IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL CARGILL and CTC HGC, LLC, *Plaintiffs*,	§	
v.	§	Civil Action No. 1:22-cv-01063
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; ATF DIRECTOR STEVEN DETTELBACH, in his official capacity; ATTORNEY GENERAL MERRICK GARLAND, in his official capacity; UNITED STATES DEPARTMENT OF JUSTICE; and UNITED STATES OF AMERICA, *Defendants*.	§	*Oral argument requested*

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Michael Cargill and CTC HGC, LLC (collectively, "Plaintiff")[1] herein respond to Defendants' Motion to Dismiss (ECF No. 7, hereinafter "Motion").

The Court should deny Defendants' Motion for two reasons: (1) Plaintiff has properly pled that Defendants changed their revocation policy, and that they are currently revoking federal firearms licenses ("FFLs") under that new policy; and (2) Defendants have completely failed to engage with Plaintiff's *Larson* claim, which alleges that federal officers have violated the U.S. Constitution by their actions.

I. Legal Standards.

Defendants invoke Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) in their Motion.

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. The party asserting jurisdiction bears the burden of proving jurisdiction exists. *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014). In a facial attack under Rule 12(b)(1), the court accepts all material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted *only if* it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (emphasis added).

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim. It "concerns the formal sufficiency of the statement of the claim for

[1] In the Motion, Defendants refer to both plaintiffs in the singular because Michael Cargill owns CTC HGC, LLC. For simplicity, this Response will do the same.

relief, not a lawsuit's merits." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 582 (5th Cir. 2020) (internal quotations omitted). The complaint need only be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court assumes "that the facts the complaint alleges are true and views those facts in the light most favorable to the plaintiff." *Sewell*, 974 F.3d at 582. The Court must also "draw all inferences in favor" of the plaintiff. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). Plaintiff does "not need detailed factual allegations" to survive a Rule 12(b)(6) motion but must merely "provide the grounds" using "more than labels and conclusions." *Sullivan v. Leor Energy LLC*, 600 F.3d 542, 546 (5th Cir. 2010). A plaintiff need not show he will "ultimately prevail," merely "whether he is entitled to offer evidence to support his claims." *Id.*

II. Defendants' motion is without merit and should be denied.

Defendants move to dismiss on the grounds of subject matter jurisdiction—based on final agency action, standing, and ripeness concerns—and failure to state a claim that entitles Plaintiff to relief. As shown below, the agency action, standing, and ripeness arguments are defeated by the fact that Plaintiffs have met their pleading burden. Plaintiff's pleading adequately alleges that Defendants are currently revoking federal firearm licenses ("FFLs") under the new enforcement policy, which they announced in June 2021, enacted through a July 2021 memo to all Special Agents in Charge. That change was then formalized through a revision to ATF-O-5371.1D.

At this stage, the Court is required to assume that the facts in the Complaint are true. *Sewell*, 974 F.3d at 582. Defendants, instead, take immediately to arguing that they are false, which is inappropriate at the motion to dismiss stage. *See Sewell*,

974 F.3d at 582. As shown below, Plaintiffs' allegations are more than sufficient to establish this Court's subject-matter jurisdiction.

A. Defendants' announcement and subsequent enforcement order constitutes final agency action.

Defendants first argue that this Court lacks subject-matter jurisdiction because there has been no final agency action. This is incorrect. There can be no doubt that Defendants' actions constitute final and reviewable agency action under the APA.

As a preliminary matter, "there is a well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[.]" *Reno v. Catholic Soc. Serv.*, 509 U.S. 43, 63-64 (1993) (internal quotations omitted). "Establishing unreviewablity is a heavy burden[.]" *Texas v. United States*, 809 F.3d 134, 164 (5th Cir. 2015) ("*Texas II*") (internal quotations omitted). Additionally, agency action is final if two conditions are met: (1) "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights and obligations have been determined, or from which legal consequences flow." *Louisiana v. U.S. Army Corps of Engineers*, 834 F.3d 574, 580 (5th Cir. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

As soon as an "agency action withdraws an entity's previously held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." *Data Marketing Partnership, LP v. United States Dept. of Labor*, 45 F.4th 846, 854 (5th Cir. 2022) (quoting *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019)); *see also Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022) (agency memo that "bound DHS staff" constituted final agency action); *cf. Texas v. United States*, 787 F.3d 733, 763

(5th Cir. 2015) ("*Texas I*") (a substantive rule is one that has a "binding effect on agency discretion or severely restricts it"). Final agency action occurs when there is a determination of "rights and obligations," *Bennett*, 520 U.S. at 603, whether by "rule, order, license, sanction relief, or similar action." 5 U.S.C. § 551(13). Legal consequences flow "whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability." *Id.* at 581. Further, plaintiffs "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 600 (2016) (internal quotations omitted).

As demonstrated in the Complaint, Defendants publicly announced a new enforcement policy in June 2021. Pl. Compl. ECF 1 ¶ 34 (hereinafter "Compl."). The Department of Justice similarly announced it would be changing its enforcement policy. Compl. Ex. C at 5 ("The Department will issue a new policy explaining how responsible conduct by federally licensed firearms dealers may play a role in its related enforcement decisions[.]"). A July 2021 memo from Acting Assistant Director of the ATF George Lauder to all Special Agents in Charge and all Directors of Industry operations further reiterated the policy change. Compl. Ex. B. The memo was an explicit change from previous practice: a single violation of the five listed violations "shall result in a revocation recommendation." *Id.* The memo further promised a revised ATF-O-5370.1D (the "Enforcement Order"),[2] which memorializes the new enforcement policy. Compl. ¶ 36.

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[2] Redacted and unredacted versions of ATF-O-5370.1D are available online. The document refers to itself as an "order." *See, e.g.*, U.S. Dept. of Justice, Bureau of

Since these actions, FFL revocations have skyrocketed. The surge in enforcement is well-documented[3] and not disputed in Defendants' Motion. Nevertheless, without revealing the contents of the revised Enforcement Order,[4] Defendants ask the Court to dismiss the Complaint as "speculation" and argue that there is no factual basis for Plaintiff's claims and that their actions do not constitute final agency action. Motion at 10-13.

The announcement of the new policy, followed by the enactment of a revised Enforcement Order constitutes final agency action. It marks the end of the ATF's decision-making process regarding how it enforces FFL revocations under the Gun Control Act. Further, it imposes obligations on all FFL-holders, like Plaintiff. As described by the July 2021 memo, the new policy is that ATF's finding of a single violation "shall result in a revocation recommendation." Plaintiffs are entitled to an inference that the revised Enforcement Order reflects this policy. *Club Retro*, 568 F.3d at 194 (Courts "must accept all well-pleaded facts as true, draw all inferences in favor of the nonmoving party, and view all facts and inferences in the light most

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Alcohol, Tobacco, Firearms, and Explosives, ATF-O-53701.D (Oct. 2,2019) (available at: https://bit.ly/3RmS3UM). It is safe to infer that the revised Enforcement Order refers to itself the same way.

[3] As explained in the Complaint, FFL revocations were exceedingly rare prior to 2021. Compl. ¶¶ 30, 33; *see also* Barton, Champe, "New data shows ATF gun store revocations at highest rate in 16 years," *The Trace, USA Today* (Oct. 5, 2022) (available at: https://bit.ly/3kTRc1H/); It has even caught the attention of Congress. On two recent occasions, members of Congress have recently written to the ATF requesting more information about the new policy, based on information they have received from constituents. U.S. Rep. Andy Biggs *et al.*, Letter from 25 Congressmen to Acting ATF Director Gary Restaino (June 29, 2022) (available at: https://bit.ly/3HO1A48); U.S. Sens. Grassley & Ernst, Letter from Iowa Senators to ATF Director Steven Dettelbach (available at: https://bit.ly/3HY3BLr).

[4] Counsel for Defendants confirmed to undersigned counsel for Plaintiff that Defendants have indeed amended ATF-O-5370.1D.

favorable to the nonmoving party."). This new policy upends decades of the ATF's enforcement practices concerning FFL revocations. Compl. ¶¶ 23-41.

Defendants' argument that their actions do not constitute final agency action directly contradicts recent Supreme Court precedent. In *Biden v. Texas*, the Court explained that agency statements "designed to implement, interpret, or prescribe law or policy" are final agency actions. 142 S. Ct. at 2545 (quoting 5 U.S.C. § 551(4)). There, the Court held that a memorandum that "officially terminat[ed]" a program of the Department of Homeland Security constituted final agency action because it "bound" the agency staff. *Id.* at 2536, 2545. Similarly, the Fifth Circuit has explained that substantive rules are those that have a "binding effect on agency discretion or severely restricts it." *Texas I*, 787 F.3d at 763. Importantly, the agency's characterization of its actions is not entitled to deference; rather, the Court will look to whether the agency applies its policy "in a way that indicates it is binding" or "severely restricts discretion." *Id.* at 763-64 (rejecting the agency's use of terms like "guidance," "case-by-case," and "prosecutorial discretion[]" in its briefing to the court) (internal quotations omitted). Further, "a substantive rule . . . is, by definition, a final agency action." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (internal quotes omitted).

These cases explain why the policy that Plaintiff challenges here constitutes final agency action. Defendants announced a policy change, Compl. ¶ 34, Motion Ex. A, issued a memorandum to their agents explaining the change, Compl. ¶ 34, Compl. Ex. B, and formalized it as a new enforcement order, Compl. ¶ 36. It binds the agency. Compl. Ex. B ("[A]n inspection that results in a finding that an FFL has willfully committed any of the following violations *shall* result in revocation

recommendation[.]") (emphasis added). The Complaint also demonstrates what a stark change the new policy implements. Compl. ¶ 34, Ex. B (Explaining the previous policy: "It should be noted, however, that ATF does not revoke for every violation it finds; and that revocation actions are seldom initiated until after an FFL has been educated on the requirements of the laws and regulations and given an opportunity to voluntarily comply with them but has failed to do so."). These actions can only be described as a substantive rule, which binds the agency and constitutes final agency action.

The new policy has forced Plaintiff to alter his conduct. Previously, the ATF did "not revoke for every violation it finds; and … revocation actions are seldom initiated until after an FFL[-holder] has been educated on the requirements of the laws and regulations and given an opportunity to voluntarily comply with them but has failed to do so." Compl. Ex. A at 3-4.

Now, Plaintiff, along with all other FFL-holders, must be keenly aware of every immaterial typo or mismarked box on a Form 4473, a form that requires approximately 100 inputs of information. A violation of the Gun Control Act further carries severe civil and criminal penalties. Revocation of an FFL essentially ends a license-holder's business, and violations of the Gun Control Act can also carry severe criminal penalties. *See* 18 U.S.C. § 924. Additionally, just like in *Data Marketing*, the ATF inspectors previously had discretion concerning how to handle violations. Now, Defendants have withdrawn that discretion and bound ATF to a zero-tolerance policy: revocation for a single violation. This is "textbook final agency action." *Data Marketing*, 45 F.4th at 854.

As pled in the Complaint, Defendants announced a new policy and issued the Enforcement Order putting into effect. Plaintiff, as an FFL-holder, is subject to the policy and need not wait for individualized enforcement to challenge it. Plaintiff will demonstrate all of this through discovery. Binding ATF discretion and the severe penalties that accompany violations of the Gun Control Act merely underscore the fact that Defendants' actions constitute final agency action. At an absolute minimum—and especially without disclosing its revisions to ATF-0-5371.1D—Defendants have not met their high burden of showing that Plaintiff *cannot* show any set of facts that would entitle him to relief.

B. The Complaint establishes standing.

Defendants next argue that Plaintiff lacks standing. Motion at 13-16. But Plaintiff has standing to file this lawsuit because he is directly regulated by the Enforcement Order (the revised ATF-0-5371.1D). "If a plaintiff is an object of a regulation there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Contender Farms, L.L.P. v. U.S. Dept. of Agriculture*, 779 F.3d 258, 264 (5th Cir. 2015). It is undisputed that Plaintiff has been inspected in the past and will be inspected in the future. *See* Motion at 5-7, 14-15. For these inspections, the revised Enforcement Order applies.

Plaintiff additionally meets the constitutional elements of standing: (1) an actual or imminent injury; (2) that is fairly traceable to Defendants' conduct; and (3) is redressable by a judgment in its favor. *Id.* For the first prong, an "increased regulatory burden typically satisfies the injury in fact requirement." *Id.* at 266. An injury in fact is required because it "helps to ensure that the plaintiff has a 'personal

stake in the outcome of the controversy.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("*SBA List*"). What the Court looks for is whether a threatened injury is "'certainly impending'" or if "there is a 'substantial risk' that the harm will occur." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 298, 409, 414 n. 5 (2013)). The harm does not need to be "literally certain," but merely enough that it "prompt[s] plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper*, 568 U.S. at 414 n.5.

This is undoubtedly the case here, where Defendants' revised Enforcement Order has resulted in increased compliance costs for Plaintiff. Plaintiff also has a personal stake in the outcome, as how he operates his business depends on Defendants' Enforcement Policy. Accordingly, Defendants' argument that there is no imminent injury also rings hollow. *See* Motion at 14. FFL-holders are inspected regularly, up to once per year and whenever it is appropriate during the course of a criminal investigation. 18 U.S.C. § 923(g)(1)(B). The threat of future enforcement is "substantial" and "impending." *SBA List*, 573 U.S. at 164. Further, there is no statute of limitations regarding previous inspections, and there is no guarantee that Defendants will not enforce the new Enforcement Order against him for his previous inspections.

Defendants also do not appear to be challenging that Plaintiff can bring his claim on behalf of his customers. *See, e.g., Craig v. Boren*, 429 U.S. 190, 195 (1976) (vendors may raise the constitutional claims on their customers' behalf). This alone satisfies the standing prong that requires injury in fact. *Id.* at 194.

Defendants do not appear to challenge the traceability and redressability prongs either, but they are also met. The traceability prong is met because there is

also no doubt that the increased cost of compliance and the threat of revocation comes from Defendants' Enforcement Order. The redressability prong is met because Plaintiff's injury would be redressed by an order of this Court vacating the challenged policy or enjoining its enforcement.

C. The Complaint establishes ripeness.

For similar reasons, Defendants' argument that Plaintiff's claims are not ripe fails. *See* Motion at 16-18. The case is ripe for review. "The ripeness inquiry hinges on two factors: the fitness of the issues for judicial decision; and the hardship of the parties of withholding court consideration." *Cochran v. United States SEC*, 20 F.4th 194, 212 (5th Cir. 2021). It focuses on "whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Lower Colo. River Auth. v. Papalote Creek II, LLC*, 858 F.3d 916, 924 (5th Cir. 2022). Regarding the hardship inquiry, review is appropriate when hardship is "sufficiently direct and immediate." *Id.* Threatened legal proceedings are one such harm that may be enough to "give rise to . . . pre-enforcement review." *SBA List*, 573 U.S. at 165. Plaintiffs need not wait for "costly" administrative proceedings for a case to be ripe for review. *Id.* at 168.

Both the fitness and hardship prongs are met here. The first is met because Plaintiff is sufficiently at risk of Defendants applying the Enforcement Order against him. As discussed above, FFL-holders are regularly inspected. It is merely a matter of time before the next one inevitably occurs, and Plaintiff is still liable for previous inspections.

The added compliance burden and fear of having an FFL wrongfully revoked is a sufficiently direct and immediate hardship to show ripeness. The ATF's collaborative enforcement era is over, and now Plaintiff, like all licensees, faces a

situation where he must be perfect in completing thousands of firearm transaction records, each of which must contain almost 100 discrete pieces of information. Thus, if a licensee sells 10,000 firearms in a year, he must submit background-check forms containing almost one million data points, and every single one of those points must be perfect under Defendants' new enforcement regime. This is plainly impossible, and it is at odds with the statutory scheme.

Defendants prefer to wait for Plaintiff to face administrative proceedings before seeking de novo review in district court; this is untenable. *See* Motion at 17-18. Plaintiff justifiably seeks court adjudication of his claims prior to being dragged into a costly administrative proceeding that might cost him his livelihood. The importance of adjudicating these claims prior to enforcement is only elevated by the fact that his and others' constitutional rights are at stake. The time to determine whether Defendants' new Enforcement Order complies with the Second Amendment and the Gun Control Act is now, not after the ATF attempts to destroy Mr. Cargill's livelihood based on this faulty Enforcement Order.

D. Taking the Complaint's assertion as true, Plaintiff has pled sufficient facts to warrant relief.

Defendants offer an alternative argument that even if ATF is now engaged in a new and unprecedented revocation policy, that policy is perfectly in step with the Gun Control Act. Motion at 18-21. This alternative argument also fails to provide grounds for dismissal.

As discussed above, the Court must take all pleaded facts as true and draw all inferences in favor of Plaintiff. *Sewell*, 974 F.3d at 582. The Court does "not determine what actually is or is not true" at this stage. *Converse v. City of Kemah*, 961 F.3d 771,

780 (5th Cir. 2020) (reversing a Rule 12(b)(6) dismissal). The Court only "ask[s] whether [Plaintiff's] allegations state a claim. *Id.*

Plaintiff alleges that Defendants' new Enforcement Policy radically changed how ATF conducts FFL investigations, resulting in an Enforcement Order that revokes licenses for inadvertent paperwork errors. Compl. ¶¶ 35, 39-41. This violates the Gun Control Act and the Second Amendment. The substance of Defendants' argument is that Plaintiff's allegations are not true. Motion at 18-20. But whether the allegations are true is not the appropriate legal standard for a motion to dismiss under Rule 12(b)(6). *Converse*, 961 F.3d at 780; *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001) ("All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." Plaintiff has the right to conduct discovery and prove up his case. *See Twombly*, 550 U.S. at 556 ("Plausible grounds . . . simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [acts].") Plaintiff will prove that Defendants have implemented a substantive change in policy that now renders the conduct of Defendants in violation of both the Gun Control Act and the Second Amendment.

Further, at this point in the case, the Court must draw inferences in favor of the Plaintiff. Defendants do not contest that FFL revocations have increased and that there is a new policy. The specifics of the new Enforcement Order—the revised ATF-0-5371.1D—are not yet known but will come to light through discovery. Plaintiffs have alleged that the revised order will show—consistent with both the announcement of the new policy and with ATF's actions on the ground—that ATF has adopted a new "zero tolerance" policy that puts gun shops out of business over

inadvertent, *non*-willful violations of the Gun Control Act, in violation of the plain language of that statute.

E. Defendants' motion does not address Plaintiffs' *Larson* claims at all, and otherwise fails to show that this court is precluded from asserting jurisdiction.

Finally—and dispositively—Defendants have completely failed to address Plaintiff's equitable claim at all, and thus have not successfully moved to dismiss that claim. That alone should suffice to defeat their motion to dismiss. In Count III of the Complaint, Plaintiff alleges that Defendants Dettelbach and Garland are violating federal law and the Constitution. Compl. ¶¶ 77-87. This is not a claim under the APA, but rather a claim at equity to "enjoin federal officers from violating the Constitution," or what is commonly known as a *Larson* claim. *See Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 195393, at *17 (N.D. Tex. July 19, 2021) (citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327-28 (2015) and *Larson v. Domestic & Foreign Com. Co.*, 337 U.S. 682, 689-90 (1949)). *Larson* claims "can be brought apart from the APA[,]" *Texas v. Biden*, U.S. Dist. LEXIS 19533, at *16, which is what Plaintiff has done here, and this Court has equitable power to hear them. *See Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020). Defendants do not challenge any of this in their Motion and that Motion must, accordingly, fail.

Larson claims are not bound by APA rules. *Leal v. Azarii*, No. 2:20-CV-185-Z, 2020 U.S. Dist. LEXIS 241947, at *17-18 (Dec. 23, 2020), *vacated and remanded on other grounds in Leal v. Becerra*, No. 21-10302, 2022 U.S. App. LEXIS 20803 (July 27, 2022). They are the federal equivalent to claims raised under *Ex parte Young*, 209 U.S. 123 (1907). To maintain a claim under *Larson* (and *Ex parte Young*), all that is

required is to allege an ongoing violation of federal law. *Texas v. Biden*, 2021 U.S. LEXIS 195393, at *17-18; *Azarii*, 2020 U.S. Dist. LEXIS 241947, at *17-19. "Through this line of cases, individuals have a 'right to sue directly under the [C]onstitution to enjoin federal officers from violating their constitutional rights.'" *Anibowei v. Barr*, 2019 U.S. Dist. LEXIS 24105, at *10-11 (N.D. Tex. Feb. 14, 2019) (quoting *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979)). These claims allow injunctive relief and are appropriate in cases like this one, where federal officials are engaged in ongoing violations of federal statutes and the Second Amendment. *See id.*; *see also Green Valley*, 969 F.3d at 472.

Whatever Defendants' new policy is, it must comply with the Supreme Court's Second Amendment ruling in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). Defendants have offered no argument that their new Enforcement Order complies with *Bruen*, which requires firearm regulation to be consistent with this Nation's historical tradition of firearm regulation. 142 S. Ct. at 2126. The Fifth Circuit has also reiterated that is the Government's burden to justify firearm regulation. *United States v. Rahimi*, No-21-11001, at *10-11 (5th Cir. Feb. 2, 2023). They must show that the Enforcement Policy has historical analogues that are similar in "*how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right." *Id.* (emphasis in original). If anything, Defendants' policy documents prove the exact opposite. They are new and unprecedented, entirely lacking in historical foundation.

Plaintiff alleges that Defendants Dettelbach and Garland implement and enforce a revocation policy that violates the Gun Control Act and the Second

Amendment. Compl. ¶¶ 77-87. It does so by effectively bypassing the "willingly" requirement of the statute and revoking licenses for merely accidental violations. Compl. ¶ 40. Other than to say that such a policy does not exist, Defendants offer nothing, not even the revised Enforcement Order, to contradict Plaintiff's allegations.

CONCLUSION

As pled, Plaintiff is subject to Defendants' revised Enforcement Policy. That policy is a final agency action that has resulted in an ongoing spike of FFL revocations. Upon information and belief, this spike has resulted, at least in part, from Defendants revocation of licenses due to minor paperwork errors that do not result in prohibited possessors obtaining a firearm. The motion to dismiss should be denied; Plaintiff is entitled to discovery in order to prove up his claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/ Matthew Miller
MATTHEW MILLER