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S T A T E: NEW JERSEY

THE ALBERT BRANSON MARIS COURTROOM (19TH FLOOR)

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DEFENSE DISTRIBUTED; :

SECOND AMENDMENT :

FOUNDATION, INC., :

Appellants, :

v. : Case No. 23-3058

ATTORNEY GENERAL NEW JERSEY, :

Appellee. :

:

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TRIAL

DATE: Monday, November 4, 2024

TIME: 10:00 a.m.

BEFORE: Honorable Krause, Scirica, and Rendell

LOCATION: Zoom Videoconference

JOB No.: 7020022

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A P P E A R A N C E S

ON BEHALF OF APPELLANTS:

CHARLES FLORES, ESQUIRE

Flores Law

917 Franklin Street, Suite 600

Houston, Texas 77002

cf@chadflores.law

(713) 364-6440

ON BEHALF OF APPELLEE:

ANGELA CAI, ESQUIRE

Office of Attorney General of New Jersey

25 Market Street, Richard J. Hughes Justice

Complex, P.O. Box 112

Trenton, New Jersey 08625

angela.cai@njoag.gov

(609) 414-5954

1 P R O C E E D I N G S

2 JUDGE KRAUSE: We'll proceed now with Defense
3 Distributed versus Attorney General of New Jersey 23-
4 3058. Mr. Flores?

5 MR. FLORES: May it please the Court, I'm
6 Chad Flores. I represent Defense Distributed and the
7 Second Amendment Foundation. Five minutes is the
8 rebuttal request that we have.

9 JUDGE KRAUSE: Granted.

10 MR. FLORES: Thank you, Your Honor.

11 For six years, the Attorney General of New
12 Jersey has blatantly violated the Constitution by
13 censoring my clients. For six years, we have
14 litigated against this censorship with diligence,
15 asking the courts to employ normal procedures to
16 render normal relief. But for six years we've had no
17 avail because the Attorney General of New Jersey has
18 enacted, "what appeared to be flagrant prior
19 restraints" with "tactics suggesting the abusive
20 manipulation of federal court procedures in order to
21 delay or altogether avoid meaningful merits
22 consideration of these claims."

23 Those, of course, aren't my words. Those are
24 the words of the Fifth Circuit in Bruck, which is the
25 keystone here.

1 JUDGE KRAUSE: Well, counsel, we'll talk
2 about the merits in a bit. But on this question of
3 transfer, you say that the District Court here should
4 have sent it back, but didn't the Fifth Circuit itself
5 point out where this all could have been, and in a
6 timely way perhaps should have been addressed in your
7 clients moving for a stay before transfer or seeking
8 mandamus from us initially, or the Fifth Circuit in a
9 more timely fashion, where that wasn't done.

10 And we've now gotten to the point where
11 there's been a full adjudication in the District Court
12 here. How does comity or judicial efficiency benefit
13 from our reversal of -- on the transfer decision?

14 MR. FLORES: Your Honor, the problem here is
15 an extraordinary one. There are multiple solutions to
16 the problem. Our side has acted with diligence
17 throughout. The diligence question was litigated in
18 Bruck itself. The day after the transfer decision
19 happened from Texas, we filed the Notice of Appeal,
20 and we pursued that relief diligently through the
21 Fifth Circuit. And indeed, the Fifth Circuit itself
22 issued a stay and vacated the transfer order. So
23 those kinds of extraordinary steps did occur here.

24 There's certainly no prejudice to the other
25 side. And recall that we raised this issue in the

1 District Court on three separate opportunities with
2 full diligence as soon as Bruck issued. We called it
3 the District Court's attention. That's why the key
4 order here is that July 2022 order. That's the
5 original decision below.

6 And at that time, the case before the New
7 Jersey District Court and the case that Bruck had
8 confronted were exactly the same. In that case, there
9 are all three of our reasons to grant retransfer.
10 They're all compelling. We have the comity reason, we
11 have the law of the case reason, and we have of course
12 that Bruck was correct.

13 JUDGE KRAUSE: What jurisdiction was there
14 for the Fifth Circuit to go forward and to address the
15 merits of a transfer decision at a point where the
16 transfer had already been completed, and the cases
17 consolidated on this end?

18 MR. FLORES: Your Honor, the jurisdiction was
19 the mandamus jurisdiction that they did exercise. So
20 that has been resolved. We can't now collaterally
21 attack the Fifth Circuit's jurisdiction to render that
22 decision. And the jurisdiction was standard mandamus
23 jurisdiction. Remember too that at that time there
24 was still a case in the District Court in the Western
25 District of Texas --

1 JUDGE KRAUSE: But the mandamus in -- from
2 the Fifth Circuit was for the District Court to make a
3 request. So that has been accomplished. But in terms
4 of any requirement or even deference to that request,
5 shouldn't we be taking account of whether the
6 transferee or transfer or court at that point had
7 jurisdiction to address the merits of transfer?

8 MR. FLORES: The merits? Yes, you should
9 account for that. There's a way to resolve this. The
10 District Court in New Jersey had a doctrine to follow.
11 It had three doctrines to follow. One, follow the
12 comity doctrine. They had jurisdiction to make that
13 decision. They did it wrongly. Two, follow the law
14 of the case doctrine when it was resident, or three
15 re-litigate Brock, if you want, and create the mother
16 of all circuit splits. But that should be avoided.
17 The first instance, right?

18 Comity is a rule of decision. It's like
19 stare decisis. It's not inexorable, it doesn't have
20 to be followed all the time. But when court number
21 two faces an issue that has been squarely decided by
22 court number one, in the same case, comity compels
23 deference to that decision, unless there's some
24 compelling reason not to do so. That's the first and
25 easy way that this case should have been resolved.

1 But instead, the District Court below
2 essentially thumbed its nose, disagreed respectfully
3 with the Fifth Circuit, but essentially just disagreed
4 with the result. And that can't be the way that these
5 -- that these kind of disputes are resolved. These --
6 otherwise, there's going to be very serious chaos in
7 these transfer cases. We also have the law of the
8 case doctrine, which is just as compelling here. I
9 mean, that's straight out of Wright and Miller. It's a
10 Supreme Court decision in Christensen.

11 JUDGE KRAUSE: Why wouldn't the right way to
12 ensure that there's not chaos to be not to simply file
13 a notice of appeal, but before the -- a transfer has
14 been completed for the party opposing it to seek
15 mandamus relief in the transferor court or of appeals
16 or when it got here to seek mandamus from us, but
17 instead it went forward and we now have a final
18 judgment.

19 MR. FLORES: The reason, Your Honor, is that
20 we pursue relief in New Jersey with all diligence.
21 Before we seek mandamus, we are obliged to give the
22 District Court every opportunity to do the right
23 thing. So the District Court issued order number one,
24 it refused re transfer and we ask the District Court
25 to reconsider that order to make sure it was really

1 sure it was going to do this.

2 And so that was a pursuit of diligence before
3 we came here and asked prematurely. We needed to make
4 sure the District Court really wanted to flaunt Brock.
5 And then we had a change of District Courts below.
6 And when there was a change of District Courts, before
7 we ask this court to issue mandamus against the
8 District Court, we need to make sure that the actual
9 judge who is going to be mandamus has an opportunity
10 to rule. And so that's the procedure that we followed
11 here.

12 We tried not to bring this prematurely,
13 right? But we certainly brought it with all diligence
14 in this case. We've pursued it all along the way.
15 We've been litigating this for six years, Your Honor,
16 we have asked literally every single court we've been
17 in front of to issue a preliminary injunction to sort
18 of stay things so that we can litigate. And that has
19 never happened. Not because of our fault, because of
20 their fault.

21 This question of diligence was litigated in
22 Brock. And the question of whether the Fifth Circuit
23 had the power to vacate the transfer order was
24 litigated in Brock.

25 This has all been fought. It's a tricky

1 issue. I understand, but they've lost that question.
2 If pressed, our position in the Fifth Circuit, and our
3 position here is that the Fifth Circuit does have the
4 authority to essentially pull a case back, the Fifth
5 Circuit disagreed.

6 They said, we don't have the authority to
7 order it back. And so all they did was vacate the
8 transfer and issue the request. And so now we're
9 here. But that doesn't lessen the Court's obligation
10 in the District of New Jersey to afford comity as a
11 rule of decision and to respect it as law of the case.
12 Those are compelling reasons. We've seen no decision
13 in this context in a transfer context where a court
14 won't follow that earlier decision in this case.

15 JUDGE KRAUSE: The Supreme Court has told us
16 in MasFoose (ph) that this is not a -- it's not a
17 requirement. It you know, comity persuades and
18 individual judges are to still follow their own
19 conscience. We're reviewing here for abuse of
20 discretion where the District Court made the
21 determination that transfer was proper and then
22 proceeded to move forward with the case with the
23 consolidation. And at this point, with the judgment,
24 why should we say that it's an abusive discretion for
25 the District Court to exercise its conscience as it

1 did?

2 MR. FLORES: For the same reasons that in
3 starry decisis, you of course, at the end of the day,
4 in some extraordinary cases where there's been a
5 grievous error need to differ with a court that's
6 already decided. The question, the usual result, the
7 result in virtually all cases is that you follow what
8 the prior court has decided. And here that press is
9 compelling.

10 There is precedent for this, Your Honor.
11 We've given it to the Court. That's the feller case,
12 which says, whenever possible these coordinate courts
13 are supposed to defer. That's the Bird case, which
14 says that these considerations apply with high
15 strength. There are cases when there's been collusion
16 when you think the first court was doing something
17 that didn't have jurisdiction to do, that maybe you
18 would address that. But here, all of that is resolved
19 in Brock. If there is ever a case for comity, this is
20 the case for comity, and it doesn't rest entirely
21 there.

22 If you don't buy the comity argument. Look
23 at law of the case, right? This is also Orthodox Horn
24 Book Law, which says that court number one decides the
25 question when the transferee court, right? This is

1 the Wrighton Miller decision. This is Christensen
2 from the Supreme Court.

3 In transfer cases in particular, when court
4 number two receives the case, they're not supposed to
5 decide anew whether there's been an abuse of
6 discretion. It's plausibility, was the first decision
7 to send the case plausible? Here, the first decision
8 was undoubtedly plausible, and so it should have been
9 accepted by court number two.

10 JUDGE KRAUSE: But the first decision was the
11 decision in Texas to send it here.

12 MR. FLORES: No, Your Honor, the first
13 decision in this context is the Fifth Circuit
14 decision, right? The controlling decision from that
15 court that that's the controlling decision that came
16 to the Court of New Jersey.

17 JUDGE KRAUSE: But we have our case law that
18 says once the transfer of a case has been completed,
19 that the transfer or court and the court of appeals
20 lose all jurisdiction over the case.

21 MR. FLORES: That's a disagreement with
22 Brock, Your Honor. If this Court wants to issue a
23 holding, says Brock was wrong, and Brock should not
24 have exercised jurisdiction, number one, we don't
25 think that's possible because that's a collateral

1 attack on a Fifth Circuit case that's been litigated
2 if they wanted to argue that (inaudible) right? So
3 that's impossible. And it's also wrong, Your Honor.

4 JUDGE KRAUSE: But we don't have to opine on
5 the Fifth Circuit's view of their own jurisdiction.
6 We have our own case law that we need to speak
7 governed by when we are going through the process of
8 reviewing the decision in front of us. And our case
9 law says that there's not jurisdiction in that
10 context.

11 MR. FLORES: Which jurisdiction --
12 jurisdictions to do what? Your Honor, I want to be
13 very precise in the answer.

14 JUDGE KRAUSE: The -- our third circuit
15 jurisdiction says that the transfer work court loses
16 all jurisdiction at the point that the transfer is
17 complete. So that's what governs us in making our
18 determination about whether the District Court here
19 abused its discretion in the determination that it
20 made.

21 MR. FLORES: If I understand what the concern
22 is, it's that if we had tried to bring the Fifth
23 Circuit mandamus we did here in the third circuit, it
24 maybe wouldn't have worked because the third Circuit
25 would've thought, oh, we can't, you know, pull back

1 the case.

2 JUDGE KRAUSE: Well, it may have under our
3 case law before the case moved forward with something
4 like consolidation or you know, any further merits
5 determination, but that didn't happen.

6 MR. FLORES: So, Your Honor, I have an answer
7 to consolidation, and it's a strong answer is that
8 consolidation has no substantive impact on a case. We
9 told the Court this, this is our citation to Wright and
10 Miller 2382, and we told the District Court this.
11 Consolidation is just an administrative matter of
12 putting the two cases next to each other. That's the
13 only thing that had happened.

14 There had been no substantive action in the
15 case when we first asked for the transfer, and we told
16 the District Court this, this is why we asked for
17 reconsideration. When we first moved, the cases had
18 been consolidated, and we told the Court transfer the
19 Texas born case back to Texas, and the District Court
20 thought something about consolidation impacts that the
21 Attorney General hadn't argued that it was a Sua
22 sponte argument from the Court.

23 And so we moved for reconsideration, said,
24 no, no consolidation has no impact. It's just an
25 administrative joining of the cases. There's been no

1 actual substantive access. This court also has an
2 opinion on that. It's the pen associates case that
3 we've given the Court consolidation is meaningless for
4 the substantive things we care about. And so that was
5 the only thing that had happened when this case was
6 before the District Court. In the things that matter
7 in the material comparison, the cases were identical,
8 the procedure posture is identical.

9 Nothing meaningful had happened. And so
10 there -- it really would've been an abuse of
11 discretion and it was abuse of discretion not to send
12 the case back. Right. If you play any deference at
13 all, any value of comity, any value of law of the
14 case, then the case should go back under those
15 standards.

16 JUDGE KRAUSE: Time clearly flies when we're
17 dealing with very interesting issues. Does -- so
18 let's add 15 minutes. We haven't even gotten yet to
19 the interesting First Amendment issues here.

20 MR. FLORES: Sure.

21 THEW COURT: But before we turn to those my
22 colleagues have questions regarding transfer.

23 MR. FLORES: Thank you.

24 JUDGE KRAUSE: Let's move on then to merits
25 issues.

1 MR. FLORES: Sure. I know there are a lot,
2 I'm happy to hear your questions. I have three things
3 I'd like to say. One --

4 JUDGE SCIRICA: There is code speech.

5 MR. FLORES: Yes, Your Honor. That's number
6 one. Great. Onto number two. Yes. So number one is
7 the question of whether these files constitute speech.
8 Number two is the civil censorship. I really want to
9 devote time to the civil censorship. And then three
10 is the bucket of criminal censorship actions. But the
11 threshold error below is the question of whether the
12 files in this case constitute First Amendment speech.
13 And they do. We have at least pleaded that they do.
14 There may be some factual dispute later with us and
15 the other side about how they work in function.

16 They may disagree with what we say these
17 files do, but if ever there is a complaint that pleads
18 files our speech, this is that complaint. Have the
19 other side tell you what we should have pleaded and
20 didn't because it's all in there. If you want to know
21 exactly what kind of files, right, what species of
22 file that's pleaded, we give you a laundry list of
23 exactly which files are at issue.

24 If you want to know how they work in terms of
25 what expressive nature we have. We plead that in

1 paragraph after paragraph. They have values in the
2 abstract. They're information stores. They're used
3 primarily for design. If you want this complaint to
4 tell you what role they play in the process of
5 manufacturing a firearm, the complaint addresses that
6 as well.

7 On every material legal question that could
8 arise on this issue of whether their speech, the
9 complaint, gets particular allegations about how these
10 files work. And the reason we can do that is because
11 in a prior restraint, they -- the attorney general has
12 targeted us for existing speech.

13 Remember the cease-and-desist letter didn't
14 say, don't publish some abstract set of stuff that we
15 don't have to imagine what it would be. They said, we
16 see what you're publishing now, stop publishing all of
17 the principal gun files so we know exactly what these
18 files are. We can talk about exactly what the formats
19 are. If you'll look in the record, Document 14851 is
20 the liberator code book. It's 450 pages of the actual
21 source code of one of the files we're talking about
22 here.

23 JUDGE KRAUSE: But it seems like plain text
24 and manuals are not what is covered by the terms of
25 the statute.

1 MR. FLORES: Oh, so that's a separate
2 question, Your Honor, of whether we've pleaded this as
3 a speech case. But the threshold question is, is
4 there any speech implicated? The answer is yes. They
5 absolutely are covered by two things. Remember, we
6 can talk about the statute in a second, but just look
7 at the cease-and-desist letter. The civil restraint
8 here, right? It doesn't speak in any of the terms
9 that the statute does. The languages are -- this is
10 what they tell us to stop publishing, "The files you
11 plan to publish." That's paragraph one of the cease-
12 and-desist letter. That's appendix page 334.

13 The command, the law from the state of New
14 Jersey is stop publishing the files you plan to
15 publish and stop publishing printable gun computer
16 files. I don't know what that is because that's a
17 term they made up, but that's the scope of the
18 censorship here. So anything you think of as a
19 printable gun computer file is covered by this.

20 Anything that we were publishing before, the
21 files you plan to publish is covered by this
22 censorship. And that bucket of files is undoubtedly
23 protected by First Amendment speech. If there's a
24 mixture, if some of the files we were publishing are
25 protected and some are not, we win because the

1 Attorney General chose to censor it all with a blanket
2 censorship. So that's the civil side --

3 JUDGE SCIRICA: You would like us to
4 distinguish the expressive from the functional
5 aspects?

6 MR. FLORES: Would I, or how would I?

7 JUDGE SCIRICA: How would we do it?

8 MR. FLORES: So the question then is a
9 technical one of, during this process, which parts of
10 the speech become conduct, our answer is that none of
11 the speech here is part of the conduct, right? That
12 none of this is integral to criminal conduct. This is
13 all attenuated. So this is why you looked at cases
14 like Ashcroft that talk about speech that in an
15 abstract sense is part of the factual causation of an
16 event happening.

17 But in the law, the only speech that we deem
18 integral to criminal conduct is speech that isn't
19 attenuated, but that is happening right then in the
20 moment of the action. And so the question is, what
21 have we pleaded the pleadings we appoint the Court to
22 are those pleadings on appendix page 257. That's
23 where we say that this is a slow process. And recall
24 that this is a essentially a divorce process.

25 We don't know who's receiving these speech,

1 right? The speech, the files, we're not in their
2 living room working with them on these projects. In
3 time, it's massively temporal. And even in causation,
4 the person who's sitting there at home, right? They
5 take one piece of a blueprint, one piece of an
6 instruction, and it takes a long time, right? There's
7 a lot of deliberation and considered action, no
8 precedent that talks about what you can actually apply
9 a speech crime to, applies it to this kind of
10 attenuated process. This, yes --

11 JUDGE KRAUSE: Help us more broadly
12 understand what the boundaries are of protected speech
13 in the context of computer code. If it's code that is
14 giving instruction to a machine to perform in a
15 certain way, what is the First Amendment protected
16 expression?

17 MR. FLORES: So the code isn't doing anything
18 itself, Your Honor. We plead this. You can look at
19 paragraph 257 of the appendix. This is page 28. I'll
20 quote from the complaint. These -- they're not
21 functional software. They do not self-execute. They
22 are mere information stores. They're not functional
23 software. If I can give you something of analogy,
24 when you produce your court opinions, right, you'll be
25 on a word processor.

1 You'll use an application like Microsoft
2 Word, that's software that does some work behind the
3 scenes. We're not talking about that here, right?
4 There's a printer that actually takes the software
5 version of your opinion and cranks it out into an
6 actual piece publication. We're not talking about
7 that here either.

8 What we are talking about are some version of
9 text files that give you some of the texts that might
10 end up on the screen. You're going to change the
11 font, you're going to change the content, you'll edit
12 it.

13 Maybe it ends up as the final product. But
14 we're talking about those raw ingredients, maybe one
15 photo that you put into your opinion if you want to
16 demonstrate something, a selection of text, right?
17 These are models, things that people often use when
18 they're not going to produce anything at the end of
19 the day. They're just using it as a model to study
20 the scientific properties. These are engineers
21 working on projects.

22 Often these files play no role whatsoever in
23 any production of an actual firearm. This really is
24 the concept of a blueprint, an illustration, raw data.
25 And to the extent that the Court thinks, I'm not sure

1 exactly what is being censored here. That's a point
2 in our favor, not theirs. The whole reason that we
3 don't have prior restraints is because this process of
4 figuring out what they're going to jail us for and
5 what they're not is what the Constitution is supposed
6 to stop after the fact.

7 If someone has actually committed a crime and
8 they think that this speech was integrally involved in
9 that crime with the necessary proximity, they can
10 prosecute the crimes after the fact. But here you
11 have the worst kind of civil censorship beforehand,
12 speaking in broad terms that says literally stop
13 publishing the files you plan to publish.

14 This is straight into Bantam books as a prior
15 restraint. It's straight into the backdoor decision.
16 This is the classic version of the reason you don't
17 let this happen, is because we can't figure out what's
18 covered and what's not. And that's why we have the
19 due process claim on the backside.

20 JUDGE KRAUSE: Are you taking issue with the
21 licensing and registration scheme in New Jersey?

22 MR. FLORES: If pressed, we would, but we
23 don't need to here. So there is an exception, and the
24 statute says that if you have an FFL, then apparently
25 this kind of information can be exchanged. We think

1 that's a point in our favor, not a point against us,
2 right? Because this is supposed to be narrowly
3 tailored to solve some sort of epidemic of a problem,
4 but they allow for exceptions. And so that shows you
5 that it can't be as bad as we think.

6 JUDGE SCIRICA: Is there a scienter
7 requirement in the --

8 MR. FLORES: There's not, Your Honor, and
9 this is another critical problem. There needs to be a
10 state of mind. The District Court seemed to think two
11 things about this statute that are wrong. One, the
12 District Court thought that this statute only applied
13 to files that are actually used in the process of
14 making a firearm, but that's not the case. It applies
15 to everything that may be used. And there's also a
16 missing scienter requirement.

17 We need to know what the files, the speech is
18 being used for in order for any criminal liability to
19 attach. And this statute does not -- requirement.
20 They want to read one in silently, but that's wrong.
21 Other statutes nearby in this same statute actually
22 use express scienter requirements, and this one has
23 none. So that's another in the laundry list of faults
24 about why the speech crime cannot be enforced against
25 the plaintiffs here.

1 And it's important to realize that once you
2 cross the threshold of saying that this is First
3 Amendment speech, I think we have to realize this is
4 content-based speech. They're taking a subject, a
5 category of speech and saying you cannot talk about
6 this topic. Once you ban a topic of conversation, you
7 trigger the laws of content-based regulations, and it
8 cannot survive on that front.

9 JUDGE KRAUSE: This -- the statute by its
10 terms -- oh, sorry.

11 JUDGE RENDELL: Can you hear me?

12 JUDGE KRAUSE: Yes, go ahead, Judge Rendell.

13 JUDGE RENDELL: I'm having trouble hearing,
14 so I'm glad you can hear me. Back to the issue of
15 speech. I'm having difficulty trying to figure out
16 exactly what message or information is being conveyed.
17 You say it's computer-aided design files and digital
18 firearms information, but what exactly is it? You
19 seem to be talking around the issue of exactly what it
20 is.

21 If I send someone a poem, I know I can look
22 at that poem and see what it is. If I send someone,
23 you know, something that is DKZ 436, I can see it. I
24 can't envision what information is being sent here.
25 You say each file has values in the abstract. Well,

1 that doesn't tell me anything about what the files
2 themself are, what they consist of. And in order for
3 us to determine whether it's speech, we need to
4 understand what that is.

5 So can you explain to me exactly what that
6 information is, and what the message is that's being
7 conveyed in these files?

8 MR. FLORES: I can, Your Honor, the complaint
9 does that, if you want the citation --

10 JUDGE RENDELL: Where does it do that?

11 MR. FLORES: So appendix page 260, Your
12 Honor, appendix page 261. These are laundry lists of
13 examples of the files. You'll see a laundry list of A
14 through M. These are the files that we were
15 publishing. These are the files that the Attorney
16 General said, you must stop publishing. And you'll
17 see in the laundry list that we describe the subject
18 of the information.

19 So we have certain firearms and firearm
20 parts, and then we describe the kind of files. So
21 there are a series of files that are unique to the
22 sort of engineering context. If I can reason by
23 analogy, these are essentially photographs and
24 diagrams. You can't open these in Microsoft Word like
25 you would, but there are applications, you use them.

1 So you would open it and see what amounts to
2 a photo that you can interrogate, which to say you can
3 look at it, you can zoom in, you can zoom out, you can
4 edit it. You can decide, ah, this nut that in this
5 diagram is shown to be these proportions. I would
6 like to make it smaller or larger. You'll also see in
7 the laundry list these diagrams of firearm components.

8 You'll see in subject K, so this is appendix
9 page 260, that we have readme plain text files about
10 assembly methods, right? We do give people
11 instructions like a blueprint might and say, in order
12 to complete this process, this is how part of the
13 process would occur. Just straight textual
14 instructions. You'll also see here text files. This
15 is subject L about the National Firearms Act and about
16 the undetectable part.

17 JUDGE RENDELL: Are these part of your
18 complaint?

19 MR. FLORES: Yes, Your Honor. I'm reading
20 you from page two -- appendix page 260. These are in
21 the complaint. And we also -- Your Honor, they're
22 also on page 261. We also -- then what we do is we do
23 the intermediary parts. So we both give you the
24 granular detail by telling you exactly what kind of
25 files they are. We also say the ultimate legal

1 conclusions. These are protected speech.

2 We have read the precedent and our -- the
3 people at the company know this well. And so we made
4 the intermediary assertions that say, in this process,
5 our role is attenuated. And we allege that. Those
6 are the allegations at 256, 257, and 258, right? That
7 this doesn't happen as a self-executing process.

8 It's not as though I hand you one of these
9 files and you click and a gun comes out. That just
10 doesn't work. That's not how the process work. That
11 is a fiction. And that's the kind of fiction that
12 gets litigated on summary judgment. If ever there's a
13 case --

14 JUDGE KRAUSE: How can we assess the
15 functional versus the expressive aspects of this
16 speech?

17 MR. FLORES: As a technical matter, you do it
18 on summary judgment with evidence. As a legal matter,
19 I think you have to look to the very small, tiny set
20 of cases where courts have said that speech is itself
21 an integral part of conduct. And compare this case to
22 those. I know of no authority in this court or any
23 other that says, this kind of speech that is so
24 attenuated in time and this kind of speech that is so
25 attenuated in content is integral to the criminal

1 conduct that they presuppose at the end of the road.

2 Remember, Your Honor, this speech can be used
3 for all kinds of things that are totally legal and are
4 not prescribed by anyone, not New Jersey or any other
5 state. It's totally legal to just look at the picture
6 or the diagram. It's also totally legal for many
7 individuals to create their own firearm, right?
8 There's one small subset of sort of hypotheticals, the
9 terrorist typos where someone's going to take these
10 files and use them in a crime. That's just as true
11 for any dangerous book, for any dangerous speech,
12 right?

13 Any of the famous cases we know about
14 dangerous information in society, I think it's their
15 burden because we've established that it's speech to
16 show you that it fits in the prohibited category.
17 It's not our burden to prove to you that it has these
18 values, but we've done so anyway.

19 JUDGE KRAUSE: Why shouldn't we look to the
20 face of the statute, which the prohibition is on a
21 person to distribute to a person in New Jersey who is
22 not registered or licensed as a manufacturer. So it's
23 only a prohibition as to folks who don't fit that
24 category. And then what's covered in terms of the
25 prohibition on distribution is digital instructions in

1 the form of computer aided design files or other code
2 that may be used to program a 3D printer to
3 manufacture or produce a firearm.

4 Doesn't that -- I mean, you certainly, you've
5 listed a lot of different things here that go, for
6 example, to plain text, but the statute on its face
7 doesn't seem to cover many of those things. And the
8 limitation on distribution seems only to be to those
9 who are not licensed as manufacturers. So aren't we
10 talking about something much more narrow, which, which
11 goes to programs that are instructing a computer to
12 produce a product?

13 MR. FLORES: The answer is no for three
14 important reasons. Number one, everything we just
15 mentioned is about the criminal statute, not the civil
16 claims. The civil claims are totally independent,
17 right? The civil cease-and-desist later, I can hang
18 my entire case on that part of the litigation. But as
19 to the criminal statute, remember, it doesn't say that
20 this applies to files that are in fact used in the
21 process you described.

22 It says it applies to files that may be used,
23 and that's the critical juncture, is that they may be
24 used for that process, but they may also be used for
25 reams of totally legal permissible conduct. And that

1 is the problem in the statute. It's both a First
2 Amendment problem. And if we need to, a Second
3 Amendment problem, we do assert a constitutional right
4 to create your own firearm.

5 If push comes to shove, we can litigate that.
6 But the question here is just on the speech side, what
7 they say is actually illegal if you spot them, cover
8 your eye, ignore my Second Amendment argument, assume
9 that they can ban private gun making. They can't ban
10 speech about that. Ban the conduct if you want, but
11 you can't ban speech that is in the abstract about it,
12 that is attenuated from it. This is the classic First
13 Amendment argument, right?

14 You can ban the rioting, but you can't ban
15 the speech two weeks beforehand that talks about maybe
16 we should do that. And of course, this has nothing to
17 do, right? The Second amendment is sacrosanct, and
18 there are reams and reams and citizens who do this for
19 totally legal reasons when they create the firearms.
20 And most of this industry really right now, is an
21 abstract industry.

22 These really are just designers who are
23 thinking in the abstract about how to solve these
24 engineering problems. That really is most of what's
25 going on here, not what the statute wants you to

1 hypothesize, about a terrorist in this case. And so
2 the key here though, that -- the speech crime is not
3 narrowly tailored. If you think there's only
4 intermediate scrutiny going on, if you think that this
5 isn't, you know, strict scrutiny and that you have to
6 look at how well this statute does its job, fine, we
7 still win.

8 Because even under intermediate scrutiny,
9 they have to show that it's narrowly tailored. They
10 have to show that it's not over or under inclusive.
11 They have to show that they're actually advancing the
12 interests. And that's what I want to focus on. Now,
13 this statute doesn't actually solve their problem,
14 because remember, the internet is essentially
15 impossible to tame, and these files are all over the
16 internet in all kinds of capacities.

17 The real reason this litigation is happening
18 is because my client Defense Distributed is public
19 enemy number one. They want to go after one person in
20 this field to chill. The speech, this is not actually
21 to solve the problem. So in technical litigation
22 terms, they enact a law and they say it passes
23 intermediate scrutiny.

24 We have pleaded. No, it doesn't because your
25 law is totally ineffective. That pushes the case to

1 summary judgment. Now, we have to litigate whether
2 this kind of statute can even conceivably solve their
3 problem they're trying to solve. And it can't. I see
4 that my time has expired, but I'm happy to answer
5 further questions. The court has.

6 JUDGE KRAUSE: Judge Rendell, any questions?

7 JUDGE RENDELL: Nothing further.

8 JUDGE KRAUSE: Scirica?

9 MR. FLORES: Thank you.

10 JUDGE KRAUSE: We'll hear from you on
11 rebuttal. Thank you.

12 Ms. Cai.

13 MS. CAI: May it please the Court.

14 Appellants demand the right to distribute computer
15 files that allow anyone, including terrorists, felons,
16 domestic abusers, minors, and the mentally ill to
17 print untraceable, but fully functional guns without
18 ever going through a background check. But appellants
19 lead contention under the First amendment fails for
20 two separate reasons.

21 First, they failed to properly plead their
22 claim that the files are protected speech under the
23 First Amendment at all, and they declined to replead
24 even after the District Court gave them multiple
25 opportunities to do so. Second, even if the files are

1 protected speech, section (1)(2) is a content neutral
2 regulation that plainly survives intermediate
3 scrutiny.

4 The legislature recognizing a serious
5 emerging risk to public safety, nearly unanimously
6 enacted session (1)(2) to prevent circumvention of
7 state and federal firearm manufacturer safety rules.

8 JUDGE KRAUSE: Ms. Cai, if what Defense
9 Distributed were putting out there were images of
10 firearms and blueprints, written instructions the
11 government would concede then that those were
12 protected. First Amendment speech, right?

13 MS. CAI: Judge Krause, you're exactly right.
14 And we would say that that is exactly what section
15 (1)(2) does not cover.

16 JUDGE KRAUSE: So what do you do with the
17 point that it does say may?

18 MS. CAI: I think what it -- it's read in
19 context, the plain language makes it clear that what
20 the legislature was trying to do is take home in on
21 the digital instructions, either in the form of
22 computer aided design files or other instructions that
23 may be used to program a three-dimensional printer to
24 manufacture or produce a firearm, firearm receiver or
25 component.

1 So it's not any kind of information on the
2 internet that may inspire someone to do so, that may
3 encourage someone to do so, or that may give someone
4 an idea of how to do so. But rather it's whether or
5 not the files may be used to program the 3D printer
6 that is a functional targeting of the statute.

7 JUDGE KRAUSE: Well, if a part -- if a step
8 in that is to pull up an image and to make adjustments
9 -- for the user to make adjustments to the size, the
10 shape, why isn't that covered by the statute?

11 MS. CAI: So, Your Honor, I think we have to
12 take a step back and part of the inquiry is difficult
13 to engage with is because they don't have the specific
14 pleadings to explain what the files actually do. If I
15 heard Mr. Flores correctly just now, that there are
16 files they want to distribute that are just diagrams
17 or just photographs of firearms or just text files
18 that talk about how great it is to 3D print firearms,
19 those are not things that can -- that may be used to
20 program a 3D printer.

21 But what if they're talking -- what -- if
22 it's the case that what they're talking about are
23 files that can be inserted into a computer hooked up
24 to a 3D printer, and if the user may be able to adjust
25 what color I want this end product to be, or if I want

1 a big one or a small one. But regardless of that,
2 what it will do when you hit the button is actually
3 produce a functional firearm, that would be prohibited
4 under section (1)(2). So the --

5 JUDGE RENDELL: But aren't we getting beyond
6 ourselves and beyond what the District Court did here?
7 The District Court said that the pleading wasn't
8 sufficient. We really don't get beyond that, do we?

9 MS. CAI: I think that's exactly right, Judge
10 Rendell, because --

11 JUDGE RENDELL: Oh, so how is the pleading
12 not sufficient?

13 MS. CAI: There's two reasons why it would
14 not be sufficient. The first is that the appellants
15 didn't plead enough facts for a court to even conduct
16 the analysis, which they don't challenge that the test
17 under Vartuli from the Second Circuit, which is if the
18 file in the form it was distributed completes
19 dysfunction without the intercession of the human
20 mind, it is not protective speech. They don't dispute
21 that -- that thing --

22 JUDGE RENDELL: But they -- but they do plead
23 that it -- to fabricate the object, the need -- the
24 user needs to do multiple things, a complex series of
25 actions. So they're pleading the fact that it is not

1 automatic. Isn't that sufficient?

2 MS. CAI: No, Your Honor. I think what
3 they're pleading is actually not about how the file
4 itself produces or doesn't produce a firearm without
5 the intercession of the human mind. Instead, the
6 complaint at paragraphs 28 to 29 talk about how a
7 human being has to obtain the equipment such as the
8 computer, the 3D printer, the spool of material that
9 goes into the 3D printer, and of course, to spend the
10 time and energy to run the program. But that's what
11 every human being has to do before and after running
12 any computer program.

13 But that's not the test that Vartuli set out.
14 Rather, what the complaint doesn't do is explain how
15 the file itself actually communicates expressive
16 speech to human beings. This idea of volition that
17 they plead is kind of a red herring because of course,
18 for any computer file to execute, there has to be some
19 human volition to get the file. So, for example, a
20 computer virus that will operate as soon as it's
21 inserted into a computer is not speech merely because
22 a person has to obtain the file and insert it into the
23 computer and have the volition to do that.

24 But we would not say that all computer
25 viruses are protected speech. So that's the problem

1 with the pleading. It talks around these issues, but
2 it never actually pleads what it is that the files do,
3 what kind of code they contain, if it contains code at
4 all, and how that communicates with a human being
5 before it actually accomplishes the function that is
6 designed to do.

7 The second thing that I think appellants
8 don't really talk about because they make assumptions,
9 is that because the files have information stores or
10 are information stores, they are per se protected
11 speech. But that can't be correct. And Judge
12 Rendell, you mentioned that they talk about how these
13 files have they supply information in the abstract,
14 but that's not the standard because everything is
15 capable of supplying information in the abstract.

16 And I think if that were the test for whether
17 or not something were speech, we would be protecting a
18 lot of things that we wouldn't be today. So consider,
19 I'm driving my Honda Civic down the New Jersey
20 Turnpike physical car, no code involved. I'm doing it
21 at 100 miles an hour. There's no question that that
22 is not protected by the First Amendment, just because
23 I'm expressing myself by doing that. Just to be
24 clear, I wasn't doing that this morning, Your Honor.

25 But under appellant's view, if I'm not the

1 driver, but it's a self-driving car with code and I
2 switch on the program that tells the car to drive at
3 100 miles an hour, that automatically becomes
4 protected speech. Just because someone can look at
5 the code and make expressive or make some kind of
6 informational judgment from it. That just not --
7 doesn't make sense under the Vartuli test or any of
8 our -- the precedents that the courts have
9 established.

10 But even if you disagree with me, and even if
11 you disagree with the District Court about the lack of
12 pleading, the lack of specificity that would allow a
13 court to be able to even adjudicate the First
14 Amendment question assuming that the files have some
15 expressive value protected by the First Amendment, the
16 question then becomes is it a content-based
17 restriction? And does it survive the level of
18 scrutiny that applies? And on this, the appellants
19 really don't have a lot of answers because section
20 (1)(2) only targets functionality.

21 That is, even if the code has some other
22 expressive value, that's not what the law is
23 targeting. This is how you know that it doesn't
24 target the expressive value. It doesn't prohibit
25 license manufacturers from receiving 3D -- the files.

1 JUDGE RENDELL: But again, aren't we getting
2 ahead of ourselves? Wouldn't that be on remand for
3 the District Court to decide we are a reviewing court?

4 MS. CAI: I think, Your Honor, you could do
5 that, but I think because it's on a motion to dismiss,
6 and we have provided the Court, both the District
7 Court and this court with all of the analysis needed,
8 the question of whether or not the statute is a
9 content-based restriction or not, is a pure legal
10 question about reading the statute. And because the
11 intermediate scrutiny question in this case is so
12 obvious, right?

13 It's a -- it's an interest that this court
14 has already recognized in prior precedents like
15 Marzzarella and it -- the objections that the
16 appellants have lodged are really not apt. This court
17 can also just make that conclusion now based on --

18 JUDGE RENDELL: Well, if you do want to get
19 there, isn't there an over breadth problem with this?
20 Because these files may be used to produce a firearm,
21 but on the other hand, they may be used for artistic
22 purposes or for me to just look and say, boy, that's
23 interesting. So don't you have an over breath problem
24 with this statute?

25 MS. CAI: I don't think so, Your Honor. So I

1 take your question to be, even if we assume that the
2 appellants had properly pled some expressive element
3 that they have not --

4 JUDGE RENDELL: As you say, you're urging us
5 to decide it rather than send it back. And I'm saying
6 if we were to decide it would you address the prospect
7 that this statute reaches to broadly?

8 MS. CAI: Yes, Your Honor. So in the Supreme
9 Court, in both old decisions and very recent ones like
10 Hansen and Net Choice have explained that an over
11 breath challenge, even on First Amendment grounds
12 requires a showing that the ratio of legitimate to
13 invalid applications is lopsided. Appellants have
14 never attempted to even plead this.

15 There's nothing suggesting that the number of
16 applications that Your Honor may be referring to would
17 be -- would be a larger percentage or would be a
18 substantial percentage of the applications then the
19 applications that appellants -- that would -- that the
20 state has an interest in regulating, which is the
21 kinds of files that we're talking about here.

22 Allow an individual who has not cleared any
23 background check to print a functional firearm. And I
24 think that's the interest that the legislature was
25 looking at and appellants haven't demonstrated why the

1 ratio of that legitimate interest would be overcome by
2 some other hypothetical interest in someone picking up
3 the all --

4 JUDGE RENDELL: All the more reason to remand
5 this.

6 MS. CAI: I actually think that's a facial
7 problem with the pleading itself, and it would not be
8 necessary to remand. Now, to be clear, the District
9 Court held that because the pleading was so deficient,
10 it needed not even look at the over breadth problem and
11 gave appellants the opportunity to amend. They did
12 not do so. He gave them another 14 days and they
13 still chose to stand on the deficient complaint.

14 And so for those reasons, I think we're
15 looking at what the complaint contains. There is
16 nothing that they -- they're suggesting that they're
17 going to add to it. And so the analysis of whether or
18 not the law is content neutral, whether it's
19 overbroad, et cetera -- et cetera, can all be
20 adjudicated based on what the same papers that this
21 court already has in front of it today.

22 JUDGE RENDELL: And why or what is described
23 at paragraph 41, 43 of the complaint. Why is that not
24 adequate in terms of telling us what is at issue here
25 and what is being conveyed?

1 MS. CAI: Your Honor, I think paragraphs 41
2 and 43 actually exhibit the problem that the District
3 Court was talking about. It does list the file
4 extensions, right? It says the STL files and the IGS
5 files, but it says nothing about how those files
6 function to either print or not print a 3D printed
7 firearm. They talk about their files for a single
8 shot firearm known as the liberator.

9 There are files for a firearms receiver for
10 AR 15 rifles, which are unlawful in New Jersey, but
11 they don't say anything about the functional aspect
12 that is, does it just instruct the computer to do
13 something or does it actually communicate something
14 expressive to a human being? And that's the test that
15 all of the courts of appeal that have looked at this
16 topic require to even make the analysis of whether the
17 threshold question of whether the First Amendment
18 applies at all.

19 JUDGE KRAUSE: But it does include diagrams
20 of firearm components, renderings, plain text files.

21 MS. CAI: Yeah, so I think that if the files
22 are just diagrams and renderings, as I understand what
23 those words mean, I don't think that's prohibited by
24 section (1)(2), but I don't know whether that's true
25 for stereolithography files about firearm components.

1 Is that something that gets inserted into a
2 computer and you don't need somebody to do anything
3 other than put it in perhaps follow technical
4 instructions for hitting print and hooking up the
5 printer to the computer? If that's true, if that's
6 all that requires, then there is only a functional
7 element and there is no expressive element.

8 But if there is something about the files
9 that were pled to have an expressive interaction with
10 the individual, then perhaps there would be an
11 expressive element. But there's just nothing in the
12 complaint, which is very long, but doesn't actually
13 explain that element at all.

14 JUDGE RENDELL: And then how are paragraphs
15 28 and 29 deficient in terms of saying they aren't
16 just inserted in a computer?

17 MS. CAI: Yeah, so this is actually exactly
18 what I was talking about just now, Your Honor. So in
19 terms of the volition, right, that it talks about, if
20 and when a person chooses to perform a complex series
21 of actions -- this is paragraph 29. What they're
22 talking about is selecting suitable component
23 materials. I understand that to mean selecting the
24 spools of plastic or other material that goes into the
25 3D printer, choosing an effective manufacturing

1 process -- that may refer to buying the right 3D
2 printer.

3 These are things that have nothing to do with
4 how the files function. These are things that talk
5 about whether a person wants to print the file or not,
6 but the files themselves, the thing that appellants
7 say have First Amendment value are not described in
8 terms of how they actually impart First Amendment
9 communications in any way, shape, or form. So the
10 allegations that you need to have a person who wants
11 to do this thing, sure, we accept that, but that
12 doesn't say anything about the First Amendment values
13 that the files themselves espouse.

14 JUDGE KRAUSE: But what is the theory of
15 First Amendment speech in this area? I mean, do we
16 look -- some courts have said source code, protected
17 speech. It's written in computer language; that's
18 expressive. If programmers are able to communicate
19 with each other by the way that they have programmed
20 something and designed it, that communicates
21 something.

22 Where does this idea of computers -- computer
23 code serving a functional purpose, taking it outside
24 of that protection, if inherently the medium is
25 language, is a communicative medium?

1 MS. CAI: Your Honor, I see my time has
2 expired. May I continue to answer?

3 JUDGE KRAUSE: You may. And just to clarify,
4 was 15 minutes added as well, for appellees? Thank
5 you.

6 MS. CAI: Your Honor, I think that is a
7 bigger question that I submit, Your Honor doesn't
8 necessarily have to answer because of the pleading
9 deficiency, but just to engage with it for a second, I
10 think that just because the, you know, something in
11 the -- either it's computer code or if it's something
12 in the physical world, can impart information to
13 somebody who's looking for that information.

14 So I'm looking at a padlock, it doesn't
15 communicate any information to me, but it may
16 communicate information to someone who knows something
17 about padlock design. That doesn't mean that the
18 thing itself and the regulation of the thing
19 necessarily implicates First Amendment values.

20 And I think that the sort of genesis of the
21 test from Judge Sack's decision in Vartuli illustrates
22 this point very well, because in Vartuli what happened
23 was there was a company that wanted to distribute a
24 computer program that basically spit out, you know,
25 individuals had -- who got the program did have to put

1 inputs, right?

2 So instead of plastic into a 3D printer, they
3 had to get a price sheet for -- I think it was Swiss
4 francs to put into their computer. They run the file
5 and the file -- the program just spits out an answer.
6 Buy this, right? Someone then has to go and do it
7 just like they have to hit print on a 3D printer, but
8 the Court held that is not protected speech because
9 the file to complete its function, which is to give
10 the signal, doesn't actually require the intercession
11 of the human mind at all.

12 So just because someone could take apart the
13 file and figure out, you know, is it, or exhibit, you
14 know, is it well done or not, would I have written in
15 a different way? Could I, you know, make it even
16 better? Doesn't mean that the file itself in the form
17 it was distributed actually has First Amendment value.
18 I was meant -- we don't even need to get to that
19 question because there's nothing in the complaint that
20 even explains whether, for example, .SL PRT files have
21 expressive code that someone could pick up and react
22 to, assuming that that would even be regulated by the
23 statute at all.

24 So I think the deficiency in the complaint
25 makes it difficult. And this is what the District

1 Court was getting at, and even making that kind of
2 assessment under Vartuli, or impossible to make that
3 kind of assessment. And that's why it held that the
4 complaint was sufficient and gave the plaintiffs an
5 opportunity to explain that in a -- in an amended
6 pleading. They chose not to do so, and instead to
7 stand on this deficient complaint. And that's why
8 we're here at this posture.

9 JUDGE RENDELL: What if the code was to 3D
10 print the statue of David, would we say that's not
11 speech, notwithstanding that what it produces is by
12 all accounts a piece of art?

13 MS. CAI: I think that's correct, Your Honor.
14 If all you needed to do is to hit print and it just
15 gives you this outcome, the outcome may be protected
16 in some way if it also has some First Amendment value.
17 But the code itself, if it doesn't require the
18 intercession of human mind to complete -- it's
19 completed its intended function -- would not have
20 First Amendment protection under these precedents.

21 So let me put it this way, if -- to change
22 the hypothetical a little bit. If the code either
23 printed the statue of David or a potato peeler and the
24 government was interested in which one it chose to do,
25 I think then you may have a content-based restriction

1 on what it is that is happening, right?

2 Like, are we just, you know, saying that some
3 things are more valuable than others, that's not
4 what's happening here, right? The restriction that we
5 have is not based on what is it that is the express,
6 but rather are you a licensed manufacturer or not, and
7 are you able to print this or not? And so that's what
8 the functionality test is all about at step two at the
9 content-based restriction stage.

10 I think in the first stage, you know, it
11 doesn't matter what the thing is printing it just --
12 the code -- if the code itself actually operates in a
13 certain way, then it just doesn't -- without the
14 intercession of the human mind, then it doesn't get
15 First Amendment protection. Just because it's written
16 in computer code, just as the fact that the self-
17 driving car is written in computer code doesn't mean
18 that the government can't restrict the output that it
19 comes out or that the fact that it's doing that now
20 turns something that is not First Amendment protected,
21 driving above the speed limit into something that is
22 First Amendment protected, just because the code is
23 the thing that's telling the car to do that instead of
24 the by foot on the pedal.

25 JUDGE KRAUSE: So what happens when we --

1 when we look to the intersection here, the first and
2 the second amendment, because part of what I
3 understand the claims to be is that there is
4 expression in the production of these firearms of the
5 right to self-manufacture.

6 And if that's the case, then how do we -- how
7 should we think of this any differently than a
8 regulation that bans the printing of a certain subject
9 matter or bans -- and not -- I mean, traditional 2D
10 printing here it happens to be a 3D printer, but if
11 what's being printed itself communicates an idea, if
12 the act of the printing and the possession of the
13 product communicates an idea, then why don't we have a
14 -- back to a -- what's a First Amendment problem?
15 Because it's really the Second Amendment right that's
16 giving that meaning, that's to the expression.

17 MS. CAI: So let me answer the First
18 Amendment part first and then get to the Second
19 Amendment. So I think that the reason that it's the
20 law, so now we're on the law as opposed to the whether
21 or not the code of speech or not. It -- because it
22 doesn't prohibit many ideas about 3D printing
23 firearms. It only prohibits the printing of the
24 functional firearm.

25 That means it's not content based and

1 certainly not viewpoint based. So for example, the
2 law does not prohibit diagrams, for example, a guide
3 on the virtues of 3D printing guns. It doesn't
4 prohibit a picture of the final product and
5 accompanying caption saying, look how wonderful this
6 is. Instead, it only prohibits the distribution of
7 files that may be used to program 3D printed firearms
8 or relevant components. And I think that one way of
9 thinking about this is the examples that appellants
10 raised in their briefing, which is they argued in
11 terms of, you know, whether or not government scrutiny
12 justifies.

13 They say, well, if 3D printing poison you
14 know, the government doesn't regulate that. Well,
15 that's because we don't know of any technology that
16 allows someone to do that. But imagine there was, I
17 think according to their theory, just because the
18 government restricted the 3D printing or files that
19 may 3D print poison or methamphetamines or whatever
20 technology may come up with, that's somehow a content-
21 based restriction. But we wouldn't -- but that
22 doesn't make sense, right?

23 It's actually the production of the thing in
24 the physical world that is being prohibited under the
25 law, not the ideas about the thing. So that's why

1 cases like Corley and Green upheld that the Digital
2 Millennium Copyright Act, which similarly prohibits
3 the distribution of files that would circumvent
4 copyrighted works to be not a content-based
5 restriction. And the same thing in Chi Mak, which held
6 that the ITAR export restrictions, right, which
7 operate similarly in terms of a category of files
8 solely because of what it produces in the outside
9 world.

10 So that's why it's not a content-based
11 restriction as to the Second Amendment claims, I do
12 think we have to think about it separately, but before
13 we even get to what is protected by the Second
14 Amendment, I think they have, and the district court
15 rightly recognized this, a fatal standing problem.
16 The first is that they have not pled, anything -- they
17 actually -- this is vow that they're challenging
18 Section (L)(1), which is actually the prohibition of
19 the use of the 3D printer to produce the firearm.

20 So the Second Amendment claim has to hinge on
21 the person being able to produce the firearm. They
22 haven't pled that Anyone in New Jersey who wants to
23 receive their code is going to use it to, you know,
24 has a 3D printer or will acquire a 3D printer, and
25 we'll use the materials to self-manufacture firearms

1 that could have been rectified via repleting, but the
2 plaintiffs chose to stand on their complaint.

3 And so here we are, but I think there's a
4 second problem, which can be thought of as either
5 injury or traceability or addressability, which is
6 that even if section (L)(2) were somehow invalid,
7 which we submitted as not, it actually doesn't redress
8 the second amendment problem that they try to put
9 before the Court, which is the ability to self-print
10 firearms.

11 But section (L)(1) is the thing that actually
12 stops someone from actually being able to print the
13 firearm. And by the way, there are federal
14 restrictions as well that they don't even talk about.
15 So they're not challenging section (L)(1) or any of
16 the federal laws. And so the second injury -- Second
17 Amendment injury, they allege, which is this inability
18 to self-manufacture, is not traceable to the provision
19 they challenge, nor does it tie to someone who's
20 otherwise not able to print the firearm that they
21 want, right?

22 It's not the actual distribution of the code
23 that is preventing them from doing so. It's the other
24 section they don't challenge that is doing so. So
25 that's sort of a threshold problem before you even get

1 to the merits of the Second Amendment argument that
2 the district court recognized. If we get to the
3 Second Amendment merits, I think they have two other
4 problems at the first step of Bruin, right?

5 We know that plaintiffs have to have to show
6 it's their burden that the Second Amendment --
7 Amendment's plain text is implicated by the law.
8 Here, the Second Amendment's plain text applies only
9 to bearable arms. And I think it's fairly obvious
10 that computer code is not bearable, nor is it arms, it
11 doesn't facilitate self-defense. And the other
12 problem they run into is that even if they can somehow
13 tie computer code to being bearable arms, the second
14 amendment only applies to arms and common use for
15 lawful self-defense.

16 But we know that because these firearms don't
17 have serial numbers, they're not traceable. Those are
18 not in common use for lawful self-defense. And the
19 fourth circuit en banc recently held this. And so
20 they run into these two threshold problems at the
21 first step of the merits analysis under Bruen. And of
22 course, if you go to step two under Bruen, the Supreme
23 Court has held time and again, that background checks
24 are presumptively constitutional and the very purpose
25 of section (L)(2) and section (L)(1), which they don't

1 challenge.

2 Hence the standing problem is to prevent the
3 circumvention of background checks, et cetera. And so
4 we can get more deeply into the historical analogs and
5 all of that, but I don't think that's necessary
6 because of the threshold standing problem. And then
7 because of the threshold failure to plead a Second
8 Amendment protection problem.

9 JUDGE KRAUSE: Judge, Rendell?

10 JUDGE RENDELL: Nothing further.

11 JUDGE KRAUSE: Let me just ask you a step
12 back to another analogy of instructions or a recipe.
13 If we think of that as what's being conveyed here, and
14 the recipient, you know, as the human recipient has
15 the option in receiving instructions to either do it
16 themselves manually or if they want to expedite the
17 creation of whatever it is, they've asked to create,
18 they have a file that they can put into a 3D printer
19 that will do it for them, or that would do it -- you
20 could drop it into a sewing machine, and rather than
21 doing it by hand, the sewing machine would then do it.

22 Why should we differentiate between those two
23 sets of instructions when the functional output is the
24 same and it's the volition of the person who has asked
25 for those instructions to produce the product?

1 MS. CAI: Yeah. So I think what Your Honor
2 is getting at is what is the First Amendment really
3 designed to protect? And of course, whenever we talk
4 about this, it becomes a little bit abstract, but I
5 think it's actually important. So the reason that we
6 have the First Amendment that protects certain
7 expressive communications is because of the capacity
8 that it has for human beings to relate to one another
9 and to their democratic system.

10 So that's sort of like the general theory of
11 the First Amendment. But if you skip that step via
12 technology and the person no longer has to do that,
13 then the thing that skips that step is not protected
14 by the First Amendment because it doesn't trigger any
15 of those values. And so, just as you know, me driving
16 a car manually does require effort, and I would love
17 to get rid of that effort with a self-driving car.

18 The fact that the car has automated that
19 step, not that I don't think driving necessarily had
20 expressive value, but let's say that you for a second
21 that, you know, I'm expressing to the world that I'm a
22 carefree person and I don't care about rules, and
23 there's some expressive value in that hypothetical,
24 the fact that that's now been replaced by code doesn't
25 mean that the code itself now has this some kind of

1 First Amendment protection.

2 Because unless the code has the ability to
3 intercede the human mind in some way, and the way it's
4 distributed to function has to give that functionality
5 or that part -- that element to -- give off that
6 element to a human being who's then engaging with it,
7 unless it does that, the code is just then an
8 automatic function that doesn't actually implicate
9 anything about expression or participation with others
10 in the marketplace of ideas, et cetera -- et cetera.
11 So I think that -- yes, Your Honor.

12 JUDGE RENDELL: But why would we read this
13 complaint to negate the expressive aspect of these
14 files?

15 MS. CAI: Our argument at --

16 JUDGE RENDELL: How could we read it to
17 exclude the expressive? Because if it doesn't exclude
18 the expressive, then wouldn't it go back for further
19 discovery as to the expressive versus the functional
20 on summary judgment or further whatever. So I'm -- my
21 question is, how do we read this complaint to exclude
22 the possibility that the file's expressive content is
23 there as compared to only functional?

24 MS. CAI: Your Honor, I think you don't have
25 to go so far as to say as pled. The files absolutely

1 could never have expressive value or could not express
2 First Amendment values to a human being. But rather
3 because the complaint doesn't explain anything about
4 whether or not it does, it lacks a First Amendment --
5 a valid First Amendment pleading.

6 JUDGE RENDELL: So you are saying their
7 pleading has to state that there is clear expressive
8 versus functional use of or aspect to this speech?

9 MS. CAI: I think that's right, Your Honor.
10 The only things that they do plead in terms of how the
11 files work actually go more to the functional than the
12 expressive. So for example, they talk about how
13 certain CAM files are ready for insertion into object
14 producing equipment, and they cite to a commerce
15 department regulation where we've discussed in -- in
16 the briefs below how the guidance explains how these
17 are files that are ready for insertion to produce a
18 firearm.

19 Those are very functional items. I'm not
20 saying that they couldn't have pled that either those
21 files or other files that are circumscribed by section
22 (1)(2) also have expressive value. They don't have
23 that, they do hint at the functional aspect, but they
24 say nothing about the expressive aspect of those
25 files, and that's why the pleading is deficient. I'm

1 not saying it could never have been pled to have, you
2 know, survived that threshold step under the First
3 Amendment, but this one just did not Well,

4 JUDGE KRAUSE: To the extent that --

5 JUDGE RENDELL: And I guess --

6 JUDGE KRAUSE: Sorry, go ahead.

7 JUDGE RENDELL: I was going to say, and I
8 guess you could distinguish Junger, because there,
9 they said the purpose of this is to explain how
10 computers function. They have not told us anything as
11 to the purpose of sending these files.

12 MS. CAI: That's exactly right. So in
13 Junger, the plaintiff was a computer science
14 professor who had a book that explained the encryption
15 code and wanted to show others how the encryption code
16 worked. And so that's very different from what we're
17 looking at here, where it's hypothetical that that
18 could happen, but that's not what was pled in the
19 complaint.

20 And so all we have is the names of files and
21 what they ultimately, I guess, are supposed to achieve
22 in terms of the kinds of firearms that they're
23 supposed to be able to print, but nothing about how it
24 gets from the file to the final product, such as, you
25 know, an AR 15 receiver.

1 JUDGE KRAUSE: But they -- they've also
2 pleaded that certain things that you concede are
3 protected by the First Amendment. Things like
4 diagrams and text files are part of that same code
5 that they understand to be prohibited by the statute.
6 And then there's separately the cease-and-desist
7 letter, which they're arguing sweeps far more broadly
8 than that and would seem to take in not just things
9 that may be used for the manufacturer but even more.

10 As to the criminal statute, do we need to
11 resort to a doctrine like constitutional avoidance to
12 reach the reading of it that you are -- that you're
13 arguing for that is that even though it says may, that
14 should be read to allow for distribution of things
15 like images and text files.

16 MS. CAI: I don't think that your -- Your
17 Honors need to do sort of, you know, some
18 constitutional avoidance, although I suppose you
19 could, I'll just say that it's not a unique
20 formulation that may be used to, in terms of the how
21 we think it's naturally read, which is that it creates
22 something in the real world. So for example
23 NJSA2C:36-1 classifies what are certain drug
24 paraphernalia, and it talks about objects used, you
25 know, for inhaling certain substances such as metal

1 ceramic or plastic pieces that contain an interior pin
2 that may be used to expel compressed gas from a
3 cartridge or canister.

4 I don't think anyone in that context would
5 read, may be used to expel as hypothetically, could
6 someone come up with an idea for how to, you know,
7 like that's just not what those words mean. It's --
8 does it -- is it used to perform this output in the
9 real world or not. The same words may be used to
10 program a 3D printer to manufacture a firearm has the
11 same meaning. It's just the natural reading of those
12 words in terms of the cease-and-desist letter. Mr.
13 Flores read you the first sentence of the paragraph
14 about the computer files that you plan to punish will
15 undermine the public safety of New Jersey residents.
16 But the very next sentences explain what it is that
17 former AG Grewal was talking about.

18 These files allow anyone with a 3D printer to
19 download your code and create a fully operational gun.
20 More than that, the codes you plan to post will enable
21 individuals to print assault weapons that are illegal
22 in New Jersey, print assault weapons, create a fully
23 operational gun. Those are the qualifiers on what the
24 files that were targeted by the cease-and-desist
25 letter are speaking of.

1 And I think that's very consistent with
2 section (L)(2), which also target the files that
3 create fully functional firearms. And so I don't
4 think there's any daylight between the two. Obviously
5 at the time that the cease-and-desist letter was
6 issued, there was no section (L)(2), but the
7 legislature very quickly thereafter recognized the
8 public safety problem and within months enacted the
9 criminal law that actually applies.

10 And so I think the reference to the cease-
11 and-desist letter as a bit of a red herring, but I
12 think overall the issue is that the law itself is
13 quite clear and if they're sort of hanging their hat
14 on, well, what about the diagrams or what about the
15 pictures? Those are not circumscribed by the law. I
16 don't think there's any pleading that they are
17 inherent in the codes that do fully just print a gun,
18 although if they wanted to plead that they could have.

19 And I will note that, you know, Mr. Flores
20 mentioned again, the sort of scienter problem, I think
21 they just ignore the fact that the overall -- the
22 overall requirement in section 2C:2-2(c)(3)
23 says a statute to kind finding a crime unless clearly
24 indicating legislative intent to impose strict
25 liability should be construed as defining a crime with

1 the culpability defined in paragraph (b)(2) of the
2 section, which is knowledge.

3 And that applies to the entire New Jersey
4 criminal code. So the fact that one particular
5 section or subsection doesn't have an express scienter
6 requirement, that doesn't matter because all of
7 section (c)(2) or sorry, all of title (2)(c), which is
8 the criminal code, imports that central requirement
9 throughout. So if that's the problem, it just doesn't
10 exist under New Jersey Law.

11 JUDGE KRAUSE: Given the intervening passage
12 of the statute, what is the current status of the
13 civil enforcement effort?

14 MS. CAI: I don't believe that there's an
15 active civil enforcement effort, given that the
16 criminal law now covers the same conduct. So that's
17 also why we don't think that there is some kind of
18 separate claim against the New Jersey Attorney General
19 that can come solely from the cease-and-desist letter.

20 So what I will say is in the intervening
21 time, as the appellants have pled, they've created a
22 geofencing system so that they can communicate their
23 code to any other recipient in other states, but
24 they're able to, and this is according to their
25 complaint, can basically block out any IP addresses

1 from New Jersey so they can comply with the law
2 without restricting their ability to distribute the
3 code in other states that don't have these
4 restrictions.

5 JUDGE KRAUSE: Okay.

6 MS. CAI: Your Honors don't have any other
7 questions. We urge you to affirm.

8 JUDGE KRAUSE: Okay.

9 MS. CAI: I'm fine.

10 JUDGE KRAUSE: Okay. Thank you very much.

11 Mr. Flores. If it's the case as the State
12 has put it that those things that are more
13 traditionally carrying First Amendment speech, like
14 images, texts, those are freely distributable under
15 the statute, what's left in terms of the code that is
16 alleged in the complaint to constitute speech rather
17 than a -- some functional mechanism to produce a
18 product?

19 MR. FLORES: I'll point the Court to four
20 paragraphs in the complaint, 26 and 27 and 32 and 33.
21 If you're yearning for a way to distinguish functional
22 files from not functional files, this is how the
23 federal regulations do it. They're CAD with a D and
24 CAM with an M. So 26 and 27 explain what CAD with a
25 D, computer-aided design files do. That I think is

1 what the Court is thinking about as sort of protected
2 type speech.

3 And then CAM with an M, computer-aided
4 manufacturing files is I think what the Court in New
5 Jersey are trying to get at as the not protected
6 functional stuff. So 26 and 27 explain what those
7 files are; 26 and 27 say that they both have
8 expressive content. And then 32 and 33 say that we
9 publish both. We publish both. They censor both. So
10 they're both implicated in the case.

11 They both have expressive values, we say, but
12 if it's a mixed bag, we win the case because their
13 censorship on both the civil side bluntly covers them
14 all, and their censorship on the criminal side, I
15 think, bluntly covers them all. But that is a
16 distinguishing way, if you think that's the only kind
17 of protected conduct is the design type files, but not
18 the manufacturing files. They're both in the case and
19 they're pleaded expressly there under the federal
20 regime.

21 JUDGE KRAUSE: But the State has made the
22 representation that as to design that it's not covered
23 by the statute.

24 MR. FLORES: They're wrong factually, Your
25 Honor.

1 JUDGE KRAUSE: It wouldn't be enforcing it as
2 to that aspect of it.

3 MR. FLORES: On summary judgment, when we say
4 how do you manufacture a firearm, the proof will show
5 you take the design file. That's something that may
6 be used to program. Now, it's attenuated, right? The
7 law would have you say, right, it has to be direct.
8 It can't be contingent in order to be criminalized.
9 So it's part of the process.

10 You use the design files to produce the final
11 product, but it's not so integral to the final step of
12 actually choosing to make the firearm that you can
13 criminalize it, right? That spectrum exists on
14 everything. Anytime you make something that the law
15 can criminalize, there's this attenuation, there's the
16 knowledge you have, the facts you have, the things you
17 have. So the design files are a necessary part of the
18 process.

19 They may be used in some cases, but they're
20 not so close and so directly related as to actually
21 constitute the criminal act that you could
22 criminalize. Right? The analogy here, if you want to
23 talk about the car analogy is not what you're hearing
24 from the other side. The analogy is like a map. I
25 hand the bank, you know, you can make a map, the bank

1 robber can use it to get away from the bank.

2 You can even load it as a piece of software
3 into the car and use an electronic map. But the map
4 is information, the map is speech, all kinds of people
5 (inaudible) map obviously for innocent purposes.
6 That's the kind of information we're talking about
7 here. It's a tool that can sometimes be used in
8 discrete circumstances for illegal activity, but you
9 would never say that we can ban the map.

10 The logic they're talking about is going to
11 ban a lot of books and a lot of libraries about
12 chemistry, about hardware, about engineering. That
13 simply cannot be the law. And it's not.

14 JUDGE KRAUSE: But again, their
15 representation seems to be looking at the CAD versus
16 CAM distinction that this statute, by its terms does
17 not cover CAD files. And that while it says may,
18 which you're suggesting could be read in a permissive
19 way, that the right reading in context --

20 MR. FLORES: Uh-huh.

21 JUDGE KRAUSE: -- as even a matter of plain
22 text is capable of.

23 MR. FLORES: If that's the case, I have won
24 half the case and I get a judgment in my favor because
25 the case began when we were publishing all of the

1 files, the CAD, and the CAM, and they issued the civil
2 cease-and-desist letter that said, stop publishing
3 everything. If they have now agreed to stop censoring
4 half of the case, I win half of the case and I get a
5 judgment in my favor, not a dismissal of the
6 complaint.

7 Now, of course, I have the other half of the
8 case to win, and I think I will, but that is a massive
9 victory in our favor. If they -- in July of 2018,
10 when they issued the initial cease-and-desist letter,
11 if they didn't know what they were censoring, that
12 breaks the First Amendment. That is the core prior
13 restraint. That's the reason the constitution exists,
14 because they can't just blindly censor people without
15 knowing what they're talking about.

16 That's literally what happened. They
17 literally don't know how the process works. They
18 don't know what these files do. They know they don't
19 like guns, but they can't prohibit the self-
20 manufacture of guns because that's constitutionally
21 protected, and they can't snap their fingers and make
22 the technology go away. All that you're hearing about
23 is a back -- yes, Your Honor.

24 JUDGE KRAUSE: I'm sorry. But isn't the
25 distinction between 26 and 27 more of a hardware

1 attenuation one? In other words, in 26, with the
2 requisite computer hardware they can employ to
3 construct and manipulate. So they need to do a little
4 bit more to get the hardware in order to construct the
5 model.

6 And then in 27, they're ready for insertion.
7 But neither of these says there is an expressive
8 purpose here. It's just a matter of how much hardware
9 and software you need to accumulate in order to stick
10 it in and make a model. Neither of these speaks to
11 the idea that there needs to be either a purpose or a
12 -- a, you know, some expressive aspect to these. And
13 under Iqbal Twombly, don't you have -- I mean, and
14 it's all about you need to show us there's an
15 expressive value, and how have these advanced that
16 ball?

17 MR. FLORES: We do, Your Honor, this is in
18 the same breath, four paragraphs after we say there
19 are CAD files and CAM files, you get to paragraph 31
20 and we say, we publish both. This is all part of what
21 we publish and we assert they have expressive values
22 that's in 31, right? That have these values in the
23 abstract. Apart from these --

24 JUDGE RENDELL: Well, they have these -- they
25 have these values in the abstract.

1 MR. FLORES: Yes, Your Honor.

2 JUDGE RENDELL: What does that mean? I mean,
3 I can have a lot of things in the abstract, but speech
4 is not supposed to be values in the abstract. It's
5 supposed to be what is it conveying --

6 MR. FLORES: Well, Your Honor,

7 JUDGE RENDELL: -- to the human mind?

8 MR. FLORES: I mean, it's the political
9 nature of the speech. It's the expressive nature of
10 the speech. It's the artistic nature in the same way
11 that, you know, creating the statute of David is in a
12 sense just an engineering activity. It's also an
13 artistic activity that may not be the view of the New
14 Jersey Attorney General, but it is the view of the
15 constitution, and it is the view of defense
16 distributed, right?

17 This isn't just an object. This is a
18 constitutionally sacrosanct object. And for the
19 citizens to discuss the object, discuss what it might
20 look like, discuss how you might very well legally
21 create, it's a protected activity. They can do a lot
22 of things as the state to regulate this process, to
23 try to backdoor, essentially suppress the
24 manufacturing of firearms. But the one thing they
25 can't do to get to the Second Amendment is run rough

1 shot over the First Amendment.

2 JUDGE KRAUSE: We are -- where are they --

3 JUDGE RENDELL: No, but --

4 JUDGE KRAUSE: Go ahead.

5 JUDGE RENDELL: -- but --

6 JUDGE KRAUSE: Go ahead, Judge Rendell.

7 JUDGE RENDELL: -- don't you have to supply
8 information in the concrete rather than in the
9 abstract?

10 MR. FLORES: That's in the -- yes, Your
11 Honor. I mean, we've shown that the diagrams matter.
12 These are pictures. This is information, this is an
13 art, just like a car can be art. It also drives, but
14 the makers of Tesla will tell you they think it's
15 beautiful. The same thing is true of the makers of
16 firearms in America.

17 And if they don't agree with that, let's
18 litigate it on summary judgment and we'll be happy to
19 have artists in the field talk about the value this
20 has, just like any engineering, any architect, anyone
21 who creates a thing will tell you there's both
22 functional value and artistic value.

23 JUDGE KRAUSE: Where in either the statute or
24 in the cease-and-desist letter, are they reaching
25 anything that can be characterized as the piece of --

1 that is --

2 MR. FLORES: Yes.

3 JUDGE KRAUSE: -- could be art. That is the
4 design, that's the expression. That's that -- any
5 sort of written text or instruction, even the cease-
6 and-desist letter is talking about code used to create
7 firearms or codes that enable individuals to print
8 weapons. They're not -- that seems very narrow as to
9 the manufacturing aspect of the code.

10 MR. FLORES: I think that some parts of the
11 letter talk about those kinds of files, but the first
12 paragraph and the last paragraph are all you need, you
13 are directed to cease-and-desist from publishing
14 printable gun computer files. That phrase, printable
15 gun computer files is not a term of art, it's not a
16 technical term. We don't know what that covers, but I
17 think the ordinary meaning if you ask anyone on the
18 street is what is he telling Defense Distributed to do
19 everything. Stop everything. Don't publish any of
20 these files.

21 Don't publish CAD, don't publish CAM. It --
22 stop everything. I mean, if that really is what
23 they're going to hang the case on, is that when they
24 said printable gun computer files a made-up term, they
25 were trying to convey the distinction that was created

1 by federal regulations and enacted three years later,
2 great, let's have that be the whole case, but that's
3 not the case. Look, in the last paragraph, the last
4 paragraph says, as the chief law enforcement officer
5 for New Jersey, I demand that you halt publication of
6 the principal gun computer files.

7 They knew what he was publishing, what
8 Defense Distributed was publishing, and they said,
9 stop it all. The reason they enacted the statute is
10 to stop what Defense Distributed was doing. They
11 called Defense Distributed out by name. They called
12 my client out by name at the enactment ceremony and
13 said, we're enacting this law to stop that guy. So
14 maybe in some abstract context with some other case,
15 you can't tell what's being regulated.

16 We all know that the Attorney General here is
17 trying to censor this company and the exact files that
18 we have listed, chapter and verse every detail, it at
19 least pleads the case. We've at least passed the
20 pleading scenario. There's no effective answer to the
21 civil cease-and-desist letter, and the scienter
22 argument is still extraordinarily strong. The last
23 thing I'll say is about that is that it's not that the
24 statute needs any scienter requirement to pass
25 constitutional muster.

1 The statute has to say that the defendant
2 knows that what they say is going to be involved in
3 illegal conduct, not just this abstract idea that they
4 know it can be used in these processes, but that this
5 particular speech will be used by a particular person
6 for a particular illegal conduct. And this statute
7 never does that, neither does the civil cease-and-
8 desist letter.

9 JUDGE KRAUSE: Judge Rendell, any further
10 questions?

11 JUDGE RENDELL: Nothing further.

12 JUDGE KRAUSE: Okay. We request that a
13 transcript of this argument be made and --

14 (Whereupon, at 11:20 a.m., the proceeding was
15 concluded.)

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CERTIFICATE OF TRANSCRIBER

I, JOHN SMITH, do hereby certify that this transcript was prepared from the digital audio recording of the foregoing proceeding, that said transcript is a true and accurate record of the proceedings to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

JOHN SMITH

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1 Defense Distributed; Second Amendment Foundation, Inc. v. Attorney
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