not subject to jurisdiction. That would be
6 estoppel because we've taken a position in open court that
7 somehow we have a remedy that we should get
8 jurisdiction-wise from Texas and then turning around and
9 saying no we shouldn't, we're immune to it. So there's no
10 estoppel here and that's why they have no case law to
11 support it.

12 Finally I would like to argue on the merits -- to
13 the merits of both judicial estoppel and the merits. It
14 turns on this: It's not what the defendants -- it's not
15 what the plaintiffs do in their activity, whether or not
16 they want to send guns to Washington, New Jersey, New York,
17 Hawaii, it's what the defendants do in this case that would
18 allow this Court to exercise jurisdiction over defendants.
19 So just because plaintiffs want to subject themselves to
20 jurisdiction all over the nation by their activities, that
21 doesn't in any way bind the New Jersey Attorney General's
22 office to be subject to personal jurisdiction in Texas.
23 That's just not the way it turns. The due-process clause
24 turns, in terms of what a defendant does in their own
25 conduct, to avail themselves of the state in which they

1 would then be subject to jurisdiction.

2 I'm happy to now address the standing argument. I
3 would like to point out the way this is briefed I think is
4 interesting in that it's not just standing but also
5 irreparable harm, when you think about it. The fact that
6 the plaintiffs are not taking action, yet they are here
7 seeking extraordinary remedy in which they have a heavy
8 burden of proof on all of the elements, including
9 irreparable harm, to get this Court to rule that there's
10 something that should be enjoined from happening when this
11 is all in some ways hypothetical.

12 The reason why it's hypothetical is not because of
13 the Washington injunction alone, it's because the plaintiffs
14 have agreed to be bound by that injunction, they've actually
15 followed that injunction because they understand that they
16 also could be prosecuted or subject to remedies in
17 Washington as a result of that injunction.

18 what plaintiffs have done is they've taken down
19 their things from the Internet and they've not distributed
20 these 3D guns, and they've made that very clear in their
21 papers.

22 Now if this Court were to say: well,
23 hypothetically, if they wanted to change their mind, what
24 would that do in terms of the relief this Court would need
25 to issue? what type of injunction would this Court need to

1 find? whether or not the statute's constitutional? All of
2 that almost is to the level of an advisory opinion. Some of
3 it is very fact specific when you think about it.

4 Mailing a 3D gun to a certain person when they're
5 licensed and they've gone through the proper channels, all
6 sorts of that, those cases could be different than posting
7 it online. There's so many different permutations to that I
8 think it would behoove this Court to abstain from looking
9 into those things, just like it has already in the TRO
10 context multiple times under the Pullman doctrine.

11 And the reason for that is because there's no
12 imminent irreparable harm or injury that is threatened here.
13 It's their burden to say that right now this activity
14 occurred, enforcement of the statute is imminent and this
15 person is going to go to jail or they're going to have a
16 civil proceeding. None of that exists here, and the reason
17 why is because there was an administrative action filed in
18 the State of New Jersey but it has been dismissed.

19 The New Jersey Attorney General's Office -- and we
20 have been clear in our paper as well that there is no need
21 for enforcement of the statute currently because of the
22 representations and the following of the injunction by the
23 plaintiffs. So to ask this Court to then go ahead and
24 speculate whether or not that statute, if it were enforced,
25 would be enforced in improper ways, I think asks too much

1 and also triggers the lack of standing.

2 I was a little surprised that they said standing
3 is our burden versus theirs. I'm not entirely sure that's
4 the case. I've not read that case law, but I think it is a
5 question of law in any respect.

6 And the fact that standing turns on injury and
7 fact is something that causes them to actually show you what
8 their injury is. Their injury is not being able to export,
9 hypothetically, things over the Internet which they've
10 already agreed not to do. Their injury is supposedly not
11 being able to mail to an unidentified recipient in the state
12 of New Jersey, but they're not really clear that they would
13 actually do that. I think it's way premature to consider
14 it.

15 I also think that distinguishing the Washington
16 injunction by the parties there is a little bit bizarre in
17 whether or not they would need to be brought in this court.
18 The very -- again, what I started off with in this argument,
19 the very limited purpose in question before this Court in
20 this hearing is whether or not the New Jersey Attorney
21 General, enforcing a recently passed statute, would be
22 unconstitutional and whether or not plaintiffs should be
23 able to go beyond or around that statute with the Court's
24 assistance through an injunction. That doesn't have
25 anything to do with the other states. It doesn't have

1 anything to do with the federal government. It doesn't have
2 anything, really, much to do with what's happening in
3 Washington other than the fact that the plaintiff's conduct
4 has been curtailed by a different court.

5 We don't need to bring those states into this case
6 for that argument to -- those are not necessary parties for
7 this determination and it's also not something that is a
8 requirement of the defendant -- or my client in this case --
9 to then defend its ability to enforce a lawfully passed
10 statute. It's not -- it's a little bizarre to me but the
11 bottom of it is if they're not doing anything that they
12 claim is First Amendment activity, how can there be harm and
13 how can there be chilling?

14 Now the last thing on the chilling is -- and I
15 always think chilling is a little bit misinterpreted when
16 it's argued before a court in the First Amendment context.

17 Chilling, when it essentially started in U.S.
18 Supreme Court jurisprudence, there's conduct that's clearly
19 not speech that's being regulated, but because the law is so
20 ambiguous or broadly written, it chills something else.

21 We are not talking about the something else in
22 this case. We are talking about shipping an AR-15 over the
23 Internet or through the mail to a citizen of New Jersey who
24 may not deserve to have that gun, not something related to
25 that that is free speech.

1 So I know we'll get into the merits of the
2 argument but to then use chilling and leverage it to say
3 that's enough to prove their irreparable harm, I think, puts
4 the cart before the horse. They would have to show you
5 conduct that they are engaged in that is actually free
6 speech beyond what we've already agreed that we're opposed
7 to, to then say that's their standing, that's their
8 irreparable harm that they have for this Court to rule in
9 their favor.

10 THE COURT: Thank you very much.

11 would you like to make any brief reply to that?

12 MR. FLORES: Yes, Your Honor. Thank you.

13 If I can, Your Honor, I'll do personal
14 jurisdiction, estoppel and the standing. On personal
15 jurisdiction we've briefed the issue in full, both in the
16 Preliminary Injunction filings and in their Motion to
17 Dismiss filings. They incorporated their Rule 12
18 jurisdictional argument and we did too. Nobody was
19 surprised by this argument.

20 They don't have an answer to Calder. The reason
21 they don't have an answer to Calder is because Calder isn't
22 about where the injury is felt, Calder is about what the
23 communication is about. It's about what the content of the
24 message is.

25 All of the argument you just heard is about their

1 criminal statue but they don't talk at all about the cease
2 and desist letter. The cease and desist letter applies
3 totally to all of our attempts to publish these files. I'm
4 not saying that, the letter does. Quote, "As the chief law
5 enforcement officer for New Jersey, I demand that you halt
6 publication of the printable gun computer files, not just
7 what's at issue in Washington, not just the mailing,
8 everything." And they have no answers for that. That's the
9 kind of demand that says you in Texas, where there's a
10 library, where the files are made, that letter concerns
11 Texas. They are not citing New Jersey citizens and saying
12 what's happening there, that's the difference about Calder.

13 On estoppel, their argument to you is that there's
14 no inconsistency because we've shipped files to Washington.
15 But remember, Your Honor, Washington, that litigation has
16 nothing to do with shipping files in the mail. It's only
17 about the Internet activity. Every filing in that case says
18 so. And for them to sustain jurisdiction there when they
19 said in their own papers: we have sufficient contacts with
20 Washington, they can't be possibly talking about anything
21 except the website.

22 The only contact we have for that case is the
23 website. We put it up. They're taking it down. They
24 cannot answer the estoppel argument by saying things about
25 shipping and mailing because that's not an issue in the

1 washington case. It's impossible for them to articulate any
2 other contact.

3 They say there's no case that applies to estoppel
4 argument in this context of personnel jurisdiction. There
5 are many. I'll give you one example. The citation you'll
6 need is 2011 westlaw 1327137, personal jurisdiction case.
7 One case somebody takes a position about personal
8 jurisdiction and the next they try to flip and the court
9 says judicial estoppel applies, we can't do that.

10 The last thing I'll say, Your Honor, is that the
11 standing-mootness distinction matters. When this case
12 started there was standing. They're making a mootness
13 argument about activities they took in the other case and so
14 that is the burden shifting that's at issue.

15 THE COURT: You stay up there. You can move on to
16 the substantive part of your argument, if you are going to
17 be doing that.

18 MR. FLORES: We're going to divide that and
19 Mr. Blackman is going to go on that.

20 THE COURT: Thank you.

21 MR. BLACKMAN: Auspicious start.

22 Your Honor, if it please the Court, it's good to
23 be back here and also I'm grateful to your staff and
24 everyone that's working in this difficult financial times.
25 I'm grateful for that. Thank you.

1 It's telling that my friends on their side spent
2 about two pages talking about the likelihood of success on
3 the merits. I think they put almost all of their eggs in
4 the basket of standing justiciability.

5 I would like to focus on why we will be likely to
6 succeed on the merits with respect to the First Amendment,
7 the Due-Process clause, the Commerce clause and the
8 Supremacy clause. And I would like to begin my presentation
9 where we left off about three years ago with our case
10 against the State Department, and these are a couple
11 important regards in which the ITAR, which this Court
12 previously addressed in a lot of detail, is quite different
13 from both Section 302, the statute they have, as well as the
14 civil enforcement campaign.

15 The ITAR had a fairly elaborate scheme with a
16 number of exceptions for scientific, literary, and artistic
17 value. There are ways of getting requests in advance but
18 certain tech may be permissible without a license.

19 We thought this was a facially unconstitutional
20 statute. Your Honor disagreed with us. But there are
21 certain aspects of that statute that you found did survive
22 that scrutiny. We don't think this statute passes strict
23 scrutiny, imputed scrutiny or even the laugh test. To quote
24 Justice Kagan in *Tanner Reed v. Gilbert*.

25 I'll start with content based. *Reed v. Gilbert*

1 teaches, we ask first, is to content-base restriction. The
2 answer is: Yes. It restricts speech on the basis of its
3 content.

4 This Court already found, correctly I think,
5 that -- or at least presumed that this formation is speech
6 and I think the same would cover here. The Corley case from
7 the Second Circuit, I think, suggests that when you have
8 information, there implies the intercession of the human
9 mind, it is speech.

10 So if we have speech, we have a content-based
11 restriction, we are now in strict scrutiny land. Once we
12 are in strict scrutiny land, this is not a narrowly tailored
13 statute. It's quite overbroad. It relates to any speech
14 that may be used, that's an important phrase, may be used to
15 create a gun. That could include something like a nut or a
16 bolt, which has a million lawful uses.

17 It also applies to, perhaps, incomplete code. For
18 example, I create code that will make a nonfunctional
19 firearm, right? I think I'm good. I put this on the
20 Internet and someone modifies it. That speech then may be
21 used to create a firearm. There is no scienter requirement
22 and Holder v. HLB requires scienter, not just what you know
23 you are going to do but how third parties may use it.

24 And the Ashcroft teaches, and there's some very
25 good language in Ashcroft, that the mere fact that there's

1 some sort of unquantifiable harm that could result in the
2 action of third parties does not allow the censor -- I'm
3 sorry -- the Government to censor the speech. So if it
4 isn't under strict scrutiny, there's really no case.

5 Now, I'll address intermediate scrutiny because
6 this is the standard that the Court addressed in its last go
7 round in this litigation. Under this degree of scrutiny
8 they have to have a compelling interest and show some narrow
9 tailoring, not quite as much as strict, but they have to
10 show some narrow tailoring. There's no narrow tailoring at
11 all. This applies to a full range of human conduct.

12 And I want to focus on the word "advertise." I
13 think maybe we had a misimpression, Your Honor, about
14 exactly where we had the disconnect. If you go to any trade
15 show and you see an advertisement, in a general sense
16 advertisement means you're trying to promote a product.
17 Right? If I have an advertisement for a widget, I may not
18 have the widget present but maybe a sign or placard or card
19 describing it.

20 This statute permits not only the distribution of
21 the code but the advertising of the code and the advertising
22 doesn't require the actual code to be conveyed. I think
23 that's where we have a disconnect in our prior pleadings. I
24 hope we can make this clear now.

25 So in that regard there's an ongoing threat to

1 activity that is protected by the First Amendment. The mere
2 advertising or offer of information would be protected by
3 free speech and they make it a crime, as well there's no
4 exception process. You have to go through a very cumbersome
5 regimen to be a licensed manufacturer merely to put
6 information online. So you have this entire universe of
7 speech which you may use to create a firearm down the road,
8 and because there's no scienter requirement under Ashcroft,
9 under Holder under Reed and Gilbert, this statute does not
10 apply.

11 Are there any further questions on the First
12 Amendment, Your Honor?

13 THE COURT: Can you conceive of a way that it
14 could have been narrowly tailored to accomplish the purpose
15 of the legislature?

16 MR. LOW: Your Honor, I'm probably going to regret
17 saying this but maybe I think close to ITAR would be better,
18 and let me explain why.

19 The ITAR actually has a process by which people
20 can request, in advance, what kind of speech may or may not
21 be covered. We don't think that's valid.

22 THE COURT: You like the ITAR.

23 MR. BLACKMAN: Yeah. Yeah.

24 we don't think it's valid, but we think it's
25 closer to what this Court recognized in the DD1 decision,

1 that the federal government did have some process in place.

2 This is a completely capacious standard.

3 And I can't know how someone else may use my work,
4 right? Now maybe the statute said if you initially use it
5 and you know the person will use it to make a gun, that gets
6 closer. Right?

7 I think you have to have, first, more clarity in
8 what's covered. It can't cover nuts and bolts because that
9 can be used in a million ways.

10 I also have some clarity with what the scantier
11 requirement is, right? If I merely put a file on the
12 Internet, and maybe it's an incomplete file that someone
13 else finishes off, I can't know how it would be used.

14 And I think if you look at the Packingham decision
15 about the importance of the Internet and the type of code we
16 have, which is open source, this is designed to be modified.
17 It's designed to be changed and adapted.

18 So my clients make a perfectly inert gun, maybe
19 used for a video game, right? You can have a -- maybe
20 Fortnite or something, is a video-game gun. And then
21 someone takes that, modifies it, makes a gun out of it,
22 right? That imputes liability. And I think as a
23 due-process matter -- I'm leading ahead a little bit -- but
24 I think as a due-process matter, that's extremely
25 problematic.

1 So, I think you can craft a far more narrowly
2 tailored statute. But, Judge, we're not really talking
3 about the statute, Section 302. They threatened us with
4 common-law nuisance.

5 I argued a case in New Jersey Chancery Court in
6 which a state court judge said they are likely to succeed on
7 the merits by putting a file on the Internet is a common-law
8 nuisance. Whatever narrow tailoring might exist in a
9 statute, a nuisance statute is about as narrowly tailored as
10 a burlap bag. There's no narrow tailoring at all. So
11 whatever analysis we have for the statute must also apply to
12 the nuisance action, the entire civil campaign.

13 I don't remember, under any reading of the First
14 Amendment, putting a file on the Internet can be a
15 common-law nuisance. That's vague. I don't even know what
16 that means.

17 So even if you think that I disagree with you,
18 even if the Court finds that the statute has adequate
19 tailoring, the same cannot be said for the common-law
20 nuisance which they've threatened us.

21 I might add, Your Honor, that letter has not been
22 withdrawn. And I think my friend said that the action in
23 Jersey was dismissed. That's not correct. It was put on
24 hold. Right? The injunction against us, which they sued us
25 in state chancery court, we did a notice of removal and then

1 we briefed the state of the case. It's not been dismissed.
2 It's a live case. And at some point we'll probably have to
3 litigate that. But they actually have this cease and
4 desist, which has not been withdrawn.

5 I do want to mention briefly on secondary effects,
6 Your Honor, because this did come up in the last case. As a
7 threshold matter, I think the secondary effects doctrine is
8 not a good fit here for at least three reasons. First, the
9 Supreme Court has never used secondary effects to uphold the
10 law outside of adult entertainment, renting, for example.

11 Second, in those cases they are a very close
12 proximate cause, a very close linkage between a strip club,
13 for example, and the sort of people who hang out around
14 strip clubs. They are very close linked. Here there's a
15 lot of attenuation. You don't get the sort of proximate
16 cause you need between our speech and what may be used down
17 the road.

18 And the third one, I think the case of Reed v.
19 Gilbert kind of shifted the secondary effect case law. And
20 Judge Sparks had an opinion about a month ago. I want to
21 get you the cite, Judge.

22 THE COURT: who?

23 MR. FLORES: Judge Sparks -- exactly.

24 It was Reagan National Advertising of Austin v.
25 City of Cedar Park, 343 F.3 664. And Judge Sparks said that

1 Reed to Gilbert did not displace the secondary effects
2 doctrine in the context of commercial speech. And I think
3 he said keep commercial where it is. But we are not talking
4 about commercial speech. This statute applies whether or
5 not there is pecuniary gain.

6 So I think we have to look very carefully at how
7 the secondary effects doctrine applies post Reed. And there
8 have been decisions from other circuits that said Reed
9 modified the secondary effects doctrine. I did a key-cite
10 last night. The 5th Circuit hasn't quite gone there yet but
11 there was a case called United States v. Petras, 879 F.3d
12 155, decided just this past year, which said that there was
13 some precedent that narrowly surveyed hits. It was a time,
14 place and manner precedent hits.

15 So I think just look very carefully, can the
16 secondary effects doctrine from Renton survive Reed v.
17 Gilbert? You don't need to say its overruled, but I think
18 it has no effect when we're talking about speech on the
19 Internet rather than adult book stores where there's not
20 nearly as close of an attenuated link.

21 Your Honor, any more questions on the First
22 Amendment?

23 THE COURT: No.

24 MR. BLACKMAN: Thank you so much, Your Honor.

25 Your Honor, I'll now turn, I think, to the second

1 argument which is very closely related which is due process.
2 And very often First Amendment and due process overlap
3 significantly. If you look at *Brown v. EMA*, Justice
4 Scalia's majority opinion found that the statute was a
5 content-based restriction. Then Chief Justice Roberts and
6 Justice Alito concurred saying, well, we don't want to reach
7 content-based restriction, we'll just rule on due-process
8 grounds and the nub here is vagueness.

9 The statute suffers due process in a couple of
10 regards. First the scanner requirement is effectively
11 strict liability. If I know that someone may use my product
12 for ill will, I am liable.

13 Again, information is meant to be open sourced.
14 It's meant to be modified. When I put information, I know
15 someone's going to modify it. That's why I do it this way.
16 It's a strict-liability offense to make me liable for how
17 someone may modify my code down the road. Right? I think
18 that's a bridge too far, this "maybe" language.

19 Also, the advertisement offer one. If I merely
20 show a placard at a trade show or I offer someone, would
21 like to have this code, I don't actually do it, that gives
22 rise to criminal liability.

23 This sweeps the breadth of a protected
24 constitutional activity, I think, in an unfortunate manner.

25 And again, unlike the ITAR, there's no way to know

1 in advance is my code valid. There's no approval process of
2 any sort that I can inspect saying, is this code okay? The
3 only thing I have to look for is a cease and desist letter
4 or perhaps a criminal indictment from the New Jersey
5 Attorney General. So I think that this law suffers on
6 due-process grounds.

7 And I will note, Judge, although many courts have
8 been asked to review laws concerning gun rights, and the
9 courts have been maybe a little hesitant to apply First or
10 Second Amendment scrutiny, the Courts have been more willing
11 to look at the due-process analysis about whether there's
12 adequate notice, whether the person knows what's to be
13 expected of him under the criminal law.

14 Did you have to any questions regarding the
15 due-process law, Your Honor?

16 THE COURT: Not at all.

17 MR. BLACKMAN: Okay. Thank you, Your Honor.

18 Next I would like to move on to the commerce laws,
19 which I don't think they address but I'll try to address it
20 here. All of the activity at issue that we're talking about
21 concerns a Texas Internet server. When we filed this case
22 back in July, not too long after I was in your court, Your
23 Honor, when we filed this case, we only had files on the
24 Internet.

25 New Jersey says: We are only trying to prosecute

1 crimes in New Jersey, but there's a little sleight of hand.
2 The sleight of hand is this, by merely putting a file on the
3 Internet under their capacious definition of distribute
4 we're effectively, in their mind, coming into New Jersey.

5 Now, we disagree with that. We don't think that
6 the Internet should be understood in this fashion. This is
7 not like shipping wine to a state when there are a bunch of
8 commerce clause cases about wine. There's one almost every
9 year in the court. This is not like shipping wine. This is
10 merely putting information on the Internet.

11 And what New Jersey is doing is they are trying to
12 regulate commerce within Texas and e-commerce around the
13 globe. And this is important because, unlike our last case
14 where the federal government has an interest in regulating
15 interstate commerce and foreign commerce, the states do not.

16 And the back-page litigation I think is very good
17 for the proposition that one state cannot regulate the
18 Internet. This is a very big deal. It's a huge decision
19 that New Jersey is looking for. And this is not only for
20 the statute, please go back to the common-law nuisance.

21 The notion that putting a file on the Internet is
22 a nuisance, the same way if your neighbor is playing loud
23 music is dangerous. If this is applied, businesses around
24 the world can be hauled before the court on nuisance actions
25 on some sort of vague statute. So I think, under the

1 commerce clause, this is extremely problematic. One state
2 cannot regulate conduct in another state.

3 Now, I'm going to make a slight concession here.
4 Right? If they want to prohibit shipment of USB drives in
5 New Jersey, that, I think, would be permissible under the
6 commerce clause but not the First Amendment. Right?

7 They could limit shipment of goods into their
8 state, physical shipment. I think under the commerce clause
9 they're okay on that. There might be problems with that if
10 there's a content-based restriction but the limiting is out
11 of line. But they can't use that same power to regulate
12 commerce in other states where the servers are in Texas.

13 THE COURT: Okay.

14 MR. BLACKMAN: Do you have any other questions on
15 the commerce clause, Your Honor?

16 THE COURT: No.

17 MR. BLACKMAN: Okay. I'll move on to the last
18 point, which is the supremacy clause and truly this is an
19 application of a very important law called the
20 Communications Decency Act, CDA Section 230. And CDA
21 Section 230 was enacted in 1990. This is part of the
22 Digital Millennium Copyright Act, very important
23 legislation.

24 And it was designed to make sure that people who
25 host and publish files on the Internet are not held liable

1 by state regulations. This is a matter solely for federal
2 law, because you can imagine having each state with their
3 own patchwork of Internet laws would have destroyed the
4 world wide web before it even got started.

5 Specifically for us, in our affidavits, both DD
6 and SAF said they want to publish and republish information.
7 And by republish that means they want to host files that
8 other people have created the same way that Yahoo or Google
9 might host a file that someone creates, publish a video on
10 YouTube. They are Internet content providers. They create
11 it as well but they republish.

12 And the sort of action New Jersey takes under
13 Section 302 and under their common-law nuisance is in direct
14 conflict with CDA Section 230.

15 These laws seek to impose liability for publishing
16 files created by others. This is preemptive under the
17 supremacy clause. I think there is a footnote that briefs
18 that, says we are not Internet content providers. The key
19 here, Judge, we are publishers and republishers. That's
20 spelled out in the affidavits. We do both.

21 Now I would note, and we put this in our brief, a
22 ruling on CDA Section 230 would not provide complete relief.
23 I think it would provide complete relief as to republishing,
24 that is posting content created by others. It would not
25 provide relief as to new files which DD has created.

1 Originally, back in July when the files went
2 online, I think all but one was old. Liberator we had
3 created, all the other files had been gathered from the
4 Internet and all of those other files are still available on
5 the Internet.

6 So I think the CDA Section 230 argument does get
7 us most of the way but not the entire way. I think the
8 First Amendment, the due-process clause and the commerce
9 clause render both the statute Section 302 and their civil
10 enforcement campaign under the nuisance statute
11 unconstitutional on their face.

12 THE COURT: Thank you very much.

13 MR. BLACKMAN: Have any other questions, Your
14 Honor?

15 THE COURT: No. Thank you. That's helpful.

16 MR. BLACKMAN: Thank you, Your Honor.

17 THE COURT: Mr. Low?

18 MR. LOW: Thank you, Your Honor.

19 I had told the Court I would give you a cite
20 earlier and I didn't have it with me, so the Walden v. Fiore
21 cite is 571 U.S. 277, and it's a 2014 U.S. Supreme Court
22 opinion.

23 I'll go in the same order. On the First Amendment
24 argument -- and also, I'll point out, I did misspeak. I
25 said "dismiss" but administratively terminated a state court

1 case in New Jersey, so essentially it's not active.

2 what the First Amendment claim that they're
3 claiming here is a little bit different in what they first
4 tried to frame it, in terms of the court. And there are two
5 things, really, in the paper version here. The papers are
6 saying: We want to ship code to these people to print it.
7 That's exactly why we want them to do it. We want them to
8 have it. We want 3D guns to be available to whoever wants
9 them no matter whether or not they're criminals or anybody
10 else. They don't want any restriction at all on the ability
11 to distribute 3D guns.

12 Here they also try and say, well, if you were to
13 advertise at a trade show or things like that, and that's a
14 different position they're taking now in court. It's okay
15 because that position is not something that we're arguing
16 would be caught up in the enforcement of the New Jersey
17 statute, which is an issue in this motion for preliminary
18 injunction.

19 whether or not they want to ship code across state
20 lines, either via Internet or mail, to someone in New Jersey
21 for them to print without restriction, without any ability
22 to regulate that is something this Court's really addressed
23 pretty much head on in the Defense Distributed 1 case. That
24 is something, at best, which is intermediate scrutiny.

25 what's the substantial governmental interest in

1 protecting against that? well it seems, to me, pretty clear
2 that we don't want guns in the hands of terrorists or
3 criminals or someone who wants to walk into a school with an
4 AR-15 which just happens to be printed on a 3D printer
5 instead of bought in a gun store where they would have to go
6 through a background check. We don't want law enforcement
7 to have to deal with people like that, with the unchecked
8 unknown knowledge of who can have these guns.

9 All of that is the purpose of this injunction that
10 they are trying to get. They are trying an extraordinary
11 relief for this Court to actually preapprove them to ship
12 code to someone in a different state so that they can print
13 it, knowing they're going to make a gun.

14 That is extraordinary. It's certainly not free
15 speech under any case that they can give you that actually
16 shows anything like that ever being preapproved, much less
17 found to be caught up within the First Amendment protection.

18 Now I think this Court asks a good question, which
19 is: well, can you think of a more narrowly tailored fashion
20 in which the New Jersey statute could prohibit this type of
21 activity which New Jersey is saying should be prohibited?
22 The answer is: No.

23 Because New Jersey's statute, in our position here
24 and I think that of most law abiding individuals, is that
25 distributing 3D gun code knowing it's going to be printed

1 into an AR-15 and used -- is something that should be
2 regulated. And there is no different way to regulate it
3 than the statute has done, which is very specific. It says
4 distributing code for the purpose of printing 3D guns is
5 what is criminalized and what is barred by the statute, not
6 advertising alone.

7 The suggestion that advertising at a gun show that
8 3D guns are good or so and so sells 3D guns, that's not the
9 statute. As this Court even acknowledged in its own orders
10 on this precise statute and in exercising the Pullman
11 abstention is that it all ties back to distribution under
12 the statute.

13 The specific language of the statute when it uses
14 the term "advertise," is using it as a synonym for
15 distribute, which would be distributing the code.

16 If they're advertising and distributing the code
17 in the same breath, yes, that falls underneath the statute.
18 If they're merely advertising, it doesn't.

19 Now the purpose of that too is so that one can't
20 be creative or cute and say, well, I can do anything I want
21 as long as speech is paired with it. That doesn't work.
22 Handing a gun to a terrorist and saying, "I really love
23 guns, here is your gun," doesn't make it free speech all of
24 a sudden. I think the fact that is criminalized is the
25 actual handing of the gun or distributing of the gun is

1 what's at issue, not what's said when being done.

2 So it is, at best, attenuated, and the statute, as
3 written, has a substantial interest behind it that I don't
4 think anyone, and certainly this Court in its prior opinion
5 acknowledges as one that's important, but also it's tailored
6 correctly in terms of prohibiting that. And it doesn't
7 sweep other types of speech, which they now claim in this
8 case, or at least in this hearing, would be swept in.

9 And, finally, I think it goes back to the other
10 argument so I'm not going to retread it, but they're not
11 claiming that somehow they are at risk by posting something
12 about how good 3D guns are on the Internet and they're going
13 to, all of a sudden, be prosecuted tomorrow. There's
14 nothing like that.

15 what they're saying is that they're not able to
16 send code for someone to print it in New Jersey without fear
17 that that would actually violate both the Washington
18 injunction but also a New Jersey statute. And that's not
19 chilling of any additional speech. It's not overbreadth or
20 anything of that nature that's at issue, and that's an
21 important governmental interest or substantial one that the
22 State of New Jersey should be able to enforce.

23 I thought it was interesting that the plaintiffs
24 brought up to you Judge Sparks' opinion, which I've not
25 read, I'll confess. But I did hear the fact that there is a

1 difference between commercial speech and noncommercial
2 speech in certain types of protection. We generally agree
3 with that. I've studied that quite a bit in constitutional
4 law and the First-Amendment aspect.

5 But for them to say that their speech is not
6 commercial speech is a little bit perplexing to me. I think
7 they admit in their own papers that they sell this material.
8 If they are distributing it for commercial purposes at
9 different places, they may have other interests in doing it,
10 too, such as, you know, firm belief in the Second Amendment
11 or whatever, but that doesn't mean that it can't be
12 regulated as it is.

13 I will now move on to the due-process argument.
14 The due-process argument also, I think, is similarly related
15 in terms of what is prohibited by the statute of
16 distribution or distribute. So the statute would violate
17 due process if it wasn't clear to whoever reads the statute
18 and knows what the activity is that would be wrong. It's
19 essentially an overbreadth argument that the U.S. Supreme
20 Court applies in this situation. It would have to be so
21 broad that no one could possibly follow this statute and thus
22 they wouldn't have due process in terms of knowing when or
23 when not they face punishment.

24 That's not the situation here. The statute's
25 pretty clear, distributing code across state lines to New

1 Jersey through the mails or through the Internet or through
2 a fax, or whatever else they try and come up with, maybe, is
3 something that should not be done under the statute.

4 whether or not one should ask for preclearance to
5 do that or whether or not one may express some sort of
6 scientific interest, or whatever, is really kind of
7 irrelevant. Because whether or not the federal government
8 decided to put those exceptions or things in as it relates
9 to exporting a gun to a different nation or something like
10 that, doesn't matter. That doesn't make this statute due
11 process -- not due-process protected versus that statute.
12 Just this statute doesn't meet an exception for asking for
13 preclearance or scientific availability because the
14 plaintiffs aren't claiming that. They aren't claiming that
15 they have some sort of scientific interest in sending code
16 so someone else can give them their scientific opinion on
17 that code or anything like that. That's not the point.

18 The point is, they're very clear in their papers.
19 They want to send the guns for someone to have and print and
20 own, and that doesn't require an exception and it doesn't
21 require any limiting of the breadth or concern about the
22 breadth of the statute. It's head on, and there's new due
23 process clause violation as the result.

24 If you look at the due process case law on this in
25 terms of when things are actually struck down by due

1 process, it's pretty rare. And the reason why is because
2 the due process argument is based on what the due-process
3 clause is about, is the ability that you have the right to
4 contest whether or not you should be found liable in a court
5 or guilty in a court and then you have a process that goes
6 along with this. It's pretty basic and straightforward.
7 It's not something the Court typically uses, at least not
8 anymore not since FDR times to reach out and cut down a law
9 because you claim that law has some sort of extra basis to
10 it. The US Supreme Court has definitely reined back due
11 process as an affirmative doctrine to reach out and cut down
12 laws.

13 The next argument on commerce clause, it's pretty
14 similar in the fact that the activity that the law, again,
15 is seeking to prevent is the shipping of guns via Internet
16 or mail, to New Jersey. It's not the shipping of guns or
17 Internet to Pakistan or to Washington State or anywhere
18 else, it's to New Jersey.

19 The commerce clause does give the United States
20 Government the ability to regulate things like foreign
21 commerce and to some extent interstate commerce, but there's
22 no suggestion that I've seen in the case law that a state
23 cannot regulate commerce coming into its states.

24 If that were the case, if they were right, if the
25 fact that they can ship something on the Internet means they

1 can all of a sudden take advantage of the commerce clause,
2 that means Internet shipping of anything -- Amazon would be
3 immune from state enforcement of any law. In other words,
4 there's no way you could make that distinction based on the
5 fact that the Internet is used as a basis for shipping.

6 what the more nuanced and probably more rational
7 basis of viewing commercial clause enforcement is: Is the
8 State of New Jersey trying to step into the shoes of the
9 federal government and say, No, you can't do this in United
10 States interstate commerce, or you can't do this
11 internationally? And that's certainly not happening here.

12 To take the commerce clause and expand it, again,
13 to a purpose which is not intended to strike down a state
14 regulating commerce within its own state, granted wherever
15 it originates, maybe China or Texas or anywhere else may be
16 something, but that's not a basis to prevent the State of
17 New Jersey from regulating things from coming into this
18 state.

19 Finally, the supremacy clause, this also seems to
20 be a bizarre argument to me, and I think when we address it
21 in the papers we do it briefly because it seems pretty
22 clear. The statutes that they're citing to in terms of
23 where the federal government has staked out its position
24 include, for example, regulation of Internet service
25 providers. It's explicit. It does not apply to publishers.

1 So now they're claiming, well, they're publishers.
2 So that means that now we can regulate them.

3 In any event, if there's some tangential
4 regulation under regulation of Internet service providers
5 publishers and republishers, there's nothing in that law
6 which is inconsistent with the state also regulating someone
7 sending something into that state; in other words, they have
8 to create two different worlds to even get there.

9 First they have to convince you this is pure
10 publishing, it's not shipping of something to a state. And
11 then they have to convince you that the federal government
12 has said that shipping of this specific thing into the state
13 should be allowed and the State of New Jersey is saying the
14 exact opposite. Neither of those are true.

15 The federal government has never said that one
16 under any law that's ever been passed by Congress,
17 especially, can ship 3D gun code into the state of New
18 Jersey or another state, and that should be allowed. In
19 fact, the federal government took the position in this case,
20 as it relates to where the Government has spoken, and that
21 concerns federal or foreign commerce. And that's not at
22 issue in this case, obviously, but I think the principles
23 are. And the principles are government, federal, state or
24 whatever should be able to pass and enforce laws to protect
25 their citizens.

1 whether or not the constitution restrains that
2 should be pretty clear. It shouldn't be a hypothetical. It
3 shouldn't be something where one can be a vigorous debate
4 when we get to a stage such as we are in today where they're
5 asking for extraordinary relief, like injunctive relief, to
6 permit them to do something that they think is contrary to a
7 state law because they think the Constitution says they can
8 do it.

9 The Constitution is not that clear here. The
10 Constitution does not authorize what they're asking to do to
11 begin with, much less to then be so clear that this Court
12 feels compelled to issue an injunction to bless the shipping
13 of guns to the State of New Jersey because they disagree
14 with the law that was passed.

15 So we appreciate the Court's -- and understand the
16 Court has put a lot of time and effort into this case even
17 predating us, and we appreciate the analysis the Court has
18 already done in its first opinion as well as its two TRO
19 opinions, and we completely agree with what the Court's
20 position is as it pertains to those opinions.

21 THE COURT: Thank you very much.

22 Any brief reply?

23 MR. BLACKMAN: Thank you, Your Honor. May it
24 please the Court.

25 My friend on the other side said a few times

1 "shipping of guns via the Internet." He compared us to
2 Amazon. DD is not shipping actual guns to New Jersey by the
3 mail.

4 what this case began with was posting a file on
5 the Internet which could be downloaded by someone in New
6 Jersey. We don't dispute that. But there's no shipping
7 there, no availment -- to use the word of the day -- of New
8 Jersey with respect to putting the code on the internet.

9 what happens when you put code on the Internet and
10 someone may use it under their statute to do something
11 illegal under New Jersey law. So the entire notion of
12 shipping code on the Internet or shipping a gun on the
13 Internet I think is a bit of a non sequitur.

14 My friend said that there's no way to make the
15 statute more narrowly tailored. Respectfully, that's not
16 correct. The ITAR at least had more narrow tailoring. The
17 statute could define a greater scantier requirement. The
18 statute could define with more precise what kind of code is
19 covered. The statute could have a higher state-of-mind
20 requirement. There's lots of ways of making this more
21 narrowly tailored.

22 we don't think this passage meets scrutiny at all.
23 Even if ITAR did, in this Court's opinion, if you agree, I
24 think there's a ways to go with how the statute could
25 proceed.

1 He mentioned nothing but the nuisance statue.
2 Even if the Court thinks that Section 302 satisfies the
3 scrutiny, the nuisance statute can't. It's vague. It's
4 nebulous. It gives no guidance whatsoever for where
5 criminal liability may arise.

6 My friend also mentioned the commercial-speech
7 doctrine. This statute provides for pecuniary and
8 non-pecuniary speech. DD makes its information available
9 for free. It's not commercial speech in any way. That
10 doctrine is irrelevant.

11 He also said that there's nothing in the record
12 that we want to have speech or scientific purposes. I will
13 read from paragraph 3 of the introduction, page 2.

14 The computer files -- firearms -- that Defense
15 Distributed published constitute important expressions of
16 technical, scientific, artistic and applicable information.
17 These have value beyond the printing. These have value to
18 look at on the screen. They've been exhibited in museums.
19 They have been shown in art shows. These are valuable
20 concepts. People in grad school study these files.

21 THE COURT: By that standard, that renders
22 meaningless that. Everything -- tell me something that
23 wouldn't have potential artistic value. Have you ever been
24 to a modern art museum?

25 MR. BLACKMAN: That's why they have the Miller

1 test, maybe, from days gone by.

2 In recent years the court has expanded -- or I'm
3 sorry -- contracted scope of obscenity quite large. I think
4 one of the few exceptions -- the test should be from
5 Miller -- the exceptions of obscenity, right, and I think
6 the obscenity test is on its way out. I don't think
7 anything is so obscene in today's day with social media and
8 the Internet, I think nothing is obscene.

9 So really the direction of the Court -- I think
10 your question gets there -- is we have a broad construction
11 of what is speech.

12 This is speech, it conveys information, and the
13 laws have content-based restrictions. And for that reason
14 the strict scrutiny is warranted. And even if the
15 intermediate scrutiny is not narrowly tailored enough, and
16 even if the statute is narrowly tailored enough, the
17 nuisance statute is not. So I think this cannot rise to
18 First Amendment scrutiny.

19 I'll turn to the commerce clause again.

20 THE COURT: I think I'm good. Thank you.

21 MR. BLACKMAN: Thank you, Your Honor.

22 THE COURT: You've all done a great job. I -- as
23 I said, I have looked at these issues and every time I look
24 at them I see nuances and aspects of these issues that
25 require more thought, and both presentations -- all of your

1 presentations have been of great use to me today to sort of
2 figure out the best approach to what's before me.

3 So, is there anything else you would like to say
4 as we leave?

5 MR. FLORES: I do, Your Honor, if I could have 30
6 seconds.

7 THE COURT: Sure.

8 MR. FLORES: The citations that I gave you about
9 the judicial estoppel doctrine are in the Court's docket now
10 as Number 96. That's a two-sentence filing that we
11 completed during Mr. Blackman's argument.

12 And the second thing I have to say is the parties
13 appreciate the Court having the hearing today.
14 Representatives from Defense Distributed are here.
15 Representatives from the Second Amendment Foundation are
16 here, and we appreciate the Attorney Generals' presence as
17 well.

18 In the federal case they have said in their filing
19 there is no dispute that federal law does not stop Defense
20 Distributed from distributing these files domestically
21 through the mail. And I think if we can get any point of
22 clarity today with both the parties it would be to have
23 either counsel or the defendant tell us if they think New
24 Jersey law stops my clients from distributing these files
25 through the mail.

1 THE COURT: If you are prepared to respond to
2 that?

3 MR. LOW: Sure, Your Honor.

4 Sorry, I just want to make sure I look at the
5 language of the statute one last time before I make this
6 statement.

7 THE COURT: You don't have to do it on your feet.
8 If you want to file --

9 MR. LOW: That may be better. I think our
10 position has somewhat suggested that but we'll make it clear
11 in a one-page filing.

12 THE COURT: That's great.

13 All right, very good. Anything else then?

14 Again, this has been very helpful to me and I
15 appreciate your hard work. And these are fascinating and
16 important issues and, again, this has been helpful to me and
17 we'll be able to get something out, hopefully in pretty
18 short order. So thank you very much. We will be adjourned.

19 (Whereupon, the hearing then concluded
20 at 11:11 a.m.)

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C E R T I F I C A T E

I, Pamela J. Andasola, Certified Shorthand Reporter, Registered Merit Reporter, Federal Certified Realtime Reporter, in my capacity as Official Reporter do hereby certify that I was present and recorded the above proceedings in stenotype and reduced the same to typewritten form, that the foregoing 61 pages constitute a true and complete record of the proceedings, to the best of my ability, had and done on January 15, 2019, before the Honorable ROBERT PITMAN, Courtroom 4 of the United States District Court, Western District of Texas, Austin Division.

Dated this 24th day of January, 2019.

s/Pamela J. Andasola
PAMELA J. ANDASOLA, CSR/RMR/FCRR

	7	advisory [1] 26/2 affecting [1] 20/7 affidavits [2] 44/544/20 affirmative [1] 52/11 after [4] 8/613/1313/1541/22 afterward [1] 13/25 AG [1] 3/8 again [9] 13/1327/1840/1340/2552/14 53/1258/1960/1460/16 against [13] 7/197/2012/1812/1918/19 18/2419/419/620/2024/432/1037/2447/1 ago [2] 32/938/20 agree [4] 17/1150/255/1956/23 agreed [3] 25/1427/1029/6 agrees [1] 14/25 ahead [2] 26/2336/23 aided [1] 1/22 aim [1] 11/1 aimed [3] 11/520/721/2 aiming [1] 21/7 Alito [1] 40/6 all [39] 2/43/143/203/214/14/24/211/2 13/1818/1219/1019/1420/1524/2025/8 25/1126/126/529/2530/130/332/334/11 37/1041/1641/2045/245/345/446/1047/9 48/1148/2349/1353/156/2258/2258/25 60/13 allow [3] 23/1324/1834/2 allowed [3] 23/954/1354/18 almost [3] 26/232/342/8 alone [3] 19/125/1348/6 along [1] 52/6 already [7] 12/2114/1026/927/1029/633/4 55/18 also [30] 2/163/123/246/38/1311/2514/12 18/819/320/2123/2225/425/1627/127/15 28/731/2333/1736/1037/1140/1945/24 46/1249/549/1850/1453/1954/657/6 57/11 although [1] 41/7 always [2] 18/128/15 am [3] 1/123/1640/12 Amazon [2] 53/256/2 ambiguous [1] 28/20 AMENDMENT [24] 1/42/82/1813/216/19 18/828/1228/1632/635/135/1237/14 39/2240/241/1043/645/845/2346/247/17 50/450/1058/1859/15 amicus [1] 9/4 analysis [4] 14/1537/1141/1155/17 Andasola [4] 1/2461/361/1861/18 ANDREW [1] 1/7 Angeles [1] 3/11 announcements [1] 2/11 another [6] 7/1310/1122/422/1343/2 54/18 answer [5] 29/2029/2130/2433/247/22 answers [1] 30/8 anticipated [1] 4/20 ANTONIO [1] 1/25 any [29] 7/229/1510/1416/218/1724/21 27/529/1131/133/1334/1435/1137/13 39/2141/241/1443/1445/1346/1046/21 47/1549/1951/2153/354/354/1655/22 57/959/21 anybody [2] 13/346/9 anymore [1] 52/8 anyone [6] 3/143/224/113/123/1649/4 anything [18] 10/2417/121/2423/523/15 27/2528/128/228/1130/2047/1648/20
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