CASE NO. 24-3200

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOREHOUSE ENTERPRISES, LLC D/B/A BRIDGE CITY ORDNANCE; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; UNITED STATES DEPARTMENT OF JUSTICE; DANIEL P. DRISCOLL, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF ATF; HANS HUMMEL, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF INDUSTRY OPERATIONS FOR THE SAINT PAUL FIELD DIVISION OF THE ATF,

Defendants-Appellees.

On Appeal from the United States District Court for the District of North Dakota
The Honorable District Court Judge Peter D. Welte
Case No. 3:23-CV-00129-PDW-ARS

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

SUMMARY OF ARGUMENT

The district court's dismissal of Plaintiffs' case was a thinly veiled merits ruling. To issue it, the district court had to suspend the meaning of words – that "zero tolerance" does not mean what it says, and that the statutory *mens rea* of "willfulness" accommodates Defendants' belief that certain regulatory violations "inherently demonstrate" that state of mind. Of course, Defendants have no authority to revoke dealer licenses in the absence of actual willfulness, and they cannot take shortcuts to presume it, like ATF has in this and other recent rulemakings. "Zero tolerance" imposed new – atextual – liability on firearm dealers, and so Defendants' statutory rewrite easily satisfies the definition of final agency action. There is no "enforcement discretion" to rewrite a law that Congress passed.

In fact, Defendants actually agree – outside of court, that is. Members of the Trump Administration – *including Defendants* – have publicly repudiated "zero tolerance" as the blatant statutory rewrite and attack on the Second Amendment that it is. Thus, to rule in Defendants' favor, this Court would have to overcome Defendants' *own agreement*

with Plaintiffs' arguments, ignoring the chorus of support Plaintiffs' position now enjoys from numerous websites ending in "dot gov."

But the problems for Defendants' unserious defense of "zero tolerance" do not end there. Their revocation policy's own title – "zero tolerance" – belies their in-court representations that it did not punish inadvertent paperwork errors. So too does the policy's plain text, which claims that certain violations *are* willful just because they *occurred*. Defendants' enforcement history likewise supports Plaintiffs' position, as ATF repeatedly moved to revoke for "inherently willful" violations, only to realize they were not willful at all. Tellingly, not even Defendants' own employees adopt the party line, as many testified that "zero tolerance" tied their hands – mandating a predetermined result in every case and depriving them of the discretion the statute requires.

Thus, it would appear that *only Defendants' lawyers* at the Department of Justice still believe in "zero tolerance," offering post hoc rationalizations that literally no one else still believes. That should undermine any residual confidence that the district court got it right and, for the reasons that follow, Plaintiffs respectfully request that the district court's judgment be reversed.

ARGUMENT

I. DEFENDANTS' PUBLIC STATEMENTS UNDERMINE THEIR CASE AND DIRECTLY CONTRADICT THEIR REPRESENTATIONS TO THIS COURT.

In a recent communication with Plaintiffs' counsel, Department of Justice ("DOJ") counsel informed that the government has no plans to abandon its previous arguments in this case. But that places Defendants in quite a pickle. Their continued litigation position – and the representations they made to this Court and the court below – are fundamentally at odds with this Administration's recent public statements about "zero tolerance." When "the government … speaks out of both sides of its mouth, no one should be surprised if its latest utterance" – here, a full-throated defense of zero tolerance – "isn't the most convincing one." *Bittner v. United States*, 598 U.S. 85, 97 n.5 (2023).

For starters is Defendants' steadfast denial that their Adverse Action Policy ("AAP") caused any "legal injury" or "consequences" to gun dealers. Brief for Appellees ("ATF Br.") at 16. That is not the President's understanding. As the White House 2026 budget request observes, "[t]he previous administration used the ATF to attack gun-owning Americans … by … the revocation of Federal Firearms Licenses, which shut down

small businesses across the Nation."[1] And while Defendants argue to this Court that "plaintiffs' fear of mass FFL closures is not borne out by the ATF data," ATF Br. at 29, the White House acknowledges otherwise – that ATF "was weaponized to end the livelihoods of law-abiding small business owners," which "led to a nearly six-fold increase in enforcement actions...."[2] Indeed, if the "zero tolerance" AAP never caused any "legal injury" (ATF Br. at 16), there would be no reason for Defendant ATF to invite "any federal firearms licensees that had their licenses revoked or surrendered under the Enhanced Regulatory Enforcement Policy to reapply" and "be judged under the new" standard now.[3] Defendants cannot both (i) scramble to fix the harm they caused and (ii) claim to this Court that no harm ever occurred.

Also consider Defendants' adamant denial that the AAP callously punished "'unintentional human error'" and that "inadvertent[]" paperwork errors led to costly revocation proceedings. ATF Br. at 18.

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[1] Russell T. Vought, *Major Discretionary Funding Changes*, Exec. Off. of the President (May 2, 2025) at 19., https://tinyurl.com/5n86f5vv.

[2] *Fact Sheet: President Donald J. Trump is Protecting Americans' Second Amendment Rights*, White House (Feb. 7, 2025), https://tinyurl.com/ywyeud9a.

[3] *ATF Launches New Era of Reform*, BATFE, (Aug. 8, 2025) https://perma.cc/H5XW-LNTD.

Again, the President says the opposite – that the AAP "tr[ied] to crush independent firearms dealers by revoking their licenses if they make a single error, even in very unimportant paperwork."[4] Even *Defendant Daniel Driscoll* does not believe what DOJ's lawyers continue to argue, as he acknowledged that, under zero tolerance, "some licensees were being penalized for … *honest mistake*[*s*]," "such as[] forgetting to put their license number on forms."[5] These are not one-off comments. The White House has reiterated this understanding, observing that the AAP specifically targeted "mom-and-pop shop small businesses *who made innocent paperwork errors*."[6]

Defendants likewise deny that the AAP mandated "automatic revocation" for "zero tolerance" violations. ATF Br. at 18. Yet Defendant ATF *admits* precisely that on its own website – that the AAP "appl[ied]

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[4] The Thinking Conservative News, *Trump Speaks at 2024 NRA Annual Meetings & Exhibits*, YouTube, (May 20, 2024) at 20:55, https://youtu.be/SVMkdwHalqo.

[5] *ATF Updates National Policy on Federal Firearm Licensee Inspections to Promote Fairness, Consistency, and Public Safety*, BATFE (May 23, 2025), https://perma.cc/34HA-C4KN (emphasis added).

[6] *Fact Sheet*, White House, *supra* (emphasis added).

automatic outcomes" and caused "*automatic revocation*" based on its "presumption of license revocation" for certain violations.[7]

Next, Defendants deny that, under the AAP, "ATF inspectors have lost the discretion they once had," and insist that "zero tolerance" allows "ATF personnel [to] continue to exercise their judgment...." ATF Br. at 22. But this, too, has been contradicted by Defendant Daniel Driscoll. As he explains it, zero tolerance has been replaced with a revocation policy that "gives our investigators the discretion to tell the difference between an honest mistake and a real threat to public safety."[8] Of course, there would be no need to "give[] … discretion" *back* if "zero tolerance" had not eliminated it.

Finally, Defendants have argued that their zero tolerance policy "do[es] not implicate or infringe the Second Amendment" (App.482; R. Doc. 55, at 29), because "the Second Amendment does not … protect the right of a private business … to sell firearms." App.484; R. Doc. 55, at 31 (emphases removed). That is a truly astonishing claim. And once again, Defendants' statements betray them. For example, as the White House

[7] *ATF Updates*, BATFE, *supra* (emphasis added).
[8] *ATF Updates*, BATFE, *supra.*

explains, "[t]he Biden Administration … flagrantly sought to eliminate Second Amendment rights" by "limit[ing] Americans' ability to acquire firearms."[9] But that is the very theory of Plaintiffs' case. App.77-78; R. Doc. 1, at 49-50 ¶244 ("This indisputably represents an infringement of the right to keep and bear arms, and a planned abolition and reduction of the Second Amendment supply chain."). DOJ's lawyers cannot continue to deny the Second Amendment violation that the Administration acknowledges occurred. As one district court put it, "[f]lip-flops of this magnitude are disingenuous at best." *United States v. Hallford*, 280 F. Supp. 3d 170, 180 n.7 (D.D.C. 2017).

In other words, *everyone* agrees that Plaintiffs were right about *every* aspect of "zero tolerance" – the President, Defendant ATF, and Defendant Driscoll included. Their statements completely undermine Defendants' case. This Court should reject Defendants' lawyers' statements to the contrary, and should reverse the court below on that basis alone.[10]

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[9] *Fact Sheet*, White House, *supra*.

[10] Defendants' conduct before this Court confirms that this case is not moot. *See* Plaintiffs-Appellants' Response in Opposition to Defendants-Appellees' Motion to Dismiss. Indeed, Defendants continue to defend "zero tolerance," and even now continue to argue it was

II. ATF'S "ZERO TOLERANCE" POLICY IS FINAL AGENCY ACTION.

A. Defendants Have No "Discretion" to Violate the Law.

Defendants deny that their "zero tolerance" AAP is "final agency action," disputing that the AAP caused any "legal consequences" or inflicted any "legal injury" to Plaintiffs. ATF Br. at 15, 16. Rather, Defendants characterize the AAP as merely "a general statement of policy" that "explains how … [ATF] will exercise its broad enforcement discretion...." *Id.* at 16.[11]

But Defendants' central argument is nothing more than an elaborate strawman. Plaintiffs never contested that Defendants have enforcement discretion to choose which *willful* violations to pursue. Rather, as Defendants are forced to acknowledge, the core dispute in this case is whether the AAP "***eliminates*** the [statutory] ***willfulness*** requirement and requires ATF to automatically revoke FFLs' licenses even for inadvertent missteps." ATF Br. at 12 (emphases added).

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perfectly permissible to implement in the first place, apparently seeking to preserve their ability to resurrect it in the future.

[11] *See* Plaintiffs-Appellants' Opening Brief ("Opening Br.") at 27 ("all parties below seemed to assume that the AAP satisfies the finality prong").

To be sure, Defendants deny that the AAP conflicts with the statute, claiming the AAP "has no independent legal effect." ATF Br. at 12. But if the opposite is true – if the AAP *does* in fact eliminate the statutory requirement of willfulness for so-called "zero tolerance" violations – then the AAP's statutory revisionism cannot be labeled a mere "statement of policy" or the exercise of ATF's "enforcement discretion." Defendants have no "discretion" to adopt "enforcement … priorities" that conflict with the statute,[12] and rewriting the statute certainly would have "legal effect." In other words, if the AAP expands the statutory text, as Plaintiffs allege, then all of Defendants' machinations about "final agency action" go out the window.

The district court recognized this reality. Thus, before finding that the AAP was not "final agency action" and therefore could not be

[12] Even if the AAP were merely a statement of enforcement policy, Defendants' brief fails to wrestle with the fact that numerous courts have found even enforcement policies reviewable under the APA. *See* Opening Br. at 38-39; *OSG Bulk Ships v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("agency's adoption of a general enforcement policy is subject to review"); *accord Cargill v. BATFE*, 2023 U.S. Dist. LEXIS 166989, at *13 (W.D. Tex. Sept. 20, 2023) (concluding ATF's "zero tolerance" "enforcement policy challenged in this case is a final agency action").

challenged at all, the court reached beyond that issue to the merits,[13] concluding that "[t]he AAP … 'does not replace or countermand' th[e] requirement" that "ATF must establish willfulness...." App.17; R. Doc. 69, at 5; *see also* App.24; R. Doc. 69, at 12 (claiming AAP "does not eliminate" the "willfulness requirement"). But again, if the district court's conclusion about "willfulness" is wrong (and it is), then so too was its dismissal for lack of final agency action. Certainly, the lower court did not hold that agencies may adopt a "general statement of policy" that rewrites the law under the guise of "enforc[ing]" it. *See AFT v. Dep't of Educ.*, 2025 U.S. Dist. LEXIS 77811, at *42 (D. Md. Apr. 24, 2025) ("The government could have outlined its new enforcement priorities well within those bounds, but it could not extend [the statute] to reach new categories of conduct.").

Seeking to avoid focus on their statutory revisionism, Defendants point fingers. They claim that Plaintiffs' asserted injuries flow from the statute, "not the guidance document," which "subjects FFLs to license

[13] *See Cargill*, 2023 U.S. Dist. LEXIS 166989, at *13 (emphases added) (declining "to consider *the merits* of the[] argument *regarding* the *willfulness* requirement in the enforcement policy, … at this [motion to dismiss] stage of the proceedings").

revocation for willful statutory and regulatory violations." ATF Br. at 17. But once again, Plaintiffs never challenged revocation in line with the statute – *i.e.*, based on a finding of willfulness – and Defendants admit as much. *See id.* at 25 ("plaintiffs do not challenge ATF's authority to revoke a firearms license for … willful violation[s]"). Rather, Plaintiffs challenged the "zero tolerance" policy which initiated revocation *in the absence of willfulness*. App.80; R. Doc. 1, at 52 ¶¶262-63. At bottom, Defendants' central argument – that the AAP is "final agency action" – is irrelevant in light of their statutory rewrite.

B. Defendants' Responses to Plaintiffs' Arguments Fall Flat.

Finally acknowledging that Plaintiffs' challenge involves something more than purported disagreement about "enforcement discretion," Defendants offer a series of arguments as to why the AAP *did not in fact eliminate willfulness* – why "zero tolerance" did not impose "zero tolerance."[14] Defendants' arguments range from specious to absurd.

[14] These should have been merits questions. The district court plainly erred by resolving them on a motion to dismiss. *See* Opening Br. at 54.

1. "Zero Tolerance" Means "Zero Tolerance."

First and most obviously, Defendants never reconcile their revocation policy's name – *zero tolerance*. ATF Br. at 16; *see* App. 381; R. Doc. 34-1, at 4 ("ATF has zero tolerance for willful violations...."); App. 384; R. Doc. 34-1, at 7 (certain "violations inherently demonstrate willfulness"). As Plaintiffs observed, a "zero tolerance" policy is one that "imposes a punishment" – here, costly revocation proceedings and loss of livelihood – "for every infraction of a stated rule. … This predetermined punishment, whether mild or severe, is always meted out."[15] *See* Opening Br. at 33-34 n.22; *see also Zero-Tolerance Policy*, Black's Law Dictionary (11th ed. 2019) (zero tolerance means "certain acts are absolutely prohibited"). Zero tolerance thus imposes a strict-liability regime, in direct conflict with the statutory *mens rea* requirement that revocation be based on willfulness.[16] Such a standard requires "the most

[15] *Zero Tolerance*, Wikipedia, (June 29, 2025) https://tinyurl.com/mtj5ffm9.

[16] *See Strict Liability*, Black's Law Dictionary (11th ed. 2019) ("Liability that does not depend on proof of negligence or intent to do harm...."); *Strict Liability*, Wikipedia, https://tinyurl.com/4mt6k9mc (June 9, 2025) (requiring punishment "even in the absence of fault or … intent").

severe punishment possible to every person who … breaks a rule,"[17] "*regardless of the individual circumstances* of each case."[18] *See also Arvia v. Madigan*, 809 N.E.2d 88, 101 (Ill. 2004) (emphases added) (explaining that an Illinois "zero tolerance law *requires*" driver's license suspension anytime an alcohol test is refused, meaning "[t]he Secretary of State exercises *no discretion*") (emphasis added).

Defendants never once explain why this Court should not take *the title* of their policy – "zero tolerance" – at face value.[19] Rather, they merely promise – ignoring all contrary evidence – that the statutory willfulness requirement was not, in fact, eliminated.

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[17] *Zero Tolerance*, Merriam-Webster, https://tinyurl.com/d6r3zuef (last visited Aug. 13, 2025).

[18] *Zero Tolerance*, Free Dictionary, https://tinyurl.com/2f6d6j6b (last visited Aug. 13, 2025) (emphasis added).

[19] When interpreting legal texts, the Supreme Court has used the "heading[,] … a short-hand reference to the general subject matter involved," to "shed light" on the meaning of a text. *Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528, 529 (1947). Indeed, although a title cannot "override the plain words of a text," *Fulton v. City of Philadelphia*, 593 U.S. 522, 536-37 (2021), it is certainly helpful "for the purpose of ascertaining legislative intent…." *Bellew v. Dedeaux*, 126 So. 2d 249, 251 (Miss. 1961). It would be quite a strange conclusion to find that ATF *did not intend* to establish a "zero tolerance" policy when it promulgated an order that is quite literally entitled "zero tolerance."

2. The AAP Replaced Willfulness with Strict Liability.

Second, Defendants claim that "the text" of the AAP demonstrates that willfulness remains a feature of license revocation. ATF Br. at 18. But Defendants primarily offer variations of the same theme – that *the word* "willfulness" still appears in their policy, and so the AAP could not have done away with it. As Defendants explain it, the AAP "repeatedly reaffirms" that "a violation must be willful," and that "inadvertent violations can[not] be the basis for revocation...." *Id.* at 19, 18.

But consider the AAP's statement that certain "violations *inherently demonstrate* willfulness." App. 384; R. Doc. 34-1, at 7 (emphasis added); *see also* App. 381; R. Doc. 34-1, at 4 ("revocation is the assumed action"). A feature that is "inherent" to something is one that is "a permanent, inseparable, or essential attribute or quality of [that] thing." *Inhere*, Black's Law Dictionary (11th ed. 2019). In other words, under zero tolerance, "willfulness" *cannot be separated* from certain types of violations – *i.e.*, certain violations *always* are willful. But that is an *assumption*, not a *finding* of "willfulness" based on "individual analysis." ATF Br. at 22. It is a blanket declaration that *all* enumerated violations are *per se* willful, and that ATF must initiate revocation for no reason

other than because they occurred. *See Cargill*, 2023 U.S. Dist. LEXIS 166989, at *17 ("Plaintiffs have adequately pleaded their claims" that "[t]he use of the word 'willful' in the new enforcement policy … broadly includes non-willful actions and thus violates the Gun Control Act and the Second Amendment."); *see also Arvia*, 809 N.E.2d at 101 ("zero tolerance law requires" a result, meaning personnel "exercise[] no discretion").

The notion that a regulatory violation can be "inherently … willful[]" is, of course, both oxymoronic and atextual. The statute Congress enacted does not provide that certain types of violations *are* willful. Rather, it provides for revocation "if the holder of [a] license has willfully violated any provision" – *i.e.*, committed a violation *in a willful manner*.[20] 18 U.S.C. § 923(e). Indeed, numerous ATF inspectors have testified that many "zero tolerance" violations were not committed "willfully" at all, but nevertheless that revocation was mandated. In one

[20] Employed as part of an adverbial phrase, the statutory term "willfully" "serv[es] as a modifier" of the term "violated," "expressing some relation of manner or … degree" to it. *Adverb*, Merriam-Webster, https://tinyurl.com/58urskyp (last visited Aug. 14, 2025). The statute therefore contemplates a dichotomy of (1) violations that *were not* committed willfully and (2) violations that *were* committed willfully. But it leaves no room for the AAP's concept of *inherently willful* violations.

case, both the ATF Industry Operations Investigator ("IOI") and Area Supervisor recommended against revocation, "with the IOI observing that '[*w*]*illfulness was not present*.'" Opening Br. at 47. Even so, ATF's report concluded that "the recommendation [wa]s revocation." *Id.* (emphasis removed). Thus, ATF's own personnel undermine the AAP's atextual claim that certain violations "inherently demonstrate willfulness." *See also Cargill*, 2023 U.S. Dist. LEXIS 166989, at *11 (recognizing that the AAP "disaffirm[s] any choice regarding certain willful violations").

The same is true for Plaintiff Morehouse and "[an]other FFL that plaintiffs identify, Kiloton Tactical," both of whom faced automatic "zero tolerance" revocation proceedings based on *the mere fact* that enumerated violations had occurred. ATF Br. at 24. Yet once their hearings concluded, both Morehouse and Kiloton ultimately "avoided revocation" because ATF recognized there *was no* willfulness after all.[21] *Id.* A

[21] *See* App.432; R. Doc. 40-1, at 3 p. 82 ll.11-18 ("[D]oes your scope of duties … include making any findings, conclusions, or recommendations concerning whether the violations were … willful?" … "It doesn't. … I mean, it really has nothing to do with my opinion on whether they're willful or whether they're inadvertent...."); *see also* Nov. 8, 2023 Revocation Hearing Transcript at 82 ll.18-20, *Kiloton Tactical, LLC v. BATFE*, No. 3:23-cv-23985-MCR-ZCB (N.D. Fla. Dec. 26, 2023),

violation cannot simultaneously be "inherently" willful and 'ultimately not' willful. Defendants' belated claims of how "zero tolerance" works is belied by the reality of how they applied it in practice.[22] The proof is in the pudding.

3. Zero Tolerance Did Not "Simply Reaffirm" Existing Policy.

Third, Defendants urge this Court to ignore the plain language of the zero tolerance policy. They claim that the language about "inherently demonstrat[ing] willfulness … does not … mean that ATF no longer has to find willfulness to proceed with revocation or that certain actions – even if inadvertent – will be treated as willful." ATF Br. at 21. But that is *exactly* what it says, and (as just explained) is *exactly* how it was applied. Indeed, Defendants' *own boss* has explained that "zero tolerance" "tr[ied] to crush independent firearms dealers by revoking

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ECF No. 36-1 (answering "whether or not the violations were willful," the Kiloton inspector testified, "I don't think they were").

[22] If this Court needed further proof that the AAP conflicts with the statute, obviating ATF from needing to prove willfulness, it is worth noting that Defendant ATF has a recent history of burden flipping. In *Texas v. BATFE*, 737 F. Supp. 3d 426, 442-43 (N.D. Tex. 2024), ATF was preliminarily enjoined from enforcing its "*presumptions*" of being "engaged in the business" of dealing in firearms, which "flip[ped] the statute on its head by requiring that firearm owners prove innocence rather than the government prove guilt."

their licenses if they make a single error, even in very unimportant paperwork."[23] The same is true for Defendant Daniel Driscoll, who publicly stated that, "[u]nder the previous [zero tolerance] policy, some licensees were being penalized for *simple mistakes*...."[24] And contrary to their briefing here, Defendants publicly explained that the AAP imposed "automatic revocation" "instead [of] considering intent, compliance history and public-safety risks." *Id.* In other words, everyone recognizes that "zero tolerance" punished *inadvertent* (*i.e.*, non-willful) violations with automatic revocation proceedings. Yet before this Court, DOJ lawyers continue to deny it. *See* ATF Br. at 18 (claiming the AAP "does not permit … 'automatic' revocation").

Undaunted, they claim that this language – "inherently demonstrate willfulness" – "simply reaffirms the established principle that ATF need not 'establish a history of prior violations,'" and so a one-off violation may suffice. ATF Br. at 21. But this spurious post hoc rationalization is belied by the revocation policy that preceded zero tolerance, which already made quite clear that "ATF does not have to

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[23] *Trump Speaks at 2024 NRA Annual Meetings & Exhibits*, YouTube, *supra*, at 20:55.

[24] *ATF Updates*, BATFE, *supra* (emphasis added).

establish a history of prior violations to demonstrate willfulness. Accordingly, ATF may revoke a Federal firearms license under appropriate circumstances based on an initial set of violations...." App.121; R. Doc. 1-4, at 6. The AAP quite obviously does something more than merely restate a principle that had long been codified.

Aside from their categorical denial, Defendants offer no explanation as to why treating a violation's occurrence as "inherently demonstrat[ing] willfulness" does *not* allow ATF to "proceed with revocation" for inadvertent errors. ATF Br. at 21. Again, that is what ATF did time and again – a reality to which its own personnel testified, and Defendants themselves admitted.

4. The AAP Removed Discretion from ATF Personnel.

Fourth, Defendants dispute that, under "zero tolerance," ATF inspectors "lost the discretion they once had to determine willfulness...." ATF Br. at 22. Rather, Defendants assert that the AAP merely instructed personnel "how to allocate their enforcement resources" and that "[e]ach inspection has unique and sometimes complex circumstances...." *Id.* But again, Defendants admitted precisely the opposite in public. *See* Section I, *supra.* Indeed, Defendant Daniel

Driscoll explained that, under "zero tolerance," ATF personnel were denied "the discretion to tell the difference between an honest mistake and a real threat to public safety."[25]

Defendants also ignore what "zero tolerance" means. Whereas the consideration of facts and circumstances to make an initial willfulness determination requires *discretion*, "zero tolerance" is the "strict imposition of penalties regardless of the individual circumstances of each case."[26] Numerous of ATF's own personnel testified that this is so – that, against their better judgment, the AAP forced them to initiate revocation anytime they found certain violations to have occurred. *See, e.g.*, App.42; R. Doc. 1, at 14 ¶64 (congressional letter reporting that "[l]ocal ATF field agents … feel pressured to take actions against individual businesses that they do not feel are appropriate or in the interest of public safety"); App.432; R. Doc. 40-1, at 3, p. 82 ll.11-18 ("[D]oes your scope of duties … include making any findings, conclusions, or recommendations concerning whether the violations were … willful?" … "It doesn't. My disclosure of violations … really has nothing to do with my opinion on

[25] *ATF Updates*, BATFE, *supra*.
[26] *Zero Tolerance*, Free Dictionary, *supra*.

whether they're willful or whether they're inadvertent...."). That is not the language of officials who exercise discretion.

5. Defendants' Attempts to Gaslight Ring Hollow.

Fifth, finally forced to wrestle with the fact that their own employees have impeached their claims, Defendants minimize the fact that "ATF inspectors fe[lt] bound" to revoke under "zero tolerance." ATF Br. at 23. Indeed, Defendants claim that everyone – *apparently including their own employees* – has simply misinterpreted the AAP. *Id.* Thus, Defendants demur that their own employees' "view is inconsistent with 18 U.S.C. § 923(e)...." *Id.* But how ATF employees interpreted and applied the AAP is *highly relevant evidence* of how "zero tolerance" should be interpreted. Defendants' casual dismissal of *their own stated views and those of their personnel* is quintessential "gaslighting"[27] – the

[27] *See Gaslighting*, Merriam-Webster, https://tinyurl.com/585ds46p (last visited Aug. 14, 2025). Courts do not take kindly to gaslighting. In response to a similar dissonance between the government's public and in-court representations, U.S. District Judge Ana Reyes reacted as follows: "I am not going to abide by government officials saying one thing to the public – what they really mean to the public – and coming in here to the court and telling me something different, like I'm an idiot. The court is not going to be gaslit." Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him*, Wash. Post (July 21, 2025), https://tinyurl.com/cvd3r2n3.

insistence that *everyone else* is crazy for reading the plain words of the AAP and understanding the obvious meaning.[28] True to its name, "zero tolerance" tied inspectors' hands. It was a feature, not a bug, of the AAP.

6. The Possibility of Exoneration on the Back End Does Not Justify ATF's Abuses.

Finally, Defendants claim 'no harm, no foul' because the statute "provides a robust process for testing an initial notice of revocation" – an administrative hearing before a Director of Industry Operations. ATF Br. at 23. But the potential for vindication on the back end does not justify Defendants' unlawful revocations on the front end. That is like saying the government may justifiably prosecute people for conduct that no statute prohibits, on the theory that a jury may acquit or a judge will dismiss at a later stage of proceedings.[29] The error in Defendants' claim

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[28] Indeed, "[t]he character of a rule depends on the agency's intent when issuing it, not on counsel's description of the rule during subsequent litigation." *Guedes v. BATFE*, 920 F.3d 1, 20 (D.C. Cir. 2019).

[29] Government enforcement policies may not violate the law. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("a prosecutor's discretion is 'subject to constitutional constraints,'" and "the decision whether to prosecute may not be based on 'an unjustifiable standard'"); *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1131 (D.C. Cir. 2023) (constitutional protection "applies not only to legislation, but also to enforcement of the laws").

is perhaps "so obvious we can't find a case that [refutes] it." *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005).[30]

At bottom, the "zero tolerance" AAP imposed non-statutory "legal consequences" across an entire constitutionally protected industry. Plaintiffs suffered this injury in the form of legal defense costs and destroyed livelihoods. *See* App.20; R. Doc. 69, at 8 ("members of GOA … had federal firearm licenses revoked while the AAP was active"). Indeed, *hundreds* of FFLs suffered such harm when ATF revoked their licenses or, unable to mount a costly legal defense, they were forced to "voluntarily" surrender their licenses. The AAP undoubtedly was final agency action – it established a new revocation regime in blatant contravention of the statute – and the district court erred in concluding otherwise.

[30] In a footnote, Defendants minimize "zero tolerance" revocations "where ATF personnel concluded that the FFL had not acted willfully, but nevertheless were bound by the AAP to revoke," noting that these examples were only "initial notices of revocation and not final revocation decisions following a hearing." ATF Br. at 23 n.4. But that does not change the fact that the "zero tolerance" policy compelled these licensees to incur significant costs defending their livelihoods.

III. PLAINTIFFS STATED A SECOND AMENDMENT CLAIM.

A. Defendants Ignore Plaintiffs' Specific Allegations of Real Harm.

Treating Plaintiffs' Second Amendment claim as derivative of their statutory claim, Defendants simply reiterate their argument that there is no daylight between zero tolerance and the statute. Thus, because "plaintiffs do not challenge ATF's authority to revoke a firearms license" under the statute, Defendants claim Plaintiffs "do not identify any constitutionally protected conduct that is burdened" by the AAP itself. ATF Br. at 24-25.

But the AAP contravenes the statute for reasons already stated, and so Plaintiffs' Second Amendment challenge to "zero tolerance" is properly against *the AAP* and not the statute it violates. Indeed, the AAP plainly violates the Second Amendment, which prohibits any government "infringement" on the right to keep and bear arms. Without question, the Second Amendment is "implicated" by a policy "restricting Americans' access to arms, based on nothing more than unintentional, technical, or paperwork violations like those at issue here." App.85; R. Doc. 1, at 57 ¶286. The statute does not cause that. The AAP does, and Defendants have admitted it. *See* Section I, *supra*.

Defendants next assert that Plaintiffs' allegations of harm were "too speculative to support a Second Amendment claim," but they focus only on one plaintiff – Morehouse and its customers, noting that "Morehouse's licenses were not ultimately revoked." ATF Br. at 28. Thus, Defendants suggest that no Second Amendment harm can accrue under "zero tolerance" *unless* a dealer's license is in fact revoked. But that ignores the harm Morehouse *did* suffer – compelled expenditure of legal defense costs due to "automatic revocation"[31] at the first sign of an alleged violation.

Defendants' argument also ignores Plaintiffs' specific allegations of harm if ATF *had* forced Morehouse out of business. Courts routinely explain that "jurisdiction is tested by the facts as they existed when the action is brought," *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957),[32] and a plaintiff may challenge a "threatened injury" when "there is a "'substantial risk" that the harm will occur.'" *Susan B. Anthony List v.*

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[31] *ATF Updates*, BATFE, *supra*.

[32] *See also Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) ("As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction.").

Driehaus, 573 U.S. 149, 158 (2014). Thus, "[one] does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). Plaintiffs unquestionably had standing to challenge the AAP at the time they sued, even if later Morehouse's licenses were not ultimately revoked.[33] Indeed, if Morehouse *had* gone out of business, Plaintiffs explained that the supply of firearms in that remote area of North Dakota would have been greatly diminished. *See* App.78; R. Doc. 1, at 50 ¶¶246-48. Defendants overlook these allegations as if Plaintiffs had never made them.

Of course, Plaintiffs also alleged that, *in addition to* Morehouse, "many other FFLs across the country, who are represented by GOA and GOF, have experienced … the same 'zero tolerance' policy revocation … which similarly will drive many of them out of business...." App.76; R. Doc. 1, at 48 ¶239; *see also* App.100; R. Doc. 1-2, at 3 ¶12 ("Since the 'zero

[33] Plaintiffs maintain standing even now, because "zero tolerance" is both "capable of repetition, yet evading review," and it was quintessential "voluntary cessation" to let Morehouse keep its licenses only when challenged in court. *See* Plaintiffs-Appellants' Response in Opposition to Defendants-Appellees' Motion to Dismiss at 5, 17; *see also* App.45; R. Doc. 1, at 17 ¶77 ("ATF has *reopened old cases*, revoking the licenses of gun stores to whom ATF previously issued a Warning Letter or held a Warning Conference, and who subsequently have rectified their mistakes.").

tolerance' policy was implemented, GOA and GOF have heard from members and supporters who have been directly impacted … because they operated an FFL and have had the 'zero tolerance' policy applied against them....''). Indeed, the district court acknowledged that Plaintiffs had proved their allegations: "members of GOA … had federal firearm licenses revoked while the AAP was active." App.20; R. Doc. 69, at 8.[34] How Defendants can claim that "Plaintiffs do not identify any specific gun store that has closed because of" zero tolerance, they do not say. ATF Br. at 14.

Next, Defendants outlandishly claim that "the Second Amendment does not … protect the right of a private business … to sell firearms." App.484; R. Doc. 55, at 31 (emphases removed).[35] But the constitutional

[34] In other words, this is not a case of "probability" (ATF Br. at 28), but rather *real* dealers who have suffered *real* harm from *real* revocations. *See Doe v. Hochul*, 139 F.4th 165, 182 (2d Cir. 2025) ("Supreme Court has emphatically barred organizations from relying on statistics or probabilities to demonstrate the standing of their members....").

[35] *But see United States v. Hicks*, 649 F. Supp. 3d 357, 360 (W.D. Tex. 2023) ("[A]ccording to the Government, Congress could throttle gun ownership without implicating Second Amendment scrutiny by just banning the buying and selling of firearms. What a marvelous, Second Amendment loophole!"), *rev'd on other grounds*, 2025 U.S. App. LEXIS 18297 (5th Cir. July 23, 2025).

violation resulting from widespread license revocation is apparent on both the dealer and purchaser ends. For starters, allegations need only be *plausible* at the pleading stage, "even if doubtful in fact" and "even if it appears 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 556 (2007). Again, Plaintiffs alleged that their licensee members not only *faced* "zero tolerance" revocation, but that some *were revoked*.[36] These business closures *obviously* disrupted the right of those entities to engage in firearm-related commerce and *necessarily* limited their customers' access to arms – the very subject matter of the Second Amendment. But rather than allow Plaintiffs the opportunity to prove these facts – showing real closures and real effects on the marketplace – the district court simply dismissed their claim. *See* App.25; R. Doc. 69, at 13.

But the alleged closure of constitutionally protected entities is not "too speculative" to state a claim. ATF Br. at 27. In the First Amendment context, virtually identical allegations about limitations on access to protected locations and activities have been found to more than meet

[36] As the district court confirmed, Plaintiffs later "submitted a declaration that identified two members of GOA that had federal firearm licenses revoked while the AAP was active." App.20; R. Doc. 69, at 8.

minimal pleading standards. *See, e.g.*, *Harcz v. Boucher*, 763 F. App'x 536, 542 (6th Cir. 2019) ("complaint plausibly alleges that the state defendants … violated their First Amendment rights by blocking access to the event"); *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 16 (2020) (enjoining COVID-era occupancy limits on churches because the "First Amendment claims [we]re likely to prevail" even without complete closures); *see also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring) ("closing down a bookstore … would clearly implicate First Amendment concerns and require analysis"). Since the Second Amendment "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022), the closure of firearm dealers should be treated no differently.[37]

[37] Nor should the "right to engage in … commerce and/or business" be treated any differently, just because it is being invoked in the Second Amendment context. App.83; R. Doc. 1, at 55 ¶278. The Constitution protects the "freedom … to engage in any of the common occupations of life," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'" *McBurney v. Young*, 569 U.S. 221, 227 (2013). To deny a Second Amendment claim against firearm dealer closures would deny the right to engage in such a *constitutionally protected* occupation in the first place.

B. Defendants' Numerical Argument Betrays the True Effects of Zero Tolerance.

Finally, Defendants once again claim 'no harm, no foul,' because "thousands of FFLs" survived zero tolerance – purportedly some "132,383 active FFLs" to be precise. ATF Br. 29. But just because *other* businesses and customers can exercise their rights does not mean *Plaintiffs'* constitutional harms are cured. Indeed, that would be akin to claiming the closure of *some* churches does not implicate the First Amendment because *others* remain open. Yet the Supreme Court has held the opposite. *See Roman Catholic Diocese*, 592 U.S. 14. And in any event, Plaintiffs' Complaint was quite clear that, if Morehouse were to close, the availability of Second Amendment products and services in that remote part of North Dakota would suffer a serious blow. *See* App.78; R. Doc. 1, at 50 ¶¶246-48. Thousands of FFLs thousands of miles away would have been of little consolation to Morehouse's thriving customer base.

And in any case, Defendants' FFL number is misleading. Their six-figure number counts *all* license types combined – including those not at issue under "zero tolerance." A far more accurate indicator of the AAP's effects is the total number of "Type 01" licenses – those typically held by ordinary gun stores – before and after "zero tolerance." In January of

2021, there were 52,976 firearm dealers nationwide.[38] Compare that figure to the 47,129 firearm dealers remaining just four years later[39] – an 11% nationwide decrease during the Biden years. "Zero tolerance" and its "voluntary" surrenders contributed in large part to this contraction in the marketplace. If a *double-digit decrease* in the availability of Second Amendment arms does not count as an "infringement," it is hard to see what would. Certainly, no court would turn a blind eye to an 11-percent reduction in the nation's churches or bookstores coinciding with a "zero tolerance" government closure policy targeting the same. Such government action more than "implicates" the Second Amendment – certainly at the pleading stage – and the district court was wrong to conclude otherwise.

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[38] *Report of Active Firearms Licenses*, BATFE (Jan. 11, 2021), https://tinyurl.com/bn5un6b4. And of that number, most are not brick-and-mortar stores like Morehouse, because "in 2022, 57 percent of all licensed gun dealers were located at residential addresses." *Inside the Gun Shop*, Everytown Rsch. & Pol'y (July 6, 2023), https://tinyurl.com/3yp58awv.

[39] *Report of Active Firearms Licenses*, BATFE (Jan. 10, 2025), https://tinyurl.com/2p2nfkpr.

CONCLUSION

For the foregoing reasons, the order of the district court dismissing Plaintiffs' case should be reversed.

Respectfully submitted,

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I hereby certify that on August 19, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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