UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GUN OWNERS OF AMERICA, INC. et al.,
Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE et al.,
Defendants.

Case No. 1:20-cv-10639-TLL-PTM
Hon. Thomas L. Ludington

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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A. Different Language Should Not Be Read to Have the Same Meaning.

In support of their interpretation of Section 922(t)(3), Plaintiffs offered three contrasts to the language found in nearby Section 922(t)(4), arguing that their markedly different language indicates a markedly different meaning. *See* ECF No. 60 at PageID.1252-55. In response, Defendants concede that "[i]t is correct that Congress used slightly different language in these two provisions," but claim that "nothing" – other than the markedly different language, of course, "suggests that Congress envisioned" a different meaning. ECF No. 64 at PageID.1312-13.

First, Plaintiffs noted that the phrases "available to such official" versus "available to the system" indicate that NICS – a "centralized repository" of records gathered from across the country – would have available more information than available to any single state official. ECF No. 60 at Page.ID.1253. Defendants claim the opposite – "[t]o the contrary, state officials are likely to have at their disposal both NICS results and materials NICS may lack...." ECF No. 64 at PageID.1313. In other words, Defendants claim a Section 922(t)(3) check must be *more extensive* than a NICS check – a claim hard to square with the Sixth Circuit's holding that Section 922(t)(3) can have "shortcoming[s]" compared to NICS, and need not be "a perfect analog" to NICS. *Gun Owners of Am., Inc. v. United States DOJ*, 2021 U.S.

App. LEXIS 33554, at *12 (6th Cir. Nov. 9, 2021) ("GOA").[1]

Second, Plaintiffs noted that, while state officials must only "verify" that NICS "does not indicate" prohibited status, NICS must determine the information it has "does not demonstrate" prohibited status. ECF No. 60 at PageID.1253-54. In response, Defendants claim that "nothing suggests" a different meaning between the terms, but in support offer a red herring – focusing again on the wording difference in the "information available," not the difference between "indicate" and "demonstrate." ECF No. 64 at PageID.1314. Defendants offer no explanation as to why these *differently* defined words have the *same* statutory meaning.

Third, Plaintiffs argued that Section 922(t)(3)'s disparate use of the phrase "would be in violation of law" versus Section 922(t)(4)'s phrase "would violate" offers further confirmation that, while NICS is to *determine* whether possession "would violate" the law, a state official merely *checks* to see whether such a final determination exists. ECF No. 60 at PageID.1254-55. Defendants avoid the issue, focusing a third time on the "information available" to the various parties.[2] ECF No.

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[1] Defendants opine that "Section (t)(3) ... cannot reasonably be construed as limited only to NICS checks...." ECF No. 64 at PageID.1313; *see also id.* at PageID.1314 ("Section (t)(3) … does not limit the information available to such officials to NICS checks."). But all that is required "[u]nder federal law [is that] NICS checks must be completed before every transfer of a firearm to a non-FFL." *Id.* at PageID.1309. Thus, Defendants *expect more from Michigan than from the FBI*.

[2] Defendants offer no coherent theory to override the axiom that different language in the same statutory text is assumed to have a different meaning. *See* Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012).

64 at PageID.1314. But, consistent with the Sixth Circuit's opinion, Congress likely intended a lesser burden on state officials, who could take their cues from NICS.

B. Defendants Seek to Require Michigan to Perform Tasks that the Sixth Circuit Explicitly "Refused" to Require.

With respect to just what Defendants expect from Michigan, the Sixth Circuit called their position "far-reaching." *GOA* at *10. Indeed, the Court expressly **refused** to require Michigan to "verify … the circumstances of the underlying offense.... No such directive appears in the statute." *Id.* at 8. As this Court summarized, this Circuit "refused to adopt ATF's interpretation that puts the onus for additional research on MSP." ECF No. 55 at PageID.1160-61.

Yet in their opposition, Defendants continue to demand that Michigan perform *precisely* those functions the Sixth Circuit *refused* to require. First, Defendants argue that state officials must seek out all "available items," "pertinent records," and "other information resources," including "police reports or state conviction records" from any "particular state court," and, if such information is not readily available, to "contact the state court to ask for a copy of that record" or "police reports or court documentation." ECF No. 64 at PageID.1313, 1318-20. Second, Defendants demand that Michigan then "must review those records," and "review such police reports and court documents." *Id.* at PageID.1318, 1320. Third, Defendants claim that Michigan must then interpret and apply federal law to those facts – for example, in the MCDV context, Defendants claim Michigan must "review

the specific state statute to determine if it contains as an element 'the use or attempted use of force or the threatened use of a deadly weapon,'" and then must also "review … police reports and court documents" to determine "the relationship between the offender and the victim...." *Id.* at PageID.1320.

But this convoluted process involves *precisely* the "difficult matching problems" the Sixth Circuit identified *specifically* in the MCDV context that Defendants now reference.[3] *GOA* at *10; *see also* ECF No. 55 at PageID.1161. Yet what is definitively not required is *exactly* what Defendants continue to demand – that Michigan determine "the circumstances of the underlying offense" ("the relationship between the offender and the victim," ECF No. 64 at PageID.1320) and whether this "violate[s]" "federal law" ("determine if it contains as an element" the force federal law requires, *id.*).[4]

Defendants conclude with the entreaty that all they are seeking from Michigan

[3] Defendants' promise that "ATF field attorneys are available by phone and email to help [with] MCDV determinations" (*id.* at PageID.1320) is irrelevant when the statute does not require this in the first place (21-1131, ECF No. 35-2 at 8).

[4] Defendants offer hollow assurances that their demands are "not limitless," do not require "limitless resources," and contain some "reasonableness limitation." *Id.* at PageID.1313, 1318-20. But the *only thing* Defendants concede is *not required* of Michigan is: (i) to "contact every possible agency or court … in that state … to locate" an ambiguous record, or (ii) to research further if a "court does not have the record and does not know where it is...." *Id.* at PageID.1319. This is clearly not what the Sixth Circuit meant when it rejected Defendants' "position that there is no limit—not even a reasonableness limitation—to [an] official's duty to root out matches between federal prohibitions and state laws that do not appear on the face of the conviction." *GOA,* at *14.

is "parity with the obligations of NICS." *Id.* at PageID.1319; *see also id.* at PageID.1314 (criticizing Plaintiffs' position as requiring "a less-extensive background check than a NICS check performed" during a purchase. But again, "parity" is precisely what the Sixth Circuit rejected, clarifying that the state background checks under Section 922(t)(3) were never intended to be a "real-time perfect match" to NICS checks. *GOA*, at *12. Rather, "States … must establish a reliable proxy, not a perfect analog." *Id.* at 9. Defendants' appeal to "parity" is thus expressly foreclosed. Although Defendants claim that Michigan may not issue a permit until it has reached a complete, definitive conclusion, they fail to mention that the FBI *failed to complete over one million background checks* over a two-year span, thereby allowing legions of potentially prohibited persons to acquire firearms.[5] Yet here, ATF hypocritically revoked Michigan's permit because of a minuscule *fifty* permits that were issued in cases where records were unclear. *See* ECF No. 16-1 at PageID.140. Michigan's "failure" to complete *at most* 50 background checks does not "frustrate[]" the "purpose … of the statute" (ECF No. 64 at PageID.1314) when the FBI's own failures exceed Michigan's by a factor of 20,000 to 1.[6]

C. It Is Defendants Who Misunderstand the Sixth Circuit's Opinion.

Defendants next claim that Plaintiffs misunderstood the Sixth Circuit, which

[5] http://tinyurl.com/55sad4bc.

[6] Indeed, after nearly four years of litigation, Defendants have not conclusively identified a single prohibited person who received a Michigan permit.

"require[d] additional information" on remand. ECF No. 64 at PageID.1315-16. Specifically, Defendants object that they must "identify a pertinent state court opinion or a preexisting Michigan AG opinion." *Id.* at PageID.1316. Rather, Defendants claim that these sources were only "*examples* of state 'law'...." *Id.* Thus, Defendants claim that a *current* Michigan AG opinion can justify a *prior* ATF decision to revoke Michigan permits. *Id.* at PageID.1317 ("Defendants have now [obtained an opinion, and] ATF's understanding … prior to issuance of the 2020 PSA is consistent with the Michigan AG's current position."). Defendants' claim is a bridge too far, as the Sixth Circuit's "example[s]" were of *pre-existing* evidence that *predated* the 2020 PSA. The Court never invited the sort of "post hoc rationalization" that APA cases universally prohibit. As this Court explained, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in" court. ECF No. 39 at PageID.644; *see also* ECF No. 42 at PageID.693 ("administrative record … limited to the facts that the ATF considered at the time of its decision."). ATF cannot justify a 2020 PSA based solely on a 2022 amicus brief.

Importantly, the Michigan AG's amicus brief "did not state what [her] position was during the relevant January 2019 to March 2020 time period." ECF No. 55 at PageID.1163; *see also id.* at PageID.1164 (striking it from the record); PageID.1170 (AG's *prior existing* position is "necessary to meaningfully evaluate

the basis for ATF's decision"). The Court's prior order would make little sense if it is, in fact, entirely ***un***necessary to know what the Michigan AG's opinion "*actually was* and *how* and *when* ATF became aware of it." *Id.* at PageID.1169.

D. Defendants' Attempts to Muddy the Waters Should Be Rejected.

Although Plaintiffs should prevail on the above arguments, Plaintiffs also explained how Defendants' latest record supplementation seeks to post hoc rationalize the 2020 PSA with vague theories, unsupported testimony,[7] unlikely inferences, rampant speculation, and blatant recharacterization of an otherwise unambiguous administrative record. ECF No. 60 at PageID.1239-50. In response, Defendants offer numerous theories as to why their record supplementation was proper. ECF No. 64 at PageID.1322-33. None holds water.

First, Defendants erect a linguistic strawman regarding the necessity of a "formal written opinion" from the Michigan Attorney General. *Id.* at PageID.1324. Plaintiffs do not recall making such an argument, and it appears that Defendants are splitting hairs between an informal opinion and "a formal written legal opinion." ECF No. 60 at PageID.1245 (referencing Epstein declaration). Of course, any such distinction is irrelevant here, where ATF has shown *no evidence of any* Michigan

[7] Responding to Plaintiffs' "best evidence" concerns that Defendants characterized "various emails" without providing them, Defendants claim to "now produce these emails" as an exhibit. ECF No. 64 at PageID.1324 n.5; ECF No. 64-1. But it is *well beyond* late in the game for Defendants to be further supplementing the record.

AG opinion prior to the 2020 PSA. Second, Defendants dispute Plaintiffs' inference that MSP has a history of operating against AG wishes, offering instead a far less plausible inference – that MSP's 2018 flip-flop occurred not because the AG overruled a position it took without his input, but instead because the AG kept changing his mind. ECF No. 64 at PageID.1326. Third, Defendants baldly assert that Epstein made a "reasonable … infer[ence]" that the Michigan AG "had, at least informally, agreed" with MSP prior to the 2020 PSA. *Id.* But as Plaintiffs explained, everything else in the record contradicts this inference. ECF No. 60 at PageID.1242, 1244-47. Fourth, Defendants defend Epstein's inferences drawn from the McQuillan notes, claiming that "Plaintiffs offer nothing but speculation" as to which AG was involved. ECF No. 64 at PageID.1327. But Plaintiffs never speculated as to *which* AG's "guidance" was involved, noting only that the reference is "ambiguous." ECF No. 60 at PageID.1244. Again, Defendants project their own speculation that "AG provided guidance" meant the current Michigan AG.

Fifth, Plaintiffs questioned why, if the current AG had "provided guidance," MSP subsequently and repeatedly reported that it was *still waiting on guidance*. *Id.* at PageID.1244-45. Defendants respond only that these were "two characterizations made by different individuals," and the conflicting statements need not "be reconciled...." ECF No. 64 at PageID.1328. Sixth, Defendants object that the Michigan AG would have responded to ATF's threat of the impending 2020 PSA,

had she intended to provide an opinion. *Id.*; *see* ECF No. 60 at PageID.1246-47. But Defendants fail to explain why they object.

At bottom, however, the parties' disputes are little nothing more than conflicting "appear[ances]," "suggest[ions]," "indicat[ions]," "interpret[ations]," "inferences," and "speculation." ECF No. 64 at PageID.1313, 1325, 1326, 1328. Ultimately, it is Defendants' burden to explain how their "'decision … runs [consistent with] the evidence before the agency.'" *Nat'l-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 838 (6th Cir. 1988). Although each inference above reasonably supports Plaintiffs (not Defendants), what is most important is that Defendants have provided no *real*, *actual*, and *concrete* evidence that the Michigan AG had taken any legal position at all, much less that ATF knew of such an opinion when it promulgated the 2020 PSA.[8] Defendants admit as much: "ATF never received a communication from anyone...." ECF No. 58-1 at PageID.1207. Assumptions and inferences cannot overcome this glaring lack of evidence.

E. Defendants' Negligence Supports Striking Portions of the Record and Granting Plaintiffs Limited Discovery.

Defendants also play word games. Although admitting that this Court "adopted Defendants' proposal" for supplementing the record, and although the

[8] Defendants continue their vague characterizations that "Michigan officials" changed their position, and that "Michigan[] change[d] [its] legal interpretation." ECF No. 64 at PageID.1309-10. Nearly four years later, Defendants still have no idea who made this purported decision.

Court noted that, as part of that process, "Defendants intend to introduce internal documents," Defendants demur that this Court's order failed to *explicitly* order "Defendants to submit any 'internal documents'" *in literally those words*. ECF No. 64 at PageID.1330-31; ECF No. 39 at PageID.645. This position borders on the disingenuous. Epstein's second declaration relies on numerous newly identified ATF and FBI communications to justify the 2020 PSA. ECF No. 57-1. Yet, despite numerous opportunities to provide purportedly *key records*, Defendants failed to do so, and offer no credible reason as to why they should be permitted to add new documents to the administrative record now, after nearly four years of litigation, more than a dozen briefs, a trip to the Sixth Circuit, and multiple invitations (orders) from this Court to provide the evidence on which the agency relied.

Defendants concede they previously denied possessing a document which has been in their possession all along, (ECF No. 64 at PageID.1331-32), but claim they acted "in good faith." *Id.* at PageID.1331. In support, Defendants claim ATF "searched all components it reasonably believed might possess the letter...." *Id.* and at n.9. But ATF apparently forgot to ask Epstein, its "Senior Policy Counsel" (ECF No. 57-1) who filed two declarations and whose name appears dozens of times across the administrative record as a key player (if not *the* key player) in promulgating the 2020 PSA. Nevertheless, Defendants claim the Epstein declaration should not be struck because this Court determined the 2006 letter at issue was "not

relevant to ATF's decision." ECF No. 64 at PageID.1332. But Defendants hoist themselves with their own petard. If the 2006 letter is irrelevant, so too are Epstein's statements about the letter. Epstein's second declaration should be struck.

CONCLUSION

The Sixth Circuit has flatly rejected the notion that Defendants can require Michigan to track down every source of information, review every piece of data, and make a final determination in every case in which NICS provides incomplete or unclear information. Indeed, that holding is consistent with the markedly differing statutory provisions. Yet what the Sixth Circuit refuses to require is exactly what Defendants continue to demand of Michigan in this case: that Michigan do the same – more in fact – than Defendants are willing to do to root out prohibited persons. Ironically, the FBI every year *fails to complete hundreds of thousands of background checks*, thereby allowing potentially prohibited persons to obtain firearms. Yet here, ATF faults Michigan for failing to complete a mere 50 background checks – not due to unwillingness, but rather due to incomplete and inaccurate information in NICS and unclear applications of federal law.

Separately and alternatively, both the Sixth Circuit and this Court have demanded Defendants to show what – if any – *actual and concrete evidence* they possessed about the Michigan AG's legal position as it existed prior to issuance of the 2020 PSA. Defendants readily concede that they have nothing more to offer on

that front. Rather, they argue that a 2022 amicus brief can provide cover for an agency action taken more than three years prior. But that is precisely the post hoc justification for agency action that no court permits (and the Court already struck the brief from the administrative record).

Finally, Defendants' professed "good faith error" (ECF No. 64 at PageID.1332) in failing to produce relevant documents at best undermines this Court's prior finding that there was "no reason to believe that such documents" of "communications between the FBI, ATF, and MSP … were 'deliberately or negligently excluded.'" ECF No. 39 at PageID.645. This litigation is nearly four years old, and Defendants continue to selectively uncover, characterize, and use records underlying the 2020 PSA. This Court should strike the offending portions of the record, grant Plaintiffs the limited discovery they previously sought, or entirely forego Defendants' snipe hunt to justify the 2020 PSA and grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kerry L. Morgan, hereby certify that I have filed with the Clerk of this Court a true and correct copy of the foregoing document or pleading, utilizing this Court's CM/ECF system, which generated a Notice and delivered a copy of this document or pleading to all counsel of record.

Dated: February 20, 2024

/s/Kerry L. Morgan
Kerry L. Morgan