**No. 19-50723**

In the United States Court of Appeals
For the Fifth Circuit

DEFENSE DISTRIBUTED;
SECOND AMENDMENT FOUNDATION, INCORPORATED,
Plaintiffs - Appellants

v.

GURBIR S. GREWAL, Attorney General of New Jersey, in his official capacity,
Defendant - Appellee

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

# Reply Brief of Appellants

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## Argument

New Jersey Attorney General Gurbir Grewal wants to tout his position as the one that truly honors notions of "sovereignty." Appellee's Br. at 8, 18. He says that "forcing New Jersey to defend the validity of its own state law in Texas courts offends fundamental principles of state sovereignty." *Id.* at 8. The central theme of Grewal's argument is not just incorrect. It is backwards.

The real affront to the Constitution's principles of state sovereignty occurs where, as here, an official of one state intentionally reaches out beyond his borders to govern what citizens of another state do *in that other state*. *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality op.) (a "defendant might well fall within the State's authority by reason of his attempt to obstruct its laws"). Whatever interest New Jersey may have in "not having an out-of-state court evaluate the validity of its laws," *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 487 (5th Cir. 2008), was waived when its Attorney General chose to proceed beyond New Jersey's borders and issue unconstitutional edicts to another state's citizens about what that other state's citizens can and cannot do in their own home state.

If Grewal does not want to be sued in Texas, he should stop governing what Texans do in Texas. This case would not exist if Grewal had stuck to governing just his own state. But now, having disrespected the boundary between New Jersey and Texas when doing so served him, Grewal has to pay the jurisdictional price.

## I. Grewal is judicially estopped from denying personal jurisdiction.

Judicial estoppel has been a critical fault in Grewal's position all along. Defense Distributed and SAF made it the leadoff argument both in the district court and in the appellants' brief. Yet Grewal tries to relegate the issue by burying it in the middle of the brief and calling it an "alternative bases for reversal." Appellee's Br. at 9. Only two actual counterarguments exist. Neither is valid.

### A. Grewal's two jurisdictional theories contradict.

The first of Grewal's counterarguments denies positional inconsistency. According to Grewal, his jurisdictional theory in the case below and his jurisdictional theory in the Washington case are "easily reconcilable." Br. at 9. In his view, there is nothing inconsistent about simultaneously asserting both "that *Defense Distributed* has minimum contacts with *Washington*" and "that the *NJAG* lacks minimum contacts with *Texas*." Appellee's Br. at 31. That shallow analysis is as far as the no-inconsistency argument goes, and it is not far enough.

Grewal's no-inconsistency argument points to the end results as though that were all that mattered. But the estoppel doctrine cares about more than just end results. It also cares about the legal *theories* that Grewal necessarily used to achieve the end results, including theories that are implicitly but not expressly invoked. *See New Hampshire v. Maine*, 532 U.S. 742, 742–43 (2001) (the doctrine applies to a "theory" of litigation); *Rep. of Ecuador v. Connor*, 708 F.3d 651, 656 (5th Cir. 2013)

(the doctrine applies to both "factual" and "legal" positions); *Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, No. 10 CIV. 2333 LTS, 2011 WL 1327137, at *3 (S.D.N.Y. Mar. 31, 2011) (the doctrine applies to theories that are "implicitly" invoked).

This aspect of estoppel is akin to bedrock norms of *stare decisis*. Just as courts must be consistent in both their judgments *and* their holdings, litigants must be consistent in both their bottom-line positions about end results *and* the legal theories that those bottom-line positions necessarily entail. Yet as to the controlling aspect of the inquiry here—whether one coherent legal *theory* could possibly justify both of his jurisdictional results—Grewal has told this Court nothing at all. No theory is articulated because doing so would make the conflict obvious. Any minimum contacts theory that justifies the Washington court's jurisdiction over Defense Distributed would, if applied here, establish the jurisdiction over Grewal in Texas.

**B. Grewal's prior theory was pressed and accepted.**

The second estoppel counterargument says that Grewal's position about minimum contacts in the Washington case did not exist and did not matter. According to Grewal, he "did not argue, and the District Court in Washington did not actually reach, the issue of [Defense Distributed's] contacts with Washington." Appellee's Br. at 9. Both of these denials contradict the Washington case's record.

Grewal did, indeed, argue to the court in Washington that Defense Distributed had minimum contacts with Washington. He did so not just once, but repeatedly.

In the complaint, Grewal did so by pleading that the Court "has jurisdiction over. . . the parties hereto," which included Defense Distributed. *State of Washington v. United States Department of State*, No. 2:18-cv-1115-RSL, Dkt. 29 (W.D. Wash.) (cited and quoted at ROA.1382). In a prominent brief, Grewal did so by asserting that Defense Distributed was a Rule 19 "necessary party." *Id.* Dkt 119 (cited and quoted at ROA.1382). On summary judgment, Grewal again argued that Defense Distributed had minimum contacts with Washington. After Defense Distributed denied the existence of minimum contacts with an extensive argument,[1] Grewal responded by arguing that "[Defense Distributed's] objections to personal jurisdiction lack merit" because of what is on "Defense Distributed's website." *State of Washington v. United States Department of State*, No. 2:18-cv-1115-RSL, Dkt. 186 at 19 (W.D. Wash.). Grewal is therefore wrong to say that he "did not ever take the position that Defense Distributed had minimum contacts with Washington because Defense Distributed never actually asserted lack of personal jurisdiction in that case." Appellee's Br. at 32. He was required to do so and did so in fact.

[1] *See State of Washington v. United States Department of State*, No. 2:18-cv-1115-RSL, Dkt. 174 at 8-12 (W.D. Wash.) ("Here, the complaint's only operative jurisdictional fact about Defense Distributed is the prediction that, in the future, Defense Distributed will publish a passive website providing generalized computer files to anyone in the world that wishes to visit. The sole operative allegation is about what Defense Distributed "intends to make available for download from the internet." Dkt. 29 at 10. Even if that future conduct had occurred already (it has not, which is a jurisdictional problem of its own), it would not meet the test for specific jurisdiction.").

Grewal also says that "the District Court in Washington did not actually reach . . . the issue of [Defense Distributed's] contacts with Washington." Appellee's Br. at 9. But the court did just that by ordering that Defense Distributed remain in the case as a Rule 19 necessary party. That status necessarily entails a valid basis for personal jurisdiction, *see, e.g.*, 7 Charles Alan Wright & Arthur R. Miller et al., Federal Practice & Procedure §§ 1604-10 (3d ed. 2019), and the court's there held that the Washington action's "findings will bind" Defense Distributed. ROA.1383.

## II. Grewal is subject to specific personal jurisdiction in Texas.

### A. Jurisdiction is demonstrated by *Calder*.

Grewal tries to avoid the holding of *Calder v. Jones*, 465 U.S. 783 (1984), by proposing two distinctions. He concedes that the holding turned on "two grounds for finding that the Calder defendants 'expressly aimed' their conduct at California," but says that "neither of the two grounds . . . applies here." Appellee's Br. at 22. But neither of these supposed distinctions is valid. *Calder* is controlling.

#### 1. Grewal failed to read this case's complaint.

Grewal's first attempted *Calder* distinction fails because Grewal does not realize why the plaintiffs here are suing him. He correctly concedes that *Calder* would apply if Plaintiffs' had attributed their injuries to the cease-and-desist order's threats themselves, as opposed to the future act of carrying out those threats.

Appellee's Br. at 21-22. So in the first supposed distinction, Grewal denies that Plaintiffs have attributed injuries to the cease-and-desist order's threats themselves:

> Appellants contend that, as in *Calder*, the 'sources' of the NJAG's cease-and-desist letter are in Texas, the letter is 'about the plaintiff's activities in Texas,' the 'censorship command was widely circulated in Texas (and nationwide),' and 'the brunt of the injury was suffered in Texas.' *Id.* But the cease-and-desist letter is unlike the article in *Calder*, since Appellants attribute their injury to the enforcement action itself, not to the impact of any statements within the letter."

Appellee's Br. at 21-22. This is wrong because the Plaintiffs here *do* attribute their injury to the "the impact of any statements within the letter"—*i.e.*, the threat itself.

First Amendment violations occur not just when a state official actually punishes a citizen for engaging in protected speech, but *also* when a state official *threatens* to do so. *See, e.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) ("such a threat is actionable and thus can be enjoined even if it turns out to be empty"); *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam) ("A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights . . . ."). Accordingly, Section 1983 creates a cause of action against both the future act of carrying out the threat *and* the present act of delivering the threat. *Id.*

This action's complaint sues Grewal for *both* kinds of First Amendment injuries. ROA.144-46, 154-56. It sues Grewal *both* for the prospective injuries that would occur if he is allowed to carry out his threats of unconstitutional punishment,

*and* for the past, current, and future injuries that the threat itself causes by way of self-censorship and chilling effects. The pleadings expressly invoke the latter injury—the one Grewal says is never invoked—repeatedly for both the First Amendment Count and all others.[2] *See* ROA.127 (Complaint ¶20: "[Grewal is] responsible for the actions and threatened actions that this lawsuit challenges"); ROA.137 (Complaint ¶68: "[Grewal] coercively demanded to punish Defense Distributed for publishing the Defense Distributed I Files to the internet."); ROA.137 (Complaint ¶68: "[Grewal] coercively threatened to punish Defense Distributed for publishing the Defense Distributed I Files to the internet."); ROA.144 (Complaint ¶116: "Because of the [Grewal's] conduct, Defense Distributed has refrained—and continues to refrain—from publishing the Defense Distributed I Files."); ROA.144 (Complaint ¶118 "[Grewal's] conduct chills the Plaintiffs' exercise of rights guaranteed by the First Amendment, Second Amendment, Fourteenth Amendment, and federal law."); ROA.144 (Complaint ¶118: "The chilling effect [of Grewal's conduct] reaches Defense Distributed's publication of the Defense Distributed I Files, SAF members' receipt of those files,

[2] *See* ROA.147 (attributing the Second Amendment Count's injuries to the letter's threat itself); ROA.148-49 (attributing the Equal Protection Clause Count's injuries to the letter's threat itself); ROA.149-50 (attributing the Due Process Clause Count's injuries to the letter's threat itself); ROA.150-51 (attributing the Commerce Clause Count's injuries to the letter's threat itself); ROA.152-53 (attributing the Supremacy Clause Count's injuries to the letter's threat itself); ROA.153 (attributing the Tortious Interference Count's injuries to the letter's threat itself).

and other related exercises of rights under the First Amendment, Second Amendment, Fourteenth Amendment, and federal law."); ROA.145 (Complaint ¶123: "The Defendants have violated 42 U.S.C. § 1983 by threatening, under color of state law, to subject the Plaintiffs to an unconstitutional abridgement of First Amendment freedoms."); ROA.145 (Complaint ¶123: "[Grewal's] conduct constitutes a prior restraint of expression . . . ."); ROA.146 (Complaint ¶129 "damages include, but are not limited to, the loss of First Amendment rights, the chilling effect on conduct protected by the First Amendment").

**2. Grewal does not realize who was sued in *Calder*.**

Grewal's second attempted *Calder* distinction fails because Grewal does not realize who the plaintiff in *Calder* sued. He correctly notices that, in *Calder*, the tortious publication was "widely circulate[d]" in the forum by the *National Enquirer*. Appellee's Br. at 22. So as his second supposedly-crucial distinction, Grewal distances himself from the *National Enquirer* by saying that Grewal himself "did not "widely circulate[]" his letter in Texas." *Id.* *If Calder* had upheld jurisdiction over the *National Enquirer* because of what it did to "widely circulate" the publication in the forum, Grewal would have a point. But that was not the case.

The *National Enquirer* was *not* the defendant at issue in *Calder*. *Calder* upheld jurisdiction over different defendants—the individuals that authored and edited the publication from out-of-state—and did so *despite* the fact that the *National*

*Enquirer* was responsible for the publication's in-forum delivery. *Calder*, 465 U.S. at 789-90.

All of *Calder*'s controlling conclusions apply here. Grewal's "intentional, and allegedly tortious, actions were expressly aimed at" Texas. *Id.* He authored a cease-and-desist letter that he "knew would have a potentially devastating impact" on Defense Distributed. *Id.* He "knew that the brunt of that injury would be felt by [Defense Distributed] in the State in which [it] lives and works." *Id.* So "[u]nder the circumstances, [Grewal] must 'reasonably anticipate being haled into court there.'" *Id.* "In this case, [Grewal] [is a] primary participant[] in an alleged wrongdoing intentionally directed at a [Texas] resident, and jurisdiction over [him] is proper on that basis." *Id.*

**B. Jurisdiction is demonstrated by *Wien Air*.**

Grewal's only answer to the rule of *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), is to double down on his misreading of the complaint. Just as he did in attempting to distinguish *Calder*, Grewal tries to escape *Wien Air* by saying that Plaintiffs' claims have nothing to do with the cease-and-desist letter order's threats themselves—as opposed to the actual act of carrying out those threats:

> Appellants cherry-pick one statement from *Wien Air* that they mistakenly say is dispositive: "When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." Appellants Br. at 39 (quoting 195 F.3d at 213). That rule clearly has no bearing here, as Appellants' claims are not based on the "actual content" of the cease-

> and-desist letter. The crux of Appellants' claims is simply that New Jersey's own state law is unconstitutional as applied to their publication of printable-gun files, and the injury they allege is their general inability to engage in that conduct. That theory does not rely on actionable statements within the letter itself. Since Appellants do not, and cannot, allege that the "actual content" of the letter constitutes an "intentional tort," the reasoning in *Wien Air* does not apply here.

Br. at 24. But as has been explained in detail above, Plaintiffs' case *does* "rely on actionable statements within the letter itself." Since Plaintiffs' complaint clearly alleges that the "actual content" of Grewal's cease-and-desist order "constitutes an 'intentional tort"—Section 1983's intentional tort[3] of unconstitutional censorship—*Wien Air* applies by Grewal's own logic.[4]

### C. There is no one-size-fits-all rule for cease-and-desist orders.

Grewal's position depends on a one-size-fits-all jurisdictional rule for cease-and-desist orders. His rule is that cease-and-desist orders *never* give rise to personal jurisdiction *no matter what* – regardless of *what state's conduct* the official purports to govern with their cease-and-desist order. For Grewal, cease-and-desist letters governing in-forum conduct are jurisdictionally indistinguishable from cease-and-desist governing out-of-forum conduct. Even though *Stroman Realty*'s

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[3] *See McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019) (Section 1983 is a "civil tort vehicle[]").
[4] *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 542 (5th Cir. 2019) (cited by Grewal at Br. 22-23), supports reversal by illustrating the other side of this distinction. *Halliburton*'s letters were sent amongst private parties with no constitutional issues, and the threats at issue were not themselves actionable. *Id.*

letter focused on *out-of-forum* conduct, Grewal reads it to have somehow resolved any and all future cases about letters concerning in-forum conduct.

As a matter of principle, Grewal's one-size-fits-all rule for cease-and-desist orders is wrong. It is precisely the sort of "mechanical" test that this Court has long rejected in favor of inquiries that account for "the particular facts" and "quality and nature" of each individual case's contacts. *Miss. Interstate Exp., Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982).

Grewal's one-size-fits-all rule for cease-and-desist orders is also wrong as a matter of precedent. *Stroman Realty* could not possibly have issued a holding as to *both* cease-and-desist letters focused on in-forum conduct *and* cease-and-desist governing only out-of-forum conduct because only the latter was at issue.

**D. Grewal's brand new arguments are wrong.**

Grewal's brief seeks affirmance with three arguments that he says were "not reached below." Appellee's Br. at 8. These were not "reached below" because they were never made below – not by Grewal in the motion to dismiss and not by Grewal in any other submission to the district court. Because of this failure and the waivable nature of personal jurisdiction defenses, the new arguments cannot be used to defend the judgment on appeal. *See, e.g.*, *Judwin Props., Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 436 n.4 (5th Cir. 1992). They are also all wrong on the merits.

The first argument that Grewal had never made before the appellee's brief is that "Texas's long-arm statute does not confer jurisdiction over the NJAG when (as here) he is sued in his official capacity because the statute only sweeps in out-of-state individuals, not out-of-state government officials." Appellee's Br. at 8. But although Grewal says that *Stroman* "explained" this proposition, *id.* at 26, everything *Stroman* said on this point was admittedly dicta. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 483 (5th Cir. 2008). This Court has never employed the extraordinary rule Grewal now proposes, *id.*, and rightly so. The statute covers any "individual who is not a resident of this state." Tex. Civ. Prac. & Rem. Code § 17.042. Grewal counts as an "individual" under any conceivable understanding of that term's ordinary meaning. There is no textual basis whatsoever for carving out "government officials" from the ordinary meaning of the statutory term "individual."

The second argument that Grewal never made before the appellee's brief is that "the NJAG's decision to send Appellants a cease-and-desist letter does not constitute 'doing business' in Texas as required by the state's long-arm statute." Br. at 8. But the statute covers anyone that "commits a tort in whole or part in this state," Tex. Civ. Prac. & Rem. Code § 17.042, and Grewal did that by delivering his cease-and-desist letter to Defense Distributed in Austin. *See* ROA.145-154 (pleading both Section 1983 torts and Texas common law torts).

The third argument that Grewal never made before the appellee's brief is that jurisdiction over him would "be 'unreasonable' and offend "traditional notions of fair play and substantial justice." Appellee's Br. at 10, 17.[5] But in state and federal courts alike, "[i]f a nonresident has minimum contacts with the forum, rarely will the exercise of jurisdiction over the nonresident not comport with traditional notions of fair play and substantial justice." *DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 388 (5th Cir. 2015); *Moncrief Oil Intern. Inc. v. OAO Gazprom*, 414 S.W.3d 142, 154–55 (Tex. 2013). This is no such rare case. Exercising jurisdiction over Grewal here is perfectly reasonable and consistent with fair play and substantial justice, especially in light of (1) Grewal's massive resource advantage, and (2) Grewal's evident ability to litigate with ease as far away as Seattle.

[5] Considering this argument for the first time on appeal is especially improper because Grewal's failure to raise it below deprived the Appellants of an opportunity to make a record on important factual components of the analysis, such as relative litigation burdens.

## Conclusion

The district court's decision regarding New Jersey Attorney General Gurbir Grewal should be reversed.

February 12, 2020

Respectfully submitted,

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## Certificate of Service

On February 12, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system to the following:

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## Certificate of Compliance

This filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 and Fifth Circuit Rule 32 because it contains 3,241 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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