Nos. 19-1729 & 19-3182

In the United States Court of Appeals
for the Third Circuit

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

Plaintiffs - Appellants,

v.

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

Defendant - Appellee.

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

Appellants' Reply in Support of Motion for Injunction Pending Appeal

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Argument

I. The motion for summary affirmance is meritless.

Grewal's response says (at 2) to deny injunctive relief "for the reasons stated in the NJAG's motion for summary affirmance." It speaks as though the motion for summary action is an unanswered instant success. Not so. It has been defeated.

Appellants responded to that motion with twenty pages of reasons to reject it. They did so *well before* Grewal filed his injunction response (October 25 versus October 28). Yet Grewal's later filing fails to acknowledge Appellants' response.

Grewal's deadline to file a reply in support of his motion for summary affirmance was October 28.[1] Grewal filed no reply by that date, effectively abandoning the motion. But then he realized the mistake and broke the rules to fix it. He lodged a reply brief yesterday, October 30—well after the deadline and without moving for leave or even acknowledging his violation of the Court's order.

An order striking Grewal's reply brief because of the deadline violation would be warranted. But Appellants neither want nor need to win that way. The Court should just reject the motion for summary affirmance on the merits, keeping this foul in mind when considering the equity of Grewal's delay criticisms, *infra* Part IV.D.

[1] The October 22 Order set deadlines for both motions: "Any reply must be filed within three days of the response." Appellants' response was filed on October 25, making Grewal's reply deadline October 28. Grewal's response was filed on October 28, making Appellants' reply deadline October 31.

II. Appellants have a sufficient likelihood of success across the board.

A. A likelihood of success on appeal suffices.

To warrant an injunction pending appeal, Appellants were *not* required to show *both* a likelihood of success on appeal *and* a likelihood of success on remand as to the underlying merits. The "likelihood of success" prong can be met with one showing or the other. A likelihood of ultimate success suffices, but is not required. A likelihood of appellate success standing alone suffices as well.

Hilton v. Braunskill, 481 U.S. 770 (1987), holds that *either* showing suffices. Injunctive relief pending appeal is warranted if the movant establishes "that it has a strong likelihood of ***success on appeal***, ***or where, failing that,*** it can nonetheless demonstrate a substantial case on the merits." *Id.* at 778 (emphasis added). Circuits follow this rule regularly. When injunctive relief *for the duration of the appeal* is at issue, courts look for the likelihood of "success on appeal."[2]

[2] *Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019); *Brakebill v. Jaeger*, 905 F.3d 553, 558 (8th Cir. 2018) (same); *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (same); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016) (same); *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1362 (Fed. Cir. 2008) (same); *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (same); *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002) (same); *Smith v. Snow*, 722 F.2d 630, 631 (11th Cir. 1983); *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981) (same). *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), is not to the contrary. The part Grewal quotes (reply at 3) is about relief during *trial*—not during an *appeal*.

Grewal mistakes Appellants' position here. The response says (at 2) that "it cannot be that a panel that concludes a particular state law is plainly constitutional would still need to enjoin it simply because the panel disagreed with a district court's choice to stay proceedings temporarily." That argument is a straw man.

Appellants' rule is that courts *need not decide* an action's likelihood of ultimate success on remand where, as here, the relief being sought lasts no longer than the appeal and there is a likelihood of success on appeal. *See Hilton*, 481 U.S. at 778. That rule promotes judicial efficiency by deciding only what is necessary to resolve the issue presented. It provides the simplest path to a decision here.

Ultimately, though, the debate about this legal rule is of little significance. Appellants' motion made overwhelming showings of *both* a likelihood of success on appeal (at 4-9) *and* a likelihood of success on remand (at 9-17), and Grewal argues precious little about either. Whatever "likelihood of success" is required has been shown. Both on appeal and on remand, Appellants are likely to succeed.

B. Appellants are likely to succeed on appeal.

This appeal concerns whether error occurred when, in one fell swoop, the "district court employed the so-called 'first filed' abstention rule, rejected the motion for a preliminary injunction, and stayed the entire action indefinitely." Mot. at 5. Appellants' motion shows that that decision was, indeed, reversible error for nine independent reasons. *Id.* at 5-9. Success on appeal is all but assured.

1. None of Grewal's arguments apply to the CodeIsFreeSpeech.com publishers.

Grewal remains unwilling to address the CodeIsFreeSpeech.com publishers distinctly—apart from Defense Distributed and SAF, as both the first-filed stay rule and injunction law require. The Appellants' Brief presents this ground for reversal in full (at 32-35), as does the motion for an injunction pending appeal (at 4-5) and the response to the motion for a summary affirmance (at 9-13). Yet Grewal's latest filing says ***nothing*** about these arguments. Standing alone, issue one of nine supplies the necessary likelihood of success.

2. Defense Distributed and SAF deserve reversal.

The only argument about Defense Distributed and SAF that Grewal remains committed to is invalid. Grewal says that the district court's decision is correct *because* Defense Distributed and SAF have the power to give up any and all role in *Defense Distributed II*. This is the logic of legal ransom and it is wrong.

The district court here had no right, under the first-filed rule or any other law, to demand that Defense Distributed and SAF give up *Defense Distributed II* as a condition of litigating the instant action. Whether they *can* supply that ransom says nothing about whether they *have to*. The appeal turns on the latter issue of whether the district court could demand abandonment *Defense Distributed II* in the first place. Appellants have not just *a* likelihood of winning that issue. They have nine.

C. On remand, Grewal's actions will likely be held unconstitutional.

Appellants' motion presented (at 9-17) extensive arguments about the unconstitutionality of Grewal's speech crime and civil censorship efforts. Amazingly, Grewal says nothing at all about Appellants' likelihood of success on remand, banking his entire opposition on equity balancing.

This unusual tactic's consequences are massive. Appellants showed—and Grewal does *not* disagree—that the "threatened enforcement of the Section (*l*)(2) speech crime should be held unconstitutional for at least six reasons" and that the "civil enforcement actions are just as unconstitutional." *Id.* at 11-17. The likelihood of success on remand has been established.

III. Vast irreparable harm is occurring right now and will continue without an injunction pending appeal.

Grewal says (reply at 3) that a *temporary* denial of First Amendment rights (a "delay") is *not* irreparable harm. But precedent has long held that the "loss of First Amendment freedoms, ***for even minimal periods of time***, unquestionably constitutes irreparable injury." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013) (emphasis added) (quoting *Elrod v. Burns*, 427 U.S. 347 (1976)).

Furthermore, Grewal says nothing about what would occur if Appellants are prosecuted and jailed pursuant to his unconstitutional speech crime. This harm is irreparable as a matter of law, *see, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932–33 (1982), and implicated as a matter of fact, *see* App. 202 (Grewal

publicly declaring "we will come after you"); *see also id.* at 148-152 (*after* Section 3(*l*)(2) was enacted, CodeIsFreeSpeech.com published files to New Jersey).

IV. The balance of equities favors an injunction pending appeal and an injunction pending appeal will serve the public interest.

The lynchpin of Grewal's response says (at 3) that "the balancing of harms and public interest here is so lopsided that the motion can and should be denied on that basis alone." To the contrary, though, the balance heavily favors Appellants.

A. Grewal's supposed "public safety threat" is unproven.

In this Circuit, facts asserted in response to a request for injunctive relief must be proven. Relying on "hollow representations of harm rather than record evidence" will not suffice. *In re Revel AC, Inc.*, 802 F.3d 558, 575 (3d Cir. 2015). Nor does a "guess" unbacked by evidence suffice. *Fulton v. City of Phila.*, 922 F.3d 140, 165 (3d Cir. 2019). Litigants "must do more than provide their own ipse dixit, citation to a similar case, and a generic assessment." *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184 (3d Cir. 2014).

No evidence supports Grewal's arguments about injunctive relief's balancing of harms. The no-evidence assertion is not hyperbole. Grewal supplied the district court and this Court with literally zero evidence of any kind. The response itself is not proof because attorney ipse dixit is not evidence. *See King v. Governor of the State of New Jersey*, 767 F.3d 216, 227 (3d Cir. 2014) ("the government's ipse dixit cannot transform 'speech' into 'conduct' that it may more freely regulate").

Grewal violates this rule in every way imaginable. How many people would receive the computer files at issue from *these Plaintiffs*, as opposed to the many other publishers Grewal does nothing about? *See infra* Part IV.B. How many of those people would fabricate anything at all, as opposed to just studying the information for its own sake? *See* Appellants' Br. at 6 (on valuable non-fabrication benefits). How many of those people would engage in acts of fabrication that are illegal? And how many of these imagined lawbreakers, who Grewal can already jail if they violate New Jersey's criminal laws about *conduct*, would change their course of action just because Grewal decided to silence Defense Distributed's directors, a SAF member, or a CodeIsFreeSpeech.com publisher? No evidence proves any of this.

For Grewal's hyper-attenuated harm hypothetical to garner any weight whatsoever, evidence proving each link in the chain is needed. But Grewal has never provided any. Assistant Attorney General Moramarco's say-so is not enough.

B. The computer files at issue are already online and always will be.

Grewal cannot take the computer files at issue away from the internet. Even if that goal were legal (it is not), Grewal's attempt to accomplish it now is futile.

The critical fact is this: Every computer file that Grewal wants to censor—and jail the Plaintiffs for sharing—*is already on the internet and always will be*. The Appellants' Brief explains this well-established fact in full (at 9-11) with complete evidentiary backing. Long before Grewal entered the picture, Defense Distributed

repeatedly published the computer files at issue to the internet's public domain. *Id.* at 9-10. And CodeIsFreeSpeech.com spent months republishing Defense Distributed's computer files online as well. *Id.* at 11. "Millions" of people therefore already have these computer files and "are persistently republishing the files at countless websites." *Id.*

Grewal cannot dispute these facts. He himself signed a letter to federal officials declaring that "[t]hese files remained online even after the Attorneys General of New Jersey and Pennsylvania instituted enforcement actions against Defense Distributed." App. 338.

Grewal's lawyers have taken the same position: Even though "the technical data that Defense Distributed had posted on its affiliated websites following its settlement with the Department of State were removed[,] . . . these files have started to appear on numerous other websites that are easily accessible to the public." App. 620. "Without a doubt," he admits, "there are other websites that are currently hosting these files, making them available to individuals who cannot lawfully purchase or obtain a firearm in the United States." *Id.*

Because of this reality, Grewal's side of the equitable scale is empty. The enforcement actions he wants to pursue yield none of his supposed benefits.

C. Other cases' equity-balancing decisions are inapposite.

Grewal's response (at 4) tries to piggyback off of two other courts' injunction decisions. But equitable balancing has to be done anew in each case, based on the arguments and record *in the instant case*. This record is nothing like the others, and many substantial disparities prevent reasoning by analogy:

- When the cited decisions occurred, Grewal's speech crime had not even been enacted. They could not possibly have accounted for Section 3(*l*)(2).
- The cited decisions accounted for interests that Grewal has no claim to here, such as the State Department's power to control foreign policy.
- In *Defense Distributed I*, the State Department realized that the preliminary injunction decision was wrong and chose to *yield*. App. 18-24.
- The Washington injunction is about APA procedure and applies only against the State Department, not to Defense Distributed and SAF.
- The Washington injunction *permits* the files at issue to "be emailed, mailed, securely transmitted, or otherwise published" offline. App. 521. But Grewal's speech crime bans *all* "distribution."

Last but not least, the Washington injunction holds that the First Amendment can be "abridged" so long as it is not "abrogated." App. 521. That first-of-its-kind holding is ripe for reversal in the Ninth Circuit and is supported by no Third Circuit law.

D. This motion is timely.

Appellants have proceeded with complete due diligence. The district court's order of August 28, 2019, App. 1018, made appellate jurisdiction unquestionable, and by October 21, Appellants had filed *both* the Appellants' Brief *and* the motion for an injunction pending appeal. This was a reasonable course of action.

Nonetheless, Grewal says that Appellants should have filed the motion for an injunction pending appeal sooner than they did. But estoppel requires "detrimental reliance," *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 133 (3d Cir. 2002), and the timing of Appellants' motion caused Grewal no "detrimental reliance" whatsoever. If anything, he *benefitted* from the motion's timing, in that he got to enforce his unconstitutional censorship regime that much longer.

SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244 (3d Cir. 1985), confronted a delay argument just like Grewal's and rejected it. The plaintiff filed a complaint and took seven months to move for a preliminary injunction. *Id.* at 1264. The defendant, without any prejudice to assert, said that the passage of time belied the need for interim relief. *Id.* The Court rejected that and held the passage of time irrelevant. *Id.* "The relevant inquiry is whether the movant is in danger of suffering irreparable harm at the time the . . . injunction is to be issued." *Id.* So too here.

Last but not least, Grewal's timing complaint is barred by "the ancient equity maxim that no one should benefit from his own wrongdoing." *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 178 (6th Cir. 1996). High-stakes constitutional litigation is extraordinarily expensive. Perhaps not for Grewal and his stable of taxpayer-funded lawyers, who have no real stake in the game. But for Appellants, the fiscal commitment required to resist Grewal's legal onslaught is enormous. Finite resources necessitate pacing, and it is *because of Grewal's wrongdoing* that these resources are depleted more than ever before. *See, e.g.*, App. 550-52 (on lost income streams and increased compliance expenses).

Grewal's censorship both offends every Appellant constitutionally *and kneecaps them financially*. Far from being a reason to *deny* an injunction pending appeal, the fiscal suffocation resulting from Grewal's ongoing censorship is another compelling reason to grant interim relief.

Conclusion

The motion for an injunction pending appeal should be granted.

October 31, 2019

Respectfully submitted,

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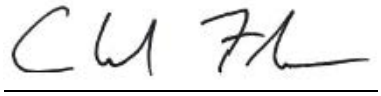

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Certifications

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