Appeal No. 22-1165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN ROE,	
Plaintiff – Appellant,	
	District Court No: 3:21-cv-00125-JPG
v.	
	District Judge J. Phil Gilbert
MARVIN G. RICHARDSON, in his official capacity as acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and MERRICK B. GARLAND, Attorney General of the United States, in his official capacity as Attorney General of the United States,	
Defendants – Appellees.	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
Case No. 3:21-cv-00125-JPG
Hon. Judge J. Phil Gilbert

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF JOHN ROE

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ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1DISCLOSURE STATEMENT

Appellate Court No: _22-2265_____

Short Caption: _John Roe v. Marvin Richardson

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure

Information required by Fed. R. App. P. 26.1 by completing item #3):

_John Roe, a pseudonym_____

(2) The names of all lawfirms whose partners or associates have appeared for the party in the case (including proceedings in the district court or

before an administrative agency) or are expected to appear for the party in this court:

_Maag Law Firm, LLC_____

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

NA_____

ii) list any publicly held company that owns 10%or more of the party's, amicus' or intervenor's stock:

NA_____

(4) Provide informationrequiredbyFRAP26.1(b) –Organizational Victims in Criminal Cases:

NA_____

(5) Provide Debtor informationrequiredbyFRAP26.1(c) 1& 2:

NA_____

Attorney's Signature:__S/Thomas G Maag_____ Date: 4-4-2022_____

Attorney's Printed Name: __Thomas G. Maag_____

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes __x___No_____

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JURISDICTIONAL STATEMENT

A. The basis for the district court's jurisdiction

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. 1331, federal question jurisdiction.

The underlying federal questions arise variously under the (1) federal Administrative Procedures Act, (2) The National Firearms Act, 26 USC. Chapter 53, (3) 18 U.S.C. 922(o), (4) U.S. Constitution, Fifth Amendment and/or (5) U.S. Constitution, Tenth Amendment.

2. The Basis For This Court's Jurisdiction.

This is an appeal from a final judgment, as to all parties and claims, thus, this Court has subject matter jurisdiction pursuant to 28 USC 1291, as to all Counts.

The date of entry of the order and judgment being challenged is January 12, 2022. (Docs 37, 38).

No motion to reconsider was filed.

The Notice of Appeal (Doc. 39) was timely filed on February 1, 2022.

No claims of any kind remain pending in the trial court on this case.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review in this Court are:

1. Does the owner and possessor of a drop in auto sear, an item that was unregulated when originally acquired, but since has been potentially reclassified into a "machinegun," a regulated item requiring federal registration, but was never afforded any opportunity to actually register same at the time of, or after reclassification, and at the same time, said drop in auto sear was potentially grandfathered as exempt from the federal registration requirement, but that grandfathering may have been without lawful authority in the first instance, or may have been revoked through no fault of possessor, have standing to seek a declaration that his item is, in fact, either subject to federal registration, or not?
2. If the answer to Issue One is in the Affirmative, is Plaintiff's drop in auto sear grandfathered, at least in isolation, or is it subject to federal registration under the National Firearms Act?

3. If Plaintiff's drop in auto sear is subject to registration under the National Firearms Act, is the Attorney General, or his designee, after publication in the Federal Register of his intention to do so, authorized to establish such period of amnesty under the National Firearms Act, for possession of unregistered machineguns, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, pursuant to Pub.L. 90-618,Title II,§ 207(d), Oct. 22, 1968, 82 Stat. 1230, and allow such registration.
4. If the answer to Issue #3 is in the affirmative, does 18 U.S.C. 922(o) impliedly repeal that authority as applied to pre November 1981 manufactured drop in auto sears, which were lawfully possessed, but not registered, prior to November, 1981, notwithstanding 18 U.S.C. 922(0)(2)(B), which makes clear that 18 U.S.C. 922(o) does not apply with respect to any lawful transfer or lawful possession of a machinegun that was lawfully possessed before 18 U.S.C. 922(o) took effect, in 1986?
5. If the answer to Issue #3 is in the affirmative, does 18 U.S.C. 922(o) impliedly repeal that authority or do Defendants have authority, as that term is used in 18 U.S.C. 922(0)(2)(A), to allow persons to possess or transfer a machinegun registered during an amnesty declared pursuant to Pub.L. 90-

618,Title II,§ 207(d), Oct. 22, 1968, 82 Stat. 1230, and allow such registration?

6. If Plaintiff's drop in auto sear is subject to registration under the National Firearms Act, and Defendants have the authority to hold such an amnesty to allow for its registration, are Defendants obliged, either under the 5th Amendment, or other authority to hold such amnesty?
7. Does 18 U.S.C. 922(o), exceed Congress's authority under the Commerce Clause, either on its face, or as applied to federally registered machineguns, which can be individually distinguished based on their markings, which include the makers/manufacturer's name, address, model number, caliber and serial number, as well as registration and transfer history, all registered in a federally maintained database, which records and requires approval for manufacture/making, transfer and crossing a state line.

STATEMENT OF THE CASE

In 1934, Congress passed the original National Firearms Act, which taxed and required registration of several types of firearms, including machineguns. As amended over the years, the statute, as amended, remains in effect, currently codified at 26 U.S.C. Chapter 53. In summary, the National Firearms Act is a revenue generating statute, at least in theory, imposes various taxes, and compliance is largely a question of paying the applicable taxes on the proper

forms. Various ancillary provisions, like manufacturers markings, serial numbers, federal registration, and the like, have been imposed as an aid to insuring the collection of the revenue.

In the mid-1970s, Drop in Auto Sears were first invented. The purpose of a DIAS is to aid in the conversion of many, but not all, semi-automatic AR15 type rifles into a machinegun, without altering the receiver to accept an M16 type auto sear, which requires some level of alteration to an AR15 receiver to accept an M16 type auto sear. At the time they were invented, and for years afterward, a DIAS was classified, under federal law, as an unregulated collection of parts, the same as a box of springs or pins that could be legally purchased at any local hardware store. Certainly, a DIAS could be used as one of several parts needed to covert an AR-15, but several other parts were required to actually do so, as well as to be considered a conversion kit by the Defendants.

In November, 1981, ATF issued ATF Ruling 81-4, which reclassified the assembly, known as a drop in auto sear, from being unregulated under federal law, at least in isolation, to being a "machinegun" under the NFA, even absent other parts. In the same ruling, ATF purported to grandfather existing DIAS, and only require their registration if possessed with certain other M16 machinegun parts, the same as they had been treated previously. DIAS made after the date of the ruling were classified as "conversion kits" in and of themselves, no additional parts

required, at least under the ruling, actual functional conversions still required additional parts, like automatic hammers, bolt carriers and the like. No initial registration period was ever held for pre-ruling DIASs, either before or after ATF Ruling 81-4, as ATF considered them to be grandfathered, and not subject to federal registration, at least in isolation. Certainly, no notice of any such period or registration was published in the Federal Register.

In 1986, as part of the broader Firearms Owners Protection Act, 18 U.S.C. 922(0) was passed, which further restricted machineguns at the federal level, but which expressly grandfathered all existing such guns. In addition to existing firearms, machineguns possessed under governmental authority, be it state, federal or local, remained legal.

That on February 2018, then President Donald Trump personally directed the U.S. Department of Justice, who at that time was, and on this date remains in charge of the Bureau of Alcohol, Tobacco Firearms and Explosives, and the National Firearms Registration and Transfer Record, and enforcement of the National Firearms Act, 26 U.S.C. Chapter 53 and 18 U.S.C. 922(o), to administratively prohibit so called "bump stocks."

While a drop in auto sear is not a "bump stock", it did trigger a memory of Plaintiff that he had a DIAS, and to investigate what the difference is, if anything,

between a bumpstock and a DIAS, and to determine if the legal status of the DIAS had changed since the last time Plaintiff checked. It was rapidly determined that, at least per the public position of Defendants, that the pre-ruling DIASs were no longer grandfathered, though it was not clear when this change actually happened, pre-ruling DIASs are both required to be registered, and, at the same time, there has never been a mechanism to so register the items, or to pay the transfer tax if it is decided to transfer same.

This lawsuit ensued, seeking primarily, an actual mechanism to actually register Plaintiff's DIAS, or a declaration that same was not actually required.

Defendant filed a motion to dismiss, which was granted. This appeal ensued. (Doc. 39).

SUMMARY OF THE ARGUMENT

In summary, prior to the administrative ruling in 1981, Plaintiff possessed lawfully acquired drop in auto sears ("DIAS"), that he lawfully purchased and stored in Illinois, and which apparently were made in Illinois. As DIASs were not federally regulated when these DIASs were either manufactured, or acquired by Plaintiff, not only were they not required to be registered, there was no actual mechanism to actually register them, as they did not qualify for registration as they did not fit the definition of "machinegun" as enforced at that time. It would be like

buying a light bulb and trying to register it as a machinegun; it just does not fit the definition, at least prior to November 1981.

In November 1981, Defendants (or their predecessors in office), reclassified DIAS as "machineguns" under federal law, as a collection of parts that could be used to convert a firearm into a machinegun, independent of whether or not they were possessed with the remaining parts necessary for full automatic fire. In so doing, Defendants caused DIAS, which were previously both unregistered and unregistrable (as they were not subject to registration), to be subject to both the internal revenue tax and registration requirements of the National Firearms Act, 26 U.S.C. Chapter 53. However, obviously to avoid a lawsuit of this type in the early 1980s, Defendants exempted from their ruling pre-existing DIAS, or at least they said they did in the actual ruling. In dicta, at least, this Court has been critical of whether Defendants had of have the power to so grandfather, but due to the facts of the prior cases, never actually get to the actual merits of the issue.

Under the National Firearms Act, as amended in 1968, "[t]he [Attorney General], after publication in the Federal Register of his intention to do so, is authorized to establish such period of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, …"). Pub.L. 90-618,Title II,§ 207(d), Oct. 22, 1968, 82 Stat. 1230. It is Plaintiff's position that, by virtue of the reclassification of DIASs, if they cannot be

grandfathered as not subject to the NFA, then the Defendants are required, as a matter of basic due process, to allow an initial registration period, and the NFA expressly allows same.

Defendants' argument is that 18 U.S.C. 922(o), "impliedly repealed" the NFA, as to unregistered machineguns, which in turn conflicts with this Court's ruling in *US v. Ross*, 9 F. 3d 1182, 1194 (7th Circuit 1993), which held that 18 U.S.C. 922(o) did not impliedly repeal the NFA, both statutes remain on the books and compliance with both is possible.

As 922(o) exempts machineguns possessed prior to May, 1986, and by definition, a pre-1981 DIAS is also a pre- 1986 DIAS, 922(o) simply does not apply on its face.

Secondarily, Plaintiff suggests that the amnesty power is at least co-extensive with 18 U.S.C. 922(o)(2)(A), which exempts "from section 922(o) transfer[s] to or by, or possession by or under the authority of a Federal, State, or local government agency." In sum, under Section 207(d) of the 1968 amendments to the NFA, Congress has granted to the Attorney General, and previously the Secretary of the Treasury, the "authority" to allow amnesty registration and continued possession of even post-1986 made machineguns ("The Secretary …, is authorized to establish such periods of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, as

the Secretary determines will contribute to the purposes of this title. Pub. L. 90-619, 82 Stat. 1236.").

Should this Court find that 18 U.S.C. 922(O) does otherwise bar an amnesty / initial registration period, then this Court should find that same is unconstitutional, either facially, or as applied to NFA registered firearms, which, unlike marijuana, wheat or similar products, are not only uniquely identifiable, they are actually registered with Defendants, by make, model, caliber and serial number, showing date of registration, name of registrant, any transfer history and any history of interstate movement. (See 26 U.S. Code § 5841, 18 U.S.C. § 922 (a)(4)). See *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2592 (U.S. 2012).

Lawfully-possessed machineguns under the National Firearms Act can be individually distinguished based on their markings, and that wheat, marijuana, and oranges cannot be individually distinguished based on similar markings.

STANDARD OF REVIEW

This case was dismissed on Defendant's Motion to Dismiss. (Docs. 21, 37). The Standard of Review on appellate review of orders of summary judgment are *de novo*. *Brunson v. Murray*, 843 F.3d 698, 704 (7th Cir. 2016).

Likewise, Defendants administrative determinations of law are entitled to *no deference*. ("The critical point is that criminal laws are for courts, not for the

Government, to construe." *Abramski v. US*, 134 S. Ct. 2259, 2274 (U.S. 2014) citing *United States v. Apel*, 571 U.S. 359, 134 S.Ct. 1144, 1151 (U.S. 2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference").). Both the National Firearms Act, 26 Chapter 53 ("NFA"), and 18 U.S.C. 922(o), are, indisputably, criminal statutes. See *United States v. Thompson/Center Arms Co*., 504 U.S. 505 (1992)(holding NFA has criminal applications).

Thus, the standard of review in this case, as to all issues on appeal, is *de novo* from the District Court, with the Defendants' administrative determination of law entitled to no deference, and thus, also *de novo* review.

ARGUMENT

Plaintiff in this case, who innocently and legally acquired what Defendants now claim to be an unregistered machinegun comes to this Court seeking either to register the firearm, in accordance with the National Firearms Act, Title 26, Chapter 53, or alternatively, to confirm the understanding, stated in not only the Ruling from 1981, memorialized in ATF Rule 81-4, that pre ruling Drop In Auto Sears ("DIAS") are grandfathered and not classified as a machineguns under federal law, but also every other similar ruling at that time, grandfathering newly reclassified "machineguns".

The trial court found it had subject matter jurisdiction. (Doc. 37, p. 7). Plaintiff agrees and does not appeal this finding.

On the other hand, the trial court found that, it "… has no legal authority to determine Plaintiff's DIAS is now legal and thus cannot redress Plaintiff's harms. The trial Court found that Plaintiff lacks standing and therefore dismissed his complaint based on the failure to meet a "case" or "controversy" under Article III of the U.S. Constitution. (Doc. 37, p. 12). Plaintiff does take issue with this finding and does appeal same.

A. Standing

While, yes, generally speaking, unregistered NFA firearms are contraband, and cannot be registered, the trial court overlooked a pair of elephants in the room. The first of those is the statute, Section 207(d) of the 1968 Amendments to the NFA, which states that

> "The Secretary …, is authorized to establish such periods of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, as the Secretary determines will contribute to the purposes of this title.

Pub. L. 90-619, 82 Stat. 1236."

While, perhaps, on a given average day, a possessor of an unregistered firearm cannot register same, during a registration period declared under Section

207(d), he can. Furthermore, it is not without precedent that Defendants have, during the 1990s, held open a seven-year registration period for possessors of certain unregistered reclassified destructive devices. (See ATF Ruling 94-1). However, notice of this was never published in the Federal Register, and the amnesty registration statute was never cited in connection with it. Like so many things, Defendants just made it up and did what they wanted.

Certainly, if an agency has the authority to do an act on its own to declare a seven-year registration period without compliance with the amnesty statute, a Court has the authority to order an initial registration period / amnesty when Defendants refuse to hold same.

Second, fundamental due process applies. The government cannot require a given item to be registered with it, but having never afforded an actual opportunity to so register the item. *US v. Lim*, 444 F. 3d 910, 914 (7th Circuit 2006)("It does not matter that Lim could not *personally* register or pay the tax on the shotgun. *Dalton*'s holding is limited to instances where registration of the firearm by anyone along the chain of possession cannot legally occur. Because at some previous point Lim's sawed-off shotgun could have been registered, Lim's reliance on *Dalton* fails."). The facts here are different than in *Lim*., nobody along the chain of possession was ever able to register these DIASs, either because they were not subject to registration, prior to the 1981 ruling, or after the 1981 ruling, when

they arguably were subject to registration, because after the 1981 ruling, no registration period was held to provide for such registration. As is well settled, and has been found by this court, impossibility is a proper defense to a crime of omission. W. LaFave & A. Scott, Jr., Handbook on Criminal Law 188 (1972). United *States v. Spingola*, 464 F.2d 909, 911 (7th Cir.1972). It is, absent an amnesty, *impossible* to register an existing unregistered machinegun. This includes transfer of an unregistered machineguns, even if the proper transfer paperwork are submitted and the proper taxes paid. (Doc. 1-2, p. 33).

As to pre-ruling manufactured DIASs, the "crime" would be, depending on one's point of view, either (1) the omission of someone, along the chain of manufacture and distribution, to register the manufacture and/or transfer of said DIASs, resulting in unregistered DIAS when the law did not classify any DIAS as machineguns at that time, and/or (2) failing, at some point after the November 1981 ruling, to register the pre-ruling manufactured DIASs, that Defendants represented to the public to be grandfathered and exempt from the machinegun classification, and at the same time, offering no ability to actually register the items, even if the possessor of the pre-ruling DIASs questioned the ability to grandfather the DIASs. In either event, a "crime" of omission of an impossible act.

Even the Defendants themselves, at least in internal discussions with themselves, *admit*, at least to themselves, that possessors of items/firearms

reclassified into "machineguns" in the early 1980s, may be been "mislead" by the language Defendants placed in their rulings into thinking that the items were grandfathered and not subject to registration. (See Doc. 30-4, p. 16). Again, not that any actual mechanism for registration was announced or actually took place. At least publicly, while Defendants change, decades after the fact, editors notes for the 1981 ruling on DIASs, they leave in place the same grandfathering notes for two rulings dealing with open bolt pistols that were similarly reclassified, but which remain on the market as expensive collector's items. (See Doc. 30-4, p. 13-14). Presumably it would also apply to the thousands of FN FAL type rifles with "machinegun receivers" "grandfathered" by the Defendants. (Doc. 1-2, p. 41). What's the difference between these rulings and reclassifications? Nothing, other than likely political feedback from applying the same types of changes to editors notes to now valuable and expensive collector's items, and the political repercussions from same.

While, in candor, the ultimate classifications of the DIASs, the "open bolt" pistols and the FN FAL rifles, could have gone either way, as it likely would not have been unreasonable for Defendants to either classify same as machineguns, or not, once Defendants did reclassify formerly unregulated items as machineguns, it became incumbent upon them to allow some mechanism for possessors to register them, at least initially.

Again, the Court can order an agency to comply with the Constitution and/or laws, as a remedy. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 US 388, 397 (U.S. 1971). The government, itself, in settling at least once case, allowed, in 1993, seven years after the enactment of 18 U.S.C. 922(o), the registration of several pre-1986 made machineguns. (Doc. 1-2, p. 35). This would be the simplest solution.

Were this Court to rule that Defendants must afford an opportunity to register the DIAS, then that is all the relief Plaintiff requires, some, even brief, chance to fill out a form and register his DIAS, just as former U.S. Senator Barry Goldwater was allowed to do with his 1968 amnesty registered Beretta submachinegun. Alternatively, this Court can find that the law does not allow actions against Plaintiff and his DIAS, as either the grandfathering was lawful, or in the absence of an actual ability to register, Plaintiff has a valid defense to any action by the Defendants in this case, due to the inability to ever register the items, much as both this Court, in *Dugan v. United States*, 341 F. 2d 85 (7th Cir. 1965), and later the Supreme Court, in *Haynes v. United States*, 390 U.S. 85 (1968), ruled that the Fifth Amendment provided a complete defense to the pre-1968 version of the statute. As this Court can order effectual relief, standing is satisfied, and it was error to dismiss this case.

The trial court, however, found that however, "Ruling 81-4

did not waive the registration requirements for pre-1981 auto sears; it waived the NFA tax." (Doc. 37, p. 8). While the trial court admittedly largely relied on *dicta* from this Court, in reaching that conclusion, what it relied on, was, in fact, *dicta*, was non controlling, and wrong, as *dicta* often tends to be. Courts are not bound to follow dicta in a prior case in which the point now at issue was not fully debated. *Central Va. Community College v. Katz*, 546 US 356, 363 (Supreme Court 2006).

As to *U.S. v. Cash*, 149 F.3d 706 (7th Cir. 1998), relief on for its interpretation of ATF Ruling 81-4. What Defendants and the trial court fail to note it, (1) this was bald dicta, (2) the litigation position of the U.S. Government in *Cash* was different, and (3) the case was actually resolved based on the assumption that a pre-81 DIAS is not regulated in and of itself. All of the language cited from *Cash* was non-controlling dicta, irrelevant to the outcome of the case in *Cash.*

Furthermore, even if not dicta, it is and was wrong. There is not a person on Planet Earth that, in 1981, did not interpret ATF Ruling 81-4, as broadly exempting, at least in isolation, the continued unregistered and untaxed possession and transfers of pre-81 DIAS. Even the Defendants, at least internally, admit that the ruling could have "mislead" people into thinking the existing items were not subject to registration. (See Doc. 30-4, p. 16). In fact, the opinion in *Cash* noted that:

> "Nonetheless, the prosecutor appears to be content with defendants' reading of ATF Ruling 81-4 and argues only that the evidence does not show that these auto sears predate 1982. … Like Cash and Croyle, Bradley contended that auto sears manufactured before November 1981 need not be registered even if transferred after the Ruling's date; we did not evaluate that possibility in Bradley in light of other facts but added that Bradley's "argument misunderstands ATF 81-4." 892 F.2d at 636. As in *Bradley* we move on without final resolution-for the prosecutor's acquiescence in defendants' legal position has deprived them of any reason to offer arguments supporting it. ***Perhaps their reading has some basis that we do not now perceive."***

U.S. v. Cash, 149 F.3d 706 (7th Cir. 1998).(emphasis added).

The basis that this Court did not then perceive, as nobody ever had reason to point it out to this Court, is if the rulings were intended to only excuse the non-payment of tax prior to the ruling, and not to grandfather the entire pre ruling DIAS, but instead to require registration going forward, how was it there was no mechanism set forth to actually register same once the item was reclassified?

The trio of rulings (81-4, 82-2 and 82-8) all stated that "this *ruling* will not be applied" to items made before their respective rulings. What is noticeable about

all of these rulings, is all of them use the same language to exempt items "manufactured" or "imported" on or before certain dates, not to possession of the items before certain dates. None of the rulings make reference to forgiving only tax liability from the past only, they all exempt the gun from the provisions of the Act, based on date of manufacture or import, much like 18 U.S.C. 922(o) grandfathers pre-1986 firearms. Was this grandfathering legal? Perhaps. But much like being pregnant, there is no halfway. The grandfathering was either legal, or it was not. If legal, the items remain grandfathered, and that itself is a resolution. If not legal to grandfather, then Defendants violated the law by not affording an initial registration period following reclassification. Such a violation of the law by the Defendants must be remedied.

If the Defendants want people to actually register reclassified firearms, at least mechanically, they know how to do it. For instance, when the Defendants reclassified certain shotguns, in 1994, into "destructive devices", in ATF Ruling 94-1, they very clearly set forth that future compliance with the NFA was required, and provided forms to register the firearms upon the asking.

Contrast ATF Rulings 81-4, 82-2 and 82-8 with ATF Ruling 94-1, which dealt with the reclassification of certain shotguns as "destructive devices," which used noticeably different language, and instead said,

> "Pursuant to section 7805(b), this ruling is applied prospectively effective March 1, 1994, with respect to the making, transfer, and special (occupational) taxes imposed by the NFA. All other provisions of the NFA apply retroactively effective March 1, 1994."

ATF Ruling 94-1.

At the same time as using this different language, ATF Ruling 94-1 was followed by a seven year long initial registration period for these shotguns, to allow people that owned then to legal register them, as due process required. (Doc. 24, Ex. 1).

The administrative record in this case apparently does not actually exist. (See Doc. 27, Ex. B, "I have not identified any administrative record to produce."), and no discovery, other than on the non-existent administrative record was allowed. Thus, we have no way of knowing the thought process of the Defendants when they wrote Ruling 81-4.

Per *Dept. of Commerce v. New York,* 139 S. Ct. 2551 U.S. 2019, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. That simply did not happen here. We don't know why Defendant did what it did, used the language it did, or was trying to accomplish. Other than the plain language of the rulings themselves, which even Defendants at various times have

admitted either comply with Plaintiff's interpretation of them, or are misleading, Defendants offer nothing.

I. Defendants Have Authority Under Existing Law to Hold an "Initial Registration Period / Amnesty"

The simple fact of the matter is that, under the authority of the federal National Firearms Act, as amended in 1968,

> "[t]he [Attorney General], after publication in the Federal Register of his intention to do so, is authorized to establish such period of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, …").

Pub.L. 90-618,Title II,§ 207(d), Oct. 22, 1968, 82 Stat. 1230.

Today, that power is reposted in the Attorney General.

II. 18 U.S.C. 922(o) Does Not Prevent an Amnesty.

The response of Defendants is that 18 U.S.C. 922(o) prevents an amnesty. Notably, however, nothing in 18 U.S.C. 922(o) touches upon the amnesty power, because, as noted by Congress an amnesty could be administratively declared under "current law." See 132 Cong. Rec. S9601

It is important to note that on the date that Plaintiff acquired his DIAS, he did no legally, both under federal and state law, and in fact confirmed same with both the federal and state authorities, who the record shows confirmed the items were legal and unregulated. (Doc 1., para. 14-18). Historically, even the

Defendants, or their predecessors, acknowledged that "a person in entirely innocent circumstances may come into possession of a firearm not previously made or transferred in compliance with the applicable provisions of the Act... *Dugan,* 341 F. 2d at 87.

A. 18 U.S.C. 922(o)'s Grandfather Clause Applies

The trial court, for its effort, found that 18 U.S.C. 922(o) prohibited an amnesty, as the purpose of 922(o) "was to limit transactions in post-1986 machineguns."

While that is an argument, for as far as it goes, it misses the fact that these DIAS are not *post* 1986, they, by definition, *pre-date* 922(o) by some five years. 18 U.S.C. 922(o)(2)(B) makes clear that 18 U.S.C. 922(o)

> "does not apply with respect to any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect."

Notably, the statute does not say "registered". Had discovery been allowed, it would likely have shown that the U.S. Government itself, specifically, the Department of Energy, has sold multiple pre-1986 machineguns to collectors well after 922(o) was enacted. Also, in 1993, the U.S. Government allowed registration of multiple pre-86 machineguns by a former CIA agent, notwithstanding 922(o). (Doc. 1-2, p. 25). Courts "assume that the legislative purpose [of the statute] is

expressed by the ordinary meaning of the words used." *United States v. Lock*, 466 F.3d 594, 598 (7th Cir.2006) (*quoting Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982)).

At the risk of being trite, before November, 1981, is also before May, 1986. Also, whatever the interpretation of the grandfather clause of Ruling 81-4, the pre-ruling DIASs were indisputably "lawfully possessed" prior to November, 1981. Thus, 18 U.S.C. 922(o) simply does not apply to them. Defendants have the power to amnesty register pre-November 1981 DIASs, if they are not properly grandfathered. As under the Fifth Amendment, ""No person shall ... be deprived of life, liberty, or property, without due process of law..." it is likely that Defendants have not only a statutory power to amnesty register the DIAS, they have a Constitutional obligation to do so, less they deprive Plaintiff of his property, lawfully acquired, without due process of law, something this Court can remedy, after all, "we presume that justiciable constitutional rights are to be enforced through the courts." *Davis v. Passman*, 442 U.S. 228, 242, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

B. Amnesties Remain Viable "Under the Authority" of the Law

While the pre-1986 status of the DIAS likely resolves the entire 922(O) dispute in this case, even if the Court disagrees, amnesties remain viable "under the authority of, the United States or any department or agency thereof." 18 U.S.C.

922(o)(2)(A). As previously noted, "[t]he [Attorney General], after publication in the Federal Register of his intention to do so, is authorized to establish such period of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, …"). Pub.L. 90-618,Title II,§ 207(d), Oct. 22, 1968, 82 Stat. 1230

Again, several senators debating 922(o), during what little debate there was, voiced their opinions that amnesties remained an open possibility despite 922(o). See 132 Cong. Rec. S9601 (1986)(colloquy of senators asking "[c]an amnesty period be declared administratively…?" and yielding the response "[a]bsolutely").

And while Defendants may well try to argue that this was some limited exchange of just a few Senators, in truth, as stated by the Senators themselves:

> "Mr. HATCH. Mr. President, I have to say that the colloquy's that have been put in the RECORD as of now do reflect the intentions of the sponsors of the bill. There is no question about it. We think that they state basically what the bill is. Moreover many other Senators have asked the questions covered by this colloquy. They endorse these statements and are anxious to have their understanding made part of this RECORD."

132 Cong. Rec. S9601

Under the authority granted to the Attorney General, the Attorney General can grant an amnesty registration period any time he wants. See Pub. L. 90-618, Title II, § 207(d), Oct. 22, 1968, 82 Stat. 1230. He simply has to publish notice of it in the federal register. To the extent that these amnesties relate to post-1986 manufactured arms, 18 U.S.C. 922(o) provides no impediment.

Defendants argue 922(o) bans possession of post 1986 machineguns, so they phrase it as an "implied repeal" of the amnesty provisions. First, this very court has ruled that 922(o) did not impliedly repeal any portion of the National Firearms Act. *US v. Ross*, 9 F. 3d 1182, 1194 (7th Circuit 1993). Replying, in turn, on the Fourth Circuit case of *US v. Jones*, 976 F. 2d 176 (4th Circuit 1992).

> ""In the absence of some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974) (emphasis added).

US v. Jones, 976 F. 2d 176, 183 (4th Circuit 1992).

Even if it was a matter of first impression on whether 922(o) and the NFA were irreconcilable, and even if *arguendo* 922(o) had, in fact, repealed all NFA related authorizations to possess post 1986 machineguns to non-governmental entities (which it did not), then manufacturers and importers of machineguns would not be able to ply their trade as to post 1986 machineguns, and their source

of authority to possess a post 1986 machinegun is the same as the amnesty power, the National Firearms Act and the permissions granted inside its text.

18 U.S.C. 922(o) and the NFA are statutes on the same subject. "Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." See Sutherland Statutory Construction § 51.02 (Sands 4th ed. 1984). One cardinal rule of statutory construction is that "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549-50, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974). An implied repeal construction is permitted only when the seemingly conflicting statutes are absolutely irreconcilable. Id. at 550, 94 S.Ct. at 2482. See also *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1018, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 815 (1984). When confronted with seemingly inconsistent statutory provisions, courts have a "duty to construe the statutes in such a way to give effect to both, if possible." *United States v. Bruno*, 897 F.2d 691, 695 (3d Cir.1990). When statutory provisions are capable of co-existence, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551, 94 S.Ct. at 2483. Defendants' reading does none of this, and simply writes out the amnesty text of the NFA, without waiting for Congress.

C. Registration Pursuant to the Attorney General's Amnesty Authority.

Defendant's challenged determination that an amnesty is not legally possible is, of course, is a question of law, and thus this Court owes *no deference* to the executive branch in its determination, as Defendant's "opinion" on the matter is legally irrelevant. ("The critical point is that criminal laws are for courts, not for the Government, to construe." *Abramski v. US*, 134 S. Ct. 2259, 2274 (U.S. 2014) *citing United States v. Apel*, 571 U.S. 359, 134 S.Ct. 1144, 1151 (U.S. 2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference"). Both the NFA, and 922(o), are, indisputably, criminal statutes. See *United States v. Thompson/Center Arms Co*., 504 U.S. 505 (1992)(holding NFA has criminal applications). By the same token, this Court affords *no deference* to the trial court's determination of law in a summary judgment order. *Brunson v. Murray*, 843 F.3d 698, 704 (7th Cir. 2016). Defendant's opinion on the topic, while perhaps, "interesting", is entirely academic and irrelevant to the outcome.

The issue, clearly, at this point in the brief, assuming the constitutionality of everything, what is the effect, if any, of 18 U.S.C. 922(o), on "the government authority to enact amnesty provisions for registration of firearms."

The first step on this journey is, logically, to review 18 U.S.C. 922(0), and see what it actually says. The Supreme Court is in accord with this approach. *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527 (U.S. 1981).

While 18 U.S.C. 922(o)(1) makes a broad statement about making unlawful for any person to transfer or possess a machinegun, there are very broad exceptions, and no repeals, express or otherwise. This brief already dealt with the pre-1986 exception. This portion of the brief deals with the next exception.

D. Under the Authority of the United States

The second exception is for machineguns that are

"… transfer[ed] to or by, or possess[ed] by or under the authority of, the United States or any department or agency thereof… ."

(18 U.S.C. 922(o)(2)(A).).

As to the first exception, the similarity to the wording of Defendants and the statute is uncanny. 18 U.S.C. 922(o)(2)(A) provides and allows for possession of machineguns "under the authority of, the United States or any department or agency thereof….". Defendants not only have the "authority" to hold an Amnesty, under the NFA, because Congress gave them that authority, currently vested in the Attorney General, but that 18 U.S.C. 922(o) provides, as an exception to the general rule barring machineguns, and provides for lawful possession of same under the authority of the federal or state governments, and their departments

and agencies, like the Attorney General and the Department of Justice. In this case, and in this argument, that authority being the authority to hold an amnesty, which Congress has not taken away. Merrium-Webster's online Dictionary defines "under the authority" as "with the permission of (someone in power)." https://www.merriam-webster.com/dictionary/under%20the%20authority%20of

Similarly, to authorize means "`[t]o empower; to give a right or authority to act; to endow with authority.'" Ibid. (quoting Black's Law Dictionary, at 133).

The term "under the authority" appears to have first been used by a United States Court in 1803, in *Marberry v. Madison*, 5 US 137 (U.S. 1803), in which the term was used to explain the basis of an ability to act. In *Murphy v. National Collegiate Athletic Association*, Supreme Court 2018, held, in the sports betting context, "the repeal of a state law banning sports gambling not only "permits" sports gambling but also gives those now free to conduct a sports betting operation the "right or authority to act."

Notably, neither 18 U.S.C. 922(o), nor any other statute, expressly says that amnesty registrations are prohibited (or for that matter ever even references the effect of 18 U.S.C. 922(o) on the NFA).

18 U.S.C. 922(o), on the other hand, has been found, in interpreting the very "under the authority" language being discussed here, to be unconstitutionally vague, by at least one judge in this Circuit. *United States v. Vest*, 448 F. Supp. 2d

1002 (S.D. Ill. 2006)(Herndon, Chief Judge, Ret.). While in this portion of the brief, Plaintiff only argues vagueness under the Rule of Lenity, the point is the same. "[T]he true problem is that § 922(o) points to nothing that gives guidance as to what "authority" is proper." *United States v. Vest*, 448 F. Supp. 2d 1002 (S.D. Ill. 2006).

Presumably, the highest-ranking federal law enforcement officer, with ultimate supervisory authority over the Department of Justice, the Bureau of Alcohol, Tobacco and Firearms and federal firearms law enforcement generally, and with express statutory authority to hold unlimited 90-day amnesties, has sufficient "authority" to be included in 922(o)(2)(A). If Congress had intended otherwise, it could have said so. It could have *actually* repealed the amnesty provisions. It did not do so. Congress left the amnesty power in place.

The second place is the legislative history. As noted Supra, several senators debating 922(o), during what little debate there was, voiced their opinions that amnesties remained an open possibility despite 922(o). 132 Cong. Rec. S9601 (1986)(colloquy of senators asking "[c]an amnesty period be declared administratively…?" and yielding the response "[a]bsolutely"). In fact, to do otherwise would likely collide head long into the President's Constitutional authority to grant pardons and reprieves, which, at the end of the day, is all an

amnesty really is, and the doctrine of Constitutional avoidance is well established. *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (U.S. 1992).

As noted by our Supreme Court, in *United States v. Thompson/Center Arms Co*., 504 US 505 (U.S. 1992), to the extent that there is some ambiguity on this issue, "[t]he key to resolving the ambiguity lies in recognizing that although it [the National Firearms Act] is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. … It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in [Plaintiff's] favor. See *Crandon v. United States*, 494 U. S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action); *Commissioner v. Acker*, 361 U. S. 87, 91 (1959).

E. Under the Authority of a State

Furthermore, even if the amnesty power, by itself, is not enough, under 18 U.S.C. 922(o)(2)(A), possession of a machinegun "by or under the authority of, … a State, or a department, agency, or political subdivision thereof" is authorized. Notably, again, the statue does not say a state *police department*. Senator Dole addressed this while in Congress:

> "The language of this new section intends that a machinegun may be transferred under the authority of a State or a subdivision thereof. The House purposely did not choose to use the language "on

behalf of" such an agency or subdivision, which is language contained in other provisions of current gun law…." 132 Cong. Rec. 9601.

Most states expressly provide for lawful possession of machineguns. Some states provide for broader authority than others. As noted by the Supreme Court in *Murphy v. National Collegiate Athletic*, 138 S. Ct. 1461, 1474 (U.S. 2018), "When a State completely or partially repeals old laws banning [an activity], it "authorize[s]" that activity." Along those lines, as again noted by our Supreme Court, states have authority to do all Acts and Things which Independent States may of right do. The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). *Murphy*, at 1474.

Thus, to the extent that a *state*, or for that matter a municipality, expressly authorizes, or at least repeals, transfer and possession of such firearms, anyone so authorized can possess them. Thus, they can be amnesty registered, if state law allows their possession, as most states do, and even those restrictive states allow in many circumstances.

F: 18 U.S.C. 922(o) Is, In Fact, Unconstitutional

The simple fact of the matter is that 18 U.S.C. 922(o) is unconstitutional. The framers of our Constitution would likely choke at the suggestion that 18 U.S.C. 922(o) would pass their muster of limited constitutional federal powers. It

is indeed difficult to imagine that any of this nation's founders would think such a statute within the powers of Congress.

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C. J.).

In every case where the Supreme Court has sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, 317 U. S. 111 (1942), the regulated activity was of an apparent commercial character. *United States v. Morrison*, 529 U.S. 598, 611 (2000). In addition, "the link between gun possession and a substantial effect on interstate commerce [is] attenuated." *United States v Lopez*, 514 U.S. 549, 612 (U.S. 1995). The "costs of crime" argument as a justification for commerce power was also rejected. Id. Presumably, this would include the costs of "interstate gun trafficking," if 922(o) were actually to target anything interstate, or for that matter, gun trafficking. It does neither, although other existing statutes, which would remain in effect even if 922(o) were to be voided, do actually target interstate activity and gun trafficking.

The National Firearms Act is based on the power to tax, it is located in the Internal Revenue Code, and compliance is largely a question of being able to pay enough money, fill out enough forms and pass extensive background checks. Though it is questionable whether the N.F.A. has brought in enough "revenue" in

the past to even cover the costs of its enforcement, it is, at least facially, a revenue statute. Notably, neither 18 U.S.C. 922(o), nor any other federal statute actually bars the manufacture or making of a machinegun, only its possession, and then, only in certain circumstances. One that engages in totally non-economic intrastate activity (like possessing a machinegun in one's home) violates the plain language of the statutes, assuming exceptions do not apply. Unlike the felon in possession statute (18 U.S.C. 922(g)), or for that matter, nearly every other federal statute that prohibits things based on the commerce clause, there is no jurisdictional nexus that must be found to trigger federal jurisdiction in 18 U..S.C. 922(o).

As noted above, it was once the official position of the U.S. Department of Justice that a total ban on a given item, like a machinegun, would be unconstitutional. (See Hearings Before the Committee on Ways and Means, House of Representatives, Seventy Third Congress, Second Session, on H.R. 9066, p. 19"). That position was and is correct.

Recently, our Supreme Court noted:

"The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims. Congress

therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."

United States v. Morrison, 529 U.S. 598, 599 (2000).

One of our Supreme Court's recent pronouncements on the outer edges of the Commerce Clause, was *Gonzales v. Raich*, 545 U.S. 1 (2005). Notably, neither this Court, nor the Seventh Circuit, have had apparent occasion to opine on the Constitutionality of 18 U.S.C. 922(o), since *Gonzales*. By implication, the same is true for the post-*Raich* commerce power cases cited by Plaintiff. The Supreme Court itself has never directly opined on the legitimacy of 18 U.S.C. 922(o). Thus, this Circuit proceeds with a clean slate on the issue, and even the Supreme Court deeply divided, at least in prior years, on the outer limits of the Commerce Clause. It is very doubtful that the Supreme Court at this point, would ultimately affirm 18 U.S.C. 922(o) as a legitimate exercise of commerce power, as to do so, to be quite candid, would be to find that there are, in fact, no actual limits to the commerce clause. Congress could literally ban anything it wanted to, fungible or not, traceable or not. The repercussions of such raw federal power would be, candidly, terrifying.

However, dealing with current law, Commerce Clause cases decided during what is called in the case law, the "new era," have identified three general

categories of regulation in which Congress is authorized to engage under its commerce power.

First, Congress can regulate the channels of interstate commerce. *Perez v. United States*, 402 U. S. 146, 150 (1971). *US v. Kenney*, 91 F. 3d 884, 886 (7th Circuit, 1996)("As an initial matter, § 922(o) does not appear to be properly categorized as a regulation of the channels of interstate commerce in the narrow sense of the first category set forth in *Lopez* and *Perez*.). Plaintiff agrees with this.

Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Ibid. Again, 922(o) does not purport to regulate or protect instrumentalities of commerce, or things in commerce, and this Court agrees. *US v. Kenney*, 91 F. 3d 884, 889 (7th Circuit, 1996).

Third, Congress has the power to regulate activities that substantially affect interstate commerce. Ibid.; *NLRB v. Jones & Laughlin Steel Corp*., 301 U. S. 1, 37 (1937). Though not apparent on the face of 18 USC 922(o), it is believed this is the basis of authority Defendants claim for 18 USC 922(o), and the only basis not foreclosed by existing Seventh Circuit precedent.

Raich did not change these classes, and only the third category is implicated in this case.

In *Raich*, the Supreme Court "denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market." *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2592 (U.S. 2012). Whatever one has to say about machineguns, at least N.F.A. registered ones, is they are not fungible. N.F.A. registered firearms, per 26 U.S. Code § 5842, 27 C.F.R. § 479.102 are required to be marked with manufacturer, importer, address of same, model, caliber and serial number. In addition, per 27 C.F.R. § 479.101, the N.F.A. firearms are required to be registered with the ATF, in a central registry, called the National Firearms Registration and Transfer record, which, in addition to identifying the firearm, identifies the date of registration and who is entitled to possess it. Per 27 C.F.R. § 479.84 the possessor of the registered firearm is provided the approved ATF paperwork.

The whole point of the entire registration scheme is to individually identify and distinguish a lawfully registered firearm, from an unlawfully possessed one, in the aid of the revenue function of the N.F.A. *United States v. Ross*, 458 F. 2d 1144, 1145 (5th Circuit 1972). Indeed it would be irrational, to put it mildly, to claim, on one end, that a N.F.A. registered machinegun was sufficiently individually distinguishable by its markings and fact of government registration, while at the same time, being sufficiently "fungible" that one could not use those same markings and government registration database to individually distinguish

those same guns in a way not possible for true fungible items, like wheat, oranges or marijuana.

Machineguns, especially those lawfully registered in the federal National Firearms Registration and Transfer Record, by registrant name and address, make, model, caliber and serial number, as required under the National Firearms Act, *are not fungible items* like marijuana or wheat. Per Black's Law Dictionary, 6th Ed., p. 675, "fungibles" are "[g]oods which are identical with others of the same nature, such as grain or oil." Citing *Mississippi State Tax Comm. V. Colunbia Gulf Trans. Co*., 249 Miss. 88, 161 So.2d 173, 178. Another definition provided by Black's Law Dictionary, 6th Ed., p. 675, is, "[a] product which has no important characteristics that identify it as coming from a particular supplier."

An item with a serial number on it, for instance (especially one registered in a government database), and includes applicable manufacturer and/or import markings, unlike vegetable products, can be instantly and conclusively determined as to have come from a particular supplier, on a particular date. Even two otherwise "identical" machineguns (with separate serial numbers), from different manufacturers, are not fungible, as aside from the fact that they are readily distinguishable by markings, such as a unique serial number, a buyer is far more likely to pay a premium for Senator Goldwater's Beretta submachinegun, President Kennedy's M16 machineguns or Elvis Presley's Thompson submachineguns, all

verifiable by serial number and federal registration forms, than similar or nearly identical guns lacking those proveniences. An M16, made by Colt, serial number xyz123 is easily distinguishable from another M16, made by H&R, serial number xxx321, which is easily distinguishable from a M16, made by F.N, serial number ABC456, which is easily distinguishable from a M16, made by General Motors, serial number GM556 or Armalite M16, serial number AR001, even though each of these firearms may appear from ten feet away to be identical, and even through the parts from each of them may well interchange to a large extent. The odds of fakery are all but non-existent, as we are not discussing a hand made Kentucky Rifle, and the history of the firearm is recorded in the NFRTR by Defendants, and a copy of the registration paperwork provided to the owner.

The same is not true for a legitimately fungible item. For example, there is no practical way to discern marijuana grown in California from marijuana grown in downtown Chicago, much less determine whether it has crossed a state line, either legally or illegally. These questions can be answered, definitively, of a registered machinegun, in all of about less than 5 seconds, by looking at the registration form in an owner's possession, which he is required to keep. 26 U.S.C. 5841(e). If the owner loses it, Defendants themselves have a large computer, in Martinsburg, West Virginia, that holds this data, at least in theory, going all the way back to 1934.

In *Sebelius*, a majority of the Supreme Court agreed that: "Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2644-2650(U.S. 2012). (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting)".

As noted by Justice Scalia, "Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far." *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2642 (U.S. 2012)(Dissent of Justice Scalia, joined by a majority of the Court).

Likewise, as previously cited, "the link between gun possession and a substantial effect on interstate commerce [is] attenuated." *United States v Lopez*, 514 U.S. 549, 612 (U.S. 1995). The "costs of crime" argument as a justification for commerce power has also been rejected. Id.

The "majority dissent", for lack of a better term (i.e. the portion of Scalia's dissent joined by a majority of the Court, thus making it the majority opinion on the point), stated:

> "The striking case of *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity."

Id. at 2643 (Scalia Dissent).

Justice Scalia, in his dissent speaking for the majority on this point lists the recent cases of the Supreme Court, dealing with the "outer edges" of commerce clause jurisprudence and the "necessary and proper clause", and states,

"The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded <u>not only</u> when the congressional action directly

violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power."

Id. at 2646 (Scalia Dissent).

Justice Scalia, writing for a majority of the Court on this point went on, explaining

"Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. 545 U.S., at 22, 125 S.Ct. 2195. See also *Shreveport Rate Cases*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (Necessary and Proper Clause allows regulations of intrastate transactions if necessary to the regulation of an interstate market). Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can't be distinguished from trophies obtained afterwards — which made it necessary and proper to prohibit the sale of all such trophies, see *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979)."

Id. at 2647.

As noted, NFA registered machineguns can be so distinguished. If this Court has doubts on that fact, it is important to remember that this case was

dismissed pursuant to F.R.C.P. 12(b)(6). Plaintiff is certain an evidentiary hearing in the District Court would prove that N.F.A. registered firearms are distinguishable and not fungible.

Justice Scalia also noted,

"The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could not be justified as necessary and proper for the carrying out of a general regulatory scheme. … It was unable to name any. … , whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept."

Id. at 2647.

Here, private possession in the home, or even on the back 40 acres, of a machinegun or other firearm does not so affect commerce in any way. Certainly, selling one across state lines may so affect interstate commerce, but 922(o) does not regulate that anyway, and other non-challenged statutes do.

Furthermore, there is no evidence in the record to support any claim that Plaintiff's particular DIAS ever crossed a state line in any capacity (See. Doc. 1, p. 3, 5), noting Plaintiff bought his DIAS in Illinois, from an Illinois dealer, who

made it in Illinois. Defendants, never filed an answer, which presumed the allegation was true.

Unlike marijuana in *Raich*, and as noted in *Sebelius*, the possession prohibitions are not the only practicable way of enabling the prohibition of interstate traffic in machineguns to be effectively enforced. It is a simple process to look at the required NFA markings on a NFA registered legal machinegun, under existing law, and determine its maker, importer, if any, model, if any, caliber and serial number, complete with a government maintained database of its owners and interstate movements. Thus, it is a simple and routine matter to determine whether a NFA registered machinegun moved or affected interstate commerce, or not, whether a given possession of a NFA registered machinegun is lawful, or not. Existing separate law required non-licensed persons to get specific permission, in writing, from the Attorney General, to cross a state line with a machinegun. (See ATF Form 5320.20.) Something that Plaintiff is not even looking to do, and not prohibited in any event by 922(o). Thus, it is not "necessary and proper" to totally ban possession of post 1986 machineguns in order to regulate the tightly controlled legal interstate market in them, as lawfully registered machineguns are individually distinguishable, and there already exists, and even with the striking of 922(o), would continue to exist, a functioning system to register their possession, transfer and movement, which, coincidentally, apparently generates federal revenue.

In light of the foregoing, either facially, or as applied to federally registered machineguns, 18 U.S.C. 922(o) is, simply, unconstitutional, as beyond the commerce clause power, and far from necessary and proper to any legitimate interstate commerce regulation.

To the extent that Defendants or the District Court found otherwise, their ruling is "contrary to law", and this Court should so hold, reversing the District Court's dismissal of this case, and remanding the matter back to the District Court to reconsider, in light of the fact that 18 U.S.C. 922(o) is unconstitutional, and thus not an impediment to an amnesty.

CONCLUSION

For the foregoing reasons, and those reasons that might be made in the Reply Brief and/or at oral argument, it is respectfully requested that this Honorable Court REVERSE and VACATE the decision of the District Court, granting Defendants' Motion To Dismiss, and remand and reinstate this case in the District Court with instructions to proceed on the merits of the case, and such other, further and different relief as allowed by law.

Dated: 4-4-2022

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CERTIFICATION OF COMPLIANCE WITH

FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR32(c)

The undersigned, counsel of record for the Plaintiff-Appellant, John Doe, furnishes the following in compliance with FRAP Rule 32(a)(7) FRAP RULE 32(g) and CR32;

I hereby certify that this brief conforms to the rules contained in FRAP RULE 32(a)(7) for a brief produced with proportionally spaced font.

The length of this brief is 11,212 words.

Dated: 4-4-2022

John Roe

s/Thomas G. Maag

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material requested by Circuit Rule 30(a) and (b) are included in the appendix.

Dated: 4-4-2022

s/Thomas G. Maag

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APPENDIX

APPEAL TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTIRCT OF ILLINOIS

JOHN ROE, Plaintiff, vs. MARVIN RICHARDSON, in his official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and MERRICK GARLAND, in his official capacity as Attorney General of the United States, Defendants.	)	Case No. 3:21-cv-00125-JPG

NOTICE OF APPEAL

Comes now Plaintiff, John Roe, by and through his attorneys, and hereby tender their NOTICE OF APPEAL, in the above styled case, to wit, Plaintiff appeals:

1. The order of January 12, 2022 (Doc. 37) dismissing this case,
2. The Judgment of January 12, 2022 (Doc. 38),
3. Order of September 21, 2021 (Doc. 31), and
4. Any and all other orders and matters necessary for a full and complete appeal of all appropriate matters in this case.

WHEREFORE, Plaintiff John Roe humbly requests that this Honorable Court reverse and vacate the orders and judgment dismissing this case, as well as the order denying Plaintiff permission to conduct discovery, and to remand this case, with directions to allow the case to proceed on the

merits, and to allow appropriate discovery, plus such other, further and different relief as is appropriate.

Dated: February 1, 2022

Respectfully Submitted,

s/Thomas G. Maag
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he filed the foregoing document, on this date, using the CM/ECF system, which will send notification to all registered users.

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Dated: 2-1-2022

s.Thomas G. Maag

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN ROE,

Plaintiff,

v.

MARVIN G. RICHARDSON, in his official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and MERRICK B. GARLAND, in his official capacity as Attorney General of the United States,[1]

Defendants.

Case No. 21-cv-125-JPG

MEMORANDUM AND
ORDER TO SHOW CAUSE

This matter comes before the Court on plaintiff John Roe's motion to conduct discovery and for other relief (Doc. 29). The defendants have responded to that motion (Doc. 30). Roe brought this case seeking opinions from the Courts about whether his current and contemplated future activities in connection with a firearm component violate the law. The defendants have moved to dismiss this case for lack of subject matter jurisdiction, including lack of standing, and for failure to state a claim (Doc. 21). That motion remains pending.

The current scheduling and discovery order describes this case as under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, and indicates discovery is not needed for such a case because it will rely on an administrative record, but provides that the plaintiff may request discovery if necessary.

[1] Marvin G. Richardson is now the Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, *see* https://www.atf.gov/about-atf/executive-staff (visited Sept. 15, 2021), and Merrick B. Garland is now the Attorney General of the United States, *see* https://www.justice.gov/ag (visited Sept. 15, 2021). They have automatically been substituted as the defendants in this case. *See* Fed. R. Civ. P. 25(d).

The plaintiff requests discovery on the grounds that the defendants have now reported that there is no administrative record to produce, but they have turned over documents related to the plaintiff's complaint. The plaintiff also expresses concerns about the withdrawal of the previous Assistant United States Attorney as defense counsel.

The Court has reviewed the filings in this case and has determined that discovery is not necessary before the Court rules on the defendants' motion to dismiss. If the case survives that motion, the Court would entertain another request for discovery. The Court further notes that there is nothing suspicious about the defendants' former counsel's withdrawal from this case; new counsel has appeared and has seamlessly continued to defend this case, as is common when responsibility for a case is transferred from one Assistant United States Attorney to another. And finally, neither the defendants nor their counsel are at fault in any way for not having an administrative record. They cannot manufacture one where none exists, although they appear to continue to search for other relevant documents to produce. The Court will keep this fact in mind, though, when it rules on the pending motion to dismiss. For these reasons, the plaintiff's motion for discovery is **DENIED without prejudice** (Doc. 29) to another motion following the Court's ruling on the pending motion to dismiss.

One additional matter warrants attention. The plaintiff admits that his true name is not, in fact, John Roe and that he is attempting to litigate this case anonymously using a pseudonym. Litigating a federal case anonymously is generally not permitted. "Judicial proceedings are supposed to be open . . . in order to enable the proceedings to be monitored by the public. The concealment of a party's name impedes public access to the facts of the case, which include the parties' identity." *Doe v. City of Chi.*, 360 F.3d 667, 669 (7th Cir. 2004). For this reason, there is a presumption that a plaintiff's identity is public information unless the plaintiff rebuts that

presumption by showing the harm to the party exceeds the likely harm from concealment. *Id.* Sufficient harm from disclosure has been found to exist, for example, where the plaintiff is "a minor, a rape or torture victim . . . a closeted homosexual, or . . . a likely target of retaliation by people who would learn her identity only from a judicial opinion or other court filing." *Id.* The Court has an obligation to determine the appropriateness of a plaintiff's concealing his name in derogation of the normal method of proceeding in federal court. *Id.* at 669-70 (citing *Doe v. Blue Cross & Blue Shield United of Wisconsin, supra*, 112 F.3d 869, 872 (7th Cir. 1997)).

The plaintiff in this case suggests he is pursuing this case anonymously because he believes he may be conducting activity for which he would be subject to arrest and prosecution. The Court is not keen on concealing the identity of potential lawbreakers so they can go undetected by law enforcement where there is probable cause to believe they have committed or are committing a crime. Enforcement of the law is not likely to be a kind of harm that would justify allowing a litigant's identity to remain hidden. Nevertheless, the Court will give the plaintiff an opportunity to argue this point directly and will give the defendants an opportunity to respond so the Court cannot determine whether such secrecy is justified.

Accordingly, the Court **ORDERS** the plaintiff to **SHOW CAUSE** on or before October 15, 2021, why the Court should not dismiss this case for failure to prosecute it in the true name of the real party in interest as required by Federal Rule of Civil Procedure 17(a). The defendants shall have 14 days to reply to the plaintiff's response to the order to show cause. An amended complaint using the plaintiff's true name shall be considered an adequate response to this order to show cause. Should the plaintiff fail to respond to this order to show cause in a timely manner, the Court may dismiss this action for failure to sue in the name of the real party in interest and/or for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) and the

Court's inherent authority to manage its docket. *See In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995).

IT IS SO ORDERED.
DATED: September 29, 2021

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN ROE, Plaintiff, vs. MARVIN RICHARDSON, in his official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and MERRICK GARLAND, in his official capacity as Attorney General of the United States, Defendants.	)	Case No. 3:21-cv-00125-JPG

MEMORANDUM AND ORDER

I. Introduction

This matter comes before the Court on Defendants' Marvin Richardson and Merrick Garland,[1] (collectively, "Defendants") Motion to Dismiss Plaintiff John Roe's ("Roe" or "Plaintiff") Complaint (Doc. 21). Plaintiff responded to Defendants' Motion to Dismiss (Doc. 24).

II. Procedural Background

Plaintiff filed his Complaint in this Court on February 3, 2021 (Doc. 1). Plaintiff seeks declaratory relief to a series of questions he posed regarding drop-in auto sear ("DIAS") that Plaintiff allegedly purchased around 1979 (Doc. 1 ¶ 4). Specifically, Plaintiff alleges that Defendants violated the Administrative Procedure Act ("APA") Notice-and-Comment Requirements (Doc. 1 at ¶ ¶ 56-65). Plaintiff argues the questions contained in paragraph 68 of his Complaint require adjudicating (Doc. 1 at ¶ 68). Additionally, Plaintiff alleges this Court has

[1] Pursuant to Fed. R. Civ. P. 25(d) Marvin Richardson and Merrick Garland are substituted for former Acting Director Regina Lombardo and Acting Attorney General Jeffrey Rosen.

subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the Federal Declaratory Judgment Act under 28 U.S.C. § 2201(a). (Doc. 1 at ¶ 71).

Defendants move to dismiss Plaintiff's Complaint for "lack of subject matter jurisdiction, lack of standing, and failure to state a claim upon which relief can be granted." (Doc. 21).

III. Factual and Statutory Background

Plaintiff alleges he lawfully purchased a DIAS in the Southern District of Illinois around 1979 (Doc. 1 at ¶ 4). "On a firearm, a sear is the part of the trigger mechanism that holds the hammer back until the correct amount of pressure has been applied to the trigger." (Doc. 21, p. 2). According to Plaintiff, a DIAS is an "aftermarket part…that would…make some, but not all, otherwise semi-automatic AR15 rifles…fire as a "machinegun" as that term was defined in 28 U.S.C. § 5845(b) …" (Doc. 1 at ¶ 5). Two weeks after Plaintiff purchased the DIAS, Plaintiff contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to inquire as to the legality of the DIAS and was told the DIAS were lawful (Doc. 1 at ¶ ¶ 14, 16). ATF allegedly told Plaintiff the following:

> …the DIAS by itself, was not prohibited or subject to the registration requirements of the National Firearms Act, as long as Plaintiff did not own compatible AR15 and M16 trigger parts, which Plaintiff did not possess, but that if Plaintiff were to acquire an AR15 or M16 parts, it was suggested that possession of both the auto sear and the AR15 and/or M16 parts might not be legal, if the group of items was not registered with ATF.

(Doc. 1 at ¶ 16).

In 1934, the National Firearms Act ("NFA") was enacted to target lethal weapons; imposing a tax on making and transferring firearms defined in the Act and requiring registration of these firearms.[2] 26 U.S.C. § 5845. The NFA defines a firearm to include a machinegun. *See*

[2] National Firearms Act, https://www.atf.gov/rules-and-regulations/national-firearms-act (last visited January 5, 2022).

26 U.S.C. § 5845(a)(6). The NFA further defines a machinegun as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b).

In 1981, the ATF published Revenue Ruling 81-4 ("Ruling 81-4") regarding DIAS. This ruling determined that DIAS manufactured after October 31, 1981 are considered machineguns and are therefore, regulated under the NFA. The entirety of the ruling is reproduced below.

> The Bureau of Alcohol, Tobacco and Firearms has examined an auto sear known by various trade names including "AR15 Auto Sear," "Drop In Auto Sear," and "Auto Sear II," which consists of a sear mounting body, sear, return spring, and pivot pin. The Bureau finds that the single addition of this auto sear to certain AR15 type semiautomatic rifles, manufactured with M16 internal components already installed, will convert such rifles into machineguns.
>
> The National Firearms Act, 26 U.S.C. 5845(b), defines "machinegun" to include any combination of parts designed and intended for use in converting a weapon to shoot automatically more than one shot, without manual reloading, by a single function of the trigger.
>
> HELD: The auto sear known by various trade names including "AR15 Auto Sear," "Drop In Auto Sear," and "Auto Sear II," is a combination of parts designed and intended for use in converting a weapon to shoot automatically more than one shot, without manual reloading, by a single function of the trigger. Consequently, the auto sear is a +machinegun as defined by 26 U.S.C. 5845(b).
>
> With respect to the machinegun classification of the auto sear under the National Firearms Act, pursuant to 26 U.S.C. 7805(b), this ruling will not be applied to auto sears manufactured before November 1, 1981. Accordingly, auto sears manufactured on or after November 1, 1981, will be subject to all the provisions of the National Firearms Act and 27 C.F.R. Part 179.

ATF Rul. 81–4, [ATFQB 1981-3 78] (1981).

In 1986, the Title II of the Gun Control Act of the NFA ("Gun Control Act") was enacted and amended the NFA to ban machineguns. 18 U.S.C. § 921(a)(23). Pursuant to 18 U.S.C. § 922(o), machineguns manufactured on or after May 19, 1986, may be only transferred or

possessed by law enforcement, effectively banning private ownership of machineguns.[3]

In 2014, the ATF published an editor's note to Ruling 81-4 in the Federal Firearms Reference Guide ("Editor's Note"), which explained that unregistered DIAS, regardless of when it was manufactured, is illegal (Doc. 1 at ¶ 56). Specifically, the Editor's Note states as follows:

> Regardless of the date of manufacture of a drop in auto sear (i.e., before or after November 1, 1981) the possession or transfer of an unregistered drop in auto sear (a machinegun as defined) is prohibited by the National Firearms Act (NFA), 26 U.S.C. § 5861, and the Gun Control Act, 18 U.S.C. § 922(o). The last paragraph of ATF Ruling 81-4 only exempts the making, transfer, and special (occupational) taxes imposed by the NFA with respect to the making, manufacture, or transfer of drop in auto sears prior to November 1, 1981. See 26 U.S.C. §§ 5801, 5811, 5821, 7805(b)(8).

U.S. Dep't of Just. ATF, Fed. Firearms Reg. Reference Guide, p. 126-27 (1988).

Plaintiff allegedly forgot about his DIAS until 2020 when he wanted to legally sell the DIAS. (Doc. 1 at ¶ 27). Plaintiff states that it would have been "an utterly futile act" to try to file an ATF Form 4[4] "because the ATF would summarily disapprove the Form 4, refund the $200.00 transfer tax, and refuse to register the auto sear to the buyer, whoever it might be, as the auto sear is not registered." (Doc. 1 at ¶ 31). Specifically, under the NFA, firearms can only be transferred when the Attorney General has approved the transfer and registration. 26 U.S.C. § 5812(b). No other provisions allow for transfer of firearms. The NFA makes it unlawful for "any person" to "receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d).

---

[3] Section 922(o) states "(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun. (2) This subsection does not apply with respect to-- (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect." 18 U.S.C. § 922(o).

[4] According to the ATF, Form 4 is a form to transfer a NFA firearm to an individual or other entity. When this form is approved, it is returned to the ATF with a tax stamp. Form 4 – Application for Tax Paid Transfer and Registration of Firearm (ATF Form 5320.4), https://www.atf.gov/firearms/docs/form/form-4-application-tax-paid-transfer-and-registration-firearm-atf-form-53204 (last visited January 5, 2022).

The crux of Plaintiff's Complaint is that he believes pursuant to Ruling 81-4, Plaintiff can legally continue to possess his DIAS while, on the other hand, the ATF and DOJ state that Plaintiff cannot legally do so (Doc. 1 at ¶ 66(B)). This leaves Plaintiff with a "conundrum" regarding conflicting laws (Doc. 1 at ¶ 66). Defendants move to dismiss for lack of subject matter jurisdiction, lack of standing, and failure to state a claim upon which relief can be granted.

IV. Law and Analysis

a. Subject Matter Jurisdiction

Defendants move to dismiss on the basis that this Court does not have subject matter jurisdiction over Plaintiff's action. Specifically, Defendants argue neither 28 U.S.C. § 1331 and the Declaratory Judgment Act provide an independent basis for subject matter jurisdiction (Doc. 21, p. 6).

Once jurisdiction has been called into doubt, the party asserting jurisdiction has the burden of proving that this Court has subject matter jurisdiction. *Ware v. Best Buy Stores, L.P.*, 6 F.4th 726, 731 (7th Cir. 2021). When deciding a facial challenge to jurisdiction, "the district court must accept as true all well-pleaded factual allegations, and draw reasonable inferences in favor of the plaintiff." *Int'l Ass'n of Heat & Frost Insulators Loc. 17 Pension Fund v. CEC Env't, Inc.*, 530 F. Supp. 3d 757, 760 (N.D. Ill. 2021) (cleaned up). The court may also "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* Thus, "no presumptive truthfulness attaches to plaintiff's allegations," and the court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.*

The Court agrees that the Declaratory Judgment Act and Section 1331 do not provide independent bases to confer jurisdiction. *Manley v. L.*, 889 F.3d 885, 893 (7th Cir. 2018) (citing

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). Plaintiff states the Declaratory Judgment Act confers jurisdiction where "federal jurisdiction would exist in a coercive suit brought by the declaratory judgment defendant." (Doc. 24, p. 2). Said differently, the Seventh Circuit states that "jurisdiction is determined by whether federal question jurisdiction would exist over the presumed suit by the declaratory judgment defendant." *Wisconsin v. Ho–Chunk Nation*, 512 F.3d 921, 935 (7th Cir. 2008) (quoting *GNB Battery Techs., Inc. v. Gould, Inc*., 65 F.3d 615, 619 (7th Cir. 1995).). Plaintiff supports its argument by citing *GNB Battery Technologies, Inc*., where the Seventh Circuit held GNB's complaint constituted an adequate request for declaratory relief and supports federal question jurisdiction because GNB's complaint presumes possibility of action under various sections of the Compensation and Liability Act. *GNB Battery Technologies*, 65 F.3d at 620.

Essentially, for this Court to have subject matter jurisdiction over an action where Plaintiff requests declaratory relief, this Court must have jurisdiction over the Defendants' 'presumed complaint" against Plaintiff (declaratory judgment defendant). *See e.g. Samuel C. Johnson 1988 Tr. v. Bayfield Cty., Wis.*, 520 F.3d 822, 828 (7th Cir. 2008) (stating "the issue is whether the County's [defendant] presumed complaint against the Landowners [plaintiff], on its face, would include an action 'arising under' federal law."). Plaintiff states "Defendants can file such a suit, and it is not uncommon for them to do so." (Doc. 24, p. 3). Plaintiff cites cases in the Sixth Circuit and District Court of the District of Columbia as examples of civil forfeiture actions of purported illegal firearms. *United States v. One Assortment of Eighty-Nine Firearms and Six Hundred and Thirty-Eight Rounds of Ammunition*, 846 F.2d 24, 26 (6th Cir. 1988) (government filed civil forfeiture of 89 firearms and 38 rounds of ammunition); *United States v. Seven Misc. Firearms*, 503 F. Supp. 565 (Dist. Court, Dist. of Columbia 1980) (court concluding

five firearms seized from the NRA museum were rendered incapable of firing and two were not designed or manufactured to fire and hence not firearms).

While these cases are not in this circuit and deal with many more than one firearm, drawing all reasonable inferences in favor of Plaintiff, the Court sees how a presumed complaint against Plaintiff Roe by the Government in a civil forfeiture case would confer jurisdiction on this Court. 26 U.S.C. § 5872(a). The Court finds there is subject matter jurisdiction.

b. Standing

Defendants further move to dismiss on the basis that Plaintiff does not have Article III standing (Doc. 6, p. 8). Specifically, Defendants argue Plaintiff does not meet redressability element under Article III. *Id*.

The elements of standing are well settled: the plaintiff must allege an injury in fact that is traceable to the defendant's conduct and redressable by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Specifically, a plaintiff must show "(1) an injury in fact that is (2) caused by the defendant's conduct and (3) redressable by a favorable decision." *Woodring v. Jackson Cnty*., 986 F.3d 979, 984 (7th Cir. 2021) (citing *Lujan*, 504 U.S. at 560). Thus, Article III of the U.S. Constitution limits a federal court's authority to resolve "cases" or "controversies." U.S. CONST. Art. III. If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve. *Casillas v. Madison Ave. Assocs., Inc*., 926 F.3d 329, 333 (7th Cir. 2019). Plaintiff bears the burden of demonstrating concrete or imminent injury. *Big Shoulders Cap. LLC v. San Luis & Rio Grande R.R., Inc*., 13 F.4th 560, 568 (7th Cir. 2021).

Defendants argue that Plaintiff does not meet constitutional standing requirements because the injury Plaintiff asserts "could not be redressed by a favorable decision." *Cornucopia*

Inst. v. United States Dep't of Agric., 884 F.3d 795, 797 (7th Cir. 2018). Plaintiff states this argument is frivolous and likens it to a homeowner having no standing to seek just compensation after a highway is built over his home (Doc. 24, p. 6). In short, Defendants argue the law is settled and this Court has no legal mechanism of redressing Plaintiff's harms. Plaintiff disagrees by arguing the opposite – the law is at issue and the Court should ignore guidance from various circuits, including the Seventh Circuit. The Court agrees that this Court has no legal way to order retroactive registration of the pre-1981 DIAS and no legal way to remedy Plaintiff's inability to sell or legally possess the DIAS. The DIAS is illegal and therefore, contraband. A favorable decision by this Court could not redress Plaintiff's alleged injury.

Plaintiff argues Ruling 81-4 allows Plaintiff to legally possess his DIAS and excludes his pre-1981 DIAS from the reclassification in Ruling 84-1 (Doc. 1 at ¶ 66A). However, Ruling 81-4 did not waive the registration requirements for pre-1981 auto sears; it waived the NFA tax implications for pre-1981 auto sears. *See* Ruling 81-4 (citing 26 U.S.C. § 7805(b))[5]. Reproduced again, Ruling 81-4 holding states, "[w]ith respect to the machinegun classification of the auto sear under the National Firearms Act, *pursuant to 26 U.S.C. 7805(b)*, this ruling will not be applied to auto sears manufactured before November 1, 1981." (emphasis added). The Seventh Circuit provides a helpful analysis of this distinction. The defendants in *Cash* argued Ruling 81-4 places "auto sears manufactured before November 1, 1981 outside all obligations laid by statute on the ownership and transfer of firearms." *United States v. Cash*, 149 F.3d 706, 707 (7th Cir. 1998). The Seventh Circuit disagreed stating, "nothing in the firearms statutes gives the Secretary of the Treasury (or the Bureau of Alcohol, Tobacco and Firearms) the power to make

[5] Section 7805(b)(8) provides, "the Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect." 26 U.S.C. § 7805(b).

exemptions to § 5845(b) [defining machineguns] and associated legal obligations." *Id*. Later, the court stated:

> Read in conjunction with § 7805(b)(8), the proviso in the fourth paragraph of ATF Ruling 81–4 means only that the Secretary will not collect any tax under 26 U.S.C. §§ 5801, 5811, or 5821 on account of auto sears manufactured or transferred before November 1, 1981. *The ruling does not—and cannot—excuse compliance with criminal laws applicable at the time of post–1981 transfers*.

Cash, 149 F.3d at 707. (emphasis added).

Plaintiff argues that such language is dicta, and the Seventh Circuit is wrong (Doc. 24, p. 7-9). To support, Plaintiff states that if the government and defendant in *Cash* believed in one reading of Ruling 81-4 and "there was no need to brief it," it must have been correct perception of the law (Doc. 24, p. 9). The Court finds these arguments are without merit and will defer to the language from the Seventh Circuit. While the Court agrees dicta is not inherently controlling, the Court finds analysis of the statute and ruling helpful and persuasive in the absence of other guidance in this circuit.

In 2013, the Sixth Circuit provided additional context of Ruling 84-1. In *United States v. Dodson*, defendant appealed his sentence where he moved to dismiss any counts of his superseding indictment related to auto-sear counts, arguing per Ruling 84-1, pre-1981 auto sears were legal to possess and transfer, without registration. *United States v. Dodson*, 519 F. App'x 344, 346 (6th Cir. 2013). The Sixth Circuit clarified the effect of the Ruling 84-1:

> The effect of the retroactivity of Ruling 81–4, therefore, is that pre–1981 manufacturers are exempt from the $200 making tax, 26 U.S.C. § 5821; pre–1981 sales are exempt from the $200 transfer tax, 26 U.S.C. § 5811; pre–1981 dealers are exempt from the $500 special occupational tax, 26 U.S.C. § 5801; and pre–1981 owners are exempt from criminal prosecution for past possession of an unregistered machinegun, 26 U.S.C. § 5861(d). *But post–1981 transfers and possessions—even of previously manufactured auto sears—must be subject to the tax and registration requirements of the National Firearms Act. Dodson mistakes an exemption limited to past time periods for an absolute exemption for a class of items*.

Dodson, 519 F. App'x at 349 (emphasis added).

Thus, the Sixth Circuit stated that while the ATF "may retroactively exempt certain weapons from tax and regulation requirements," the ATF cannot "exempt those same weapons from prospective application of the law." *Id*. at 349. Any other reading of Ruling 81-4 is problematic because, as the Sixth Circuit in *Dodson* recognized, the Court cannot find that a 1981 ATF Ruling exempts the Plaintiff's unregistered DIAS from a 1986 machinegun ban. "ATF does not have the ability to redefine or create exceptions to Congressional statutes, and surely cannot do so before those statutes were passed." *Id*. *See also id.* at fn 4 (stating "Ruling 81–4 is such an interpretation of existing law, issued to facilitate compliance by the public, not create new law").

In line with the Seventh and Sixth Circuit reasoning, interpretation, and analysis, Ruling 84-1 does not allow for retractive registration of Plaintiff's pre-1981 DIAS. Ruling 84-1 did not create an exception for Plaintiff's pre-1981 DIAS.

Plaintiff urges the Court that it has a way to redress Plaintiff's injury. Specifically, Plaintiff urges this Court to see how Defendants have the "legal obligation" under "Constitutional Due Process" and Section 207(d) of the Gun Control Act of 1968 to establish amnesty periods (Doc. 24, p. 6). Section 207(d) provides:

> The Secretary of the Treasury, after publication in the Federal Register of his intention to do so, is authorized to establish such periods of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, as the Secretary determines will contribute to the purposes of this title.

Pub. L. 90-619, 82 Stat. 1236.

Plaintiff argues that Defendants have the obligation to "establish amnesty periods, upon publication of notice in the federal register, of up to 90 days, to allow for registration of

unregistered firearms," which "would resolve the issue in this case." (Doc. 24, p. 6). However, courts have held that there is no authority to provide amnesty for machineguns because the purpose of 18 U.S.C. § 922(o),[6] where Congress intended to make it illegal for any person to transfer or possess a machinegun, was to limit transactions in post-1986 machineguns. *United States v. Hunter*, 843 F. Supp. 235, 247 (E.D. Mich. 1994) (stating "it is evident that Congress prohibited the transfer and possession of most post–1986 machineguns not merely to ban these firearms, but, rather, to control their interstate movement by proscribing transfer or possession")[7]; *Doe v. Trump*, No. 19-CV-6-SMY, 2021 WL 4441462, at *3 (S.D. Ill. Sept. 28, 2021); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990) (rejecting the district court's holding that § 922(o) did not prohibit private possession of machineguns if the owner complied with the NFA's registration requirements and agreeing with ATF's interpretation that § 922(o) prohibits the private possession of machineguns not lawfully possessed prior to May 19, 1986). This intent is buttressed by Senator Kennedy during the colloquy on the Senate floor:

> MR. METZENBAUM: Do you believe that an amnesty period can be administratively declared by the Secretary of the Treasury by the enactment of this bill?
> MR. KENNEDY. Yes, I am aware of the discussions earlier today on the question of amnesty, and I joined the Senator in rejecting any such proposal. There is nothing in the bill that gives such an authority, and there is clearly no valid law enforcement goal to be achieved by such open-ended amnesty.

132 Cong. Rec. S5358 (Tuesday, May 6, 1986).

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[6] 922(o) states "(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun. (2) This subsection does not apply with respect to-- (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect." 18 U.S.C. § 922.

[7] Plaintiff also requests for this Court to render Section 922(o) unconstitutional (Doc. 24, p. 13-17). Section 922(o) has already been held constitutional as valid under the Commerce Clause by various circuits in this country. *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996) ("regulation of machine guns is well within the scope of congressional authority over activities affecting commerce"); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) ("[t]he interstate flow of machineguns 'not only has a substantial effect on interstate commerce; it is interstate commerce") (cleaned up); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996). This Court will not contradict clear precedence.

Considering the extensive judicial authority and clear Congressional intent saying so, the Court agrees Defendants do not have the authority to provide an amnesty period for Plaintiff's DIAS.

Unregistered DIAS such as Plaintiff's are now contraband. *United States v. Tankersley*, 492 F.2d 962, 967 (7th Cir. 1974) ("only transferors can register firearms under the" National Firearms Act); *United States v. Aiken*, 974 F.2d 446, 448 (4th Cir. 1992) (explaining Congress changed the legislative scheme to flatly prohibit possession of an unregistered gun and therefore contraband). This Court has no legal authority to determine Plaintiff's DIAS is now legal and thus cannot redress Plaintiff's harms. The Court finds that the Plaintiff lacks standing and therefore dismisses his Complaint based on the failure to meet a "case" or "controversy" under Article III of the U.S. Constitution.

c. APA Final Agency Decision

Plaintiff's Complaint states that the official position of the ATF changed from Ruling 81-4 where pre-1981 DIAS were legal (which the Court has determined differently above) to 2014 where the ATF stated in an Editor's Note explaining Ruling 81-4 in the Federal Firearms Reference Guide, "possession to transfer of an unregistered drop in auto sear…is prohibited by the…NFA, 26 U.S.C. 5861, and the Gun Control Act, 18 U.S.C. 922(o). U.S. Dep't of Just. ATF, Fed. Firearms Reg. Reference Guide, p. 126-27 (1988); (Doc. 1 at ¶ 56). Such a change in policy, according to Plaintiff, violates notice requirements of the APA. (Doc. 1 at ¶¶ 56-65). Defendants move to dismiss under 12(b)(6) on the basis that Plaintiff cannot be granted relief under the APA because the Editor's Note is not final agency action (Doc. 21, p. 10).

The purpose of a motion to dismiss filed under Rule 12(b)(6) is to decide the adequacy of the complaint. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In order to

survive a Rule 12(b)(6) motion, the complaint must allege enough factual information to "state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When considering a motion to dismiss filed pursuant to Rule 12(b)(6), the Court must accept well-pleaded facts as true and draw all possible inferences in favor of the plaintiff. *McReynolds v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 879 (7th Cir. 2012).

The APA limits judicial review to "final agency actions." 5 U.S.C. § 704. The Supreme Court has explained that to constitute a final action, the decision at issue "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature" and it must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Menominee Indian Tribe of Wisconsin v. Env't Prot. Agency*, 947 F.3d 1065, 1070 (7th Cir. 2020) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

In *Menominee Indian Tribe of Wisconsin*, the Seventh Circuit held detailed letters from the Environmental Protective Agency and Army Corps of Engineers to an Indian tribe explaining that the state government (and not federal) had jurisdiction over mining company's application for permits submitted pursuant to the Clean Water Act did not constitute "final agency actions." *Menominee Indian Tribe of Wisconsin*, 947 F.3d at 1070. Specifically, the Seventh Circuit found such letters were "purely informational in nature" because it "impose[s] no obligations and "denie[s] no relief. *Id*. Additionally, the Court found that the letters "reiterated the status quo" and thus, there was nothing for the district court and Seventh Circuit to review. *Id*.

If the Seventh Circuit does not constitute these letters as "final agency" action, the Court does not see how the editor's note in the Federal Firearms Reference Guide can constitute a

"final agency" action. The Editor's Note is informational in nature and imposed no obligations on gunowners. Additionally, the Court is unclear how legal consequences were to follow from this note regarding Ruling 84-1. While the Seventh Circuit understood the tribe would find its conclusion "unsettling" since the tribe relied on such "detailed and specific" letters to its detriment, the Court does not find these same concerns present here; especially since Plaintiff allegedly forgot about his DIAS until finding them in 2020. The Court does not agree with Plaintiff's allegation that such a "change" in interpretation regarding DIAS is Orwellian (Doc. 24, p. 18) (citing the Animal Farm's original and Napoleon's changed commandments).

In fact, there are jurisdictions across the circuits that have stated or inferred that even *rulings* of the ATF are considered interpretations of existing law, used to facilitate compliance in the form of informal rulemakings, and not subject to the notice and hearing requirements of the APA. *York v. Sec'y of Treasury*, 774 F.2d 417, 419–20 (10th Cir. 1985) (ATF ruling merely interpretative rule); *see also United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 420 (6th Cir. 2006) (declining to answer question of what deference is due to ATF rulings).

Additionally, this Court has found that Ruling 81-4 does not hold that Plaintiff is legally allowed to possess his DIAS. Thus, Ruling 81-4, the Editor's Note, Seventh Circuit, and other courts have the same understanding that possessors could not legally own pre-1981 DIAS, and Ruling 81-4 excluded pre-1981 DIAS from reclassification. In short, all interpret or clearly state pre-1981 DIAS are contraband. Similar to the *Menominee Indian Tribe of Wisconsin* court, this Court believes the Editor's Note "reiterated the status quo" and thus, there is nothing for this Court to review under the APA.

Defendants also move to dismiss Plaintiff's APA claim based on the fact Plaintiff did not file its claim within the required six years. 28 U.S.C. § 2401(a). (Doc. 21, p. 14). Plaintiff argues

the problem is a "continuing one" and finds the different notices confusing (Doc. 24, p. 20). Finding that the Editor's Note is not an "final agency" action, the Court finds this argument moot.

The Court GRANTS Defendants' Motion to Dismiss Plaintiff's claim under the APA.

V. Conclusion

Finding that the Plaintiff has no Article III standing to pursue this case, the Court hereby GRANTS Defendants' Motion to Dismiss (Doc. 21) and DISMISSES Plaintiff's Complaint (Doc. 1). Further, the Court dismisses Plaintiff's claim under the Administrative Procedure Act.

IT IS SO ORDERED.
Dated: January 12, 2022

/s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN ROE, Plaintiff, vs. MARVIN RICHARDSON, in his official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and MERRICK GARLAND, in his official capacity as Attorney General of the United States, Defendants.	)	Case No. 3:21-cv-00125-JPG

JUDGMENT

This matter having come before the Court, and the Court having rendered a decision,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff John Roe's Complaint against Defendants Marvin Richardson and Merrick Garland is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.
Dated: January 12, 2022

/s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

U.S. District Court
Southern District of Illinois (East St. Louis)
CIVIL DOCKET FOR CASE #: 3:21-cv-00125-JPG
Internal Use Only

Roe v. Lombardo et al
Assigned to: Judge J. Phil Gilbert
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/03/2021
Date Terminated: 01/12/2022
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: Federal Question

Plaintiff

John Roe

represented by **Thomas G. Maag**
Maag Law Firm, LLC
22 West Lorena Avenue
Wood River, IL 62095
618-216-5291
Fax: 618-551-0421
Email: tmaag@maaglaw.com
ATTORNEY TO BE NOTICED

V.

Defendant

Regina Lombardo
in her official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms and Explosives

represented by **Nicholas J. Biersbach**
Assistant U.S. Attorney - Fairview Heights
9 Executive Drive
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Fairview Heights, IL 62208
618-628-3700
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Email: nicholas.biersbach@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nathan D Stump
Assistant U.S. Attorney - Fairview Heights
9 Executive Drive
Suite 300
Fairview Heights, IL 62208
618-628-3700
Fax: 618-622-3810
Email: Nathan.Stump@usdoj.gov
TERMINATED: 09/02/2021

Defendant

Jeffrey Rosen

represented by **Nicholas J. Biersbach**

in his official capacity as acting Attorney General

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nathan D Stump
(See above for address)
TERMINATED: 09/02/2021

Email All Attorneys
Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
02/03/2021	1	COMPLAINT against All Defendants (Filing fee $ 402 receipt number 0754-4393817.), filed by All Plaintiffs. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet, # 2 Exhibit Exhibits)(Maag, Thomas) (Entered: 02/03/2021)
02/03/2021	2	NOTICE OF INITIAL ASSIGNMENT TO A U.S. MAGISTRATE JUDGE: This case has been randomly assigned to United States Magistrate Judge Gilbert C. Sison pursuant to Administrative Order No. 257. The parties are advised that their consent is required if the assigned Magistrate Judge is to conduct all further proceedings in the case, including trial and final entry of judgment pursuant to 28 U.S.C. 636(c) and Federal Rule of Civil Procedure 73. As set forth in Administrative Order No. 257, each party will be required to file a Notice and Consent to Proceed Before a Magistrate Judge Jurisdiction form indicating consent or nonconsent to the jurisdiction of the assigned Magistrate Judge. If all parties do not consent to the Magistrate Judge's jurisdiction, the case will be randomly assigned to a district judge for all further proceedings and the parties cannot later consent to reassignment of the case to a magistrate judge. The parties are further advised that they are free to withhold consent without adverse substantive consequences. Within 21 days of this Notice, the following party or parties must file the attached form indicating consent to proceed before the assigned Magistrate Judge or an affirmative declination to consent: John Roe. A link regarding the magistrate judges in this district is attached for your convenience: http://www.ilsd.uscourts.gov/documents/BenefitsofConsent.pdf. All future documents must bear case number 3:21-cv-00125-GCS. Refer to Civil/Removal Case Processing Requirements, found on the ILSD website, for further service information. Consent due by 2/24/2021 (clt) (Entered: 02/03/2021)
02/04/2021	3	NOTICE of Appearance by Thomas G. Maag on behalf of All Plaintiffs (Maag, Thomas) (Entered: 02/04/2021)
02/04/2021	4	Summons Requested. (Maag, Thomas) (Entered: 02/04/2021)
02/04/2021	5	Summons Requested. (Maag, Thomas) (Entered: 02/04/2021)
02/04/2021	6	Summons Issued as to Regina Lombardo. Original mailed to requesting party. (clt) (Entered: 02/04/2021)
02/04/2021	7	Summons Issued as to Jeffrey Rosen. Original mailed to requesting party. (clt) (Entered: 02/04/2021)
02/25/2021	8	NOTICE: John Roe was directed to file the attached form regarding consenting or declining to consent to magistrate judge jurisdiction. The time for doing so has now passed, and the Court has not received the form. As required by Administrative Order No. 257, John Roe shall return the form within 7 days or face possible sanctions. The Clerk notes that due to the COVID-19 public health crisis, deadlines

		that were pending on or before April 1, 2020 were extended in accord with Administrative Order No. 261 and/or Amended Administrative Order No. 261. This automated notice does not take into account any such extensions. If, after the expiration of the 7-day deadline set forth herein, the Court chooses to take further action, all applicable deadline extensions will be considered at that time. Consent due by 3/4/2021 (clt) (Entered: 02/25/2021)
03/02/2021	9	STRICKEN. CONSENT/NON-CONSENT TO U.S. MAGISTRATE JUDGE - sealed pending receipt from all parties. (Maag, Thomas) Modified on 3/2/2021 (clt). (Entered: 03/02/2021)
03/02/2021	10	NOTICE STRIKING ELECTRONICALLY FILED DOCUMENTS striking 9 Consent/Non-Consent to US Magistrate Judge. NOTICE to Plaintiff STRIKING PLEADING: The Clerks Office received your Consent to Proceed Before a Magistrate Judge Jurisdiction form. The form is incomplete. Your signature was absent from the form under Signature of Party or Attorney. Therefore, the pleading is STRICKEN. Please refile completed document. Another form is attached to this notice. Please note that, pursuant to the Courts prior Order, the deadline for submitting this form is March 4, 2021. (clt) (Entered: 03/02/2021)
03/08/2021	11	ORDER TO SHOW CAUSE: Consistent with Administrative Order No. 257, Plaintiff ROE was previously directed to file the form indicating consent to proceed before the Magistrate Judge or an affirmative declination to consent. The time for doing so has passed, and in spite of a warning and additional time to do so, said party continues to ignore the Court's directive by not returning the form. Thus, ROE and/or Counsel of Record is ordered to SHOW CAUSE why sanctions should not be imposed for failure to file the attached form as is required under Administrative Order No. 257. Show Cause Response re Consent due by 3/22/2021. Signed by Magistrate Judge Gilbert C. Sison on 3/8/2021. (klh)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/08/2021)
03/09/2021	12	CONSENT/NON-CONSENT TO U.S. MAGISTRATE JUDGE - sealed pending receipt from all parties. (Maag, Thomas) (Entered: 03/09/2021)
03/09/2021	13	RESPONSE to 11 Order to Show Cause re Consent,,, filed by All Plaintiffs. (Maag, Thomas) (Entered: 03/09/2021)
03/10/2021	14	NOTICE TERMINATING JUDGE ASSIGNMENT: Pursuant to Administrative Order No. 257, and a request for reassignment having been received, this case, in its entirety, is hereby reassigned to Judge J. Phil Gilbert for further proceedings. Magistrate Judge Gilbert C. Sison no longer assigned to the case. All future documents must bear case number 3:21-cv-00125-JPG. (clt)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/10/2021)
03/31/2021	15	SUMMONS Returned Executed by All Plaintiffs. Jeffrey Rosen served on 2/17/2021, answer due 4/19/2021. (Maag, Thomas) (Entered: 03/31/2021)
04/07/2021	16	NOTICE of Appearance by Nathan D Stump on behalf of All Defendants (Stump, Nathan) (Entered: 04/07/2021)
04/07/2021	17	MOTION for Extension of Time to File Answer *(Unpposed)* by All Defendants. (Stump, Nathan) (Entered: 04/07/2021)
04/08/2021	18	NOTICE REGARDING FILING re 16 Notice of Appearance filed by Jeffrey Rosen, Regina Lombardo, 17 Motion for Extension of Time to File Answer filed by Jeffrey Rosen, Regina Lombardo. The document incorrectly reflects the case

		number as 3:21-cv-00125-GCS. The correct case number for future filings is 3:21-cv-00125-JPG. This Notice is sent for informational purposes only. THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (clt)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 04/08/2021)
04/09/2021	19	CJRA TRACK B assigned: Final Pretrial Conference is scheduled for 4/20/2022 at 9:00 AM with a Bench Trial date of 5/2/2022 at 9:00 AM in Benton Courthouse before Judge J. Phil Gilbert. **Parties are to submit a Joint Report regarding Proposed Scheduling and Discovery Order within 21 days of the entry of this filing. Scheduling/Discovery and Settlement Conferences will NOT be set for hearing unless requested by the parties or deemed necessary by the Court.** (tag) (Entered: 04/09/2021)
04/12/2021	20	**ORDER GRANTING** the defendants' 17 Unopposed Motion for Extension of Time. They have through June 18, 2021, to file their responsive pleading. Signed by Judge J. Phil Gilbert on 4/12/2021. (cab). THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 04/12/2021)
06/11/2021	21	MOTION to Dismiss by All Defendants. Responses due by 7/15/2021 (Stump, Nathan) (Entered: 06/11/2021)
06/14/2021	22	MOTION for Extension of Time to File *to tender CMO* by All Plaintiffs. (Maag, Thomas) (Entered: 06/14/2021)
06/15/2021	23	**ORDER GRANTING** the plaintiff's agreed 22 Motion for Extension to Tender Case Management Order. The litigants now have through June 22, 2021, to submit their Proposed Scheduling & Discovery Order. Signed by Judge J. Phil Gilbert on 6/15/2021. (cab). THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 06/15/2021)
06/16/2021	24	RESPONSE in Opposition re 21 MOTION to Dismiss filed by All Plaintiffs. (Attachments: # 1 Exhibit Exhibits to Response to MTD)(Maag, Thomas) (Entered: 06/16/2021)
07/15/2021	25	SCHEDULING AND DISCOVERY ORDER: The Joint Report of Parties is approved and entered. Dispositive Motions due by 1/21/2022. The Final Pretrial Conference is scheduled for 4/20/2022 at 9:00 AM with Bench Trial date of 5/2/2022 at 9:00 AM in Benton Courthouse before Judge J. Phil Gilbert. Signed by Judge J. Phil Gilbert on 7/15/2021. (Attachments: # 1 Joint Report)(tag) (Entered: 07/15/2021)
09/02/2021	26	MOTION to Withdraw as Attorney , MOTION to Substitute Attorney by All Defendants. (Stump, Nathan) (Entered: 09/02/2021)
09/02/2021	27	NOTICE of Appearance by Nicholas J. Biersbach on behalf of All Defendants (Biersbach, Nicholas) (Entered: 09/02/2021)
09/02/2021	28	ORDER granting 26 Motion to Withdraw as Attorney. Attorney Nathan D Stump terminated. Signed by Judge J. Phil Gilbert on 9/2/2021. (tlp)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 09/02/2021)
09/14/2021	29	MOTION *To Conduct Discovery and other relief* by All Plaintiffs. (Attachments: # 1 Exhibit Ex A, cover letter, # 2 Exhibit Ex B, e-mails)(Maag, Thomas) (Entered: 09/14/2021)
09/27/2021	30	RESPONSE to Motion re 29 MOTION *To Conduct Discovery and other relief* filed

		by Regina Lombardo, Jeffrey Rosen. (Attachments: # 1 Exhibit A (ATF Production 2021-09-10), # 2 Exhibit B (Emails 2021-09-13), # 3 Exhibit C (Emails 2021-09-14), # 4 Exhibit D (ATF Production 2021-09-24))(Biersbach, Nicholas) (Entered: 09/27/2021)
09/29/2021	31	MEMORANDUM AND ORDER TO SHOW CAUSE. Response due by 10/15/2021.The Court DENIES without prejudice (Doc. 29). Signed by Judge J. Phil Gilbert on 9/29/2021. (jdh) (Entered: 09/29/2021)
10/04/2021	32	RESPONSE to 31 Memorandum & Opinion, Order to Show Cause filed by John Roe. (Attachments: # 1 Exhibit ATF Emails on subject)(Maag, Thomas) (Entered: 10/04/2021)
10/18/2021	33	REPLY TO RESPONSE TO 31 MEMORANDUM AND ORDER TO SHOW CAUSE - *Defendants' Reply to Plaintiff's Response (Doc. 32) to Court's Order to Show Cause (Doc. 31) re: Anonymous Litigation* - filed by Regina Lombardo, Jeffrey Rosen. (Biersbach, Nicholas) Modified on 10/19/2021 (clt). (Entered: 10/18/2021)
10/19/2021	34	NOTICE OF MODIFICATION re 33 Response filed by Jeffrey Rosen, Regina Lombardo. Incorrect event selected. Select the event that most closely matches the document being filed. For this document, the correct event is "Reply to Response to Motion" under the heading "Memoranda in Support, Responses and Replies." Docket text modified to reflect the correct document. No further action required by the filer. (clt)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 10/19/2021)
11/18/2021	35	NOTICE of HEARING: A Show Cause Hearing is scheduled for 12/9/2021 at 9:00 AM via Telephone Conference before Judge J. Phil Gilbert. **Parties are directed to call into (618) 439-7733 to join the conference call.** (tag)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 11/18/2021)
12/09/2021	36	Minute Entry for proceedings held before Judge J. Phil Gilbert: Show Cause Hearing held on 12/9/2021. Thomas G. Maag appears on behalf of Plaintiff. AUSA Nicholas J. Biersbach appears on behalf of Defendants. (Court Reporter Amy Richardson.) (lmt) (Entered: 12/09/2021)
01/12/2022	37	MEMORANDUM AND ORDER, granting 21 MOTION to Dismiss filed by Jeffrey Rosen, Regina Lombardo. Signed by Judge J. Phil Gilbert on 1/12/2022. (jdh) (Entered: 01/12/2022)
01/12/2022	38	JUDGMENT. Signed by Judge J. Phil Gilbert on 1/12/2022. (jdh) (Entered: 01/12/2022)
02/01/2022	39	NOTICE OF APPEAL as to 38 Judgment, 31 Memorandum & Opinion, Order to Show Cause, 37 Memorandum & Opinion, Terminate Motions by All Plaintiffs. Filing fee $ 505, receipt number AILSDC-4696787. (Maag, Thomas) (Entered: 02/01/2022)