No. 20-3065

In the United States Court of Appeals for the Third Circuit

VAHAN KELERCHIAN,
Plaintiff–Appellant,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, REGINA LOMBARDO, WILLIAM BARR, AND UNITED STATES OF AMERICA,
Defendants–Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2-20-cv-00253

BRIEF OF THE APPELLANT

JOSHUA PRINCE, ESQ.
PRINCE LAW OFFICES, P.C.
646 Lenape Road
Bechtelsville, PA 19505
(888) 313-0416
joshua@princelaw.com

Counsel for Appellant

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had proper subject-matter jurisdiction to hear the action pursuant to 5 U.S.C. §§ 702 and 704 and 28 U.S.C. §§ 1331 and 1346 as this case arises under the Constitution and laws of the United States.

This Court has proper appellate jurisdiction pursuant to 28 U.S.C. § 1291, which provides that the United States Court of Appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

The order dismissing the complaint was entered on July 17, 2020; reconsideration was denied on August 12, 2020; and notice of appeal was filed with this Court on October 9, 2020, therefore this appeal is timely.

STATEMENT OF THE ISSUES

1. Whether the district court had erroneously dismissed Appellants' complaint? [1]

2. Whether the district court erred by not granting Appellant an opportunity to amend his complaint? [2]

[1] App. Vol. I at 12-13; Pl. Brief in Supp. of Mtn. to Recons., 1-5; Order Den. Mtn. for Recons.
[2] App. Vol. I at 12, fn. 4; Pl. Brief in Supp. of Mtn. to Recons., at 2-3, 5.; Order Den. Mtn. for Recons.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to L.A.R. 28.1(a)(2), the Appellant advises this Court that he is not aware of any cases that are related or pending before this Court that are similar in nature to the instant matter.

STATEMENT OF THE CASE AND FACTS

In or about January of 2006, Mr. Kelerchian obtained an FFL, as a dealer, with the number of 8-23-017-01-5A-02276.[3] Mr. Kelerchian's FFL had been timely renewed, every three years, as required by 18 U.S.C. § 923 and 27 C.F.R. §§ 478.45, 478.49.[4] Mr. Kelerchian timely submitted a renewal of his dealer license in December of 2014 and again on or about December 21, 2017. Appellees issued numerous "letters of authorization", referred to by Defendants as "LOAs", [5] purporting to extend his license for limited periods of time, due to charges filed against him in 2013, which are discussed *infra*. [6] Appellees' most recent LOA purported to authorize Mr. Kelerchian to continue business until July 7, 2020; however, when the Supreme Court, on June 1, 2020, denied Mr. Kelerchian's Petition for Certiorari, the Government contended, during the pendency of the litigation before the district court, that Mr. Kelerchian needed to immediately cease operations within thirty days (*i.e.* July 1, 2020) and turn in his FFL, even though he

[3] App. Vol. II at 5; Compl. at ¶ 19.
[4] App. Vol. II at 6; Compl. at ¶ 20.
[5] Neither the Gun Control Act, 18 U.S.C. § 921, *et seq*., nor its implementing regulations mention or authorize "letters of authorization" or "LOAs."
[6] App. Vol. II at 6; Compl. at ¶ 21.

had complied with 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144, which permit him to continue in operation, until such time as the ATF makes a determination on his application for relief.[7] At that point, the Parties discussed the matter and to preserve scarce judicial resources, it was agreed that Mr. Kelerchian did not need to file a motion challenging the Government's position or submit another Application for Relief or FFL Renewal to the Government and in return, he would remit, under protest, his FFL to the Government, with the understanding of the Parties that the outcome of this action would directly control the status of his FFL as either valid or void; whereby, if the Court rules in his favor, his FFL will be returned to him by the Government.[8]

In relation to Appellant's prior charging, on May 17, 2013, Mr. Kelerchian was charged in a nine (9) count Indictment, primarily related to the transfer of

[7] As discussed *infra*, *see*, Section 925(c) declaring, in pertinent part, "A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, *shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section*." (emphasis added).

See also, 27 C.F.R. § 478.144(i)(1) declaring, in pertinent part, "A licensee who incurs disabilities under the Act (see § 478.32(a)) during the term of a current license or while the licensee has pending a license renewal application, and who files an application for removal of such disabilities, shall not be barred from licensed operations for 30 days following the date on which the applicant was first subject to such disabilities (or 30 days after the date upon which the conviction for a crime punishable by imprisonment for a term exceeding 1 year becomes final), and if the licensee files the application for relief as provided by this section within such 30–day period, *the licensee may further continue licensed operations during the pendency of the application*." (emphasis added).

[8] While Appellant contends he complied with the requirements of Section 925(c) and Section 478.144, thereby resulting in his right to retain his FFL, the Parties agreed that given the scarce judicial resources, especially in light of COVID and the plethora of urgent matters that continued to be filed, that it made little sense to initiate further motions practice, since the Parties' respective positions were being preserved through their agreement.

machineguns and laser-aiming devices, in the U.S. District Court, Northern District of Indiana, docket no. 2:13-cr-00066.[9] On or about October 15, 2015, the jury found Mr. Kelerchian guilty of some, but not all, charges.[10] On February 5, 2018, Mr. Kelerchian was sentenced, his conviction was affirmed on April 2, 2019 by the Seventh Circuit Court of Appeals,[11] and his petition for certiorari to the U.S. Supreme Court was denied on June 1, 2020.[12]

As mandated by 27 C.F.R. § 478.144(i)(1), within 30 days of sentencing, on March 2, 2018,[13] the undersigned submitted one (1) day Priority Mail letters to then-ATF Acting Director Thomas Brandon, Philadelphia Director of Industry Operations Juan Orellana, and ATF's NCETR division with three copies of Mr. Kelerchian's Application for Restoration of Firearms Privileges, pursuant to 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144, and requisite documentation.[14]

On April 3, 2018, the undersigned received a response dated March 27, 2018, from John R. Day, Chief, Explosives Enforcement and Training Division, acknowledging receipt of Mr. Kelerchian's Application for Restoration of Firearms Privileges, but stating that since ATF cannot, currently, act on applications for

[9] App. Vol. II at 6; Compl. at ¶ 24
[10] App. Vol. II at 6; Compl. at ¶ 25
[11] *United States v. Kelerchian*, 937 F.3d 895 (7th Cir. 2019).
[12] *Kelerchian v. United States*, 140 S. Ct. 2825 (2020).
[13] The Government admits that the relief application was submitted on March 2, 2018. *See*, Gov't Mem. in Supp. of MTD at 6.
[14] App. Vol. II at 7 and 16-70; Compl.at ¶ 28 and Exhibit A.

relief, the application was being returned to the undersigned.[15] On April 9, 2018, the undersigned responded by explaining that as the statutory and regulatory law only requires that an FFL "make" an application for relief, ATF is required to retain the application and process it, when, if ever, the Congress appropriates money for ATF to conduct federal firearms relief determinations, and resubmitted Mr. Kelerchian's Application for Restoration of Firearms Privileges with the applicable documents (App. Vol. II at 16-70).[16] The undersigned's April 9, 2018 letter with Mr. Kelerchian's Application for Restoration of Firearms Privileges and the applicable documents (as contained in Exhibit A to the Complaint; App. Vol. II at 16-70) was received by ATF Chief John Day on April 12, 2018.[17] Neither Chief John Day, Acting Director Brandon, Director Orellana, NCETR nor anyone else acting as an employee or agent of the Defendants has sent any further correspondences regarding Mr. Kelerchian's Application for Restoration of Firearms Privileges.[18] The Government concedes that it did not return the application for relief and that it is currently in possession of it.[19]

On November 27, 2019, ATF Philadelphia Division Counsel Kevin White inquired as to whether Mr. Kelerchian had filed an appeal with the U.S. Supreme Court in relation to his criminal charging, as ATF was taking the position, pursuant

[15] App. Vol. II at 8 and 72; Compl. at ¶ 34 and Exhibit E.
[16] App. Vol. II at 8 and 123-125; Compl. at ¶ 35 and Exhibit F.
[17] App. Vol. II at 8-9; Compl. at ¶ 36
[18] App. Vol. II at 9; Compl. at ¶¶ 37-38.
[19] App. Vol. II at 126, fn 4.; Gov't Mem. in Supp. of MTD at 7, 15 fn. 4

to an internal policy, that although Mr. Kelerchian timely complied with 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144 by making and filing the application for relief with ATF, since ATF cannot adjudicate the application that it could immediately revoke his license upon U.S. Supreme Court denial of certiorari.[20] This "internal policy" has not been published anywhere, including, but not limited to, in the Federal Register, and it is unknown whether it exists in written form.[21]

As a result, Mr. Kelerchian brought the underlying action for declaratory and injunctive relief in the district court.

PROCEDURAL HISTORY AND RULING PRESENTED FOR REVIEW

Appellant filed his complaint in the United States District Court for the Eastern District of Pennsylvania on January 13, 2020. The district court below dismissed the complaint on July 17, 2020 for lack of subject matter jurisdiction. On August 12, 2020, the district court denied Appellant's motion for reconsideration. Appellant now appeals the district court's Memorandum Opinion and Order[22] dismissing the complaint with prejudice.

SUMMARY OF ARGUMENT

Mr. Kelerchian brought an action in the United States District Court for the Eastern District of Pennsylvania seeking declaratory and injunctive relief to

[20] App. Vol. II at 9; Compl. at ¶ 40.
[21] App. Vol. II at 10; Compl. at ¶ 42.
[22] App. Vol. I at 8-13.

enforce the provisions of 18 U.S.C. 925(c) and 27 C.F.R. § 478.144 providing that a federal firearms licensee who makes a timely application for relief from federal firearms disability may continue operations under that license pending a final action on the application for relief. Despite Mr. Kelerchian's extensive briefing explaining that he was *not* seeking judicial review of his application for relief, the district court dismissed the claim for lack of subject matter jurisdiction on the basis that judicial review of an application was proscribed. Mr. Kelerchian is not now, nor has he ever, argued he was seeking judicial review of his application or seeking to have the district court grant his application for relief from disability.

Rather, as a result of ATF's refusal to acknowledge the applicability of Section 925(c) and its stated intention to revoke/void Mr. Kelerchian's federal firearms license, the district court had jurisdiction to hear the action and declare the rights of Appellant, as afforded by Sections 925(c) and 478.144. Specifically, the district court had subject matter jurisdiction under 28 U.S.C. § 1331, granting district courts original jurisdiction over civil actions under the Constitution and laws of the United States; 28 U.S.C. § 1346, grating district courts original jurisdiction over any civil action or claim against the United States, not exceeding $10,000, founded upon any act of Congress; 5 U.S.C. § 702, providing for judicial review of agency action when a person is suffering a legal wrong; and, Section

704, providing for judicial review of agency action when there is no other adequate remedy.

Neither the U.S. Supreme Court decision in *United States v. Bean*, nor the congressional appropriation rider at issue in this matter preclude judicial review of ATF action under federal question jurisdiction or the Administrative Procedure Act. The *Bean* decision *only* precludes judicial review of applications for federal firearms disability and, as admitted by the government below [23], does not address the impact of the appropriations proscription on federal firearms licensees right to continue operations, where the licensee timely "makes application for relief from the disabilities incurred." [24] Similarly, the appropriation proscription, as discussed *infra*, is explicit and limited to preventing ATF from investigating or issuing a final determination on an application for relief – not receiving it – and therefore does not impact the existence of Section 925(c) or the right of *anyone* to make or file applications for relief. Rather, it merely prevents ATF from investigating and deciding applications for relief.

As there is no dispute in this matter that Mr. Kelerchian made [25] and filed [26] an application for relief and has therefore satisfied his statutory burden, he is now entitled to its protections. While the Appellees contend that the appropriation rider

[23] App. Vol. II at 126, fn. 5.
[24] *See*, 18 U.S.C. § 925(c); *see also*, 27 C.F.R. § 478.144(i)(1) which utilizes the word "files" instead of "makes" (*i.e.*, "who files an application for removal of such disabilities).
[25] 18 U.S.C. § 925(c).
[26] 27 C.F.R. § 478.144(i)(1)

goes further than the very explicit language enacted by the Congress in the rider, the argument is directly contrary to binding precedent and would result in the language not only being ambiguous but the invocation of the rule of lenity, both of which compel a grant of declaratory and injunctive relief in Mr. Kelerchian's favor.

While the district court professed to not address the Government's motion to dismiss based on a failure to state a claim upon which relief could be granted, it refused to grant Mr. Kelerchian the opportunity to amend his complaint.[27] The district court cited futility for its refusal; however, futility is only available when there has been a determination by the court that it is impossible to state a claim upon which relief can be granted. The court cannot both refuse to consider that question and deny the opportunity to amend on that basis. Further, the district court could not have carried its burden that there is no set of provable facts under which the requested relief could be granted. As such, this Court should reverse Judge Beetlestone's Opinion and Order.

[27] App. Vol. I at 12, fn. 4.

ARGUMENT

1. The District Court had Subject Matter Jurisdiction to hear Mr. Kelerchian's Cause of Action

"The standard of review is plenary where the District Court dismisses for lack of subject matter jurisdiction." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)(citation omitted). In a facial attack on the complaint such as the one made by Appellees below, this Court reviews "whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court." *Licata v. U.S. Postal Serv.*, 33 F.3d 259, 260 (3d Cir. 1994).

Subject matter jurisdiction is founded first, on 28 U.S.C. § 1331, which provides that district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1331 requires that "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936)(explaining that "[t]he right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.") Further, the district court has jurisdiction over any civil action or claim against the United States, not exceeding $10,000, founded upon any act of Congress. 28 U.S.C. § 1346.

Similarly, 5 U.S.C. § 702 explicitly provides a right of judicial review for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" and 5 U.S.C. § 703 explicitly permits such actions seeking declaratory judgments. Furthermore, 5 U.S.C. § 704 makes agency action reviewable when there is no other adequate remedy. Appellees contend that judicial review is precluded, by the absence of "final action" and congressional appropriation; however, such an outcome would require the court to mistakenly conflate judicial review of Appellant's application for relief – which Appellant has *never* sought and acknowledges is proscribed by the appropriation rider and decision in *Bean* – with the protection of his still existing rights under 18 U.S.C. § 925(c), as discussed *infra*, which he seeks to enforce.

Put simply, should the district court have decided the merits in favor of the Appellant, he would be entitled, consistent with explicit text Sections 925(c) and 478.144(i)(1), to continue operations of his federal firearms license, at least until such time as the ATF issues a final determination on his application for relief. In the event the district court decided the merits in favor of Appellees, then Appellant's license would be voided or revoked. This goes to the heart of subject matter jurisdiction under Sections 1331, 1346 and the test set out by the *Gully* decision. The right to continue operations created by 18 U.S.C. § 925(c) is an

essential element of the Appellant's cause of action and the construction or effect given to the appropriations language will determine the outcome of the action, in the absence of any review by the district court or this Court of Appellant's application for relief. Therefore, the district court had subject matter jurisdiction and should not have dismissed the complaint.

a. Appellant is Not Seeking Judicial Review of his Application for Relief from a Federal Firearms Disability

Appellant seeks declaratory and injunctive relief that, pursuant to *his compliance with* 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144(i)(1), his federal firearms license remains valid. Section 925(c) and § 478.144(i)(1) only require that an individual "make" or "file" an application with ATF in order to invoke the statutory and regulatory protections afforded. The Government conceded he did so [28] and the district court found he did so.[29] Despite these findings and conclusions and Section 925(c)'s declaration that an individual "shall not be barred by such disability from further operations under his license pending final action on an

[28] *See*, Gov't Mem. in Supp. of MTD, pg 1., declaring that Plaintiff "asks the Court to compel the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to take action on *an application he made under 18 U.S.C. § 925(c)*." (emphasis added). *See also*, App. Vol. II at 126 fn. 4, declaring that ATF has not "tak[en] any action on [Mr. Kelerchian's] application;" thereby reflecting that it is in possession of an application he made.

[29] *See*, App. Vol. I at 8, declaring "[Mr. Kelerchian] submitted to the ATF an Application for Restoration of Firearms Privileges pursuant to Section 925(c) of the Act."

application for relief filed pursuant to this section," [30] the Appellees contend that Appellant's license is currently void.

The portion of Section 925(c) at issue states:

> A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, *who make application for relief from the disabilities incurred under this chapter*, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. (emphasis added).

Moreover, Section 478.144(i)(1) in pertinent part provides:

> A licensee who incurs disabilities under the Act (see § 478.32(a)) during the term of a current license or while the licensee has pending a license renewal application, and who files an application for removal of such disabilities, shall not be barred from licensed operations for 30 days following the date on which the applicant was first subject to such disabilities (or 30 days after the date upon which the conviction for a crime punishable by imprisonment for a term exceeding 1 year becomes final), and if the licensee files the application for relief as provided by this section within such 30–day period, the licensee may further continue licensed operations during the pendency of the application.

Nowhere in Appellant's complaint does he request, contend, or otherwise take a position that ATF is currently required to "act" on his application so that he may be *granted* federal firearms relief. Appellant only seeks declaratory and injunctive relief to prevent the ATF from acting contrary to the law, when it is

[30] *See also*, Section 478.144(i)(1) declaring that "if the licensee files the application for relief as provided by this section within such 30–day period, the licensee may further continue licensed operations during the pendency of the application."

undisputed that he has complied with the statutory and regulatory provisions; thereby, triggering the safeguards of Sections 925(c) and 478.144(i)(1).

As Section 925(c) declares, a licensee need *only* "make" an application for relief. While neither the Gun Control Act ("GCA") nor the implementing regulations define the word "make" or "makes," [31] a review of Black's Law Dictionary, 8th ed., yields the following definition, in pertinent part, for the word "make": "1. To cause (something) to exist <to make a record>…4. To legally perform, as by executing, signing, or delivering (a document) <to make a contract>." In this matter, there is no dispute that Appellant timely prepared an application for relief (causing it to exist), and thereafter, executed and delivered it to the ATF.[32] Moreover, Defendants even acknowledge attempting to return the relief application to the undersigned and that thereafter, the undersigned again delivered it back to them.[33]

Similarly, neither the GCA nor the implanting regulations define the word "file" or "files" as used in Section 478.144(i)(1).[34] A review of Black's Law

[31] To the extent the word "make" is vague or capable of multiple interpretations, as discussed *infra*, the rule of lenity and the Supreme Court's holdings in *Leocal* and *Thompson/Ctr. Arms Co.* would apply, thereby inuring to Appellant's favor.
[32] App. Vol. II at 7-8; Compl. at ¶¶ 28-33; Gov't Mem. in Supp. of MTD at 6.
[33] App. Vol. II at 8-9 and 126 fn. 4; Compl. at ¶¶ 34-39; Gov't Mem. in Supp. of MTD at 7, 15 fn. 4.
[34] To the extent the word "files" is vague or capable of multiple interpretations, as discussed *infra*, the rule of lenity and the Supreme Court's holdings in *Leocal* and *Thompson/Ctr. Arms Co.* would apply, thereby inuring to Appellant's favor

Dictionary, 8th ed., yields the following definition, in pertinent part, for the verb "file":

> 1. To deliver a legal document court clerk or record custodian…3 To record or deposit something in an organized retention system or container for preservation and future reference <please file my notes under the heading 'research'>. 4. *Parliamentary law*. To acknowledge and deposit (a report, communication, or other document) for information and reference only without necessarily taking any substantive action.

Once again, as discussed *supra*, the Appellees concede that Appellant, through the undersigned, timely delivered the requisite relief application to the appropriate parties. Thus, regardless of the definition utilized, Appellant has complied with the requirements of Section 925(c) and therefore, "shall not be barred by such disability from further operations under his license pending final action on an application for relief filed."

Before the district court, Appellees contended that Appellant's application was not "pending" despite the fact that "pending" modifies "final action" – not the relief application [35] – and after acknowledging that Appellees currently had within their possession Appellant's application for relief. [36] Even if, *arguendo*, "pending" modified the relief application instead of "final action," a review of the term as defined in Black's Law Dictionary, 8th ed., yields the following, in pertinent part,

[35] Section 925(c), in pertinent part, declares that a licensee "who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license *pending final action* on an application for relief filed pursuant to this section." (emphasis added).
[36] *See*, Gov't Mem. in Supp. of MTD at 14.

for the adjective "pending": "1. Remaining undecided; awaiting decision." In this matter, there is no dispute that the Government has Mr. Kelerchian's relief application and that it has not taken action to issue a decision on it; thereby resulting in it being "pending." [37]

Accordingly, there can be no dispute that Appellant has "made" and "filed" an application for relief, as required by the statutory and regulatory provisions, and is therefore entitled to continue further operations under his license pending a final action on the application. Appellant is merely seeking declaratory and injunctive relief to effectuate that outcome, not to compel ATF, or the district court, to act on the application for relief.

b. The *Bean* Decision does not bar Subject Matter Jurisdiction

The underlying issue in *United States v. Bean*, 537 U.S. 71, 74-75 (2002) was whether Mr. Bean could obtain review by the district court of his personal application for relief by contending that ATF's inaction was a constructive denial. The Supreme Court addressed the limited question of whether ATF's failure to act constituted a constructive denial under Section 925(c) thereby supplying the district court with jurisdiction to *review the application for relief*. *See Bean*, 537 U.S. at 75. The Supreme Court *did not* address Section 925(c)'s prevention of the revocation or voiding of a federal firearms license relative to an application for

[37] *See*, App. Vol. II at 126 fn. 4; Gov't Mem. in Supp. of MTD 7, 15 fn. 4.

relief having been made or filed with ATF. [38] Unlike the *Bean* case, and every other case cited by the district court and Appellees below in support of their contention that the district court lacked jurisdiction,[39] a review of the record does not yield *any* support for the contention that Appellant is seeking judicial review of a constructive or actual denial of his application for relief. [40] In fact, Appellant has made explicitly clear, throughout the proceedings before the district court, that he is not seeking *any* form of review of his application for relief; rather, he only seeks declaratory and injunctive relief that his "making" and "filing" of his application for relief triggered the safeguards of Section 925(c).

While this Court similarly held in in *Pontarelli v. U.S. Dep't of the Treasury*, 285 F.3d 216, 231 (3d Cir. 2002)(*en banc*) that "Section 925(c) gives courts jurisdiction to review applications only after a 'denial' by ATF," that holding, like *Bean* and the other circuit court decisions noted *supra*, does not address whether the "making" or "filing" of an application for relief triggers the safeguards of Section 925(c) relative to federal firearm licensees, and therefore,

[38] *See*, App. Vol. II at 126, fn. 5.
[39] *See,* Government's citation to *Logan v. United States*, 552 U.S. 23, 28, fn.1 (2007); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (*en banc*); *Mullis v. United States*, 230 F.3d 215, 221 (6th Cir. 2000); *Black v. Snow*, 272 F. Supp. 2d 21, 24 (D.D.C. 2003); *Pontarelli v. Dep't of Treasury*, 285 F.3d 216, 218 (3d Cir. 2002) (en banc); *McHugh v. Rubin*, 220 F.3d 53, 57-58 (2d Cir. 2000); *United States v. McGill*, 74 F.3d 64, 67 (5th Cir. 1996); *Dreher v. United States*, 943 F. Supp. 680, 684 (W.D.La. 1996); *Owen v. Magaw*, 936 F. Supp. 1568, 1571 (D. Kan. 1996).
[40] *See*, App. Vol. II at 2-3, 10-11, 13-15; Compl. at ¶¶ 4-5, 47-49, 53, 65-66; Prayer for Relief at (a)-(c).

does not control the outcome. Further, in a concurrence to *Pontarelli*, learned Judge McKee even stated that "persons seeking relief from the federal-firearms disability *can still petition* the Secretary for relief from that disability under S 925(c)." *Id*. at 236 (emphasis added). Importantly and arguably dispositive of this matter, Appellees below stated "[t]he appropriations ban does not expressly prohibit plaintiff from applying for the relief no longer available under Section 925(c)." [41]

It is well settled that ATF is not permitted to act on applications for federal firearms relief. It is equally well established that ATF's refusal to act on applications does not constitute a constructive denial of applications and cannot be judicially reviewed as such. However, the right to "make" or "file" an application for relief is not foreclosed, and neither are the protections explicitly provided by Section 925(c) as a result of making an application, particularly in light of the explicit language Congress utilized in the appropriations rider discussed *infra*.

Regardless of whether ATF is permitted to act on applications for federal firearms relief, neither *Bean* nor the aforementioned related decisions bear on the Appellant's right to "make" or "file" an application for relief or the statutory and regulatory provisions allowing a licensed dealer to continue operations pending

[41] Reply in Supp. of Def. MTD, 7.

final action on such an application. Accordingly, *Bean* does not foreclose the district court's subject matter jurisdiction in this action.

c. The Congressional Appropriations Rider does not bar Subject Matter Jurisdiction

As discussed *supra*, in pertinent part, Section 925(c) explicitly provides that:

> A … *licensed dealer* … conducting operations under this chapter, who *makes* application for relief from the disabilities incurred under this chapter, *shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section*. (emphasis added).

Therefore, to trigger the protections enumerated, Appellant had only to make an application for relief from disabilities incurred under the GCA in order to not be barred by such disability from further operations under his license pending final action on an application for relied filed.

The congressional appropriations language that underlies the issue is as follows:

> *Provided*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code: *Provided further*, That such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code.

Consolidated Appropriations Act, 2019, Division C, P.L. 116-6 (2019-2020), and FY 2020 Omnibus Bill (HR 1158).

As pointed out by learned Judge McKee's concurrence to *Pontarelli,* discussed *supra*, the language above clearly does not prevent the filing of

applications for relief by individuals. Congress has provided, *at most*, only a *limited* proscription on ATF's ability to "investigate" or "act" upon applications for relief for individuals, while continuing to fund determinations relative to corporations and other fictitious entities.[42]

The explicit language of the Congressional appropriation is clear about exactly what can and cannot be done in comparison to the language of statute. Congress specifically addressed federal firearms licensees in the statute, but chose not to in the appropriations rider. This Court must look to the language that Congress specifically chose to use, not what ATF wishes or otherwise interprets that language to mean. *See Loughrin v. U.S.*, 573 U.S. 351, 358 (2014)(declaring, "We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another' … this Court 'presumes' that Congress intended a different meaning."); *Russello v. United States*, 464 U.S. 16, 23 (1983)(declaring, "Where Congress includes particular language in one section of a statue but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.); *U.S. v. Borden*, 308 U.S. 188, 198 (1939)(declaring, "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible."); *Shalom*

[42] *See*, Consolidated Appropriations Act, 2019, Division C, P.L. 116-6 (2019-2020), and FY 2020 Omnibus Bill (HR 1158).

Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec., 783 F.3d 156, 166 (3d Cir. 2015)(declaring, "[W]e have concluded that 'we must read the statute as written,' giving meaning to distinctions between statutory provisions, rather than rely on implicit assumptions of intent.")

A review of the relevant terms in Black's Law Dictionary, 8th ed., yields the following definition, in pertinent part, for the word "investigate": "1. To inquire into (a matter) systematically…2. To make an official inquiry…" In this matter, there is no dispute that the Appellees have not inquired into or made any official inquiry regarding Appellant's relief application [43] and Appellant does not seek to compel them to investigate his application for relief.

In turning to the word "act," Black's Law Dictionary, 8th ed., yields the following definition, in pertinent part: "1. Something done or performed, esp. voluntarily;…2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world." Once again, there is no dispute that the Appellees have not "done" anything in relation to Appellant's relief application and Appellant does not seek to compel them to take any action or issue a final determination related to his application for relief. Rather, consistent with the requirements of Section 925(c), the only party that has taken any action is Appellant, who timely made the requisite application to Appellees. Therefore,

[43] *See*, App. Vol. II at 126 fn. 4, declaring that ATF has not "tak[en] any action on [Mr. Kelerchian's] application."

under a plain reading of the statute, Appellant is not "barred by such disability from further operations under his license pending final action on an application for relief." [44]

d. The Rule of Lenity Requires Congressional Clarity

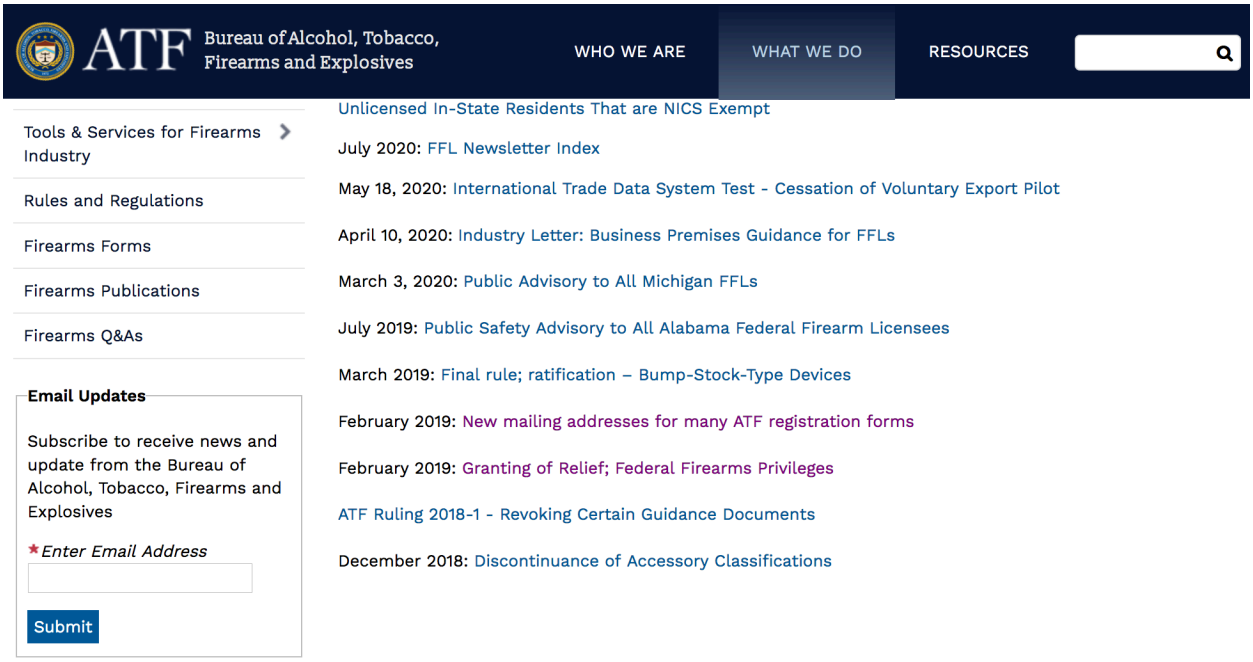
The rule of lenity, the "principle of legality," the "first principle," or otherwise known as the *nulla poena sine lege* of criminal law, requires that criminal laws be explicitly and unambiguously specified in advance by statute. *See Liparota v. United States*, 471 U.S. 419, 424 (1985). However, where the applicable text is found within a criminal statute, it applies with equal force in the civil context. *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)(declaring "Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954)(declaring "There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."). This principle has even been enforced against the ATF at least once prior. In 1992, the Supreme Court, in addressing ATF's interpretation of the definition of "making" under the National Firearms Act, 26 U.S.C. § 5801, *et seq*., held that the rule of lenity applied to the ambiguity in the statute because it had

[44] *See also*, Section 478.144(i)(1) declaring "if the licensee files the application for relief as provided by this section within such 30–day period, the licensee may further continue licensed operations during the pendency of the application."

"criminal applications." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992).

In this case, examining the specific language of Section 925(c) and the appropriations rider laid out *supra*, reveal several important points in relation to the Appellees' argument that Section 925(c) has been repealed. First, Section 925(c), which is still codified, in its entirety, creates a process by which an individual, corporation, or licensee can obtain relief from their federal firearms disability. Second, Section 925(c) explicitly allows a federal firearms licensee to continue operations pending a final decision on their application. Third, the text of the appropriation rider is noticeably devoid of *any* mention of licensees or any application of the rider to the provisions of 925(c) permitting a licensee to continue in operations if the licensee makes a timely application for relief. Fourth, further review of the appropriations rider yields that while it precludes ATF from using funds to investigate or act upon applications for individuals, it permits relief investigations and determinations for corporations and ATF cannot dispute that it currently conducts such relief investigations and determinations in light of the fact that ATF granted federal firearms relief, pursuant to 18 U.S.C. § 925(c), to Xisico USA, Inc. on February 4, 2019, [45] which it has prominently displayed on its website at https://www.atf.gov/firearms.

[45] 84 Fed. Reg. 1491-02.



Accordingly, not only has the Section 925(c) not been repealed, but the appropriation rider does not address Section 925(c)'s application to licensees and even if, *arguendo*, the rider did apply to licensees, it does not preclude anyone, including licensees, from making or filing an application for relief. Rather and consistent with Judge McKee's concurrence in *Pontarelli*, the appropriation rider has only limited or otherwise precluded two functions of ATF: investigation and action on individual applications for relief. Nothing within the language enacted by the Congress prevents individuals or licensees from making or filing their applications and continuing operations under their federal firearms license.

Accordingly, the rule of lenity compels a finding that Section 925(c) is limited by the appropriations rider only in such ways as are made clear and unambiguous, in advance, by the language of the statute and appropriation. As the

appropriation does not address anything more than the ATF's inability to "investigate or act" upon applications as it relates to individuals, the remaining statutory provisions are valid and enforceable by Appellees.

2. The District Court could have Granted Declaratory and Injunctive Relief

Appellant brought this action for declaratory and injunctive relief pursuant to 5 U.S.C. §§ 552, 702, 703, 704 and 28 U.S.C. §§ 1331, 1346, 2201, and 2202; therefore, as discussed *supra*, jurisdiction is founded on 5 U.S.C. §§ 702 and 704 and 28 U.S.C. §§ 1331 and 1346, as this action arises under the Administrative Procedure Act, as well as the Constitution and laws of the United States.

The district court below correctly stated "Section 702 does provide that 'a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof[.]'" [46] However, the district court incorrectly continued on to find that such is inapplicable because the GCA creates an exclusive manner of review. However, as discussed extensively *supra*, the judicial review offered by Section 925(c) of the GCA is neither sought, nor applicable, in this context and case, as Appellant is not seeking review of a denial or constructive denial – or any form of review – of his application for relief. The challenged agency action is far more broad and encompasses ATF's failure to publish its internal policy as

[46] *See* App. Vol. 1 at 11-12 fn. 3.

required by Section 552(a)(1) and (b)(2) of the APA, its violation of its rulemaking authority, and, in direct defiance of the Congressionally-enacted statutory text, its refusal to permit a federal firearms licensees to continue operations, as provided for by a provision of Section 925(c). Therefore, the agency action is final and there is no "adequate remedy in a court," making it reviewable under Section 704 of the APA.

Contrary to the district court's assertion,[47] as has been addressed *ad nauseam*, Appellant's complaint did *not* seek to compel Appellees to take action on his application. Rather, he *only* sought declaratory and injunctive relief that, pursuant to *his compliance with* 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144(i)(1), his federal firearms license remains valid. As Sections 925(c) and 478.144(i)(1) only require that he "make" or "file" an application with ATF, the Government conceded he did so,[48] the district court found he did so,[49] and Section 925(c) declares that he "shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to

[47] *See* App. Vol. I at 8.
[48] *See* Gov't Mem. in Supp. of MTD, pg 1., declaring that Plaintiff "asks the Court to compel the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to take action on *an application he made under 18 U.S.C. § 925(c)*." (emphasis added). *See also*, App. Vol. II at 126 fn. 4, declaring that ATF has not "tak[en] any action on [Mr. Kelerchian's] application;" thereby reflecting that it is in possession of an application he made.
[49] *See* App. Vol I at 8, declaring "[Mr. Kelerchian] submitted to the ATF an Application for Restoration of Firearms Privileges pursuant to Section 925(c) of the Act."

this section," he is entitled to a declaration of his rights therefrom and enforcement of them.

As there is a dispute over the legal interplay between federal statutory provisions, the district court had jurisdiction to determine the matter under 5 U.S.C. §§ 702 and 704 and 28 U.S.C. §§ 1331 and 1346; and authority to provide the requested relief pursuant to the Declaratory Judgment Act. 28 U.S.C. § 2201 explicitly provided the district court the authority to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Thereafter, 28 U.S.C. § 2202 provided the district court with jurisdiction to grant "[f]urther necessary or proper relief based on a declaratory judgment or decree." [50]

3. Mr. Kelerchian Should have been Afforded an Opportunity to Amend his Complaint

In the event, *arguendo*, the Court finds that Appellant insufficiently pled his complaint, he respectfully requests that this Court reverse the district court decision denying him an opportunity to file an amended complaint.

This Court has held that when a district court dismisses a case, the court must allow the plaintiff to file an amended complaint, "unless doing so would be

[50] *See also*, 5 U.S.C. § 702 (declaring, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereto."); 28 U.S.C. § 1331 (declaring, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")

inequitable or futile." This Court reviews the District Court's denial of leave to amend for abuse of discretion. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997); *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007); *Shane v. Fauver*, 213 F.3d 113, 115 (3d. Cir. 2000). This Court has defined futility as meaning "that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory*, at 1434 (citation omitted); *see also*, *Fauver* at 115. This Court continued that "[i]n assessing 'futility,' the District Court applies the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Fauver* at 115. The district court erroneously cited futility as the basis for refusing to grant Appellant the opportunity to amend his complaint.[51]

In refusing to provide Appellant with an opportunity to file an amended complaint, the district court cited to *Fauver*, despite explicitly refusing to address the Appellee's motion to dismiss for failure to state a claim.[52] The district court cannot both refuse to address whether or not the complaint failed to state a claim and refuse to allow amendment on the basis that the amended complaint would fail to state such a claim. As the two positions taken by the district court are irreconcilable, they are a manifest abuse of discretion and should be reversed.

[51] *See* App. Vol. I at 12, fn. 4.
[52] *See* App. Vol. I at 9, fn 2.

4. Mr. Kelerchian has Stated a Claim Upon which Relief can be Granted

Although the district court declined to address whether or not the complaint failed to state a claim upon which relief can be granted, in the event, *arguendo*, this Court decides to review whether the Appellant sufficiently pled his complaint, Appellant contends that he has sufficiently pled a claim upon which relief can be granted.

The standard of review is plenary over a district court's dismissal of a matter pursuant to Fed. R. Civ. P. 12(b)(6). *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). This Court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Id*. Unless it is a "certainty" that no relief could be granted under any set of facts which could be proven, the motion to dismiss on the basis of failure to state a claim, must be denied. *Id*.

As discussed *supra*, although the district court claimed to have not decided the question of whether Appellant had stated a claim upon which relief could be granted, it improperly denied Appellant the opportunity to amend his complaint based on what this Court has determined is a finding that the complaint, as amended, would fail to state a claim upon which relief can be granted.

Appellant has nonetheless satisfied his burden in that respect. To survive a motion to dismiss on that basis, the complaint's factual allegations must present a

facially plausible claim of relief that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Mayer v. Belichick*, 605 F.3d 223, 229-30 (3d. Cir. 2010).

Appellant's factual allegations contained in the Complaint demonstrate that Appellant is challenging ATF's "internal policy" on grounds that: (1) it is not available to the public, as required by 5 U.S.C. §§ 552(a)(1), (b)(2); (2) ATF failed to provide at least a 90-day public comment period, as required by 18 U.S.C. § 926(b), relative to this "internal policy;" (3) that ATF failed to consider the cost-impact relative to this "internal policy;" (4) that ATF failed, pursuant to 18 U.S.C. § 926(b), to "afford interested parties opportunity for hearing, before prescribing such rules and regulations;" and (5) ATF's "internal policy," pursuant to 5 U.S.C. § 706(2)(A), is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and is, in fact, contrary to 18 U.S.C. § 925(c).[53]

As discussed *supra*, there is no dispute that Appellant timely made the requisite application for relief, as required with Section 925(c), and in direct defiance of the statutory and regulatory language, the Government contends that his license was revoked/voided upon the U.S. Supreme Court denying certiorari. As a result, as also discussed *supra*, pursuant to 28 U.S.C. §§ 2201, 2202, Appellant has a right to have his rights declared and for the district court to

[53] *See* App. Vol. II at 12-14; Compl. at ¶¶ 58-66.

additionally grant such "necessary or proper relief based on a declaratory judgment or decree." Moreover, if there is any question as to the protections afforded to Appellant by Section 925(c) and its implementing regulation, consistent with the rule of lenity, those questions must be resolved in his favor. It is clear that Appellant made factual allegations sufficient to demonstrate both that his claim for relief is plausible and that the Court could reasonably conclude that the ATF is liable for the alleged misconduct.

CONCLUSION

For the foregoing reasons, the Order of the district court should be vacated and the case remanded to the district court for further proceedings, consistent with this Court's holding.

Respectfully Submitted,

/s/ Joshua Prince

Joshua Prince, Esq. (306521)
Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, PA 19505
610-845-3803 (t)
610-845-3903 (f)
Joshua@princelaw.com
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B)(ii) because, according to the word-count feature of Microsoft Word, it contains 7,729 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that I am admitted to practice in the Third Circuit Court of Appeals. I further certify that I am a member in good standing.

Respectfully Submitted,

/s/ Joshua Prince

Joshua Prince, Esq. (306521)
Prince Law Offices, P.C.
646 Lenape Road

Bechtelsville, PA 19505
610-845-3803 (t)
610-845-3903 (f)
Joshua@princelaw.com
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Joshua Prince, Esq., of Prince Law Offices, P.C. hereby certify that I served a copy of the *BRIEF OF THE APPELLANT* and the *APPENDIX Vol. I and II*, through the Court's ECF system, as follows:

Lauren DeBruicker
Lauren.DeBruicker@usdoj.gov

Respectfully Submitted,

/s/ Joshua Prince

Joshua Prince, Esq. (306521)
Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, PA 19505
610-845-3803 (t)
610-845-3903 (f)
Joshua@princelaw.com
Counsel for Plaintiff-Appellant