IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAY AUBREY ISAAC HOLLIS Individually and as Trustee of the JAY AUBREY ISAAC HOLLIS REVOCABLE LIVING TRUST, Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States; B. TODD JONES, Director of the Bureau of Alcohol Tobacco Firearms and Explosives, Defendants.	)	Case No.3:14-cv-03872-M

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The instant matter brings into question the constitutionality of the Firearm Owners' Protection Act of 1986 ban on the ownership of machineguns. As Defendants correctly observe, it is a decades-old law; one of many now unconstitutional laws passed prior to the United States Supreme Court holding that the Second Amendment confers an individual right to keep and bear arms in *District of Columbia v. Heller*, 554 U.S. 570 (2008). This law was passed during a time of uncertainty regarding the nature of the Second Amendment. Now that this uncertainty has passed, this complete ban on the ownership of a type of bearable arm cannot pass constitutional muster. This ban is analogous to the one struck down in *Heller*, and for many of the same reasons it is unconstitutional.

By way of background, the National Firearms Act ("NFA") regulates the manufacture and transfer of certain firearms by, in sum, (1) requiring a person proposing to make or transfer an NFA firearm to file an application with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"), (2) obtain BATFE approval, (3) have the firearm registered in the National Firearms Registration and Transfer Record (completed by BATFE upon approval), and (4) pay a $200 tax which is evidenced by the BATFE's attachment of a tax stamp on the application which is then returned to the maker or transferor. 26 U.S.C. §§ 5812 and 5822. Possession of an NFA firearm not registered to the possessor is a felony punishable by ten years imprisonment and a fine of $250,000. 26 U.S.C. § 5861(d), 18 U.S.C. § 3571(b). Machineguns, defined as any firearm capable of firing more than one round automatically by a single function of the trigger, fall under the purview of the NFA. 26 U.S.C. § 5845(b).

In 1986, 18 U.S.C. § 922(o) was codified into law under the Gun Control Act of 1968 ("GCA") and prohibits a "person" from transferring or possessing a machinegun manufactured

after May 19, 1986. While an unincorporated trust falls under the definition of "person" in the NFA, 26 U.S.C. §7701(a)(1), a trust is not included in the definition of "person" under the GCA. 18 U.S.C. §921(a)(1). Accordingly, a trust wishing to manufacture a machinegun is subject to the provisions of the NFA, but is not subject to the GCA's prohibition on possession of post-1986 machineguns. The BATFE is charged with the administration and enforcement of the NFA and GCA, and is overseen by the Defendants.

Plaintiff Jay Aubrey Isaac Hollis, as trustee of the Jay Aubrey Isaac Hollis Revocable Living Trust ("the Trust"), submitted the proper applications (commonly known as a "Form 1") to the BATFE pursuant to the NFA for authority to manufacture an M-16 style machinegun from an AR-15 semi-automatic lower receiver owned by the Trust. Plaintiff submitted the application in paper form and that Form 1 was approved on September 8, 2014.[1] On or about September 10, 2014, Plaintiff received a phone call from the BATFE stating that the application was "disapproved" because of 18 U.S.C. §922(o) and that the firearm was no longer registered in the National Firearms Registration and Transfer Record. *See* Affidavit of Mr. Hollis, App.001.

Mr. Hollis is a law abiding citizen, a United States Marine Corps reservist, and maintains a Top Secret clearance. The M-16 at issue is considered a rifle by the military, even though under federal law it is referred to as a machinegun because it fires more than one shot by a single function of the trigger. This brief will address the M-16 rifle as a machinegun consistent with federal law. Mr. Hollis makes that distinction to the Court to alleviate any confusion between the terms "rifle" and "machinegun" in this case.

[1] *See* Exhibit "C" to the Complaint.

STANDARD OF REVIEW

"The party which asserts jurisdiction bears the burden of proof for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *Davis v. U.S.*, 597 F.3d 646, 649 (5th Cir.2009) (quoting *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001)). This Court should only grant a Fed. R. Civ. P. 12(b)(1) motion "if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction." *Davis,* 597 F.3d at 649 (quoting *Castro v. United States,* 560 F.3d 381, 386 (5th Cir.2009). "In ruling on such a motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts." *Id*. at 649-50 (quoting *Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir.2008)).

"In circumstances where "the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court ... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case" under either Rule 12(b)(6) or Rule 56. *Montez v. Dept. of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (quoting *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir.1981)).

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotations omitted) (citation omitted). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal,* 556 U.S. at 679.

A Fed. R. Civ. P. 56 motion should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). "The movant has the initial burden of demonstrating the absence of a material fact issue." *Forsyth,* 19 F.3d at 1533 (quoting *St. Paul Ins. Co. v. AFIA Worldwide Ins. Co*., 937 F.2d 274, 279–80 & n. 6 (5th Cir.1991)).

ARGUMENT

I. Plaintiff has Standing to Assert his Second Amendment and Commerce Clause Claims and this Court has Subject Matter Jurisdiction

Defendants generally argue Plaintiff lacks standing to assert his Second Amendment claims but devotes only barely over two pages of a roughly forty-page brief to discuss. This cannot be a serious claim by Defendants, because if Plaintiff did in fact not have standing, there would be no need for Defendants' Motions to Dismiss or alternatively for Summary Judgment. Defendants' motion to dismiss on standing grounds lacks merit. Defendants' application of the law of standing is novel to say the least and since Defendants raised the issue of standing, Plaintiff will address it.

To demonstrate standing, "a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Natl. Fedn. of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208-09 (5th Cir. 2011) (quoting *Davis v. FEC*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)).

The first factor is easily met. While Defendants spend a considerable amount of page length arguing against Plaintiff's Second Amendment rights, Plaintiff does have a legally protected interest in his approved Form 1 to manufacture his machinegun. Plaintiff's Second Amendment rights were violated by the Defendants when they revoked, without authority, his approval to manufacture his machinegun. Plaintiff's injury was and still is concrete and is particularized

because Plaintiff was affected in a personal and individual way as his Second Amendment rights are violated by the Defendants.[2]

Plaintiff additionally meets the second factor's causal connection requirement. Defendants' conduct in revoking Plaintiff's approval to manufacture a machinegun is not only "fairly traceable" to the Defendants, but is *actually* traceable to the Defendants. Defendants concede that the "[BATFE] is charged with the administration and enforcement of the GCA and the NFA and is overseen by the Defendants" and are therefore directly responsible for the conduct complained of. Def. Brief at p. 2.

Defendants cite to *White v. United States*, 601 F.3d 545, 552 (6th Cir.2010) for the proposition that a state ban on a particular activity precludes traceability and redressability in challenges to a federal ban. Def. Brief at p. 9. For instance, Defendants state that Texas law prohibits machineguns. *Id.* This assertion is absolutely false and is eventually rectified in Footnote 6 on page 10 of the brief explaining that a defense is compliance with the NFA. However, Defendants go further and state that if Plaintiff is successful in his challenge to the NFA, he would still be prohibited from ownership of the machinegun. Defendants fail to take into account that if the NFA is found constitutional, but § 922(o) falls as overbroad, unconstitutional, or unconstitutional as applied to Mr. Hollis, Mr. Hollis' machinegun would be approved and registered and thus not prohibited under Texas law. Even if the NFA falls, the states banning possession of machineguns unless lawfully registered under the Federal law would have to be amended. Either way, the Texas statute stands for the proposition that machineguns are legal in Texas if properly registered with the federal government.

[2] Plaintiff will fully detail *infra* how an M-16 is protected under *Heller* and *Miller*.

Further, Defendants' assertion that Plaintiff's Second Amendment challenge is not somehow traceable to federal law but is somehow "th[e] result [of] the independent action of some third party not before the court" has absolutely no connection with the actual facts of the case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The facts of this case matter. Plaintiff filed for and received approval from the federal government (the BATFE) to manufacture a machinegun in accordance with federal law. Plaintiff intended to manufacture his machinegun pursuant to the approval from the BATFE but did not because the BATFE contacted him leading him to believe that his registration had been revoked. Plaintiff, not wanting to violate federal law (and thus be imprisoned, fined, and lose his livelihood) had no choice but to comply with BATFE's illegal revocation of his Form 1. Had Defendants not later rescinded that approval, Mr. Hollis would have been legally entitled to possess the machinegun under both federal and state law. In short, Plaintiff need not challenge the Texas law and Defendants' assertion that he must is meritless.

Moreover, Defendants reach too far when they opine the resolution of this case *requires* overturning federal law. Mr. Hollis simply wants to manufacture and possess his machinegun. This Court may find an appropriate way and manner to allow Mr. Hollis to manufacture and possess his machinegun pursuant to the approved Form 1 while engaging in traditional constitutional avoidance. Mr. Hollis suggests it is far too early in the proceedings to make that determination. The very point of this lawsuit is to resolve these issues and Defendants' argument that this Court has no authority to do so is simply rhetorical tautology.

The third factor that the injury is "…likely to be redressed by a favorable ruling[,]" is likewise met. *Abbott*, 647 F.3d at 208-09. This Court has the authority, despite Defendants' assertion to the contrary, to allow for Mr. Hollis to manufacture his lawfully approved machinegun

and to rule that the BATFE did not have the authority, statutory or otherwise, to revoke an approved Form 1 application. Therefore, it is likely that if a favorable decision is rendered, Plaintiff's injury will be redressed.

Defendants cite to a number of cases regarding agency power that is "axiomatic" in its ability to reconsider and rectify errors. Def. Brief at Fn. 19. But the approval of Mr. Hollis' Form 1 to manufacture his machinegun under his trust is not believed to be an error. The BATFE approved many of these exact Form 1s for non-governmental entities. It is believed that the BATFE changed its policy on approving Form 1s to trusts, as trusts are not defined in the GCA as a "person," and §922(o) can only be read as barring a "person" from possession of a post-1986 machinegun.[3] Plaintiff needs to engage in discovery to fully develop whether this was in fact a mistake or a change of policy.

Entertaining the "mistake" theory, in *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189 (2d Cir. 1991), the Postal Service reconsidered a number of refund requests after they were approved. That court held that the Postal Service had "discretion to review the … decisions granting the refunds, provided that the Postal Service afforded D & B proper notice that these decisions would be reconsidered…" *Dun & Bradstreet*, 946 F.2d at 193-94 (2d Cir.1991). In the case at bar, there was simply no "reconsideration" by the BATFE. Instead, the BATFE unilaterally and arbitrarily revoked Mr. Hollis' lawfully approved Form 1. "Ordinarily, however, an agency may undertake such reconsideration only if it does so within a reasonable time period and affords the claimant proper notice of its intent to reconsider the decision." *Dun & Bradstreet*, 946 F.2d at 193-94. What notice was given Mr. Hollis? Only that his approved Form 1 was marked "disapproved" and that the machinegun he intended to manufacture pursuant to the

[3] *See* Complaint ¶¶ 24-25.

BATFE's approval was no longer registered in the "National Firearms Registry [sic] and Transfer Record."[4] Had he already manufactured the machinegun, he would have been instantly in possession of an unregistered machinegun and subject to all the penalties under the Acts.

Defendants scream long and loud on the "dangers machineguns pose to public safety and to law enforcement officers…" But if public safety was an actual concern, why would the BATFE allow thousands of machineguns to exist lawfully, without registration? In 1982, in BATFE Rule 82-8, the BATFE held that certain machineguns, while actually meeting the definition of machinegun (i.e., by shooting automatically more than one shot, without manual reloading, by a single function of the trigger) were not machineguns if they were manufactured before June 21, 1982. But, the same machinegun, if manufactured after June 21, 1982, would "be subject to all the provisions of the National Firearms Act…" *See* Declaration of Len Savage, App.005.[5]

The BATFE essentially concedes there is no statutory or regulatory authority for revoking, rescinding or disapproving, *post hoc*, an issued tax stamp or they would have cited to it. Instead they rely on "implied" power to do so. While agencies apparently enjoy unfettered power to legislate, execute and adjudicate, at the least the BATFE should have simply notified Mr. Hollis that they issued his stamp in error (if that was actually the case and not a change of policy due to the number of Form 1s issued to trusts) and allowed him to manufacture and possess his machinegun pursuant to his approval.

In addressing Defendants' argument regarding the BATFE allowing others to possess post-1986 machineguns, it is interesting that Defendants did not state that this has never happened. They will not (or should not) say that because Defendants know that it has happened in the past. But without discovery, Plaintiff cannot prove the exact number of times this has occurred. As the

[4] *See* Exhibit "E" to the Complaint

[5] *See also* https://www.atf.gov/files/regulations-rulings/rulings/atf-rulings/atf-ruling-82-8.pdf.

National Firearms Registration and Transfer Record can be queried to provide this information, Plaintiff, at a minimum, should be allowed this discovery, and Defendants Motion to Dismiss and Motion for Summary Judgment should be denied or at least held in abeyance until such time as discovery can be taken as discussed *infra*. For instance, Plaintiff knows of at least one transfer of a post-1986 machinegun approved by the BATFE. In this case, the "error" came to the BATFE's attention after the transfer, but instead of disapproving, de-registering and sending letters to confiscate and/or surrender, the BATFE merely said "Since we approved the transfer, you may continue to possess the firearm."[6] App.069.

Defendants state that "… no Form 1 applications to make machineguns have been approved since May 19, 1986 except at the request of government entities." Def. Brief at p. 32. This is patently false. The BATFE approved a Form 1 to manufacture a machinegun in this case and in another case, currently pending in the United States District Court for the Eastern District of Pennsylvania, Case No. 2:14-cv-06569-SD. The Defendants have actual knowledge of other Form 1 machineguns that were approved for other than "government entities." While Plaintiff does not know exactly how many Form 1s were approved, Defendants' statement that "… no Form 1 applications have been approved…" is demonstrably false.

Defendants' further claim that Mr. Hollis cannot make a claim of "entitlement" to his approved Form 1. Def. Brief at p. 32. This argument cannot be made with a straight face. Mr. Hollis, as stated previously, is a model citizen, a Marine Corps reservist and maintains a Top Secret security clearance. For him to disregard the $250,000 fine, felony conviction, ten years imprisonment, loss of his clearance, and numerous other losses if he *illegally* manufactured a machinegun makes absolutely no logical sense and cannot seriously be considered by this Court.

[6] Presumably, this could have been under § 922(o)'s "authority" exception.

Of course Mr. Hollis claims entitlement to his Form 1. Likewise, Mr. Hollis, if he could have manufactured the machinegun before the BATFE instructed that his Form 1 was revoked, would most certainly have a property interest in that manufactured machinegun. That was the next logical step for Mr. Hollis, as demonstrated by the case pending in Pennsylvania where the plaintiff actually manufactured his machinegun pursuant to the approval by the BATFE.

II. SECOND AMENDMENT

a. Defendants Misapply *Heller's* Dangerous and Unusual Language

As set forth below, the dangerous and unusual doctrine does not pertain to the mere *possession* of a firearm (or other weapon), but only applies to the *manner* in which that right is exercised. This case is not about the carrying of dangerous and unusual weapons, but mere possession of that firearm.

Justice Scalia clarified this recently "For example, there was a tort called affrighting, which if you carried around a really horrible weapon just to scare people, like a head ax or something that was, I believe, a misdemeanor," he explained.[7]

Justice Scalia's comments likely stem from A Treatise on the Criminal Law of the United States by Francis Whartson (1874)

> An affray, as has been noticed, is the fighting of two or more persons in some public place, to the terror of the citizens. (footnote omitted) There is a difference between a sudden affray and a sudden attack. An affray means something like a mutual contest, suddenly excited, without any apparent intention to do any great bodily harm. (footnote omitted). ... yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute. *Id.* at 527.

[7] *See* http://cnsnews.com/news/article/justice-scalia-2nd-amendment-limitations-it-will-have-be-decided (last visited 2/1/2015).

In this context, the Common Law's definition of "dangerous" was any item that could be used to take human life through physical force. ("[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life … is … the use of dangerous weapons" *United States v. Hare*, 26 F. Cas. 148, 163 - 64 (C.C.D. Md.1818)). "Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt" *See Baron Snigge v. Shirton* 79 E.R. 173 (1607). In this context, "unusual" meant to use a protected arm in a manner which creates an affray. Timothy Cunningham's 1789 law dictionary defines an affray as "to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror." An unusual use of weapons in common use led to *Baron Snigge v. Shirton* 79 E.R. 173 (1607), this case involved a landlord - lessee dispute. The tenant "kept the possession [of the house] with drum, guns, and halberts". The Court found he used "unusual weapons" to maintain possession of the house. *Id. Rex v. Rowland Phillips* 98 E.R. (1385) holds "if an officer in the impress service, fire in the usual manner at the hallyaras of a boat, in order to bring her to, and happen to kill a man it is only manslaughter". *Id.*

The "dangerous and unusual" doctrine is not merely a restatement of *Heller*'s tests for protected arms. *Heller* offered that its test for what arms are protected by the Second Amendment is "supported by" the prohibition on the carriage of dangerous and unusual weapons, *Heller*, 554 U.S. at 627 (citations omitted), but that is not to say the two concepts—the scope of the arms protected by the Second Amendment, and the "dangerous and unusual" doctrine—are identical. They are very different.

As the sources *Heller* cited indicate, the longstanding prohibition on the carrying of "dangerous and unusual weapons" does not, in fact, refer to types of weapons, but to types of conduct with weapons. A necessary element of this common law crime of affray, to which the

"dangerous and unusual" prohibition refers, had always required that the arms be used or carried in such manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense.

Heller's first source on the topic, Blackstone, offered that "[t]he offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, *by terrifying the good people of the land*." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769) (emphasis added). Blackstone referenced the 1328 Statute of Northampton, which, by the time of the American Revolution, English courts had long limited to prohibit the carrying of arms only with evil intent, "in order to preserve the common law principle of allowing 'Gentlemen to ride armed for their Security.'" David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789, 795 (1982) (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)). "[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[ ] act of violence or disturbance of the peace." TREATISE ON THE PLEAS OF THE CROWN, ch. 63, § 9 (Leach ed., 6th ed. 1788); *see* Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104-05 (1994).

Heller's additional citations regarding the "dangerous and unusual" doctrine are in accord. "[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people*." James Wilson, WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804) (footnote omitted) (emphasis added). "It is likewise said to be an affray, at common law, for

a man to arm himself with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people*." John A. Dunlap, THE NEW-YORK JUSTICE 8 (1815) (emphasis added).

> Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land … But here it should be remembered, that in this country the constitution guar[]anties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.

Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also Heller*, at 588 n.10 (quoting same). It is the *manner* of how the right is exercised, not the type of weapon that is carried that constitutes the crime. At no point is a test referred to regarding the commonality of the usage of the weapons carried. Said another way, just because a firearm or other weapon is in common usage at the time does not make the *manner* in which the right is exercised excused or excusable simply due to the type of firearm or weapon carried.

"[T]here may be an affray … where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the people." William Oldnall Russell, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1826). But:

> it has been holden, that no wearing of arms is within [meaning of Statute of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons . . . in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.

Id. at 272.

The other treatises *Heller* cites in support of the "dangerous and unusual" doctrine are in accord, as are the cases *Heller* cites. *See O'Neill v. State*, 16 Ala. 65, 67 (1849) (affray "probable" "if persons arm themselves with deadly or unusual weapons for the purpose of an affray, *and in such manner as to strike terror to the people*") (emphasis added); *State v. Langford*, 10 N.C. (3

Hawks) 381, 383-384 (1824) (affray "when a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people*") (emphasis added); *English v. State*, 35 Tex. 473, 476 (1871) (affray "by terrifying the good people of the land"). In fact, one does not even need to be armed with a firearm to commit the crime of affray under the dangerous and unusual doctrine. *See State v. Lanier*, 71 N.C. 288, 290 (1874) (riding horse through courthouse, unarmed, is "very bad behavior" but "may be criminal or innocent" depending on whether people alarmed).

As *Heller* summarized, the traditional right to arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626. Thus carrying of dangerous and unusual weapons refers to a time, place and manner restriction on the carrying of protected arms. As Mr. Hollis' challenge is about mere possession of a machinegun, and not carrying, the dangerous and unusual doctrine simply does not apply. Accordingly we are left with the proposition that Mr. Hollis' machinegun is a protected arm. Hence we must determine the constitutionality of Defendants' prohibition on this arm.

b. Defendants Complete Ban on Machineguns is Categorically Invalid

In *Heller*, applying heightened scrutiny was unnecessary. The Court found no matter what standard of review to which the Court might have held the D.C. restrictions, "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster." *Id*. at 628–629 (internal quotation marks and citation omitted). A law effecting a "destruction of the right" rather than merely burdening it is, after all, an infringement under any light. *Heller* at 629 (emphasis added) (quoting *Reid*, 1 Ala. at 616–17); *see also Heller II*, 670 F .3d at 1271 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

This matter is analogous. Here, Defendants completely ban a class of bearable firearms. Mr. Hollis concedes that the ownership of machineguns can be regulated to a point. However this complete ban can fulfill no level of scrutiny. *See Heller* 628–35. "[C]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them. . . ." *Id.* at 634-635. (A law that "under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional"). However, if this Court rejects the approach applied by *Heller* then at a minimum, strict scrutiny should apply.

i. U.S. v. Marzzarella Supports Applying a Categorical Approach

U.S. v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) supports applying a categorical approach to this complete ban on a class of arms. The Defendants in *Marzzarella* argued that the Court should apply a categorical approach finding the ban on firearms with obliterated serial numbers unconstitutional. The Court found this argument unpersuasive:

> His argument rests on the conception of unmarked firearms as a constitutionally recognized class of firearms, in much the same way handguns constitute a class of firearms. That premise is unavailing. *Heller* cautions against using such a historically fact-bound approach when defining the types of weapons within the scope of the right. 128 S.Ct. at 2791 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way"). Moreover, Marzzarella himself asserts that serial numbers on firearms did not exist at the time of ratification. Accordingly, they would not be within the contemplation of the pre-existing right codified by the Second Amendment. It would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms.
>
> Furthermore, it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. *Heller* distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality. *Id*. at 2818 (citing handguns' ease in storage, access, and use in case of confrontation). But unmarked firearms are functionally no different from marked firearms. The mere fact that some firearms possess a

> nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic. *Marzzarella* at 93-94.

Clearly, *Marzzarella* supports applying a categorical approach on bans on arms functionally different from a handgun. Such is the case here. Mr. Hollis' automatic M-16 is considerably different in form and function than a handgun. As established above, it is a protected arm. Accordingly, Defendants complete ban on these protected arms should be deemed categorically invalid. However, if any level of scrutiny need apply, then strict scrutiny must apply.

ii. The 1934 Hearing on National Firearms Act Supports That A Categorical Ban Would Be Unconstitutional

Unlike the machinegun ban in § 922(o), the constitutionality of the original National Firearms Act bill was actually debated, with then-Attorney General Homer Cummings admitting that a ban on machineguns may not survive Constitutional scrutiny unless reached through Congress' power to tax. National Firearms Act: Hearings Before the House Committee on Ways and Means, 73rd Cong., 2d Sess., 6 (1934). Cummings denied that machineguns could be banned, because "we have no inherent police power to go into certain localities and deal with local crime. It is only when we can reach those things under the interstate commerce provision, or under the use of the mails, or by the power of taxation, that we can act." App.105. Specifically, Mr. Cummings felt that if it were purely a taxing statute, it would survive scrutiny. The following exchange is on point:

> **Mr. David J. Lewis, Maryland:** Now a very brief statement on this subject: Lawyer though I am, I have never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms. Concealed-weapon laws, of course, are familiar in the various states; there is a legal theory upon which we prohibit the carrying of weapons – the smaller weapons.
>
> **Attorney General Homer Cummings**: Of course we deal purely with concealable weapons. Machine guns, however, are not of that class. Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?

> **Mr. Lewis**: I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped that provision in the Constitution.
>
> **AG Cummings**: Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. *You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved.* But when you say "We will tax the machine gun" and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated," you are easily within the law.
>
> **Mr. Lewis**: In other words, *it does not amount to prohibition, but allows of regulation.*
>
> **AG Cummings**: That is the idea. We have studied that very carefully.

App.116. (Italics added). While Congress may have the power to regulate under the auspices of a tax, Section 922(o) goes beyond that and is treated as a categorical ban on a bearable arm. Even in 1934, Congress understood and the Attorney General conceded there may be a constitutional issue with a categorical ban.

c. The Ban on Machineguns in § 922(o) is not Longstanding or Presumptively Lawful

Defendants state that the restrictions on possession of a machinegun are longstanding and presumptively lawful.[8] Def. Brief at pp. 17-18. The federal ban on machineguns, as stated *supra*, is not a longstanding law, as it became law only in 1986. And *Heller*, not a case about machineguns, did not stand for the proposition that the ban is presumptively lawful.

Defendants cite to a number of cases regarding machineguns being regulated at the state level, so that must mean that the ban on machineguns is longstanding. But that demonstrates nothing other than states regulate firearms. The federal ban is the statute being considered and that the states regulate or regulated machineguns is a matter for another time. What matters is that Texas does not prohibit machineguns, as long as they are properly registered per federal law, and

[8] As shown below, *Heller* does not hold longstanding doctrines are presumptively lawful, however, even if it did, the federal ban on machineguns discussed *supra* is not a longstanding law as it only became law in 1986.

Mr. Hollis would be able to manufacture a machinegun, pursuant to federal law, if Defendants were not prohibiting him from doing so. If it did matter that machineguns were subject to longstanding regulations, the D.C. gun ban would likewise have been classified a "longstanding law," forbidding residents from keeping and bearing arms in the home, and thus the *Heller* court would have found in D.C.'s favor. But as we know, D.C.'s categorical ban did not survive, no matter how long it had been in effect.

While the Fifth Circuit has held that the "unlawful possession of a machine gun is a crime of violence" under the Sentencing Guidelines (*see U.S. v. Golding*, 332 F.3d 838, 839 (5th Cir. 2003)) and has affirmed convictions for the unlawful possession (i.e., not in compliance with the NFA) of a machinegun (*see U.S. v. Kirk*, 105 F.3d 997, 998 (5th Cir. 1997)), those cases are easily distinguishable as those cases dealt with a *felon* in possession and an *unregistered* machinegun, respectively. In fact, most of the cases dealing with machineguns are those entwined in criminal prosecutions, not remotely close to the Plaintiff in this case that applied for and received permission from the BATFE to build his machinegun. Cases regarding *criminal* behavior are simply not applicable to the case at hand, as Mr. Hollis is not prohibited from owning firearms.

When *Heller* refers to certain longstanding prohibitions surviving it is not giving a temporal test. It simply is providing examples of existing firearms laws which are constitutional post-*Heller*. It is a misreading of *Heller* to argue all long standing prohibitions are presumptively constitutional. *Heller* states:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller at 626-27. This passage is simply to give assurances that reasonable regulations would continue to be constitutional post-*Heller*. This is evidenced by *Heller* referencing both modern restrictions such as those on commercial sales and historical restrictions on Common law felons and the mentally ill. Moreover, a natural reading of this passage supports that these are simply examples of restrictions that survive constitutional muster. While *Heller* teaches us that text and history are essential to analyzing the scope and nature of the Second Amendment right, Defendants position finds no support in *Heller*.

d. If Means End Scrutiny is Necessary Strict Scrutiny Should Be Applied

As a preliminary matter it is unclear why *United States v. Decastro,* 682 F.3d 160, 163 (2d Cir.2012) is cited at all by Defendants. The Second Circuit is the only Circuit to apply the substantial burden test. Every other Circuit to address this issue has applied a two-step analyis as did this Circuit in *Natl. Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives,* 700 F.3d 185, 194 (5th Cir. 2012). Accordingly, if the Second Amendment right is implicated at all, the presiding Court must apply (at the very least) some form of means end scrutiny. Here, the complete ban on a protected class of arms should trigger a categorical approach. However if means end scrutiny applies then this Court should adopt the 6th Circuit recent approach.

The United States Court of Appeals for the 6th Circuit recently stated "*Heller*'s footnote 27—even aside from the Court's flat rejection of Justice Breyer's interest-balancing inquiry—strongly suggests that intermediate scrutiny "could not be used to evaluate" Second Amendment challenges. *Tyler v. Hillsdale County Sheriff's Dept*., 13-1876, 2014 WL 7181334, at *16 (6th Cir. Dec. 18, 2014). Under strict scrutiny, a challenged law will satisfy scrutiny "if it furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Fed. Election Commn*., 558 U.S. 310, 312 (2010). Section 922(o) furthers no compelling interest, or if it does, is not narrowly tailored as it is a categorical ban on machineguns.

We turn back to the two-pronged approach in *Natl. Rifle Ass'n*. First, the court must ascertain "whether the conduct at issue falls within the scope of the Second Amendment right." *Natl. Rifle Ass'n,* 700 F.3d at 194. "To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Id.* If the conduct is not burdened, then the court's inquiry is complete as the "conduct … falls outside the Second Amendment's scope…" *Id*. However, if the conduct is burdened, the court will "then proceed[ ] to apply the appropriate level of means-end scrutiny." *Id*.

The court's first inquiry is whether 18 U.S.C. § 922(o) regulates conduct within the scope of the Second Amendment. The first prong is not difficult to answer in the affirmative that § 922(o) regulates conduct within the Second Amendment. As stated in *Heller*, "… the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller* at 582. The Second Amendment does not only protect "those arms in existence in the 18th century." *Id*. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Id.* at 634.

18 U.S.C. § 922(o) generally bans the transfer or possession of a machinegun manufactured after May 19, 1986. The statute provides:

> (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.

This provision was enacted in 1986 as §102(9) of the Firearm Owners' Protection Act, which amended the GCA of 1968. Further, the term "person" is defined in the GCA to mean "any individual, corporation, company, association, firm, partnership, society, or joint stock company." *See* 18 U.S.C. § 921. The statutory definition of the term "person" does not include an unincorporated trust. As the plain language excludes "unincorporated trust" from the definition, this court (and the BATFE) should not read into the statute what is not there. *See Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 14-2767, 2014 WL 7172253, at *6 (3d Cir. Dec. 17, 2014) (citing *Meese v. Keene*, 481 U.S. 465, 484, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

Defendants, mindful of the definition of the term "person," stated in an opinion letter on March 17, 2014 to Dakota Silencer in Sioux Falls, South Dakota, referenced the "person" definition and stated: "[u]nlike individuals, corporations, partnerships, and associations; unincorporated trusts do not fall within the definition of "person" in the GCA."[9] By the BATFE's admission, the term "person" in the GCA does not include an unincorporated trust and such a trust cannot be subject to the prohibition in § 922(o).

But delving further into the constitutionality of § 922(o), *Heller* does not stand for the proposition that the types of firearms at issue in this case are not protected by the Second Amendment, only that it would be a "startling reading of the [*Miller*] opinion since it would mean that the NFA's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939." *Id*. at 624. (*See U.S. v. Miller*, 307 U.S. 174 (1939) (Absence of evidence showing that short-barreled shotguns have reasonable relationship to

[9] *See* Exhibit "A" to the Complaint.

preservation or efficiency of well-regulated militia, Court cannot say Second Amendment protects such a firearm).

Justice Scalia's majority opinion is logically correct, and perhaps for some of the machineguns regulated by the NFA, § 922(o) is simply overbroad as it regulates all machineguns; machineguns that are protected by the Second Amendment as bearable arms and machineguns that are not bearable arms. But reading *Miller* and *Heller* together, clearly an M-16 (under *Miller*) has "some reasonable relationship to the preservation or efficiency of a well-regulated militia" as every branch of the armed forces (and multitude of federal and state agencies) utilizes the M-16 for some purpose. *Miller*, 307 U.S. at 178.

The machinegun in this case, an AR15 which would be converted into an M-16 (after payment of the mandated tax and approval under the authority of the government, in this case, the BATFE) is a bearable arm. This is not to say that all machineguns are protected under *Heller*, as the machinegun under current Supreme Court precedent would first have to be a "bearable arm," and arguably machineguns which are crew-served would fall outside of that protection. But it cannot be questioned that an M-16 would fall under the "bearable arms" protection of *Heller*. As such, it is protected.

Under the second prong, the court will "then proceed[ ] to apply the appropriate level of means-end scrutiny." *Natl. Rifle Ass'n*, at 194. The level of scrutiny that is appropriate "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. *See Chester*, 628 F.3d at 682 (observing that a 'severe burden on the core Second Amendment right of armed self-defense should require a strong justification,' but 'less severe burdens on the right' and 'laws that do not implicate the central self-defense concern of the Second Amendment[ ] may be more easily justified' (quotation and citation omitted))." *Id*. at 195. The

intermediate scrutiny test cannot be a rational basis review as *Heller* forbids a rational basis application to evaluate an "enumerated right." *Id.* If intermediate scrutiny applies, the government must demonstrate a "reasonable fit between the challenged regulation and an important government objective." *Id.* (internal quotations and additional citations omitted).

The ban contained in § 922(o) is a complete ban on the possession of post-May 19, 1986 machineguns. All of them. The ban discriminates not on bearable arms or crew served machineguns. If the firearm fires more than one shot with a single function of the trigger, then it is classified as a machinegun. The burden imposed by § 922(o) severely limits the possession of a protected class of firearms. Substituting machineguns for handguns, it is not difficult to make the leap that § 922(o) does "not just regulate possession of [a machinegun]; it prohibited it, even for the stated fundamental interest protected by the right—the defense of hearth and home." *U.S. v. Marzzarella,* 614 F.3d 85, 97 (3d Cir. 2010) (citing *Heller*, 128 S. Ct. at 2818). Thus strict scrutiny must apply.

However under any means end scrutiny Defendants have failed their burden in showing a compelling or important government interest in banning machineguns as applied to Mr. Hollis. Defendants can, in fact, not demonstrate a compelling government interest, or if they can demonstrate *an* interest, it is not a *compelling* interest. If the Defendants were serious about banning machineguns, then they would attempt to simply ban them. But Defendants instead ban machineguns solely based upon date of manufacture even though the NFA already regulates the ownership, possession and transfer of <u>all</u> machineguns. Section 922(o) simply goes too far.

e. Even if Means End Scrutiny Applies, Defendants Fail Their Burden

Here, the burden is on the Defendants to show that their complete ban on machineguns meets the requisite level of scrutiny. As Defendants do not address strict scrutiny analysis, they presumably concede that if this Court applies strict scrutiny then their complete ban on a protected

arm is unconstitutional. However, Mr. Hollis will brief this issue for the convenience of the Court. In order to fulfill strict scrutiny the government must show that there is compelling governmental interest and that the restriction is narrowly tailored and is the least restrictive means. *See Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 718 (1981).

Here, protecting public safety and combating crime is what Defendants offer as their interest in regulating machineguns. However a complete ban is not in any way, shape, or form narrowly tailored and it is certainly not the least restrictive means to achieve this government interest. Defendants could simply regulate their use, such as requiring strict registration, background checks, imposing storage requirements and otherwise making it possible for Mr. Hollis and other law abiding citizens to own automatic firearms while ensuring that these weapons are stored safely so that they do not fall into the hands of criminals. The BATFE does this already within the purview of the NFA.

However even if this Court finds intermediate scrutiny is proper, Defendants complete ban on these protected arms still fails. Why? Defendants have not actually shown that machineguns are actually linked to crime. Under intermediate scrutiny, "the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *United States v. Reese*, 627 F.3d 792, 802 (10th Cir.2010).

Defendant bears the burden of proving a "reasonable fit" or a "substantial relationship" between the ban and a "significant, substantial, or important" government objective. *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir.2013) (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)). This requires a demonstration that the law is likely to advance that interest "to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996).

The government's "burden is not satisfied by mere speculation or conjecture"; instead, it "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (emphasis added). Defendants must prove with "substantial evidence" that the statute "will alleviate" the identified harm "in a material way." *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) (*Turner II*); *Edenfield*, 507 U.S. at 770-71 ("will in fact alleviate them to a material degree").

While machineguns certainly can be dangerous weapons, (as can be cars, knives, and even matches to an arsonist) no evidence has been presented that even if available they are the weapon of choice for criminals. That likely is because Defendants cannot produce that evidence. The weapon of choice for criminals are cheap handguns that can be disposed of easily. Not ten thousand dollar machineguns that are worth more than any convenience store registry could possibly have. Thus, applying <u>any</u> level of heightened scrutiny; Defendants' complete ban fails.

Specifically with regard to crime, as Defendants repeatedly point to government's *compelling* interest in protecting public safety and combating crime,[10] if we look at the actual statistics and congressional testimony, they do not demonstrate the parade of horribles posited even exist. In fact, in 1984 at a hearing before Congress, then-Director Stephen E. Higgins testified about the NFA and lawfully registered machineguns specifically. Director Higgins stated,

> These weapons are held by collectors and others; only rarely do they figure in violent crime. In this connection, the question of why an individual would want to possess a machinegun or, more often, a silencer, is often raised. We would suggest that ATF's interest is not in determining why a law-abiding individual wishes to possess a certain firearm or device, but rather in ensuring that such objects are not criminally misused. The regulatory scheme for dealing in or legally possessing NFA weapons and silencers is straightforward and provides safeguards which are adequate, in normal circumstance, to ensure that the firearms remain in the hands of law abiding individuals.

[10] *See* Def. Brief at p. 26

Armor Piercing Ammunition and the Criminal Misuse of and Availability of Machineguns and Silencers: Hearings on H.R. 641 and Related bills Before the Committee on the Judiciary, 98th Congress, 1st Sess. 132 (1984). App.075-76. Further, Director Higgins testified that "registered machineguns which are involved in crimes are so minimal so as not to be considered a law enforcement problem." *Id.*

Director Higgins testified that as of September 30, 1984, there were 105,125 registered machineguns with 20,499 registered to governmental entities (law enforcement agencies and the like), 41,419 registered to Special Occupational Taxpayers (dealers and manufacturers), and 43,207 registered to individuals. App.079. Adding together the "private" owners, dealers and individuals; 84,626 of those machineguns did not belong to a governmental entity, or approximately 80.5% of registered machineguns were in private hands.

The statistics from the Bureau of Justice Statistics ("BJS"), a U.S. Department of Justice, Office of Justice Program, tell the same tale. In the Highlights section of the 1995 Firearms, crime and criminal justice report by Marianne W. Zawitz, BJS Statistician, it states "Although most crime is not committed with guns, most gun crime is committed with *handguns*." (italics added). App.129. The report states that "Of all firearm-related crime reported to the survey, 86% involved handguns," and that 57% of all murders in 1993 were committed with handguns, 3% with rifles, 5% with shotguns and 5% where the type was unknown. App.130 . With regard to machineguns, the report states that in 1995, the BATFE had 240,000 automatic weapons registered. App.131. However, the number of "trace requests," (meaning when a firearm is used in a crime and a police agency requests the National Tracing Center at the BATFE to trace the original point of sale) for machineguns barely registered on the report. In 1994, handguns constituted 79.1% of all trace requests; Rifles 11.1%; Shotguns 9.7%; and "Other including machinegun" 0.1%. App.132. Out

of the ten most frequently traced firearms in 1994, (a mere eight years after the ban) not surprisingly, machineguns do not appear. In fact, nine out of those ten are pistols, with the majority of those pistols being inexpensive handguns, commonly referred to as "Saturday night specials." App.133.

In May 2013, another report from the BJS regarding Firearm Violence from 1993-2011 shows the government's position regarding machinegun crime or public safety is untenable. The report's findings show that handguns account for "about 83% of all firearm homicides in 1994, compared to 73% in 2011…. For nonfatal firearm violence, about 9 in 10 were committed with a handgun…" App.138. In 2011, there were 11,101 firearm homicides, down from 18,253 in 1993. Compare that with 38,023 deaths related to motor vehicle accidents; 27,483 deaths due to falls, 43,544 deaths related to drugs; and 26,654 deaths related to alcohol.[11] App.166. Yet vehicles and alcohol are not banned.

Assuming arguendo that public safety and/or the prevention of crime was a serious contention for the banning of an entire category of weapons, handguns would not have been allowed or specifically protected under *Heller*. This bears repeating. Despite the majority of homicide and firearms crime being committed with handguns, the *Heller* court protected that category of firearm. *See Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012) (the "mere possibility" that a gun control law may save lives is not enough or "*Heller* would have been decided the other way" if it were).

Yet even if we ignored the government's own statistics, the Supreme Court has rejected the notion that arms bans for the law-abiding are justified to prevent unlawful use by criminals. *Heller* at 636; *McCullen v. Coakley, Id.* at 712 (Breyer, J., dissenting) (arguing that lawfully-owned

[11] http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf, table 13.

handguns could be stolen by criminals); *cf. Fotoudis v. Honolulu*, 2014 WL 4662385 at *5 (D. Haw. 2014) (prohibition of gun ownership by lawful permanent resident aliens is not "narrowly tailored," because it applies "regardless of whether they are otherwise qualified to acquire firearms, and regardless of whether they might pose a threat to others"). And there is no argument that Mr. Hollis is a prohibited person or would be dangerous with a machinegun. He is a Marine Corps reservist and has trained extensively with an M-16 or its equivalent. *See* Affidavit of Mr. Hollis, App. 001-004.

f. Defendants Misread *United States v. Miller*

Defendants misread the holding of *United States v. Miller*, 307 U.S. 174 (1939) and argue it holds short-barrel shotguns are not protected by the Second Amendment. *Miller* holds that

> …in the absence of any evidence tending to show that a possession or use of 'a shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or the efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within the judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id.

For background on *Miller*, Jack Miller and Frank Layton were accused of transporting a double barrel, a Stevens Shotgun, with a barrel length of less than 18 inches, without registering it and paying a $200.00 tax; a violation of the NFA. Jack Miller, Frank Layton and their representative attorney-at-law did not appear in court for the hearing. The lower trial court found the NFA violated the Second Amendment's right to keep and bear arms and ultimately dismissed the government's case. The government then appealed to the Supreme Court. Interestingly, neither Miller nor his counsel filed any briefing with the Court nor did they appear. As such, the Court ruled as it did and remanded the case to the lower Court for further proceedings consistent with its

opinion. Unfortunately this did not occur as both Miller and Layton died shortly after the Court's decision.

Heller relies on *Miller* for the historical fact that when militia men "were called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." While this historical fact has been misinterpreted as a test, *Miller* cites this historical fact solely to support its holding. The Court provided one example of how something can aid in the preservation or the efficiency of a well-regulated militia. That is to show something is "part of the ordinary soldier's equipment." *Heller* expands on *Miller* to hold handguns (and other arms) designed for personal self-defense receive Second Amendment protection regardless of whether they have military value.

Defendants argue that the Second Amendment right does not foreclose "categorical legislative prohibitions [as]…the right protected by the Second Amendment is a right to 'keep and bear Arms,' not a right to possess a specific firearm or type of firearm." This argument borders on the frivolous as it was explicitly rejected in *Heller*. "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Heller* at 629. The Supreme Court rejected the argument that a ban on handguns is constitutional as long as long arms are legal to own. Further, Defendants' reference to the Militia Acts is unpersuasive. Mr. Hollis has no duty to standardize his small arms collection for mandatory military training, nor were members of colonial militias limited to owning weapons authorized for militia duty. However, Defendants' concession that arms tied to militia duty are part of the historical right supports finding an M-16 is protected by the Second Amendment.

Defendants argue that bearable machineguns are not needed for personal self-defense. This fails to acknowledge there are millions of veterans who are most comfortable defending

themselves with this arm due to training received in the armed forces. However, even if Defendants' argument was valid, the M-16 machinegun receives Second Amendment protection on independent grounds as it is the standard issue weapon of the ordinary soldier. As such, it is the quintessential militia arm. Accordingly, just as colonial Americans had a fundamental right to own and familiarize themselves with the rifles which constituted the militia arms of the time, Mr. Hollis has a fundamental right own his modern day equivalent which is the M-16 rifle for the Defense of himself and the State.

g. *Miller* Provides the Outer Limits for the Second Amendment Right

This Court may have legitimate concerns that a ruling in Mr. Hollis' favor will open the floodgates to legalizing deadlier bearable weapons such surface-to-air missiles. This Court should be assured that it will not. *Heller*'s ruling that the Second Amendment right extends prima facie to all bearable arms should be read in tandem with *Miller*'s holding that the Second Amendment right extends to items that are part of the ordinary soldier's equipment. Mr. Hollis' M-16 rifle clearly falls within the scope of the military equipment issued to the average infantry soldier. Moreover, they are bearable upon the person. Thus M-16s fall within Second Amendment protection in lock step with the framework established by *Heller* and *Miller*. Arms such as bazookas, mortars and heavy machineguns probably do not. Either the aforementioned weapons require a crew of two or more, *or* they are not part of the ordinary soldier's equipment.

Moreover, Defendants argue that Mr. Hollis' M-16 would not have been considered a militia arm. In fact, the M-16 is the quintessential militia-styled arm for the modern day. Since the Founding of Jamestown in 1607 the militia firearm has evolved from the following:

- Muzzleloader – Musket.
- Manual breach load – rifle or pistol.
- Clip load (normally five rounds on an inline clip) deposited into a built in magazine located in the mechanics of the firearm.
- Detachable Box-magazine from the firearm usually holding 5, 10,15,20,30 rounds.

- Detachable Drum-type magazine holding up to 100 rounds.
- Belt-fed ammunition expending indefinite number of rounds.

The M-16 service rifle is the standard issue firearm for all branches of the military. Since 1965 and the introduction of the M-16 rifle, from conscription draft days to the modern volunteer armed forces, every single man and woman has been trained and possesses knowledge and experience with the firearms, and is familiar with the maintenance and care and repair of the firearm. The advantage to owning and training with the standard military weapon is the shortness of time to re-familiarize returning personnel back to active duty; assisting in instructing new and unfamiliar personnel; standardizing the ammunition and maintenance tools; and to lessen the burden of the State and Federal government to resupply the returning forces with arms and ammunition. Accordingly, Mr. Hollis' M-16 fulfills the *Miller* test of aiding in the preservation or the efficacy of the militia and *Heller*'s bearable on the person requirements for Second Amendment protection.

III. DUE PROCESS

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333.

The Defendants argue that Plaintiff is not entitled to any due process because Plaintiff has no protected property interest in the approval in the approved Form 1 application (and consequently, the not-yet-manufactured machinegun). Def. Brief at pp. 30-34. Accordingly, the Defendants contend they could summarily revoke Plaintiff's authority to manufacture a machinegun. *Id.* Defendant cites to *Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012) (quoting *Welch v. Thompson*, 20 F.3d 636, 639 (5th Cir. 1994)) for the proposition that the Plaintiff must

demonstrate that the "state has deprived [Plaintiff] of [his] liberty or property interest." *Id*. at 30. Because the GCA "prohibits any person from possessing a machinegun," the Defendants contend that Plaintiff does not have a "legitimate claim of entitlement" to the manufactured firearm or the approved application. *Id.* at 31.

What the Defendants have overlooked in their Brief is that Plaintiff brought this suit both individually and as trustee of his trust. It was indeed the trust that was approved to manufacture a machinegun.[12] The distinction is not trivial as § 922(o) only prohibits a "person" from manufacturing or possessing a post-1986 machinegun as "person" is defined in the GCA as an "individual, corporation, company, association, firm, partnership, society, or joint stock company." 18 U.S.C. § 921(a)(1). The definition of "person" in the GCA is in contrast to that in the NFA, which does not in itself define "person." Defendants assert the NFA definition of "person" is invoked through the Internal Revenue Code at 26 U.S.C. § 7701(a)(1) and defined "an individual, trust, estate, partnership, association, company, or corporation." Def. Brief at p. 5.

The distinction requires that the GCA and NFA not be comingled and how the two provisions interact be properly understood. The NFA enacted certain requirements for the manufacture and transfer of certain types of firearms, including machineguns. Under the NFA, a "person" must submit an application to the BATFE, obtain BATFE approval, and pay a $200 tax before manufacturing a firearm subject to the NFA's provisions, such as a machinegun. 26 U.S.C § 5822.[13] Section § 922(o) did not alter the NFA, but rather prohibited a "person" (not including a trust in the definition) from possessing a machinegun manufactured after May 19, 1986. As it is not subject to the provisions of § 922(o) under the plain language of the law, a trust is permitted

[12] *See* Exhibit "C" to the Complaint.

[13] While the IRC includes a trust in the definition of "person," the NFA still distinguishes a trust from an individual by imposing the additional requirement that an *individual*, but not a trust, submit fingerprints and the individual's photograph. 26 U.S.C. § 5822.

to manufacture or possess a machinegun manufactured after 1986, so long as the trust complies with the provisions of the NFA. Indeed, the Defendants in stating that the "definition of 'person' under the NFA therefore includes 'trusts,' while the GCA definition does not include this term" admit that the Plaintiff trust is not prohibited by law from possessing a post-1986 machinegun. Def. Brief at p. 5.

Because the Plaintiff trust is not prohibited from possessing a machinegun manufactured after May 19, 1986, Plaintiff has a "legitimate claim of entitlement" to the wrongfully revoked approved Form 1 to manufacture the machinegun as Plaintiff fully complied with all applicable laws and there was therefore no legal basis for the Defendants to deny the application or revoke the Form 1 after having been approved. Defendants argue that Plaintiff can simply not have a protected property interest because Plaintiff "…voluntarily entered into [an area] … which, from the start, is subject to pervasive Government control." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 272 (5th Cir. 2012). Def. Brief at p. 31. Defendants then argue that the NFA and GCA "delineate such an area of pervasive control." While the Defendants do regulate under the GCA and the NFA, there can be no legitimate argument that one does not have a property interest in his firearm, simply because the government pervasively controls it. However, Defendants seem to make that argument.

Had Defendants not revoked Plaintiff's approval, Defendant would have manufactured the machinegun pursuant to federal (and state) law. For all the BATFE knew, Plaintiff had manufactured the machinegun as soon as he received his approval to do so. That he did not, for fear of federal charges, loss of livelihood and a prison sentence, should not factor into the equation as Defendants' post-approval conduct prohibited him from acting. Assuming Plaintiff manufactured, Plaintiff could absolutely "sell … transfer or exclude," which Defendants' claim is

the crucial indicia of a property right. *See Hearts Bluff Game Ranch*, 669 F.3d at 1330; Def. Brief at p. 32. NFA regulated firearms are often sold and transferred, and most certainly one can exclude someone from using his or her firearms, especially one regulated by the NFA. It matters not that the BATFE would have to approve a second transfer if indeed Plaintiff desired to sell his machinegun once built, because the BATFE approves transfers of NFA regulated firearms. Taking machineguns out of the picture, Defendant essentially argues that because of the GCA and the government's regulations of firearms, a person would not have a property interest in his firearm. *See U.S. v. Rodriguez*, EP-08-1865-PRM, 2011 WL 5854369, at *6 (W.D. Tex. Feb. 18, 2011) (Felon has a constitutionally protected property interest in firearm not proscribed by NFA).

In *Rodriguez*, the BATFE seized approximately 100 firearms from a collector, who was caught with a short barreled rifle that was not registered under the NFA. Rodriguez pleaded guilty to that charge (a felony) and requested that the court return the firearms to his brother; the government pay him the fair market value of the firearms; or the firearms be sold and proceeds given to Rodriguez. *Rodriguez*, 2011 WL 5854369, at *6. Even in that case, a felon, who could not sell the firearms on his own, nor exclude anyone from them (the BATFE had them in its vault), nor transfer them, and all the firearms in that case were subject to the same "pervasive" government regulations, but the court held Rodriguez still had a property interest in them.

Despite claiming Plaintiff was not entitled to any measure of due process, the Defendants attempt to argue that Plaintiff was indeed afforded due process. Def. Brief at Fn. 21. According to the Defendants, the "ATF's rapid reversal of the error within 48 hours . . . and the limited effort required to submit a new ATF Form 1 if Plaintiff believed ATF's decision to be in error, demonstrate that the opportunity for Plaintiff to reapply to ATF constitutes sufficient due process." *Id.* It is at best laughable to consider the opportunity to reapply to the ATF to manufacture another

machinegun after receiving correspondence from the ATF informing Plaintiff that such an application would not be approved to satisfy due process for the Defendants' revoking Plaintiff's authority to make a machinegun.

But even if the property interest is not at issue, Plaintiff has established a liberty interest as the Second Amendment is implicated in his right to manufacture his approved machinegun as discussed *supra*. As Plaintiff had a property interest and/or a liberty interest in his Form 1, and as it was wrongly revoked without any due process nor just compensation as required by the Fifth Amendment to the United States Constitution, Plaintiff has sufficiently plead a Fifth Amendment claim for relief.

IV. EQUAL PROTECTION

The Defendants argue that Plaintiff's equal protection claims should be dismissed. Def. Brief at pp. 34-36. In the Complaint, Plaintiff alleges that other individuals have been granted permission by the Defendants to manufacture and possess post-1986 machineguns, namely civilian companies and their employees, firearms dealers and their employees who possess "samples", and various individuals, none of which are provided with an exception to § 922(o) that would not apply to Plaintiff. Complaint, ¶¶ 30-31.

The Defendants contend that since Plaintiff's claimed equal protection violation "neither burdens a fundamental right nor targets a suspect class," the "equal protection claim must be evaluated under rational basis scrutiny." Def. Brief at pp. 34-35 (citing *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). As established above, the right to own the machinegun at issue is a fundamental right.

Accordingly the proper standard is strict scrutiny and the Defendants must show a compelling interest for the disparate treatment between Plaintiff and others who have been approved to manufacture machineguns by the Defendants. Plaintiff's allegations and affidavit are

certainly sufficient to survive the Defendants' Motion to Dismiss pursuant to Rule 12(b)(6), or in the alternative for Summary Judgment.

Nonetheless, despite the Defendants' assertions otherwise, even if Plaintiff's claim is merely subject to a rational basis standard of review, Plaintiff has met the Pleading requirements set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A Plaintiff need not plead "detailed factual allegations." *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265 (1986)). Rather, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

Plaintiff has plead sufficient factual matter to "state a claim to relief that is plausible on its face." Accepting as true Plaintiff's allegations that others, who under the Defendants' interpretation of 18 U.S.C. § 922(o), are equally prohibited from manufacturing or possessing machineguns have been permitted by the Defendants to manufacture and possess machineguns, Plaintiff has sufficiently stated an equal protection claim through the Fifth Amendment's Due Process Clause. Additionally, the Defendants' averment that "no Form 1 applications to make machineguns have been approved since May 19, 1986 except at the request of government entities," Def. Brief at p. 32, is demonstrably false. Further, it is telling that Defendants do not state that no person, other than a governmental entity, has been approved for a transfer of a post-1986 machinegun. They cannot because the BATFE has allowed this. App.069.

Mr. Hollis has a reasonable belief that others have been allowed to manufacture and possess post-1986 machineguns. The Supreme Court has "recognized successful equal protection claims

brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). That Defendants state no Form 1s have been approved after May 19, 1986 is false, and Plaintiff, while not able to prove at this time to whom and when *other* approvals issued, Plaintiff directs this Court to a similar case in the United States District Court for the Eastern District of Pennsylvania, Case No. 2:14-cv-06569-SD, where a Form 1 to manufacture a machinegun was approved after May 19, 1986. At a minimum, Plaintiff, while showing that at least one other Form 1 was issued post-1986, and that another was able to possess a post-1986 machinegun, should be allowed discovery on these issues to ascertain how many more approvals since 1986 exist.

Fed. R. Civ. P. 56(d) provides that the party opposing a summary judgment motion can request additional discovery if he is unable to present facts to justify the opposition to the motion. The nonmovant must request the continuance from the court and "present an affidavit containing specific facts explaining [his] failure to respond to the adverse party's motion for summary judgment via counter affidavits establishing genuine issues of material fact for trial." *Intl. Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1266 (5th Cir. 1991) (additional citations omitted). The Fifth Circuit has "observed that Rule 56(d) motions are generally favored and should be liberally granted." *Beverly v. Wal-Mart Stores, Inc.*, 428 Fed. Appx. 449, 451 (5th Cir. 2011)(unpublished).

As discussed *supra*, the BATFE denied that Form 1 machineguns have ever been approved for manufacture for non-governmental entities after May 19, 1986. However, Mr. Hollis provided an affidavit averring that he has knowledge of at least one, and a reasonable belief that at least two more have been approved. Mr. Hollis requests this Court allow discovery on this issue so that he

may more fully respond to Defendants' Motion. If discovery is allowed, this will prove that Defendants have in fact allowed post-1986 machineguns to be manufactured and even possessed, and will create a genuine issue of material fact if it does not already exist.

CONCLUSION

As argued above, some machineguns would be bearable on the person and thus protected by the Second Amendment under *Heller* and *Miller* and there are undoubtedly some machineguns that, under current Supreme Court precedent, fail the "bearable arm" test and would not at this time be protected under *Heller* and *Miller*. To better illustrate which machineguns would be considered bearable, Plaintiff provides the Affidavit and Declaration of Len Savage, an expert in firearms, and machineguns specifically, to the Court. *See* App.005.

This Court may ask why Mr. Hollis needs his machinegun for self-defense. But self-defense is not the only right the Second Amendment preserves. While it may seem outlandish to believe one needs this right insisted upon, Constitutional rights are enshrined at the time of ratification. *See Heller* at 634-635. As a nation of immigrants, those who have escaped their homeland to come to this country understand what it means when only the criminals and the government have firearms and the necessity of a strong Second Amendment still ring true. Circuit Judge Kozinski of the Ninth Circuit fled Romania with his parents to come to the United States. In a dissent pre-dating *Heller*, regarding a request for hearing *en banc* on the California Assault Weapons Control Act, he said:

> [*Miller*] did not hold that the defendants lacked standing to raise a Second Amendment defense, even though the government argued the collective rights theory in its brief. *See Kleinfeld* Dissent at 586-587; *see also* Brannon P. Denning & Glenn H. Reynolds, Telling Miller's Tale: A Reply to David Yassky, 65 Law & Contemp. Probs. 113, 117-18 (2002). The Supreme Court reached the Second Amendment claim and rejected it on the merits after finding no evidence that Miller's weapon-a sawed-off shotgun-was reasonably susceptible to militia use…We are bound not only by the outcome of *Miller* but also by its rationale. If

Miller's claim was dead on arrival because it was raised by a person rather than a state, why would the Court have bothered discussing whether a sawed-off shotgun was suitable for militia use? The panel majority not only ignores *Miller*'s test; it renders most of the opinion wholly superfluous. As an inferior court, we may not tell the Supreme Court it was out to lunch when it last visited a constitutional provision.

The majority falls prey to the delusion-popular in some circles-that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth-born of experience-is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. *See* Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id*. at 341-42. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. *See Dred Scott v. Sandford*, 60 U.S. 393, 417, 15 L.Ed. 691 (1857) (finding black citizenship unthinkable because it would give blacks the right to "keep and carry arms wherever they went"). A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.

All too many of the other great tragedies of history-Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few-were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. *See Kleinfeld* Dissent at 578-579. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed-where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira v. Lockyer, 328 F.3d 567, 569-70 (9th Cir. 2003) (Judge Kozinksi, dissent). This is the main thrust of Mr. Hollis insisting upon his rights. The Second Amendment protects an M-16 as a bearable arm. *Miller* and *Heller* dictate that outcome.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment is denied and that this Court award Plaintiff any other relief he is entitled to.

This, the 4th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen D. Stamboulieh, hereby certify that the above Brief in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment has been filed electronically with the Clerk of this Court, which sends notification of such filing to all counsel of record in this case.

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