UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

MICHAEL CARGILL, *et al.*,

Plaintiffs,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *et al.*,

Defendants.

Case No. 1:22-cv-01063-DAE

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Gun Control Act of 1968 ("GCA") imposes regulatory controls on federal firearms licensees ("FFLs"), a category that includes individuals and businesses licensed to sell and manufacture firearms. Because of the dangers posed by the sale of weapons to criminals and other prohibited individuals, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has an established inspection and enforcement process to ensure that FFLs meet their obligations to operate safely and in compliance with federal law. Although ATF inspects only approximately ten percent of FFLs per year and revokes the licenses of only a small fraction of FFLs, this process serves a vital role in preventing gun violence by revoking the licenses of the worst-offending FFLs and deterring violations of the laws and regulations governing the sale of firearms.

As part of this process, ATF periodically inspects the premises and records of FFLs. In accordance with the GCA, if ATF finds evidence that an FFL willfully violated federal laws and regulations, such as by failing to run a required background check or by falsifying records, then ATF may notify the FFL of its intent to revoke the license at issue, or to deny an application for license renewal. Following this initial notice, the FFL may request an administrative hearing before an ATF official and present any relevant evidence or testimony. After the hearing, ATF may issue a final decision to revoke a license or deny a renewal, but only if the hearing officer finds that one or more violations took place and were willful.

Plaintiffs' action here seeks to undermine this established process by asking the Court to broadly enjoin ATF's operative guidance governing FFL inspection and enforcement. While the GCA authorizes ATF to revoke a license upon the finding of any single, willful violation of law, ATF's guidance prioritizes the enforcement of five specific types of willful violations affecting public safety. This guidance reasonably implements the GCA's statutory directives, does not implicate—much less run afoul of—the Second Amendment, and is well within the agency's statutory authority. This Court

should decline Plaintiffs' invitation to upend ATF's enforcement process and should instead grant summary judgment to Defendants.

BACKGROUND

I. The Parties

Plaintiff Michael Cargill owns and operates Central Texas Gun Works in Austin, Texas. Compl. ¶ 4, ECF No. 1. Plaintiff CTC HGC, LLC is a Texas limited liability company owned by Michael Cargill that holds a federal firearms license. *Id.* ¶ 5. Defendants are the United States, the ATF, and the Department of Justice ("DOJ"). *Id.* ¶¶ 6, 7, 9. Defendant agencies are responsible for administering and enforcing the Gun Control Act. Defendant Steven Dettelbach is the Director of ATF and Defendant Merrick Garland is the Attorney General of the United States. *Id.* ¶¶ 8, 10.

II. Regulatory Scheme

The Gun Control Act of 1968, codified at 18 U.S.C. §§ 921 *et seq.* creates a comprehensive scheme for regulating federal firearms licenses. The GCA gives the Attorney General the authority to approve and revoke such licenses. Among other things, it provides that "[n]o person shall engage in the business of importing, manufacturing, or dealing in firearms . . . until he has filed an application with and received a license to do so from the Attorney General[,]" and that application "shall be in such form and contain only that information necessary to determine eligibility for licensing as the Attorney General shall by regulation prescribe[.]" 18 U.S.C. § 923(a).

Pursuant to that authority, ATF periodically inspects FFLs for compliance with the GCA's requirements. 18 U.S.C. § 923(g)(1)(B)(ii)(I). "ATF's industry operations investigators (IOIs) conduct inspections of FFLs to ensure compliance with applicable federal, state and local laws and regulations," and to "educate licensees on the specific requirements of those laws and regulations." ATF0042–

0043[1]; ATF, *Firearms Compliance Inspections*, https://perma.cc/36U8-68CZ. Typically, an inspecting IOI will arrive at the business premises during business hours and will review operations, evaluate internal controls, verify the FFL's compliance with state and local laws, review the FFL's records, and inventory the firearms, among other things. ATF0042–0043; ATF, *Firearms Compliance Inspections*, https://perma.cc/36U8-68CZ. If the IOI detects violations, they will create a final report of violations and discuss that report with the FFL.

Under the GCA, ATF "may, after notice and opportunity for hearing, revoke any license . . . if the holder of such license has willfully violated *any provision of this chapter or any rule or regulation* prescribed by the Attorney General." 18 U.S.C. § 923(e) (emphasis added). Therefore, following an inspection, "[w]henever the Director has reason to believe that a licensee has willfully violated any provision of the Act . . . a notice of revocation of the license, ATF Form 4500, may be issued." 27 C.F.R. § 478.73(a). This is the first step of the revocation process, and ATF "shall afford the licensee 15 days from the date of receipt of the notice in which to request a hearing prior to suspension or revocation of the license" with the Director of Industry Operations ("DIO") in their ATF field division. *Id.* § 478.73(b); *see also* 18 U.S.C. § 923(f)(2). "During the hearing the licensee will have the opportunity to submit facts and arguments for review and consideration[.]" 27 C.F.R. § 478.74; *see also* ATF0045 ("At the hearing, the licensee can be represented by an attorney and may bring employees and documentation to address the violations cited in the notice."); ATF, *Revocation of Firearms Licenses*, https://perma.cc/9FTZ-JG48 (same); 27 C.F.R. § 478.76. "If the DIO decides that the violations were willful and revocation is justified, . . . ATF sends a final notice of revocation (ATF Form 5300.13) to the licensee with a summary of the findings and legal conclusions that warrant revocation." ATF0045; *see also* 27 C.F.R. § 478.74; 18 U.S.C. § 923(f)(3).

[1] Defendants have filed the complete and certified administrative record for ATF's Policy and ATF-O-5370.1F in support of this motion.

If ATF sends a final notice of revocation, the license holder may "file a petition with the United States district court for the district in which he resides or has his principal place of business for a de novo judicial review of such . . . revocation." 18 U.S.C. § 923(f)(3). "If the court decides that [ATF] was not authorized to . . . revoke the license, the court shall order [ATF] to take such action as may be necessary to comply with the judgment of the court." *Id.*

III. Current ATF Policies and Guidance

On June 23, 2021, President Biden and Attorney General Garland announced the Administration's Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety. Among other things, the Strategy announced a policy (herein "Policy") establishing "zero tolerance for rogue gun dealers that willfully violate the law." *See* The White House, *Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety*, https://perma.cc/ZFK7-8RRN. Pursuant to the Policy, "[a]bsent extraordinary circumstances," ATF will seek

> to revoke the licenses of dealers the first time that they violate federal law by willfully 1) transferring a firearm to a prohibited person, 2) failing to run a required background check, 3) falsifying records, such as a firearms transaction form, 4) failing to respond to an ATF tracing request, or 5) refusing to permit ATF to conduct an inspection in violation of the law.

Id. Thus, ATF will issue an initial notice of revocation of the federal firearms license of any FFL upon the discovery of any one of these five serious violations, where there is reason to believe such violations were willful. And ATF will issue a final notice of revocation of the license following a hearing where the DIO determines by a preponderance of the evidence that such violations occurred and were willful. 27 C.F.R. § 771.80.

ATF employs an internal guidance document to assist ATF personnel as they conduct compliance inspections and take appropriate administrative actions. For consistency, Defendants will refer to this document as ATF's Administrative Action Policy or "AAP." ATF amended the AAP first in 2022 and again in 2023 to reflect the agency's implementation of the Policy. The currently operative

guidance, ATF Order 5370.1F, is attached as Exhibit A and can be found at pages ATF0522–534 of the administrative record.[2] This version repeatedly makes clear that ATF may only revoke federal firearms licenses for willful violations of the GCA and its implementing regulations. *See id.* at 2 ("Pursuant to 18 U.S.C. § 923(e), ATF may revoke a federal firearms license for willful violations of the GCA and its implementing regulations[.]"); *id.* at 6 ("ATF must establish willfulness to proceed with revocation under 18 U.S.C. § 923(e)."). Consistent with caselaw, the AAP also defines willfulness: "The term willful means a purposeful disregard of, or a plain indifference to, or reckless disregard of a known legal obligation." *Id.* at 2.

In the years the Policy has been in effect, the number of final revocations has increased, but not drastically so. For instance, in 2022, there were a total of 157 licenses revoked under the Policy (88 revocations, and 69 occasions in which the FFL voluntarily ceased operations after inspection). *See* ATF0046–0049; *see also* ATF, *Enhanced Regulatory Enforcement Policy*, https://perma.cc/4TT6-TK8T. In 2023, there were a total of 237 licenses revoked (157 revocations, and 80 occasions in which the FFL voluntarily ceased operations after inspection).[3] ATF, *Enhanced Regulatory Enforcement Policy*, https://perma.cc/4TT6-TK8T. Still, this represents a very small percentage of the total number of active federal firearms licenses. *See* ATF0476 (listing 136,563 active federal firearms licenses, meaning that these revocations and voluntary closures represent approximately .11% and .17% of the total number of licenses); *see also* ATF, *Fact Sheet – Facts and Figures for Fiscal Year 2022* (Jan. 2023), https://perma.cc/NY6G-5Z7V (same).

[2] Portions of the AAP are redacted because those portions are protected by the law enforcement privilege and/or are law enforcement sensitive. *See* Decl. in Supp. of Defs.' Mot. for Summ. J. & Resp. in Opp. to Pls.' Mot. for Summ. J. ("ATF Decl.") ¶ 4, attached as Exhibit B.

[3] For additional context, in 2022, 83 licenses were not revoked after an administrative hearing was held, and in 2023, 165 licenses were not revoked after a hearing. ATF0048; ATF, *Enhanced Regulatory Enforcement Policy*, https://perma.cc/4TT6-TK8T.

IV. Plaintiffs' Inspection History

Plaintiffs operate a gun shop, Central Texas Gun Works, located in Austin, Texas, that sells firearms and offers classes and firearm training. Compl. ¶¶ 42–43. Prior to the initiation of this lawsuit, Central Texas Gun Works had last been inspected in August 2018. *Id.* ¶ 45; ATF0565. Following that inspection, Central Texas Gun Works was cited for four types of violations in a total of 35 transactions. ATF0565–570; Compl. ¶ 47. ATF issued a report of violations but did not recommend revocation. ATF0546–570; Compl. ¶ 49; Ex. 14 to Pls.' Mot., Decl. of Michael Cargill ¶ 10, ECF No. 53-1 ("Pl.'s Decl."). Instead, ATF instructed Plaintiffs to "ensure that all information on the ATF 4473 was filled out accurately and supporting documentation is attached when necessary." Pl.'s Decl. ¶ 10; *see also* ATF0557–563. Since the 2018 inspection, Plaintiffs assert they have "instituted remedial measures in order to comply with the law, including purchasing a software system that better tracks transactions and required background checks." Pl.'s Decl. ¶ 12.

Central Texas Gun Works was inspected again in June 2023. *See* ATF0535–545; *see also* Defs.' Further Resp. to Notice of Change of Material Facts ("Defs.' Further Resp.") at 1–2, ECF No. 32. Although the IOI identified a few categories of violations, these violations did not implicate the Policy, and Plaintiffs were merely notified of these findings and advised of the corrective actions required to remedy the issues. *See* ATF0539; ATF0541; Defs.' Further Resp. at 1–2. No further administrative action was taken, and Plaintiffs face no immediate risk of revocation under the Policy or otherwise.

V. This Case

On October 19, 2022, Plaintiffs filed the present action. *See* Compl. The Complaint asserts three claims: (1) the Policy violates the Gun Control Act; (2) the Policy violates the Second Amendment; and (3) Plaintiffs are entitled to equitable relief for an ongoing violation of federal law.

See Compl. ¶¶ 59–87. As for relief, Plaintiffs seek declaratory judgment and an injunction.[4] *See id.* at 14–15. Plaintiffs moved for summary judgment on March 18, 2024. *See* Pls.' Mot. for Summ. J. ("Pls.' Mot."), ECF No. 53.

LEGAL STANDARD

"Where, as here, parties have filed cross-motions for summary judgment, each motion must be considered separately because each movant bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law." *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, LLC*, 620 F.3d 558, 562 (5th Cir. 2010). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

This case reflects Plaintiffs' fundamental misunderstanding of the AAP. To be clear, the AAP does not dispose of the GCA's willfulness requirement. Rather, it prioritizes the enforcement of certain GCA violations that pose acute threats to public safety. As with any individual GCA violation, where ATF makes an individual determination of willfulness, ATF may seek to revoke an FFL's license. The AAP does nothing to change this, and in any event, Plaintiffs have not been subject to revocation based on the AAP. Plaintiffs' claims fail for threshold jurisdictional reasons and on the

[4] Although Plaintiffs request injunctive relief, apart from their equitable claim, their Motion fails to brief the factors required to demonstrate entitlement to that relief. "The party seeking a permanent injunction bears the burden of demonstrating: '(1) that they have suffered an irreparable injury; (2) that remedies at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *ZeniMax Media Inc. v. Oculus VR LLC*, Civ. A No. 3:14-CV-1849-K, 2018 WL 4078586, at *1 (N.D. Tex. June 27, 2018) (quoting *eBay Inc v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). "Failure to sufficiently establish any one of the four factors requires this Court to deny the movant's request for an injunction." *ZeniMax Media Inc.*, 2018 WL 4078586, at *1; *see also Gillaspy v. Dallas Ind. Sch. Dist.*, 278 F. App'x 307, 314 (5th Cir. 2008) ("It is the practice of this court and the district courts to refuse to consider arguments raised for the first time in reply briefs.").

merits as a matter of law, and the Court should grant Defendants summary judgment.

I. This Court lacks jurisdiction over all or some of Plaintiffs' claims.

a. Plaintiffs lack standing.

Federal court jurisdiction is limited "to actual cases or controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (citation omitted). "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (citation omitted). "To establish standing, '[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Denning v. Bond Pharm. Inc.*, 50 F.4th 445, 450 (5th Cir. 2022) (quoting *Spokeo*, 578 U.S. at 338).

As Defendants have previously argued, Plaintiffs have failed to allege injury-in-fact. *See* Defs.' Mot. to Dismiss at 14–16, ECF No. 7; Defs.' Reply Br. in Supp. of Mot. to Dismiss at 3–6, ECF No. 16. But that aside, any injury is not traceable to the AAP, or likely to be redressed by a favorable decision. The GCA provides for the revocation of a federal firearms license for any single willful violation. *See* 18 U.S.C. § 923(e) ("The Attorney General may . . . revoke any license . . . if the holder of such license has willfully violated any provision of this chapter or any rule or regulation[.]"); *Fairmont Cash Mgmt., LLC v. James*, 858 F.3d 356, 362 (5th Cir. 2017) ("A single willful violation authorizes the ATF to revoke the violator's FFL, regardless how severe, though the frequency and severity of the violations can be relevant to willfulness."). Plaintiffs have not challenged the validity of this statutory provision, nor have they argued that any of the Policy's five identified violations themselves are unlawful for any reason. Therefore, even if this Court were to declare unlawful and enjoin the AAP (Plaintiffs' only requested relief, *see* Pls.' Mot. at 19–20), nothing would prevent ATF from exercising its statutory authority to revoke the license of any business found to have willfully committed any of the five violations identified by that guidance. Accordingly, Plaintiffs' requested relief would not

remedy their purported injury, and they lack standing to sue.

b. ATF's enforcement decisions are committed to agency discretion by law.

Judicial review of the AAP is also not available because ATF's enforcement decisions are committed to agency discretion by law. *See Morehouse Enters., LLC v. ATF*, No. 3:23-cv-129, 2024 WL 708954, at *7–8 (D.N.D. Jan. 2, 2024). 5 U.S.C. § 701(a) precludes judicial review of agency action when that action "is committed to agency discretion by law." "[W]hether to institute an enforcement action" is one type of agency action that courts have "traditionally left to agency discretion." *Ngure v. Ashcroft*, 367 F.3d 975, 982 (8th Cir. 2004) (citation omitted); *see also Heckler v. Chaney*, 470 U.S. 821 (1985). Agency enforcement policy often involves a "complicated balancing of a number of factors," and an "agency is far better equipped than the courts to deal with the many variables involved." *Heckler*, 470 U.S. at 831–32. Additionally, some statutes may be "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

The AAP is an internal guidance document setting forth ATF's enforcement priorities and is therefore not subject to judicial review. *See Morehouse*, 2024 WL 708954, at *8 ("Most of the AAP concerns enforcement priorities."); *see, e.g.*, AAP at 1 ("This order provides fair and consistent guidelines for administrative remedies for violations disclosed relative to inspections of [FFLs]."). Although the GCA permits ATF to revoke a firearms license for any willful violation, given the sheer number of FFLs (136,563 as of 2022) and ATF's limited inspection and enforcement resources, ATF cannot and does not seek revocation for every willful violation that occurs. *See* ATF0476. Instead, like most agencies charged with the enforcement of a statute, ATF prioritizes the enforcement of certain types of willful violations—namely, those it determines "directly affect public safety and ATF's ability to trace firearms recovered in violent crimes." AAP at 3. To that end, the AAP "establishes a unified plan of action for resolution of violations through administrative action," and "groups . . . violations into categories for which specific administrative actions are recommended." *Id.* at 2. The AAP

accordingly identifies willful violations for which revocation is the "assumed" administrative action because such violations directly affect public safety, including the transfer of a firearm to a prohibited person, and the failure to conduct a required background check. *Id.* at 3. But the AAP also specifies violations, both willful and otherwise, for which a warning letter or a warning conference are appropriate actions. *See id.* at 4–6. The AAP is therefore precisely the type of agency policy for which judicial review is precluded, as it reflects ATF's balancing of multiple factors in determining how to enforce the GCA. *See United States v. Texas*, 599 U.S. 670, 680 (2023) ("[F]ederal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions.").

Additionally, the GCA provides this Court with no "meaningful standard against which to judge [ATF's] exercise of" enforcement discretion. *Heckler*, 470 U.S. at 830. The statute simply states that ATF "may" revoke a firearms license for any willful violation. *See* 18 U.S.C. § 923(e) (emphasis added); *see also Fairmont Cash Mgmt.*, 858 F.3d at 362. The GCA does not specify willful violations for which revocation is definitely appropriate, nor does it identify willful violations for which revocation is not appropriate. This is simply an instance in which the statute is "drawn in such broad terms that . . . there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted). As Congress did not specify which, if any, willful violations of the GCA to prioritize (or deprioritize), it is within ATF's discretion to make such determinations, and that discretion is not subject to judicial review.

c. Plaintiffs do not challenge reviewable final agency action.

Review is further precluded because the AAP is not final agency action. *See Morehouse*, 2024 WL 708954, at *8–9; *see also* 5 U.S.C. § 704; *U.S. Army Corps. of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). Agency action is final when it "mark[s] the consummation of the agency's decisionmaking process," and is "one by which rights or obligations have been determined, or from which legal

consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

The AAP is a general statement of policy that merely sets forth ATF's enforcement priorities and is thus not reviewable final agency action. The AAP does not revoke any federal firearms licenses, nor does it determine the rights or obligations of any FFL. *See* AAP. Indeed, no legal consequences flow from it. The GCA prohibits FFLs from willfully violating the requirements of that statute and its implementing regulations, and it subjects FFLs to license revocation for any willful violation. *Fairmont Cash Mgmt.*, 858 F.3d at 362. The AAP does not expand or contract that liability, nor compel any additional affirmative action or prohibit otherwise lawful action on the part of FFLs. Instead, the AAP simply sets forth how ATF will exercise its enforcement discretion and what administrative actions it will take when it discovers certain violations. The ineffectiveness of any court-ordered remedy only demonstrates that the AAP is not final agency action. *See supra* pp. 8–9. Even if this Court enjoined the AAP, ATF could still exercise its statutory authority to revoke a license for any willful violation of the GCA, including the five identified by the AAP. The AAP thus has no "actual legal effect . . . on regulated entities," and all obligations flow from the statute. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

Separately, to the extent Plaintiffs challenge ATF's alleged or hypothetical enforcement of the GCA in a manner not actually articulated by the AAP, they also fail to challenge reviewable final agency action. *See*, *e.g.*, Pls.' Mot. at 14 (challenging hypothetical scenarios not set forth in the AAP).

II. ATF's enforcement policy is not contrary to the GCA.

Plaintiffs argue that the AAP and the Policy reflect a "radical" shift that "effectively writ[es] the word 'willfully' out of the statute." Pls.' Mot. at 7. But the AAP—the only agency action this Court has suggested is final and suitable for judicial review, *see* Order at 10, ECF No. 41—reiterates that ATF may only revoke for *willful* violations and defines willfulness in the same manner Plaintiffs do.

Accordingly, ATF's enforcement policy is entirely consistent with the GCA and Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706.

The AAP specifically states that "ATF must establish willfulness to proceed with revocation under 18 U.S.C. § 923(e)." AAP at 6. There is no qualification to this statement, and it appears at the top of the section titled, "Revocation Under 18 U.S.C. § 923(e)," confirming that it applies to all license revocations. *Id.* at 6. This alone disposes of Plaintiffs' contention that the AAP somehow eliminates the GCA's willfulness requirement. But if more were needed, even the portions of the AAP referencing the challenged Policy reiterate that ATF must demonstrate willfulness. *See, e.g.*, *id.* at 3 ("ATF has zero tolerance for willful violations that can directly affect public safety and ATF's ability to trace firearms recovered in violent crime."); *id.* at 7 ("[T]he below five items merit revocation of the license if committed willfully unless extraordinary circumstances exist."). Further, the term willful and its derivatives appear over twenty times in the AAP, and nowhere does the AAP suggest that revocation is permitted for unintentional or inadvertent violations. *See generally* AAP.[5] There is thus simply no support for the notion that, through the AAP, ATF has adopted a policy of strict liability. *See also* ATF0024 (remarks by President Biden) ("If you willfully sell a gun to someone who is prohibited from possessing it, if you willfully fail to run a background check, if you willfully falsify a record, if you willfully fail to cooperate with the tracing requests or inspections, my message to you is this: We'll find you, and will seek your license to sell guns.").

[5] *See, e.g.,* AAP at 3 ("ATF has zero tolerance for willful violations that can directly affect public safety and ATF's ability to trace firearms recovered in violent crimes."); *id.* at 6 ("In instances in which it is determined that the violations were not willful and/or the FFL is likely to come into compliance, the [Warning Conference] shall be the final administrative action."); *id.* (explaining how ATF "can establish the knowledge element of willfulness"); *id.* at 7 ("Consistent with section 7(a)(4), the below five items merit revocation of the license if committed willfully unless extraordinary circumstances exist."); *id.* at 12 ("[T]he IOI will obtain and preserve all available evidence and document the violations to show if the violations were willful[.]"); *id.* at 12–13 ("If the DIO believes such elements have not been proven, including the willfulness required to sustain a . . . revocation under 18 U.S.C. § 923(e), the DIO must fully brief the DAD (IO) as to the basis for this determination.").

What is more, the parties agree as to the definition of willfulness. *See* Pls.' Mot. at 8. Although the GCA does not define the term "willful," courts have consistently held that a licensee acts "willfully" when he "knew of his legal obligation and purposefully disregarded or was plainly indifferent to" that obligation. *Fairmont Cash Mgmt.*, 858 F.3d at 362; *see also Willingham Sports, Inc. v. ATF*, 415 F.3d 1274, 1276–77 (11th Cir. 2005) (per curiam) ("We agree with [five other circuit courts] that a showing of purposeful disregard of or plain indifference to the laws and regulations imposed on firearms dealers shows willfulness for purposes of [the GCA]."); *On Target Sporting Goods, Inc. v. Att'y Gen. of the U.S.*, 472 F.3d 572, 575 (8th Cir. 2007) (defining willfulness in the GCA context as where "a licensee knew of its legal obligation and purposefully disregarded or was plainly indifferent to" that obligation (citation omitted)); *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 85–86 (4th Cir. 2009) (same). The AAP defines the term "willful" in this same manner: "[t]he term willful means a purposeful disregard of, or a plain indifference to, or reckless disregard of a known legal obligation." AAP at 2; *compare* Pls.' Mot. at 8 ("The Fifth Circuit has held that a licensee has acted 'willfully' under the Gun Control Act when he 'knew of his legal obligation and purposefully disregarded or was plainly indifferent to the record-keeping requirements.'" (quoting *Fairmont Cash Mgmt.*, 858 F.3d at 362)). It is therefore entirely unclear to Defendants why Plaintiffs have devoted several pages of their motion to advocate for the "basic and obvious" definition the AAP explicitly adopts. Pls.' Mot. at 9.

Plaintiffs also challenge the AAP's manner of establishing the "knowledge element" of willfulness. *See id.* at 12–13. At its core, Plaintiffs' argument is that too many licensees will satisfy this first element. But the firearms industry is highly regulated, and if functioning properly, it should be the case that the majority of FFLs understand their legal obligations. After all, it is no secret that FFLs are subject to numerous legal requirements and are charged with understanding those requirements. And ATF works hard to help FFLs understand those requirements, as ensuring that FFLs comprehend and comply with their obligations is key to ATF's ultimate goal: protecting communities

from violent crime. That is why following each compliance inspection, the inspecting "IOI will review the federal firearms regulations with the licensee, who will have an opportunity to ask questions." ATF0042; ATF, *Firearms Compliance Inspections*, https://perma.cc/36U8-68CZ. Additionally, ATF has an abundance of publicly-available materials to help FFLs meet their obligations. *See, e.g.*, ATF, *Federal Firearms Licensee Quick Reference and Best Practices Guide*, https://perma.cc/95V9-D8MY (explaining that IOIs assist FFLs "in understanding and complying with the laws and regulations for operating a firearms business," providing links to multiple publications explaining those laws and regulations, "encourag[ing] FFLs to contact ATF if they have any questions about their responsibilities as an FFL," and providing guidance regarding common issues); ATF, *Federal Firearms Regulations Reference Guide*, https://perma.cc/H2ZT-EWSC; ATF, *Safety and Security Information for Federal Firearms Licensees*, https://perma.cc/PCY8-FTF3; ATF, *E-Regulations*, https://perma.cc/3JPP-CGKM (providing editorial, searchable compilation of the regulations governing the manufacture, import, purchase, sale, and transport of firearms and ammunition). Therefore, it should be no surprise that most licensees will be found to have knowledge of their legal obligations.[6]

Additionally, the ways that ATF can prove the "knowledge element" under the AAP are supported by both common sense and prior judicial interpretations of the willfulness standard. For instance, if an FFL previously committed a violation prompting ATF to explain the underlying legal obligation to that FFL, it makes perfect sense to later determine that the FFL had knowledge of that obligation. *See* AAP at 6–7. Likewise, that an FFL has substantial experience or has previously complied with the specific regulation at issue similarly supports that the FFL had knowledge of a particular legal obligation. *Id.* at 7. And importantly, courts have considered factors similar to those

[6] Although Plaintiffs suggest that knowledge will be "automatically imputed," knowledge, like purposeful disregard or plain indifference, must be established by a preponderance of the evidence for ATF to proceed with revocation. *See* AAP at 12.

listed in the AAP in determining that an FFL had knowledge of its legal obligations. *Compare* AAP at 6–7, *with On Target*, 472 F.3d at 572 (establishing knowledge through licensee's repeated failure to follow GCA); *CEW Props., Inc. v. DOJ*, 979 F.3d 1271, 1279–81 (10th Cir. 2020) (considering licensee's training and acknowledgment of training, quantity and seriousness of violations, occasional adherence to regulatory obligations, length of time license had been held, and licensee's statements to investigators in finding willfulness); *Best Loan Co. v. Herbert*, 601 F. Supp. 2d 749, 754–55 (E.D. Va. 2009) ("Best Loan signed an Acknowledgment of Federal Firearms Regulations, demonstrating that the company understood the regulatory requirements applicable to firearms dealing."). And in *Morehouse*, another district court observed that the six options the AAP identifies as ways to establish knowledge "appear to be supported by prior judicial interpretation[s] of the GCA's willfulness requirement." 2024 WL 708954, at *10 (citing cases).

Plaintiffs' next contention—that ATF has deleted the requirement that a licensee purposefully disregarded or was plainly indifferent to a known legal obligation—is wrong. *See* Pls.' Mot. at 13. The AAP explicitly includes this requirement in its definition of willfulness. AAP at 2 ("The term willful means a *purposeful disregard of, or a plain indifference to*, or reckless disregard of a known legal obligation." (emphasis added)). The AAP therefore reflects that this component, along with knowledge, must also be proven by a preponderance of the evidence following a hearing in order to proceed with a final license revocation, the same as always, in line with how courts have defined willfulness.

Plaintiffs' arguments on this score focus on the AAP's "inherently demonstrate willfulness" language, *see* Pls.' Mot. at 13–14. That language, however, is included within the context of explaining that "ATF *does not have to establish a history of prior violations* to demonstrate willfulness," and the agency may revoke a license based on initial violations if those violations demonstrate willfulness and are warranted by the circumstances. *See* AAP at 6 (emphasis added). This language does not somehow abrogate the agency's definition of willfulness set forth clearly in the AAP on a previous page, and

read in context, there can be no doubt that ATF still requires willfulness—defined as requiring both knowledge and purposeful disregard or plain indifference—for such violations; *see also* ATF Decl. ¶ 10 ("The 'inherently demonstrate' language simply means that ATF need not establish a *history* of prior violations to demonstrate the willfulness of a violation. It does not mean that ATF will revoke a license upon the mere finding of one of these five violations."). And indeed, the definition of willfulness has remained consistent across ATF's recent versions of the AAP. *Compare* ATF0500 *with* ATF0511 *and* ATF0523. Through adoption of the Policy, ATF has merely decided to prioritize enforcement for some willful violations over others; it has not eliminated or altered the willfulness requirement with regards to those violations.

Plaintiffs' hypotheticals regarding how ATF is applying the AAP are neither based in reality, nor final agency action suited to judicial review. *See* Pls.' Mot. at 14–15. Plaintiffs have not had the AAP applied towards them in this manner, nor can they even identify another FFL who has. Plaintiffs cannot invalidate and enjoin the AAP on its face based on speculation about how it *might* be applied to other FFLs without any competent evidence to support those allegations. *See Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670 (5th Cir. 2015) (summary judgment cannot be avoided by presenting "speculation, improbable inferences, or unsubstantiated assertions" (citations omitted)); *Cordoba v. Dillard's Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("Speculation does not create a genuine issue of fact; instead it creates a false issue, the demolition of which is a primary goal of summary judgment." (citation omitted)).

Lastly, decisions from other district courts concerning the AAP support Defendants' arguments, and Plaintiffs point to no authority endorsing theirs. For instance, as noted above, in *Morehouse*, the court found that the AAP "appear[s] to be supported by prior judicial interpretation of the GCA's willfulness requirement," that courts "are in agreement that only a single willful violation

is sufficient to revoke a federal firearms license," and therefore, that "the AAP does not appear to violate the GCA," in line with Defendants' arguments. 2024 WL 708954, at *10 (citation omitted).

For all these reasons, the AAP is entirely consistent with the text and requirements of the GCA.

III. ATF's enforcement policy does not violate the Second Amendment.

Plaintiffs' second claim, that the AAP violates the Second Amendment, Compl. ¶¶ 67–76 and Pls.' Mot. at 15–17, likewise fails as a matter of law.[7] *See Morehouse*, 2024 WL 708954, at *10 (rejecting similar claims to those brought here).

The Supreme Court clarified the framework for assessing Second Amendment challenges to firearm regulations in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Under *Bruen*, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 597 U.S. at 24. A regulation governing such conduct is justified, however, so long as the government "demonstrat[es] that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Here, Plaintiffs do not challenge any particular application of the AAP. Rather, they have brought a facial challenge to ATF's enforcement policy, and must therefore show the AAP "is unconstitutional in *all* of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added).

Plaintiffs' Second Amendment claim fails on multiple fronts under these standards. As a threshold matter, Plaintiffs fail to establish that the AAP burdens any conduct that is encompassed by the Second Amendment's plain text. And while the Court can dispose of Plaintiffs' claim without engaging in the "historical analysis prescribed by *Bruen*'s second step," *United States v. Sitladeen*, 64 F.4th

[7] To the extent that Plaintiffs' Second Amendment claim relies on the AAP's purported elimination of the GCA's willfulness requirement, it fails for the reasons set forth above. *See supra* pp. 5, 11–17; *see also Morehouse*, 2024 WL 708954, at *10.

978, 986 n.3 (8th Cir. 2023), the licensing and inspection regime that the AAP implements is supported by a robust historical tradition of regulating commercial firearms sales.

a. Plaintiffs fail to show the AAP burdens conduct covered by the Second Amendment's text.

To determine whether a firearm regulation is constitutionally sound under *Bruen*, "a court must begin by asking whether" the regulation in question "governs conduct that falls within the plain text of the Second Amendment." *Sitladeen*, 64 F.4th at 985; *see United States v. Tilotta*, No. 3:19-cr-04768, 2022 WL 3924282, at *6 (S.D. Cal. Aug. 30, 2022) ("[S]imply because a law involves firearms does not mean that the Second Amendment is necessarily implicated."). "Only if the answer is yes" should the court then "proceed to ask whether" the regulation "fits within America's historical tradition of firearm regulation." *Sitladeen*, 64 F.4th at 985. Because Plaintiffs fail to identify *any* constitutionally protected conduct that is meaningfully burdened by the AAP, they cannot satisfy this "threshold textual inquiry," and their Second Amendment claim fails. *Id.* at 986 n.3.

Plaintiffs argue that the AAP "violates the Second Amendment right to the means of effective self-defense" by "threaten[ing] total closure to access to training and arms based on paperwork errors." Pls.' Mot. at 15, 16. But the Second Amendment simply "does not confer a freestanding right" on private businesses to engage in the commercial sale of firearms—much less to engage in the commercial sale of firearms while in willful violation of the law. *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 673 (9th Cir. 2017) (en banc). To the contrary, *District of Columbia v. Heller*, made clear that the Second Amendment's text "guarantee[s] the *individual* right to possess and carry weapons" for purposes of *self-defense*. 554 U.S. 570, 592 (2008) (emphasis added); *see McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) ("[I]n *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right." (quoting *Heller*, 554 U.S. at 599)). And *Bruen* reiterated that the Second Amendment confers an "*individual*[] right" to "armed *self-defense*." 597 U.S. at 10, 29 (emphasis added). Accordingly, both before and after *Bruen*, courts routinely agreed that the Second Amendment does

not additionally protect the right of a *private business* like Plaintiffs' and other FFLs to *sell* firearms. *See United States v. Flores*, 652 F. Supp. 3d 796, 803 (S.D. Tex. 2023) (concluding that "commercial firearm dealing is not covered by the Second Amendment's plain text"); *United States v. Deare*, No. 6:21-CR-00212-01, 2023 WL 4732568, at *2 (W.D. La. July 24, 2023) ("Defendants have failed to persuade this Court that these commercial licensure and recordkeeping requirements implicate the Second Amendment.").[8]

That Plaintiffs cannot state a Second Amendment claim based on the speculative impact of the AAP on FFLs is reinforced by the Supreme Court's distinction between regulations implicating the "core" Second Amendment right of an individual "to use arms in defense of hearth and home," and those that "impos[e] conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27, 634–35; *see also Morehouse*, 2024 WL 708954, at *10. The Court described the latter type of regulations as "presumptively lawful" in *Heller*, 554 U.S. at 627 n.26, and "*Bruen* did nothing to disturb that part of *Heller*." *McRorey v. Garland*, ---F.4th---, No. 23-10837, 2024 1825398, at *3 (5th Cir. Apr. 26, 2024). In *McDonald*, the Court "repeat[ed]" its "assurances" that *Heller* "did not cast doubt on . . . longstanding regulatory measures" involving commercial firearms sales. 561 U.S. at 786. And in *Bruen*, three of the Justices in the six-Justice majority reiterated that the decision (1) "decide[d] nothing about . . . the requirements that must be met to buy a gun," 597 U.S. at 72 (Alito, J.,

[8] *See also Teixeira*, 873 F.3d at 683 ("Nothing in the text of the [Second] Amendment . . . suggests [it] confers an independent right to sell or trade weapons."); *United States v. King*, 646 F. Supp. 3d 603, 607 (E.D. Pa. 2022) ("[T]he Second Amendment does not protect the *commercial* dealing of firearms."); *United States v. Kazmende*, No. 1:22-cr-236-SDG-CCB, 2023 WL 3872209, at *5 (N.D. Ga. May 17, 2023) (agreeing that the Second Amendment "simply does not extend to the commercial sale of firearms" and collecting cases concluding the same), *report and recommendation adopted*, 2023 WL 3867792 (N.D. Ga. June 7, 2023); *see also Morehouse Enters., LLC v. ATF*, 78 F.4th 1011, 1018 (8th Cir. 2023) ("Regarding the business plaintiff in this case, we are left unsure what behavior it wishes to engage in, as an LLC, that is protected by the Second Amendment."), *reh'g and reh'g en banc denied*, 2023 WL 7205512 (8th Cir. Nov. 2, 2023); *Gazzola v. Hochul*, 645 F. Supp. 3d 37, 64 (N.D.N.Y. 2022) (concluding that the "individual right secured by the Second Amendment" does not "appl[y] to corporations or any other business organizations"), *aff'd*, 88 F.4th 186 (2d Cir. 2023).

concurring); (2) did not "disturb[] anything that [the Court] said in [*Heller*] about restrictions that may be imposed on the possession or carrying of guns," *id.*; and (3) still allowed for "a variety of gun regulations," including ones "imposing conditions and qualifications on the commercial sale of arms" as recognized in *Heller*, *id.* at 80–81 (citations omitted) (Kavanaugh, J., joined by Roberts, C.J., concurring). Thus, because the AAP provides guidance regarding inspection and enforcement procedures involving FFLs engaged in the business of selling firearms, Plaintiffs cannot show that such a presumptively lawful commercial regulation violates the Second Amendment.

Nor have Plaintiffs established that they are entitled to assert the "concomitant rights" of their customers. *See* Pls.' Mot. at 15 (quoting *Craig v. Boren*, 429 U.S. 190, 195 (1976)); Compl. ¶ 84. The Policy was announced nearly three years ago, and the challenged AAP has existed in some form since at least 2022. *Supra* p. 4. Yet Plaintiffs have not identified a single gun store in imminent danger of closing because of the AAP, nor do they name a single customer—whether in Austin, Texas, or elsewhere—whose ability to purchase firearms would be "meaningfully constrained" by such a closure. *See Gazzola v. Hochul*, 88 F.4th 186, 197 (2d Cir. 2023), *petition for cert. docketed*, No. 23-995 (U.S. Mar. 12, 2024); *Teixeira*, 873 F.3d at 680; *see also Morehouse*, 2024 WL 708954, at *10 (finding Plaintiffs' allegations that "individual gun owners' constitutional right to purchase firearms will be infringed as FFLs go out of business is too speculative to warrant analysis at [preliminary injunction] stage."). Mr. Cargill's "fear" that ATF will "attempt to revoke [his] license," Pl.'s Decl. ¶ 13, and unsupported speculation that the AAP "threatens total closure to access to training and arms based on paperwork errors" are insufficient to raise a genuine dispute of material fact, much less establish their derivative claims as a matter of law.[9] Pls.' Mot. at 16 (citing Ex. 3 to Pls.' Mot. at 6, ATF0527, ECF No. 53-1);

[9] Of course, any FFL that has its license revoked is entitled to *de novo* review by a federal district court. 18 U.S.C. § 923(f)(3); *see supra* p. 3. ATF then has the opportunity to demonstrate that revocation is supported by at least one willful violation of the GCA. *See*, *e.g.*, *Heartland Outdoor, Inc. v. Miller,* No.

see Fountain v. Rupert, No. 6:15-cv-100, 2024 U.S. Dist. LEXIS 65484, at *32 (E.D. Tex. Jan. 9, 2024), *report and recommendation adopted* 2024 U.S. Dist. LEXIS 64580, 2024 WL 1530805, (E.D. Tex. Apr. 9, 2024) ("[T]he concern or fear of future, speculative injures is not competent summary judgment evidence."), *appeal filed* Apr. 23, 2024. To the contrary, undisputed facts show that ATF's enforcement priorities have not had any material impact on the ability of private citizens to acquire weapons or training: in 2022, for example, only about 1/10th of 1% of FFLs nationwide were subject to revocation (including voluntarily ceasing operations) under the AAP. *See* ATF0476 (listing 136,563 active federal firearms licenses, meaning that AAP-related revocations represent approximately .11% and .17% of the total number of licenses). And, at least through 2022, none of the revoked FFLs appeared to be located in Austin, Texas. *See* ATF0049–0060; ATF, *Enhanced Regulatory Enforcement Policy,* https://perma.cc/4TT6-TK8T.

In sum, the conduct challenged in Plaintiffs' Complaint does not implicate the Second Amendment, and there is no genuine dispute of material fact precluding summary judgment on their derivative claims. Their Second Amendment claim therefore fails as a matter of law at *Bruen*'s first step, and the Court need not proceed to the second step of the *Bruen* inquiry. *See Second Amend. Found., Inc. v. ATF*, ---F. Supp. 3d---, 2023 WL 7490149, at *12 (N.D. Tex. Nov. 13, 2023) ("Nothing in *Bruen* requires one to unconditionally proceed to the second step of the inquiry where the first step is not met."), *appeal filed*, No. 23-11157 (5th Cir. Nov. 14, 2023).

23-1182-DDC-BGS, 2023 WL 6376751, at *5–6 (D. Kan. Sept. 29, 2023) (acknowledging the AAP's enforcement priorities and holding that an FFL was unlikely to succeed on the merits of its challenge to ATF's revocation decision). Indeed, the Fifth Circuit has repeatedly upheld ATF revocations for violations of the GCA, even where the gun shop argues—similar to the hypotheticals posed by Plaintiffs here, Pls.' Mot. at 16—that its violations were the result of record-keeping mistakes and not willful. *See Fairmont Cash Mgmt.*, 858 F.3d at 360; *Athens Pawn Shop Inc. v. Bennett*, 364 F. App'x 58, 59 (5th Cir. 2010) (affirming summary judgment for ATF where the pawn shop did not dispute the found violations, but argued "that revocation of its license was not warranted because the violations were not willful and were due to inadvertent and technical record-keeping mistakes"); *Weaver v. Harris*, 486 F. App'x 503, 504 (5th Cir. 2012) (same).

b. A robust historical tradition supports the regulation of commercial firearms dealers.

As the Fifth Circuit recently recognized, "[o]n its face 'keep and bear' does not include purchase." *McRorey*, 2024 WL 1825398, at *4. And although "[t]he right to 'keep and bear' can implicate the right to purchase . . . such an implication is not the same thing as being covered by the plain text of the amendment." *Id.* at 4. The AAP is even further removed from the plain text—it does not regulate any conduct protected by the Second Amendment. *Supra* Part III.a. Instead, the AAP reflects ATF's enforcement priorities, and the Second Amendment does not require Defendants to identify a historical analogue for the Executive's prosecutorial discretion. *Supra* pp. 8–11. Rather, all of the relevant substantive legal obligations come from the GCA, which Plaintiffs do not challenge. *See supra* pp. 8, 11. To the extent Defendants are required to identify historical analogues for the GCA regulations prioritized for enforcement, *contra McRorey*, 2024 WL 1825398, at *4, Defendants focus their Second Amendment analysis there.

Under *Bruen*, to demonstrate that a regulation "is consistent with the Nation's historical tradition of firearm regulation," the government need only "identify a well-established and representative historical *analogue*" that is "relevantly similar" to the modern regulation being challenged. 597 U.S. at 24, 29–30. And a modern regulation can be "analogous enough" to a relevant historical precursor "to pass constitutional muster" if the "modern and historical regulations impose a comparable burden on the right of armed self-defense" that is "comparably justified." *Id.* at 29–30. Identifying a "historical *twin*" is not necessary. *Id.* at 30.

A robust historical tradition supports the government's authority to regulate the commercial sale of firearms by requiring licenses for and the inspection of firearms sellers.[10] In fact, since colonial times, state and local governments have routinely exercised their authority to regulate the sale of

[10] Please see attached Appendix of Laws for the historical laws referenced in this Part.

firearms through licensing, inspections, and similar enforcement procedures. *Deare*, 2023 WL 4732568, at *2 ("Despite having concluded that the Second Amendment is not implicated, the Court further agrees with the Government that there is 'historical tradition' of regulating firearm sales that dates back to the 'Founding' period.") (collecting cases).

The third U.S. Congress, for instance, made it unlawful for a limited period "to export from the United States any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenades, gunpowder, sulpher[,] or saltpetre," Act of May 22, 1794, ch. 33, § 1, 1 Stat. 369, ("An Act prohibiting for a limited time the Exportation of Arms and Ammunition, and encouraging the Importation of the same"), which reveals a clear understanding on the part of Founding-era government officials that the Constitution permitted strict regulation of firearms sellers. As the *en banc* Ninth Circuit recounted in detail, colonial governments also "substantially controlled the firearms trade," including through "restrictions on the commercial sale of firearms." *Teixeira*, 873 F.3d at 685; *see id.* ("Governmental involvement in the provision, storage, and sale of arms and gunpowder is consistent with the purpose of maintaining an armed militia capable of defending the colonies."). "In response to the threat posed by Indian tribes," for example, "the colonies of Massachusetts, Connecticut, Maryland, and Virginia all passed laws in the first half of the seventeenth century making it a crime to sell, give, or otherwise deliver firearms or ammunition to Indians." *Id.* Connecticut and Virginia further "controlled more generally where colonial settlers could transport or sell guns," with the former banning the "sale of firearms by its residents outside the colony," and the latter criminalizing the possession of "arms or ammunition above and beyond what . . . [was] need[ed] for personal use" "within an Indian town or more than three miles from an English plantation." *Id.* And

in the early nineteenth century, multiple states regulated so-called "Bowie Knives" by taxing their sale or possession or prohibiting their sale entirely.[11]

Less restrictive yet still analogous measures on firearms sellers were also commonplace historically. In the first decade of the 1800s, for instance, Massachusetts required that all musket and pistol barrels manufactured in the state and offered for sale be "proved"—that is, inspected and marked by designated individuals—upon payment of a fee to ensure the weapons' safe condition, and Maine enacted similar requirements in 1821. *See United States v. Alberts*, No. CR 23-131-BLG-SPW, 2024 WL 1486145, at *5 (D. Mont. Apr. 5, 2024) (citing Laws of the Commonwealth of Mass. from Nov. 28, 1780 to Feb. 28, 1807, 259–61 (1807); Laws of the State of Maine 546 (1830)). Furthermore, multiple states—including Massachusetts (1651 and 1809), Connecticut (1775), New Jersey (1776), and New Hampshire (1820)—required licenses or inspection to export or sell gunpowder, which was the historical equivalent to modern ammunition.[12] *See also Rocky Mountain Gun Owners v. Polis*, ---F. Supp. 3d---, 2023 WL 8446495, at *19 (D. Colo. Nov. 13, 2023) (relying on expert testimony to

[11] *See*, *e.g.*, 1837 Ala. Acts 7, §§ 1, 2 (imposed $100 tax on sale of Bowie Knives and "Arkanssaw [sic] Tooth-picks"); 1837-1838 Tenn. Pub. Acts 200, An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, ch. 137, § 1 (prohibited sale of such knives); 1855–56 Tenn. L. 92, ch. 81 (prohibited sale of such knives and other arms to minors).

[12] *See* Colonial Laws of Mass. Reprint. from the Ed. of 1672, at 126 (1890); 2 General Laws of Mass. from the Adoption of the Constitution to Feb. 1822, 198, 200 (1823) (1809 statute providing for the appointment of an "inspector of gunpowder for every public powder magazine, and at every manufactory of gunpowder," and imposing penalties for any sale or export of gunpowder "before the same has been inspected and marked"); 15 The Public Records of the Colony of Connecticut 191 (1890) (1775 Connecticut law establishing, among other things, that no gunpowder manufactured in the colony "shall be exported out" of the colony "without [an applicable] licence," and no gunpowder manufactory "shall . . . be erected . . . without the [applicable] licence"); Laws of the State of N.H.; with the Constitutions of the U.S. and of the State Prefixed 276 (1830) (authorizing "inspector of gunpowder for every public powder magazine, and at every manufactory of gunpowder in this state" and imposing penalties for any sale or disposition of gunpowder "before the same has been inspected and marked agreeably"); *see also* 3 Laws of the Commonwealth of Pennsylvania, from the Fourteenth Day of October, One Thousand Seven Hundred 240-44 (1810) (1795 statute requiring that before any gunpowder be brought into the city, county, or port of Philadelphia, it be appropriately marked and deposited in a public magazine).

conclude that the "longstanding history of firearm licensing regimes in the United States" provided sufficient historical analogues to uphold at the preliminary injunction stage the constitutionality of a state statute imposing a three-day waiting period for gun sales), *appeal filed* No. 23-1380 (10th Cir. Dec. 6, 2023); *United States v. Libertad*, 681 F. Supp. 3d 102, 114 (S.D.N.Y. 2023) (finding that various historical state firearms laws "demonstrate[d] the expansive authority exercised by colonial and early state legislatures as well as early congresses over the transfer of firearms between individuals and across borders," which included licensing and registration requirements); *cf. Bruen*, 597 U.S. at 38 n.9 (suggesting that shall-issue licensing regimes were not unconstitutional under the two-step *Bruen* framework). Similar licensing and taxation requirements for the sale of gunpowder and certain arms were also enacted in the antebellum and Reconstruction eras.[13]

In short, early American governments closely controlled the sale and manufacture of firearms and ammunition, and in many cases delineated who could buy and sell such arms as well as the areas where firearms could be offered for sale. Accordingly, the licensing and inspection procedures described in the AAP—which similarly govern the commercial sale of firearms—are wholly "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. And that in turn means that Plaintiffs' Second Amendment challenge to the AAP fails as a matter of law.

IV. Plaintiffs' *Larson* claim fails as a matter of law.

Plaintiffs have also brought an *ultra vires* claim pursuant to the *Larson* doctrine for equitable relief but are not entitled to relief on that basis. *See* Pls.' Mot. at 17–18.

To start, "under [Fifth Circuit] precedent, Congress apparently did away with the *ultra vires*

[13] Ordinances of the City of Chicago, Ill., ch. 16, § 1 (1851 city law barring the sale of gunpowder absent written permission of the authorities); Ordinances of the City of St. Paul, Minn., ch. 21, § 1 (similar 1858 city law); 1874 Ala. L. 41, ch. 1 (imposed $25 occupational tax on dealers of pistols and certain knives); 1878 Ala. L. 437, ch. 314 (authorized town to license dealers of pistols and certain knives).

doctrine and other fictions surrounding sovereign immunity when it amended the APA in 1976." *Apter v. Dep't of Health & Human Servs.*, 80 F.4th 579, 593 (5th Cir. 2023) (citation omitted and cleaned up); *see also Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985) ("The principal purpose of the [1976] amendment was to do away with the *ultra vires* doctrine and other fictions surrounding sovereign immunity."); *see also Danos v. Jones*, 652 F.3d 577 (5th Cir. 2011); *E.V. v. Robinson*, 906 F.3d 1082, 1092 (9th Cir. 2018); *Burnett Specialists v. Abruzzo*, No. 4:22-cv-00605, 2023 WL 5660138, at *5 (E.D. Tex. Aug. 31, 2023), *appeal filed*, No. 23-40629 (5th Cir. Nov. 1, 2023). Accordingly, the Fifth Circuit, like several other circuit courts, has declined to apply the common-law doctrine of *ultra vires* review when other forms of review, like APA review, are available. *See Apter*, 80 F.4th at 593 (citing *Robinson*, 906 F.3d at 1092–93; *Dotson v. Griesa*, 398 F.3d 156, 177 & n.15 (2d Cir. 2005); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1308–09, 1307 n.20 (11th Cir. 2001); *Strickland v. United States*, 32 F. 4th 311, 366 (4th Cir. 2022)). For this reason, an *ultra vires* challenge, like a *Larson* claim, is "essentially a Hail Mary pass[.]" *Fed. Express Corp. v. United States Dep't of Com.*, 39 F.4th 756, 764–65 (D.C. Cir. 2022) (citation omitted).

Even assuming this cause of action still exists, it is available only when a plaintiff establishes that a government officer was acting "without any authority whatever, or without any colorable basis for the exercise of authority." *Danos*, 652 F.3d at 583 (citation omitted); *see also Apter*, 80 F.4th at 587–88 (same). An officer's actions are not *ultra vires* if they are merely "based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 695 (1949). Instead, the "agency overstep must be 'plain on the record and on the face of the statute.'" *Fed. Express Corp.*, 39 F.4th at 765 (cleaned up and quoting *Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233, 238 n.7 (1968)).

Here, for the reasons set forth above, by prioritizing enforcement for five types of willful violations, Defendants acted consistent with their authority under the GCA and did not violate the

Second Amendment. But even assuming the AAP is somehow inconsistent with the GCA, Defendants have not acted *ultra vires*. The GCA specifically provides that "[t]he Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter[.]" 18 U.S.C. § 923(e). Thus, the GCA clearly provides Defendants with authority to prescribe regulations regarding licensing as well as to revoke licenses for the willful violation of the GCA itself or its implementing regulations—the very authority exercised through the AAP. Notably, the GCA itself does not define willfulness, so it's not evident how any technical change in ATF's definition of willfulness could amount to overstep plain on the face of the statute.[14] Instead, even if ATF's definition had some technical defect, that defect would amount to merely an incorrect decision of fact or law and would not implicate the *ultra vires* doctrine.

Accordingly, Plaintiffs have not established an entitlement to the extraordinary equitable relief they seek.

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment should be granted and Plaintiffs' Motion for Summary Judgment should be denied.

Dated: May 13, 2024

Respectfully submitted,

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[14] To be clear, Defendants maintain that the Policy does not reflect a change in ATF's definition of willfulness, and that definition continues to mirror judicial constructions of that definition.

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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