

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 Brief

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Argument

New Jersey Attorney General Gurbir Grewal has committed a decisive briefing failure. His appellee’s brief says literally nothing about the standalone basis for reversal presented in Appellant’s Brief Part VI. There the Plaintiffs established that, “regardless of whether or not any stay is proper, the district court’s denial of the Plaintiffs’ motion for a preliminary injunction should be reversed because of *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991),” which held that “even if a district court is right to stay an action, it cannot to do so without first adjudicating a pending motion for a preliminary injunction on its merits.” Appellants’ Br. at 51–53. Grewal’s brief never answers this in any way.

The debate is no longer about *whether* to reverse the orders below, but *how*. The unanswered *Rolo* argument requires the district court on remand to immediately decide the motion for a preliminary injunction on its merits no matter what—*i.e.* regardless of what next step occurs below. As to that next step, the Court should hold that the district court is required to exercise jurisdiction instead of abstain.

Plaintiffs seek just one merits ruling—not two. Yet they have zero. No court anywhere has ruled on the merits of the request to stop Grewal’s censorship. The district court’s ransom—demanding an end to the Fifth Circuit appeal as a condition of access to justice—is illegal as to all Plaintiffs and especially as to those that have nothing to do with the Texas case. Article III calls for an adjudication here and now.

I. Appellate jurisdiction exists.

28 U.S.C. § 1292(a)(1) supplies interlocutory appellate jurisdiction over district court orders “refusing . . . injunctions.” 28 U.S.C. § 1292(a)(1). It covers this appeal because both of the orders at issue refused the Plaintiffs’ motion for a preliminary injunction. The first order did so in effect when it “STAYED” the entire action indefinitely, App. 4, and the second order did so both expressly and in effect when it “DISMISSED” the motion for a preliminary injunction, App. 1018. The statute’s clear text establishes this, and so do this Court’s decisions in both *Rolo* and *Victaulic*. Appellants’ Supp. Br. at 1–9. Grewal’s opposing arguments are wrong.

A. The statute covers orders expressly denying injunction motions and the district court expressly denied Plaintiffs’ motion.

Most of Grewal’s jurisdictional argument tries to establish that “the District Court’s orders did not have the ‘practical effect’ of denying Appellants an injunction.” Appellee’s Br. at 9. The effort fails for many reasons to be explained. But apart from that, there is a far simpler separate issue that Grewal pays almost no attention to: whether the district court *expressly* denied Plaintiffs’ injunction motion.

These appeals are founded on both an order that “STAYED” the entire action, App. 4, *and* an order that that “DISMISSED” the motion for a preliminary injunction, App. 1018. Regardless of whether one or both orders had the “practical effect” of denying the motion, the latter order *expressly* denied it. Grewal makes three arguments to counter this. None are effective.

1. Grewal misrepresents *Gulfstream* (U.S. 1988).

First, and most surprisingly, Grewal denies that § 1292(a)(1) even covers orders expressly denying injunction motions. He does so by quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), for the extraordinary proposition that § 1292(a)(1) covers “only” orders that have the “practical effect” of denying injunction motions:

Section 1292(a)(1) is a limited carve-out to the finality rule which authorizes jurisdiction **only** over orders that “have the practical effect of granting or denying injunctions and have serious, perhaps irreparable, consequence.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988).

Appellees’ Br. at 9 (emphasis added). What the opinion actually says is that the statute covers *both* orders expressly refusing injunctions *and* orders that have the practical effect of doing so:

Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions **and** orders that have the practical effect of granting or denying injunctions and have “serious, perhaps irreparable, consequence.”

Gulfstream, 485 U.S. at 287–88 (emphasis added). Instead of accurately representing that sentence, Grewal stripped away the half he disliked, removed the “and,” and created an “only” proviso from whole cloth, all without batting an eye.

The Court should reject Grewal’s use of just the secondary appealability measure. Where, as here, an order *expressly* refuses a preliminary injunction, § 1292(a)(1) is satisfied without the need for any special secondary analysis.

2. Grewal invents the “docket clearing order” idea.

Grewal’s second point about the dismissal order calls it a “docket clearing order,” Appellee’s Br. at 9, as though that label carried some sort of special jurisdictional significance. But no court in this Circuit has ever used the phrase “docket clearing order,” let alone in the transformative way Grewal does. The district court below certainly did not use that label or anything like it. The order it issued was as full-fledged and impactful as any, and because it expressly rejects Plaintiffs’ motion, it alone can serve as the basis for appellate jurisdiction.

3. The “without prejudice” element is not decisive.

Grewal’s final point about the dismissal order emphasizes that it refused the Plaintiffs’ motion for a preliminary injunction “*without* prejudice to their ability to refile the motion once the stay is lifted.” Appellee’s Br. at 9. But Plaintiffs’ preempted this twice, defeating it both as a matter of statutory text, *see* Appellants’ Supp. Br. at 2 (“Section 1292(a)(1) . . . [has] no exception for refusals made “without prejudice” and [has] no exception for orders that might be followed by a new and different ruling on a new and different motion.”), and as a matter of precedent, *id.* at 5 (“The *Rolo* defendant made that postponement argument and it was rejected.”).

Grewal does not grapple with either of these responses directly. He instead just calls Plaintiffs’ outcome a “limitless” “exception” that would “swallow the rule.” Appellee’s Br. at 10–11. But of course, the notion of *all* injunction denials

being appealable *is exactly the rule* that Congress exacted in § 1292(a)(1). And even though Plaintiffs' view has been the law of the land for almost three decades now (*Rolo* was issued in 1991), Grewal has no actual adverse consequences to report.

For these reasons, jurisdiction exists by virtue of the order that “DISMISSED” the motion for a preliminary injunction because it expressly “refus[ed]” an “injunction” within the meaning of § 1292(a)(1). No further analysis is required.

B. Both orders meet the appealability test of *Rolo & Victaulic*.

To the extent that there is no order expressly refusing Plaintiffs' motion for a preliminary injunction, both *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), and *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007), are on all fours. In every relevant respect, these cases show that both of the decisions at issue have the necessary practical effect and consequences that warrant an immediate appeal. *See* Appellants' Supp. Br. at 2–8. Grewal's efforts to distinguish these cases fail.

The first supposed distinction says that *Rolo* does not matter because it involved only *one* jurisdiction (New Jersey), whereas this case involves *two* (New Jersey and Texas). *See* Appellee's Br. at 13. But Grewal has the *Rolo* facts wrong. The *Rolo* plaintiffs were *not* “seeking relief against defendants *only* in New Jersey.” *Id.* They were seeking relief in the District of New Jersey *and* the United States Bankruptcy Court for the Southern District of Florida. *Rolo*, 949 F.2d at 698–99. This argument's false premise deprives it of any force.

The second supposed *Rolo* distinction is just another phrasing of the first. According to Grewal, *Rolo* does not matter because *Rolo*'s injunction motion was the *only* avenue for relief, whereas this case involves avenues for relief *besides* the injunction motion. Appellee's Br. at 13. But Grewal again has the *Rolo* facts wrong. The *Rolo* case was *not* its plaintiffs' *only* source of relief. Relief in *Rolo* was also available from the ongoing bankruptcy action in Florida. *See Rolo*, 949 F.2d at 698–99. Another false premise defeats Grewal's other supposed *Rolo* distinction.

C. No court has adjudicated the merits of any request for injunctive relief against Grewal .

To distinguish both *Rolo* and *Victaulic*, Grewal asserts that “Appellants already sought and were denied relief in Texas.” Appellee's Br. at 13; *accord id.* at 15. But as to the CodeIsFreeSpeech.com publishers, that assertion is completely false. Their only case against Grewal is this one. They never sought anything in Texas. And as to Defense Distributed and SAF, the assertion is immaterial because the district court in *Defense Distributed II* never ruled *on the merits*; personal jurisdiction is the only issue it ever reached.

No court has ever adjudicated the merits of any Plaintiffs' request for injunctive relief against Grewal. The only action with now-pending requests to enjoin Grewal's unconstitutional censorship is the instant one. Hence, the same considerations of irreparable harm and a need for immediate relief that existed in *Rolo* and *Victaulic* exist here.

D. Appealability turns on *what* the district court did—not *why*.

Grewal says that appealability depends on *why* the district court decided to refuse the Plaintiffs’ motion. Appellee’s Br. at 10. He thinks that if the district court’s *reasons* for denial had nothing to do with the merits, the orders “did not have the practical effect of denying an injunction.” *Id.* This is legally incorrect.

A decision and its reasons are not one and the same. They are distinct. Occasionally jurisdiction turns on what reasoning an order involves. But not usually and not here. The district court’s *reasons* do not matter to this jurisdictional inquiry.

The § 1292(a)(1) jurisdictional inquiry looks only at *what* the district court did in the decision itself; reasons are irrelevant. The test is whether the order “refus[es]” an “injunction” — period. If Congress had wanted to include a reasoning element in § 1292(a)(1), it would have used language like neighboring § 1292(b), which makes appealability turn on which legal issues an “order involves.” § 1292(b). Because the statute at hand speaks only of what the decision actually does and not the reasoning it involves, Grewal’s reasoning-based analysis is wrong.

Rolo is on point once again. The Court there took jurisdiction and reversed not *in spite* of a lack of merits reasoning, but *because of it*—i.e., because the stay was entered without adjudicating the injunction motion’s merits.¹

¹ *Shirey v. Bensalem Township*, 663 F.2d 472 (3d Cir. 1981) (cited by Appellee’s Br. at 10) does not hold otherwise. The shortcoming there was far simpler: no injunction ruling occurred because appellants had *never asked* for one. *Id.* at 476–77. No such failure exists here. *Shirey* is inapposite.

E. Yielding to a ransom does not “effectively challenge” it.

Grewal’s most vehement argument is the idea that Plaintiffs “can seek immediate relief in the District of New Jersey if they voluntarily abandon their Fifth Circuit appeal.” Appellee’s Br. at 13. This is the ransom point that permeates Grewal’s brief, and it is wrong for several reasons.

First, the ransom argument fails on its own terms. As Grewal puts it, the Plaintiffs’ supposed ability to give up *Defense Distributed II* proves that the stay order can be “effectively challenged” without an immediate appeal. Appellee’s Br. at 11. But if the Plaintiffs were to end *Defense Distributed II* as Grewal suggests, the Plaintiffs would *not* be “effectively challenging” the district court’s order or “challenging” it at all. They would be *yielding* to the order. The only way to effectively challenge the stay order is, indeed, to appeal it immediately.

More importantly, the issue of whether the Plaintiffs *can* comply with the district court’s ransom says nothing about whether they *have to*. The whole point of the appeal is to show that the district court broke the law in imposing its ransom and demanding that Defense Distributed and SAF give up *Defense Distributed II* in exchange for a ruling on their injunction request. Illegally requiring the sacrifice of one legal right for the sake of another causes irreparable harm no matter what choice is made. Whatever mileage Grewal gets out of arguments supporting the stay’s merits go to the appeal’s merits—not jurisdiction.

Absurd results would occur if Grewal’s view prevails. As he sees it, a court can demand as ransom for a decision that a litigant do *anything*—no matter how illegal, immoral, corrupt, or unconscionable—and if the litigant is physically capable of complying, they must do so and can never appeal. That is obviously not the law.

Last but not least, as to the CodeIsFreeSpeech.com publishers, Grewal’s ransom point is factually wrong. They have no control over *Defense Distributed II* and could not pay the ransom even if they wanted to. Jurisdiction as to them is unquestionable.

F. Footnote 2’s argument about the CodeIsFreeSpeech.com publishers’ independence is wrong.

Realizing that the CodeIsFreeSpeech.com publishers’ case for jurisdiction is even stronger than that of Defense Distributed and SAF, *see* Appellants’ Supp. Br. at 8–9, Grewal buries his treatment of the CodeIsFreeSpeech.com publishers in a footnote at the very end of his jurisdictional argument. Rather than acknowledge how threatening their procedural posture is, Grewal tries to sluff it off by asserting that the CodeIsFreeSpeech.com publishers “are bound by the decisions of [Defense Distributed and SAF] to continue the Texas Action” because they share the same attorneys in one case. Appellee’s Br. at 15 n.2. But since Grewal made this exact same argument before, Appellants have answered it in full already. *See* Plaintiffs’ April 23, 2019 Letter to the Court at 1–2; Appellants’ Br. at 8–9. Grewal cites no authority for his astonishing new rule of agency law because there is none.

Jurisdiction does not turn on which lawyers represent which parties. Original jurisdiction does not and appellate jurisdiction does not. Congress has never made access to the judicial branch depend on identity of counsel. Instead, jurisdiction here turns on what kind of “order” the district court issues. § 1292(a)(1).

This case has no second-class plaintiffs and no second-class appellants. All are of equal jurisdictional rank and all are equally entitled to invoke § 1292(a)(1)’s provision of appellate jurisdiction. So long as Grewal insists on unconstitutionally censoring all of these litigants, and so long as the district court makes decisions as to them all, all have the right to demand full judicial review, both at trial and on appeal.

II. The Court should reverse because the CodeIsFreeSpeech.com publishers play no role whatsoever in *Defense Distributed II* and have distinct claims.

The Appellant’s Brief was careful not to ever suggest that the first-filed rule always requires an *exact identity* of all parties and all claims. Grewal’s focus on that, *see* Appellee’s Br. at 17, is a red herring. The correct rule is that actions *are* truly duplicative if they have *identical* parties and *identical* claims; but if the instant action’s plaintiff is a *total stranger* to the predecessor action with *distinct* claims, the two are *not* truly “duplicative” and a stay is improper. This is clearly the latter case.

Sufficient identity does *not* exist here because the CodeIsFreeSpeech.com publishers are total strangers to *Defense Distributed II* asserting distinct claims. The facts of their claims are different, as they have a different publication history,

different threat history, and different course of future conduct than the other Plaintiffs.² *See* App. 9–13, 40–45. The law governing their claims is different, as the CodeIsFreeSpeech.com publishers are not parties to the State Department Settlement Agreement that plays a role in the claims of Defense Distributed and SAF’s claims. *See* App. 18-26. And the injunction that they seek will necessarily be individualized and unique to their circumstances. *See, e.g., Reilly v. City of Harrisburg*, 858 F.3d 173, 176–79 (3d Cir. 2017). Grewal never confronts any of these differences.

The phrase “lead plaintiff” is one of Grewal’s attempted workarounds. *See* Appellee’s Br. at 7. He bestows that title on Defense Distributed and SAF as a sort of slight to the CodeIsFreeSpeech.com publishers. But the phrase has no actual legal significance, save for the obviously inapplicable law of class certification. Nor does that phrase have any basis in this action’s pleadings. The complaint never bestows “lead plaintiff” status (or anything like it) on anyone. It pleads all seven Plaintiffs’

² The CodeIsFreeSpeech.com publishers are interested in more than just the right “to receive and republish “Defense Distributed’s files,” Appellee’s Br. at 20, though that is a critical part of the case. They are also litigating about their right to publish “digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component” at large. App. 40–41; *see also* App. 49; App. 148 (“The purpose of the CIFS project is to allow people to share knowledge and empower them to exercise their fundamental, individual rights. CIFS contains, among other things, links to digital instructions in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a three-dimensional printer to manufacture or produce a firearm, firearm receiver, magazine, or firearm component.”).

claims with equal force. A federal court’s obligation to exercise the jurisdiction conferred upon it is “virtually unflagging” for all litigants—not just the ones that happen to appear first in the caption. *See, e.g., Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

III. The Court should reverse because *Defense Distributed II* does not warrant abstention as to any Plaintiff.

A. Demanding abstention requirements apply.

Grewal denies that any abstention principles matter. But he has neither a theoretically sound position nor any answer to this Court’s on-point precedents.

Theoretically, Grewal’s position is incoherent because the district court’s action is, by definition, one of “abstention.” The district court *has* jurisdiction, but is *choosing* not to exercise it. That is the very *sine qua non* of “abstention.” *See, e.g.,* 17A Charles A. Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 4247 (3d ed. West 2019). There is no other word for it.

With respect to precedent, Grewal says that no authorities invoke “abstention” principles when making first-filed determinations in the federal-federal context. Appellants’ Br. at 24. But plenty do, and they have been cited to Grewal before. *See* Appellants’ Response to Appellee’s Motion for Summary Action at 17–19 (“The admission of ‘no federalism concerns’ makes the decision below more erroneous—not less.”). He just chooses to ignore them. Two *en banc* decisions from this Court ought to be enough to settle the question.

The leading case is this Court’s en banc decision in *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 189 F.2d 31 (3d Cir. 1951) (en banc), *aff’d*, 342 U.S. 180 (1952). It shows that “[t]he first-filed abstention rule turns *not* on a static timing test of which action started first, but on a dynamic test of whether one action will clearly afford relief *more* expeditiously and effectively than another.” Appellants’ Br. at 44–45. If its holding applies to the federal-federal context, Appellants prevail because *Defense Distributed II* cannot “clearly afford relief more expeditiously and effectively than” the instant case. *Kerotest*, 189 F.2d at 34–35. And indeed, *Kerotest* applies. It was a federal-federal case. *Id.* at 31.

Another case proving that “abstention” principles apply when making first-filed determinations the federal-federal context is *Chavez v. Dole Food Co., Inc.*, 836 F.3d 205 (3d Cir. 2016) (en banc), the very authority that Grewal invoked below, *see* App. 968–69, 991. Once again, the Court *en banc* recognized that the first-filed rule in a federal-federal context flows from “abstention jurisprudence.” *Chavez*, 836 F.3d at 220; *see also* *Complaint of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37 (3d Cir. 1980).

B. Mere parallelism does not justify abstention.

Grewal touts a concern for “wasted judicial efforts, conflicting judgments, and unnecessary friction between courts.” Appellee’s Br. at 22. But he never explains how any of those harms will actually come to pass here. There is nothing “wasted”

about judicial efforts to adjudicate both the jurisdictional issue of where Grewal can be sued and the merits of a motion for a preliminary injunction. No “conflicting judgments” are at risk because the questions presented are different in kind. And Grewal cannot even articulate what “unnecessary friction” is, let alone show that it would occur here. All of these arguments were pressed in *Rolo* and rejected. *See Rolo*, 949 F.2d at 699 (“The district court justified its decision to stay the Rolos's action in part on the need to conserve judicial resources and to avoid inconsistent judgments.”). The Court should do so again here.

Grewal also warns of “forum shopping.” Appellee’s Br. at 22. But if anyone is guilty of that here, it is Grewal. To evade the scrutiny of a preliminary injunction in Texas, he successfully argued that Texas courts *can never address the merits*; and to evade that same scrutiny here, he has so far successfully argued that the Texas courts *are addressing the merits*. This gamesmanship should not be tolerated.

C. Massive irreparable harm stops abstention.

Even in instances of “duplicative litigation,” courts cannot abstain where, as here, the plaintiff at issue seeks to halt irreparable harm. Appellant’s Br. at 40–43. Decades of Supreme Court precedent uphold the rule, as do decades of this Court’s precedent. *Id.* And in this case, the wealth of preliminary injunction filings below show that “Plaintiffs are suffering massive irreparable harm of the highest constitutional order” because “Grewal’s censorship has both stopped Plaintiffs from

engaging in the constitutionally protected free speech Grewal has outlawed and caused a nationwide chilling effect that further insults the Constitution.” *Id.*

Grewal’s first (presumably best) response says that the irreparable harm does not matter because Plaintiffs saw the stay coming. Appellee’s Br. at 31 (“Nothing about the resulting delay in the District of New Jersey is an unanticipated outcome here.”). But to say that these Plaintiffs went to all the trouble they did—constructing a new lawsuit in Grewal’s home jurisdiction and moving for a preliminary injunction with full briefing and thousands of pages of evidence—*knowing that it would never be ruled upon* is absurd.

Grewal says that “[t]his appeal does not present any issue regarding the constitutionality of Section 3(*l*)(2), New Jersey’s 3D-gun statute.” Appellee’s Br. at 6. Although that is true for some of the issues, it is not true as to this one. When the Court decides whether the district court’s decision exposes Plaintiffs to “irreparable harm,” it will have to confront a key foundational merits issue: Does the speech that Section 3(*l*)(2) criminalizes deserve any First Amendment or other federal free speech protections?

Grewal makes this an issue by denying the existence of any First Amendment rights. He says that, under *Commodity Futures Trading Commission v. Vartuli*, 228 F.3d 94 (2d Cir. 2000), the computer files at issue “do not qualify as speech that warrants First Amendment protection.” Appellee’s Br. at 31.

The Court should address this issue squarely and reject it. As a matter of law, this action’s digital firearms information qualifies as First Amendment speech entitled to all of the Constitution’s protections against government censorship. The Appellant’s Brief set forth both the factual and legal components of this analysis, Appellants’ Br. at 5–7 & n.1, and Grewal does not respond.

Factually, Grewal has no evidentiary support whatsoever for his assertion that “the 3D printable firearms files at issue here require the mechanical following of instructions. They do not convey instructions to a human, but instead are files that instruct another inanimate object – the 3D printer – to manufacture a gun.” Appellee’s Br. at 32. These assertions are nothing but attorney *ipse dixit*.

To the contrary, reams of evidence that Plaintiffs assembled below prove that the files at issue do *not* operate in the automatic fashion Grewal presupposes and instead constitute an important expression of technical, scientific, artistic, and political matter from person to person. Appellants’ Br. at 5-7 & n.1. The proof comes not just from Defense Distributed’s own experts, *see* App. 546–551, App. 528–536, and leading trade publications, *see*, App. 665–716, App. 718–735, App. 737–761, but also from experts like John Walker, founder and principal developer of the AutoCAD software, App. 538–543. The man that invented these files knows better than Gurbir Grewal’s attorneys.

Legally, Grewal has no answer to the wealth of authority establishing that the files at issue qualify as constitutionally protected speech under any conceivable framing of that test. Appellants' Br. at 7 n.1. (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“[T]he creation and dissemination of information are speech within the meaning of the First Amendment.”), *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) (“[G]iven that the purpose of [the delivery of a tape recording] is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of ‘speech’ that the First Amendment protects.”), *Junger v. Daley*, 209 F.3d 481, 482 (6th Cir. 2000) (“Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.”), *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) (“[C]omputer code, and computer programs constructed from code can merit First Amendment protection.”), *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) (“source code is speech”), Brief of Amicus Curiae Electronic Frontier Foundation in Support of Plaintiffs-Appellants, *Def. Distributed v. U.S. Dep’t of State*, 2015 WL 9267338, at * 11, 838 F.3d 451 (5th Cir. 2016) (“functional consequences of speech are considered not as a bar to protection, but to whether a regulation burdening the speech is appropriately tailored”), and *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680, 692 (W.D. Tex. 2015)).

Furthermore, just this week, the Department of State and Department of Commerce took the position in a separate case that these same kind of computer files *are* covered by the First Amendment’s speech protections. Fed. Defs.’ Brief in Opp’n to Pls.’ Mot. for Prelim. Inj. at 20–22, *State of Washington et al. v. U.S. Dep’t of State, et al.*, No. 2:20-cv-00111-RAJ (W.D. Wash. Feb. 24, 2020), ECF No. 84.

Grewal argues that “courts have long recognized an exception to the First Amendment for speech integral to criminal conduct.” Appellant’s Br. at 32. But speech cannot be “integral to criminal conduct” where, as here, it has at most only a “contingent and indirect” relationship to that conduct. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002). In other words, government cannot base speech bans on “some unquantified potential for subsequent criminal acts,” *id.*, which is all that Grewal musters here.

D. Grewal never answers *IFC Interconsult* (3d Cir. 2006).

Under the first-filed rule, actions are sufficiently “duplicative” only if both are “ongoing,” which is not true here. *Defense Distributed II* was not “ongoing” when the district court abstained and is not “ongoing” now because a final judgment with preclusive effect has issued. The Court held this—that the issuance of a final judgment with preclusive effect is the keystone—in *IFC Interconsult, AG v. Safeguard International Partners*, 438 F.3d 298 (3d Cir. 2006). Appellants’ Br. at

38–39.³ Grewal has no answer for *IFC Interconsult*. Without ever citing the case, he defies its holding by saying that a case is still “ongoing” *after* a preclusive final judgment issues. Appellee’s Br. at 28. The Court should adhere to its precedent and hold that *Defense Distributed II* is no longer “ongoing.” This alone is enough to stop the first-filed rules’ application.

E. Grewal never answers *Kelly* (3d Cir. 2017).

Under the first-filed rule, actions are sufficiently “duplicative” only if their issues overlap *currently*, which is not true here either. This is the rule of *Kelly v. Maxum Specialty Insurance Group*, 868 F.3d 274 (3d Cir. 2017), *Fru-Con Construction Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009), and *Fox v. Maulding*, 16 F.3d 1079 (10th Cir. 1994). Appellants’ Br. at 39–40.

Grewal has no answer to this legal rule. So instead he resorts to a procedural assertion that is false: “In both cases, Appellants seek the same injunctive relief with respect to the same New Jersey statute.” Appellants’ Br. at 29. That is not so. *Defense Distributed II* contains no now-pending request for any injunctive relief. There was one over a year ago, but it is long gone, having been denied as moot in light of the district court’s personal jurisdiction ruling. The point of *Kelly* and the other precedents in its line is that the timing difference matters.

³ Although *Defense Distributed II* did not make merits determinations, its judgment has preclusive effects with respect to the personal jurisdiction issues it decided.

The Court should adhere to its precedent and hold that the issues in *Defense Distributed II* and this case do not overlap *currently*. This alone is enough to stop the first-filed rules' application.

IV. Due process violations warrant reversal as to all Plaintiffs.

The district court denied Plaintiffs due process by (1) failing to provide notice that it would rule on Grewal's stay request at the March 7 "status conference" and (2) failing give Plaintiffs a meaningful opportunity to be heard before granting that request. *See* Appellants' Br. at 49–51. Grewal disagrees, contending that his own letter requesting the stay and Plaintiffs' last-minute arguments at the "status conference" constituted sufficient notice and an opportunity to be heard. Appellee's Br. at 26, 25–28. In effect, Grewal equates *any* notice and *any* opportunity to be heard with constitutionally *adequate* notice and a constitutionally *meaningful* opportunity to be heard. But "just as a hearing which does not afford a meaningful opportunity to be heard may be as fatal to due process as a denial of any hearing at all, so too constitutionally mandated notice which is inadequate under the circumstances may be as fatal to due process as no notice at all." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 834 (3d Cir. 1973).

Even the authorities Grewal cites belie his position. *Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199 (3d Cir. 2009), by itself demonstrates the error of the district court's ways.

The district court in *Acumed* ordered the parties to submit letter briefs in lieu of formal motions and scheduled “a pre-motion argument” over two weeks later. *Id.* at 208 n.6, 223. The parties filed the letters the day before the hearing, and then the court held a full argument on the merits. *Id.* This Court indicated that the district court’s procedure failed to satisfy due process. *Id.* at 224 (“[I]n this case it is doubtful that the District Court gave the parties adequate opportunity to present evidence or make arguments with respect to granting summary judgment.”). It reasoned that “a party has sufficient notice . . . if it had reason to believe that the court might reach the matter . . . and the party had an opportunity to support its position fully.” *Id.* at 223 (emphasis added). This, in turn, requires a district court to “give notice to the parties that it is considering” ruling on a motion before it actually does so. *Id.* at 224. The scheduled “pre-motion argument” in *Acumed* did not provide such notice, rendering the procedure there defective.⁴

This case is even easier than *Acumed*. The court’s scheduling of a “status conference” here provided no notice that the district court would entertain—much less rule on—the merits, just like the scheduled “pre-motion argument” in *Acumed*. Compare *id.* at 208 n.6 with App. 974. But unlike in *Acumed*, where the parties had over two weeks to prepare their letter briefs, Plaintiffs here had only *four days*

⁴ The Court deemed the error harmless because, on plenary review, it held that the entry of summary judgment against the defendant was proper. *Acumed*, 561 F.3d at 224.

between Grewal's stay request and the unannounced hearing on it. If sixteen days did not afford the defendant "an opportunity to support its position fully" in *Acumed*, the much shorter period here must not do so either. *Acumed*, 561 F.3d at 223.

It is no answer to point to Plaintiffs' written objections or oral responses to the district court's inquiries as proof of due process. *See* Appellee's Br. at 25-26. The defendant in *Acumed* also got to respond at oral argument, yet this Court still found the more generous procedure there defective. *See* 561 F.3d at 223–24.

Grewal's remaining authorities provide no refuge for his indefensible position. In *IPSCO Steel (Alabama), Inc. v. Blaine Construction Corp.*, 371 F.3d 141 (3d Cir. 2004), this Court held that a district court *did err* in failing to give a plaintiff an opportunity to file a brief in response to a co-plaintiff's motion to approve a settlement agreement. *Id.* at 150. The Court only held the error harmless because the two plaintiffs had fully briefed a similar motion to approve a settlement agreement against another defendant, and the fully-briefed motion "raised essentially all the same issues that were raised" in the non-briefed motion. *Id.* Thus, "by presenting arguments as to why the [first] [s]ettlement should not be approved, [the opposing] attorney was also presenting arguments as to why the [second] [s]ettlement should not be approved." *Id.* Such cross-pollination was not present here. Plaintiffs did *not*, for instance, argue against the first-filed rule in their motion for a preliminary injunction such that those arguments could be transplanted. The

issue had not been raised yet. Plaintiffs' only opportunity to respond to the stay request came at the "status conference" within days of the request, having received no actual notice of the nature of the "conference" or a meaningful opportunity to develop a response. This was not due process.⁵

Finally, Grewal also tries to justify the district court's "expedited timeframe" and express disregard for due process based on his imminent deadline to respond to the preliminary injunction motion. Appellee's Br. at 26–27. In Grewal's view, he was entitled to a ruling on the stay *before* a ruling on the injunction. But, as discussed below, *Rolo* commands the opposite. And, regardless, Plaintiffs were entitled to adequate notice and a meaningful opportunity to be heard on the stay issue. The district court denied them these rights, a constitutional violation that merits reversal.

⁵ Grewal also cites an unpublished district court case concerning the denial of a discovery request. See Appellee's Br. at 28 (citing *Khan v. Dell Inc.*, CIV.A. 09-3703 MAS, 2013 WL 1792525, at *4 (D.N.J. Apr. 26, 2013)). But, as that case recognized, "[d]iscovery issues . . . are often times handled informally rather than by formal motion practice," so a "letter request, able oral argument and [the] motion [before the court] . . . satisfied any due process concerns raised" in that context. *Id.* The district court's procedure does not do so here where the stay had the effect of denying Plaintiffs' request for a preliminary injunction, exacerbating the irreparable injury they continue to suffer to this day.

V. No matter what, the district court must decide the motion for a preliminary injunction on its merits.

Last but not least, the Appellants' Brief asserted an independent ground for reversal based on *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991). Appellants' Br. at 28, 51–53. Not to be confused with *Rolo*'s holding about appellate jurisdiction, at issue here is Part V of the *Rolo* decision, which reversed a district court's "deferred consideration of [a] preliminary injunction application" in circumstances just like this case. *Id.* There, as here, the district court committed reversible error by issuing a stay without *first* adjudicating a pending motion for a preliminary injunction on its merits. *Id.*

Plaintiffs did everything necessary to present this as an independent ground for reversal. The summary of the argument made clear that *Rolo* warrants reversal "regardless of whether any stay is upheld." *Id.* at 28. So did the argument's heading: "No matter what, the district court must decide the motion for a preliminary injunction on its merits." *Id.* at 51. And so did the argument itself, quoting *Rolo*'s holding extensively to make its application undoubtable. *Id.* at 51–53.

Grewal never answers this argument. The appellee's brief includes literally zero words about the issue despite its prominence. From now on, Grewal is barred from presenting any new arguments about this issue, either via supplemental filings or at oral argument, because doing so would prejudice Plaintiffs. *See, e.g., Cayetano-Castillo v. Lynch*, 630 F. Appx. 788, 794 (10th Cir. 2015). He has

essentially conceded error. *See Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994) (failure to brief an issue “waives, as a practical matter anyway, any objections not obvious to the court”); *In re Incident Aboard D/B Ocean King*, 758 F.2d 1063, 1070 n.9 (5th Cir. 1985) (“We treat the failure to respond to [appellate] arguments as a concession . . .”).

Conclusion

One merits ruling is all that the Plaintiffs seek. Yet they have zero—not two. No court anywhere has ever ruled on the merits of any Plaintiffs’ injunction request.


Ultimately, the Court should reverse the district court’s Order of March 7, 2019, Doc. 26, and Order of August 28, 2019, Doc. 33, and render a judgment holding that the district court should (1) exercise jurisdiction over this action immediately, and (2) begin by deciding the motion for a preliminary injunction on its merits.⁶ In the meantime, the Court should grant Plaintiffs’ motion for an injunction pending appeal.

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⁶ Alternatively—if the Court has rejected all of the primary arguments seeking rendition—the Court should vacate the district court’s orders and render a judgment holding that the district court must (1) reconsider the abstention request by affording Plaintiffs due process and using the proper legal rules, and (2) still begin by deciding the motion for a preliminary injunction on its merits.

Certifications

1. At least one of the attorneys whose name appears on this brief is a member of the bar of this Court.
2. The text of this document's electronic version matches its paper copies.
3. A virus detection program, BitDefender Endpoint Security Tools major version 6, has been run on the file and no virus was detected.
4. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32 because it contains 6,393 not-exempted words.
5. This filing complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32 because it uses a proportionally spaced typeface, Times New Roman 14 point.
6. On February 28, 2020, this filing was served on the opposing party's counsel by delivering it through the Court's electronic docketing system to the following registered user of the system:

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