No. 20-3065

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

VAHAN KELERCHIAN,

Appellant,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; REGINA LOMBARDO, ACTING DIRECTOR, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; ACTING ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES OF AMERICA,

Appellees.

On Appeal from the July 17, 2020 Memorandum and Order Dismissing Civil Action No. 20-253 in the United States District Court for the Eastern District of Pennsylvania for Lack of Subject Matter Jurisdiction (Hon. Wendy Beetlestone)

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Rules

Other Authorities

STATEMENT OF SUBJECT MATTER JURISDICTION

In this appeal, plaintiff-appellant Vahan Kelerchian challenges the district court's ruling that it lacked subject matter jurisdiction over his claims for declaratory and injunctive relief from his federal firearms disabilities under 18 U.S.C. § 925(c).

As the district court correctly concluded, a district court is without jurisdiction to hear any claims for relief under § 925(c) unless and until the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has denied an application for such relief made under its terms. As ATF has not denied Kelerchian's application for relief from his federal firearms disabilities (and due to an appropriations ban has been prohibited by Congress from doing so), and as Congress has nullified the relief once available under § 925(c) in the first instance, the district court lacked subject matter jurisdiction over his claims.

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Lack of jurisdiction under 18 U.S.C. § 925(c). Kelerchian applied to ATF for relief from his federal firearms disabilities under 18 U.S.C. § 925(c), but Congress has prohibited ATF from considering such applications. A district court lacks jurisdiction to hear any claims for relief under § 925(c) unless and until ATF has denied an application for relief made under its terms. As ATF has not denied Kelerchian's application, did the district court correctly conclude that it lacked subject matter jurisdiction over his claims?

2. Lack of other bases for jurisdiction. Kelerchian asserted that the district court had jurisdiction to hear his claims under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*., the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"), and 28 U.S.C. § 1331. As neither the Declaratory Judgment Act nor the APA provides an independent basis for jurisdiction, and § 925(c) precluded federal question and other bases for jurisdiction, did the district court correctly conclude that it lacked jurisdiction over Kelerchian's claims?

3. Failure to state a claim under § 925(c). Through an appropriations ban first imposed in 1992 and reaffirmed every year

since, Congress nullified § 925(c), stating that its purpose was to prohibit convicted felons from using § 925(c) to regain their federal firearms privileges. Because § 925(c) has been nullified by Congress, should this Court affirm on the alternative basis that Kelerchian fails to state a claim under § 925(c) upon which relief can be granted?

4. Failure to state a claim under the APA. Kelerchian alleges that ATF's inability to recognize his federal firearms license as valid and in force after his convictions became final was due to an unpublished ATF "internal policy." "Internal policies" are exempt from the APA's rulemaking requirements. Further, the Gun Control Act and Congress's appropriations ban precluded ATF from treating Kelerchian's federal firearms license as valid and in force after his convictions became final. Should this Court affirm on the alternative ground that Kelerchian fails to state a claim under the APA upon which relief can be granted?

STATEMENT OF RELATED CASES

Appellees (collectively, "ATF") are aware of *United States v. Kelerchian*, 2:13-CR-66, N.D. Ind., Am. J., App. Vol. II at 30-37,[1] *aff'd*, 937 F.3d 895 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 2825 (2020) (the "Criminal Action"), in which Kelerchian, a federally-licensed firearms dealer, was convicted of multiple federal gun felonies. His crimes included conspiring with corrupt sheriff's officers to illegally obtain machineguns by making false representations to another federal firearms licensee in violation of the Gun Control Act, and illegally obtaining other firearms, including highly-restricted, military-style belt-fed machineguns, by making fraudulent representations to ATF. By operation of law, Kelerchian's federal firearms license became void on July 1, 2020, thirty days after the Supreme Court denied his petition for certiorari, at which point his eight felony convictions became final. 18 U.S.C. § 925(b); 27 C.F.R. § 478.144(i)(1). As a result, he is permanently

[1] The two volumes of the appendix filed by Kelerchian are not continuously numbered across the volumes and contain multiple, conflicting page numbers. ATF follows the convention used by Kelerchian in his brief and cites to page numbers corresponding to each individual volume of the appendix.

barred from possessing or distributing firearms, and from holding a federal firearms license, unless and until he obtains relief from these federal firearms disabilities – which is the relief he seeks in this action.

ATF is further aware of *Armament Servs. Int'l v. Yates*, 760 F. App'x 114 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 52 (2019), in which this Court affirmed that Kelerchian's firearms business, Armament Services International, Inc. ("ASI"), and his wife, Maura Kelerchian, based on their own conduct in connection with Kelerchian's criminal activity, willfully violated the Gun Control Act on multiple occasions by illegally distributing firearms. As willful violators of the Gun Control Act, ASI lost its federal firearms licenses and Mrs. Kelerchian is ineligible for a license in her own name.

ATF is not aware of any other related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

STATEMENT OF THE CASE

As a result of Kelerchian's convictions for violating multiple federal gun laws, the Gun Control Act, 18 U.S.C. § 921 *et seq*., imposed various federal firearms disabilities on him. As enacted, § 925(c) of the Gun Control Act provides that felons may apply to ATF for relief from such disabilities. Kelerchian now seeks relief under that section so that he may maintain his federal firearms license and continue to operate a firearms dealership. ATF's director, under § 925(c)'s terms, has discretion to grant a felon relief from his or her federal firearms disabilities if, after an investigation, ATF's director determines that restoring that individual felon's gun rights in the public's best interest and would not pose a danger to society.

After the Gun Control Act's enactment, however, Congress effectively repealed these provisions of § 925(c). Nearly three decades ago, Congress banned all appropriations for ATF to take any action on applications for relief like Kelerchian's. As this Court has found, Congress's intent in imposing the appropriations ban, and renewing it every year since, was to "prevent individual felons from regaining

firearms privileges." *Pontarelli v. United States Dep't of the Treasury*, 285 F.3d 216, 231 (3d Cir. 2002) (*en banc*).

Under the Gun Control Act, a district court's jurisdiction to hear claims made under § 925(c) is limited to reviewing ATF's denials of applications for relief. By Kelerchian's admission, and as required by law, ATF has taken no action on his application at all. Because Congress nullified all relief that had once been available to felons like Kelerchian under § 925(c), Kelerchian's application for that relief is a legal nullity. Kelerchian has no legal basis for his claims for relief from his federal firearms disabilities, and under the plain terms of § 925(c), the Supreme Court's unanimous ruling in *United States v. Bean*, 537 U.S. 71, 77-78 (2002), and this Court's comprehensive *en banc* opinion in *Pontarelli*, the district court properly held that it was without jurisdiction to hear them.

I. Overview of the Gun Control Act

A. The Gun Control Act strips convicted felons of their federal firearms privileges, including federal firearms licenses.

The Gun Control Act, 18 U.S.C. § 921 *et seq.*, bans certain classes of persons from possessing, receiving, or transporting firearms,

including felons. 18 U.S.C. § 922(g). These persons are also ineligible for federal firearms licenses under the Gun Control Act. 18 U.S.C. § 923(d)(1)(B). The Gun Control Act further provides that any federal firearms license held by a convicted felon becomes void thirty days from the date that the conviction becomes final. 18 U.S.C. § 925(b); *see also* 27 C.F.R. § 478.144(i)(1). These "federal firearms disabilities" are imposed by operation of law; no action by ATF is required to implement them. Most relevant here, no action is required by ATF to "revoke" a felon's federal firearms license. The license becomes void thirty days after his or her conviction becomes final.

B. Section 925(c) of the Gun Control Act once provided a path for felons to seek relief from their federal firearms disabilities.

The Gun Control Act once provided a mechanism for relief from the above federal firearms disabilities. As enacted, the Gun Control Act authorized the Secretary of the Treasury (and, after a 2002 amendment, the Attorney General) to grant a felon relief from his or her federal firearms disabilities if it was established to the Secretary's satisfaction that certain preconditions were met – including that the felon no longer posed a danger to the public and granting the relief would be in the

public's interest. *See* 18 U.S.C. § 925(c). Authority to administer the § 925(c) relief-from-disabilities program was delegated to the director of the ATF. 28 C.F.R. § 0.130(a)(1); *see also Pontarelli*, 285 F.3d at 217 n.2. Judicial review was available in the federal district court of appropriate jurisdiction to "[a]ny person whose application for relief… is denied by the [ATF]." 18 U.S.C. § 925(c). ATF's decision was reviewed under an arbitrary and capricious standard. *Bean*, 537 U.S. at 77-78.

In enacting this relief provision, Congress provided that if an applicant seeking relief from disabilities holds a federal firearms license, that applicant would not be barred from further operations under the license "pending final action" on the application for relief. 18 U.S.C. § 925(c); *see also* 27 C.F.R. § 478.144(i)(1) (if application for relief under § 925(c) was timely filed, licensee could further continue licensed operations "during the pendency of the application.").[2]

[2] Aside from the procedure set forth in § 925(c), a convicted felon can regain his firearms privileges if the jurisdiction in which he was convicted expunges the conviction, pardons him, or restores his civil rights. 18 U.S.C. § 921(a)(20); *Pontarelli*, 285 F.3d at 217 n.1. These measures are not at issue here.

C. Congress revoked § 925(c) in 1992 through a ban on ATF appropriations in order to prevent felons from regaining their federal firearms privileges.

By 1992, Congress determined that the relief provision of § 925(c) was unworkable, costly, and dangerous. ATF agents were spending inordinate hours and resources evaluating applications for relief, and guns were getting back into the hands of dangerous criminals.

After observing these negative impacts of the felony relief program, in 1992 Congress defunded the § 925(c) relief-from-disabilities program, providing in its appropriations bill that year 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." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. 102-393, 106 Stat. 1732 (the "appropriations ban"). In each subsequent year, Congress has permitted the use of appropriated funds to process applications for relief filed by corporations, but has retained and reaffirmed the ban on the use of appropriated funds to process applications for relief filed by individuals. *See Bean*, 537 U.S. at 75 n.3 (listing subsequent appropriations decisions); *see also, e.g.*, Consolidated

Appropriations Act, 2018, Division B, Pub. L. 115-141, 132 Stat. 348 (2018); Consolidated Appropriations Act, 2019, Division C, Pub. L. 116-6, 133 Stat. 13 (2019); Consolidated Appropriations Act, 2020, Division B, Pub. L. 116-93, 133 Stat. 2317 (2020); and Consolidated Appropriations Act, 2021, Division B, Pub. L. 116-260, 134 Stat. 1182 (2021) (applicable at the time Kelerchian mailed his application in 2018 and thereafter).

The Senate Report accompanying the first appropriations ban in 1992 explained the purposes of the ban:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 102-353, at 19-20 (1992).

The House Report accompanying the renewal of the appropriations ban in 1995 reiterated those reasons three years later:

> For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities… .

> Those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Government's time or taxpayer's money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 104-183, at 15 (1995). As this Court has found, "[t]he legislative history of the appropriations ban confirms that Congress intended to prevent individual felons from regaining firearms privileges." *Pontarelli*, 285 F.3d at 231.

Pursuant to Congress's mandate in enacting the appropriations ban, ATF is prohibited from taking any action at all regarding – including considering or even acknowledging – applications for federal firearms relief under § 925(c).

II. Factual and Procedural History

A. In 2015, Kelerchian was convicted of multiple felony violations of federal gun laws.

Kelerchian obtained a federal firearms license as a dealer in or around 2006. *See* Compl., App. Vol. II at 5, ¶ 19. For many years, he and his wife owned and operated ASI, a firearms business in Warminster, Pennsylvania.

In 2015, a jury in the Northern District of Indiana convicted Kelerchian of multiple felony violations of federal firearms laws, including using his federal firearms license to conspire and make false statements to illegally obtain highly-restricted weapons, including military-style, belt-fed machine guns only legal for military and law enforcement use. *See* Am. J., App. Vol. II at 30.[3]

On February 5, 2018, the court in the Criminal Action sentenced Kelerchian to a term of 100 months in prison, fined him $100,000, and, among other terms of his eventual release, ordered that he "may not own or possess a firearm, ammunition, destructive device, or any other dangerous weapon." *Id*. at 32, 34, 36. The Seventh Circuit affirmed Kelerchian's convictions, *see Kelerchian*, 937 F.3d at 903-904, and the Supreme Court denied his petition for certiorari. *See* 140 S. Ct. 2825.

[3] For further details of Kelerchian's criminal firearms activity and convictions, *see United States v. Kelerchian*, No. 2:13-CR-66 JVB, 2015 U.S. Dist. LEXIS 80336, at *2, 4-5 (N.D. Ind. June 22, 2015) (denying Kelerchian's motion to dismiss) and 2017 U.S. Dist. LEXIS 64926, at *4 (N.D. Ind. Apr. 28, 2017) (denying his motion for acquittal).

Kelerchian is incarcerated at FCI Fort Dix in New Jersey, with an anticipated release date of May 2025.[4]

B. As a result of his criminal convictions, Kelerchian is subject to federal firearms disabilities.

As a result of his eight felony convictions, Kelerchian is prohibited from possessing, receiving, or transporting firearms. 18 U.S.C. § 922(g)(1). This prohibition became effective upon Kelerchian's sentencing in February 2018.

C. Kelerchian mailed an application for restoration of his firearm privileges under § 925(c) to ATF in 2018.

On March 2, 2018, through his counsel, Kelerchian mailed an application to ATF seeking relief from his prohibiting federal convictions pursuant to 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144(i) (his "Relief Application"). *See* App. Vol. II at 17-70. In light of the appropriations ban, on March 27, 2018, ATF returned Kelerchian's Relief Application to his counsel with the following explanation:

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[4] In the interim, this Court affirmed ATF's finding that both Mrs. Kelerchian and ASI willfully violated the Gun Control Act, such that ATF did not renew ASI's federal firearms licenses and denied Mrs. Kelerchian's application for one in her own name. *See Armament Servs. Int'l,* 760 F. App'x at 120-21(affirming summary judgment for ATF).

> Although Federal law provides a means for the relief of firearms disabilities, since October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities submitted by individuals. Accordingly, ATF cannot act upon these applications.

Id. at 72.

On April 9, 2018, Kelerchian re-sent his Relief Application to ATF accompanied by a letter stating his position that the law "requires ATF to retain [his] application and process it, when, *if ever*, the Congress appropriates money for ATF to conduct Federal firearms relief determinations." *Id*. at 8, ¶ 35, and at 124-25 (emphasis added). ATF did not respond to this letter.

D. As a result of his criminal convictions, Kelerchian's federal firearms license is now void.

Pursuant to Gun Control Act, Kelerchian was able to continue to operate under his federal firearms license until thirty days after his conviction became final. *See* 18 U.S.C. § 925(b) and 27 C.F.R. § 478.144(i). As the Supreme Court denied his petition for certiorari on

June 1, 2020, his license became void by operation of law on July 1, 2020. 18 U.S.C. § 925(b); 27 C.F.R. § 478.144(i).[5]

III. Procedural History and Rulings on Review

A. In his complaint, Kelerchian sought a judicial order relieving him of his federal firearms disabilities.

On January 12, 2020, Kelerchian filed suit in district court seeking: (1) a declaration that because he submitted a Relief Application under § 925(c), his license must remain in force indefinitely; and (2) an order enjoining ATF from taking any actions to the contrary. Asserting that the district court had jurisdiction to hear his claims under the Gun Control Act, the Declaratory Judgment Act, the APA, and the U.S. Constitution, Kelerchian sought an order declaring that his federal firearms license is and must remain valid and in force until such time as ATF decides his Relief Application (which he recognizes could be never, due to the appropriations ban) and enjoining ATF from taking any actions relating to his license – or as a result of its expiration under § 925(b) – in the interim.

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[5] Kelerchian disputes the legal impact of 18 U.S.C. § 925(b) on his license, but acknowledges that the outcome of this matter will determine that issue. *See* Appellant's Br. at 3.

ATF moved to dismiss the complaint on two grounds. First, § 925(c) precludes judicial review of any request for relief from federal firearms disabilities unless and until ATF denies an application for the same. As ATF has taken no action on Kelerchian's Relief Application and is prohibited by the appropriations ban from doing so, ATF sought to dismiss the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Second, as Congress effectively repealed § 925(c) nearly thirty years ago in order to prohibit felons like Kelerchian from regaining their federal firearms privileges, ATF moved to dismiss Kelerchian's claim for relief under this long-defunct provision on the alternative basis of failing to state a claim upon which relief can be granted under Rule 12(b)(6).

B. The district court correctly determined it did not have subject matter jurisdiction over Kelerchian's claims for relief under § 925(c).

In an opinion and order dated July 17, 2020, the district court determined that, under § 925(c), it did not have subject matter jurisdiction over Kelerchian's claims. *See* Mem. Op., App. Vol. 1, at 8-12. Relying on uncontroverted jurisprudence and long-established legal principles – including unanimous opinions by the Supreme Court and

this Court, and the thorough and well-documented legislative history of the appropriations ban – the district court confirmed that the Gun Control Act prohibited federal firearms licensees from circumventing the terms of § 925(c) and applying directly to the courts for relief from their federal firearms disabilities. App. Vol. I at 9. The district court concluded that "the appropriations ban 'rendered inoperative' Section 925(c)… in that Congress has stated clearly its intention that the ATF be prohibited from enforcing Section 925(c) in any capacity." *Id.* at 10 (citing *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007)). The district court ruled that "the provision under which [Kelerchian] seeks relief has been amended by Congress to effectively be written off the books as it applies to individual applicants," and that Congress passed the appropriations ban "to *specifically avoid* the outcome plaintiff seeks." *Id.* at 10 (emphasis in original). The district court further found that granting Kelerchian the relief he seeks would "subvert legislative fiat" and "require[] [ATF] to directly contravene the law." *Id.* at 11. Addressing Kelerchian's alternative claimed bases for jurisdiction, the district court concluded that neither the APA, the Declaratory Judgment Act, nor 28 U.S.C. § 1331 provided a basis upon which the

court might exercise jurisdiction over his claims. *Id*. at 11 & n.3. The district court also found that any attempt to amend the complaint would be futile, noting that – given the effective repeal of § 925(c) – the relief Kelerchian sought was "impossible." *Id*. at 12 n.4.

As a result, the district court dismissed Kelerchian's complaint for lack of subject matter jurisdiction and did not address other grounds for dismissal raised in ATF's motion. *Id*. at 9 n.2.

Kelerchian moved the district court to reconsider its decision, which motion the district court denied on August 12, 2020. *Id*. at 7.

Kelerchian timely appealed.

SUMMARY OF THE ARGUMENT

The district court correctly ruled that it lacked subject matter jurisdiction over Kelerchian's complaint for relief from his federal firearms disabilities under § 925(c). District courts do not have jurisdiction under § 925(c) unless and until ATF has denied a request for relief from federal firearms disabilities, and ATF is prohibited by Congress's appropriations ban from issuing that denial.

The district court also correctly ruled that Kelerchian failed to meet his burden of establishing the district court had jurisdiction over his claims under the APA, or the Declaratory Judgment Act, because neither provision serves as an independent basis for jurisdiction. The district court further correctly found that judicial review is not available under the APA or 28 U.S.C. § 1331 if another statute forecloses relief – as § 925(c) does here.

Finally, the district court correctly found that amendment of the complaint would be futile, because Congress, through the appropriations ban, "rendered [§ 925(c)] inoperative," and "passed the appropriations ban to *specifically avoid* the outcome [Kelerchian] seeks, *i.e.*, to allow convicted felons to retain their firearms license." App. Vol. I

at 10 (emphasis in original). The relief he seeks is therefore "impossible." *Id.* at 12 n.4.

Kelerchian asks the Court to find that because he mailed a petition for relief from disabilities to ATF under § 925(c) and related portions of 27 C.F.R. § 478.144(i), these defunct provisions permit him to operate as a federal firearms licensee until such time as ATF acts on his Relief Application, *i.e.*, until Congress repeals the appropriations ban that has been in place for decades. Such a ruling would have the perverse effect of permitting individual felons to operate under their licenses indefinitely *because of* the appropriations ban expressly intended to deny them from ever obtaining such relief.

The Court should affirm because both the Gun Control Act and the appropriations ban preclude jurisdiction. The Court should also affirm because the appropriations ban nullified the provision under which Kelerchian makes his claim, and effectively outlawed the very relief he seeks.

ARGUMENT

I. The Court should affirm because the Court is without jurisdiction to hear Kelerchian's claim for relief under § 925(c).

A. Standard of Review

This Court considers *de novo* whether the district court had subject matter jurisdiction. *Pontarelli*, 285 F.3d at 219.

At issue in a motion to dismiss a complaint pursuant to Rule 12(b)(1) is the Court's jurisdiction – its very power to hear the case. *See Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997). ATF made a facial challenge to the court's jurisdiction in that it argued that, based on the pleadings and causes of action, the district court lacked jurisdiction to consider Kelerchian's complaint. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). In such a facial attack, all well-pled allegations must be accepted as true and all reasonable inferences taken in the plaintiff's favor. *Id*. The plaintiff bears the burden of proving that jurisdiction exists. *Id*.

B. Section 925(c), as enacted, precludes jurisdiction over Kelerchian's request for declaratory and injunctive relief.

Kelerchian seeks a judicial declaration that, because he mailed a Relief Application to ATF in 2018, he is effectively relieved of his federal firearms disabilities under § 925(c) and may continue to operate under his federal firearms license despite his multiple federal felony gun convictions. As ATF has not denied Kelerchian's Relief Application, the district court was without jurisdiction over Kelerchian's claims.

A district court's sole authority under § 925(c) is to review an ATF denial of relief to determine whether that denial is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 18 U.S.C. § 925(c); *see also* 5 U.S.C. § 706. Section 925(c) has never authorized district courts to exercise jurisdiction over a direct claim by a felon for relief from his federal firearms disabilities. Without an ATF "denial," a court has no authority to act under § 925(c).

The Supreme Court has unanimously held that under the plain text of § 925(c), "the absence of an actual denial of [a] respondent's petition by ATF precludes judicial review under § 925(c)." *Bean*, 537 U.S. at 78.

> The text of § 925(c) and the procedure it lays out for seeking relief make clear that an actual decision by ATF on an application is a prerequisite for judicial review, and that mere inaction by ATF does not invest a district court with independent jurisdiction to act on an application.

Id. at 75-76. Kelerchian makes no allegation that ATF has denied his Relief Application. He acknowledges that due to the appropriations ban, ATF can take no action on his Relief Application whatsoever, and may never be able to do so.

Kelerchian emphasizes that he was not asking the district court to decide his § 925(c) application. But the relief he seeks is the same – a declaration that he is relieved of his federal firearms disabilities pursuant to § 925(c). If the Court were to grant the relief he requests, the Court would be exercising jurisdiction it does not have under the plain terms of § 925(c). As ATF has not denied Kelerchian's Relief Application, the district court was without jurisdiction to hear his claims for relief under § 925(c), and the district court should be affirmed on this basis alone.

C. The appropriations ban stripped federal courts of all jurisdiction over claims arising under § 925(c).

The appropriations ban did not create jurisdiction where there was none.

To the contrary, the unanimous Court in *Bean* confirmed that Congress's decision to defund the § 925(c) relief program – such that ATF is now barred from considering or acting upon on any applications for relief in any way – effectively stripped the federal courts of jurisdiction to review any claims arising under § 925(c). *Id*. at 75-78. The Court held this is so, regardless of how the claim is styled. *Id*. (rejecting felon's contention that the ATF's inaction on § 925(c) application by virtue of the appropriations ban invoked district court jurisdiction under the APA). As this Court has likewise confirmed, "because the appropriations ban suspends ATF's ability to issue the 'denial' that § 925(c) makes a prerequisite, *it effectively suspends that statute's jurisdictional grant*." *Pontarelli*, 285 F.3d at 218 (emphasis added); *see also id*. at 230 ("Section 925(c) gives district courts jurisdiction to review applications only after a "denial" by ATF. The appropriations ban renders ATF unable to deny individual felons'

applications, and thus effectively suspends § 925(c)'s jurisdictional grant."). *See also Beers v. AG United States*, 927 F.3d 150, 156 n. 39 (3d Cir. 2019), *vacated on other grounds*, 40 S. Ct. 2758 (2020) ("Congress's denial of funds to process § 925(c) restoration applications stripped the federal district courts of jurisdiction to review the Justice Department's refusal to act on those applications."); *Mullis v. United States*, 230 F.3d 215, 221 (6th Cir. 2000) ("Congress, through its appropriations act, has chosen to at least temporarily suspend the operation of § 925(c) in its entirety, thereby removing subject matter jurisdiction from the district court.").[6]

The applicable jurisprudence unanimously holds that district courts simply do not have the jurisdiction to review claims under § 925(c) or relating to ATF's congressionally-mandated inaction on applications for relief under § 925(c). The district court was thus without jurisdiction to hear Kelerchian's claims for declaratory and

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[6] *See also, e.g.*, *McHugh v. Rubin*, 220 F.3d 53, 57-58 (2d Cir. 2000); *United States v. McGill*, 74 F.3d 64, 67 (5th Cir. 1996); *Black v. Snow*, 272 F. Supp. 2d 21, 24 (D.D.C. 2003), *aff'd*, 110 F. App'x 130 (D.C. Cir. 2004); *Owen v. Magaw*, 936 F. Supp. 1568, 1571 (D. Kan. 1996), *aff'd*, 122 F.3d 1350 (10th Cir. 1997); *Dreher v. United States*, 943 F. Supp. 680, 684 (W.D. La. 1996).

injunctive relief restoring his federal firearms privileges, and properly so held. The Court should affirm the dismissal of Kelerchian's complaint in its entirety for lack of jurisdiction.

D. Judicial consideration of Kelerchian's request for declaratory and injunctive relief would violate the Gun Control Act and defeat the purpose of the appropriations ban.

Kelerchian contends that to "trigger the protections enumerated" by § 925(c), he "had only to make an application for relief from disabilities incurred under the Gun Control Act[.]" Appellant's Br. at 19. Mailing his Relief Application to ATF, he argues, was all he needed to do "in order to not be barred by such disability from further operations under his license pending final action" on his application. *Id*.

If Kelerchian's interpretation were to hold, every federal firearms licensee who is convicted of a felony – including those who have committed violent crimes – could retain their licenses forever, and potentially continue to commit more felonies with those firearms, simply by mailing an application for relief of disabilities which ATF cannot lawfully act on. Such a result would directly defy Congress's intent, in enacting the Gun Control Act, to deny felons access to and

control of firearms. *See, e.g.,* 18 U.S.C. §§ 925(b); 922(g); *see also Huddleston v. United States*, 415 U.S. 814, 824-25 (1974) (purpose of Gun Control Act licensing system is to keep firearms out of the hands of criminals; firearms dealers must comply with Gun Control Act or face criminal penalties).

It also would directly defy Congress's plainly stated intent in further tightening those restrictions by nullifying the exemption once allowed under § 925(c).

As the Court held in *Pontarelli*, "congressional intent to prohibit any Federal relief – either through ATF or the courts – is clear[]." 285 F.3d at 230 (citation omitted). "The legislative history of the appropriations ban confirms that Congress did not intend for the appropriations ban to allow individual felons to go straight to district court to seek the restoration of their firearms privileges." *Id.* at 226.

> The legislative history of the appropriations ban confirms that Congress intended to prevent individual felons from regaining firearms privileges. Indeed, Congress could not have meant to confer new jurisdiction on the district courts to restore those privileges because district courts are incapable of predicting accurately which felons will misuse firearms.

Id. at 231.

In *Pontarelli*, this Court found that the House and Senate Appropriations Committee reports to their respective chambers reflected Congress's clear intent to dismantle the § 925(c) relief program, and their reasons for doing so. 285 F.3d at 226-27 ("These reports indicate that Congress wanted to suspend § 925(c)'s relief procedure because it was concerned that dangerous felons were regaining their firearms privileges and because it believed that the resources allocated to investigating felons' applications would be better used to fight crime."). *See also McGill*, 74 F.3d at 67 ("By withdrawing funds to the ATF to process these applications under these circumstances and with this explanation by the appropriations committee, it is clear to us that Congress intended to suspend the relief provided by § 925(c)."); *Mullis*, 230 F.3d at 218 ("[T]hrough its appropriations measures, Congress intended to suspend all relief available through the ATF."); *Black*, 272 F. Supp. 2d at 27 ("In enacting the restriction each year since 1992, Congress has sent a clear signal that it wished to disable the firearms relief provision.").

The *Pontarelli* Court summarized its review of the legislative history:

> [T]he legislative history of the appropriations ban demonstrates that Congress *wanted to suspend felons' ability to regain their firearms privileges under § 925(c).* This history refutes the claim that Congress intended to give district courts jurisdiction to review ATF's congressionally mandated inability to restore felons' firearms privileges.

Id. at 230 (emphasis added).

In enacting the appropriations ban, it was not Congress's intent to allow convicted felons, such as Kelerchian – who used his federal firearms license as a dealer to commit multiple federal gun felonies – to operate gun stores indefinitely. To the contrary, § 925(b) provides that Kelerchian's license became void by operation of law once the felony conviction became final. Congress has left this provision untouched. Furthermore, as this and every other appellate court to have considered the matter has held, it was Congress's clear and plainly stated intent in defunding § 925(c) to prevent felons from regaining their firearms privileges.

Kelerchian's construction of what "protections" he insists "remain" of § 925(c) thwarts the intent of both the Gun Control Act and the repeal of § 925(c) through the appropriations ban, and must be rejected. *See, e.g., Rowland v. California Men's Colony*, 506 U.S.194, 200-01

(1993); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (statutes should be interpreted in a manner that avoids absurd results). Just as Congress did not intend for ATF or the Courts to restore felons' firearms privileges, it surely did not intend for felons to be able to circumvent these prohibitions and maintain their licenses beyond the clear operation of § 925(b) simply by submitting a legally meaningless § 925(c) application – with no accounting of the public's best interest or the applicant's danger to society.

E. Kelerchian stated no other basis for jurisdiction, and there is none.

In an attempt to circumvent the barrier to judicial action presented both by § 925(c) and the appropriations ban, as well as unanimous case law holding that district courts are without jurisdiction to hear claims raised under § 925(c), Kelerchian insists that the Declaratory Judgment Act, the APA, and 28 U.S.C. § 1331 provide the district court with jurisdiction here. They do not.

While the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, increased the range of remedies a district court may award, it did not create a basis for subject matter jurisdiction. *Skelly Oil Co. v. Phillips*

Petroleum Co., 339 U.S. 667, 671 (1950); *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1218 n.2 (3d Cir. 1989).

Similarly, the APA provides the standards for reviewing agency action when jurisdiction is established, but does not in itself confer subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). While a court may have jurisdiction under 28 U.S.C. § 1331 to review an agency action under section 702 of the APA, courts have no jurisdiction when "statutes preclude judicial review" or the agency action is committed to agency discretion by law. 5 U.S.C. §§ 701(a), 702; *see also, e.g., Cunningham v. R.R. Ret. Bd.*, 392 F.3d 567, 578 (3d Cir. 2004) (Railroad Retirement Board decisions are unreviewable under the APA because the Railway Unemployment Insurance Act created an exclusive system of review).

As enacted, the Gun Control Act limited judicial review of ATF's action (and inaction) with respect to § 925(c) to instances where ATF denied an application for relief. *Bean*, 537 U.S. at 78 (rejecting contention that claim under § 925(c) invoked district court jurisdiction under the APA). Because the appropriations ban suspended ATF's ability to issue a denial under § 925(c), "it effectively suspend[ed] that

statute's jurisdictional grant." *Pontarelli*, 285 F.3d at 218. There has been no ATF denial, and unless and until Congress lifts the appropriations ban, there will be none. The APA therefore provides no basis for jurisdiction over Kelerchian's claims.

Lastly, as this Court has found, § 925(c) "does not 'create a freestanding opportunity for relief' that district courts may grant pursuant to their jurisdiction over federal questions or commerce regulations." *Pontarelli*, 285 F.3d at 222 (citing *McHugh*, 220 F.3d at 59). The district court therefore correctly found that "§ 925(c) 'is not written so as to create a freestanding opportunity for relief from federal firearms disabilities which might be vindicated pursuant to 28 U.S.C. § 1331,' which confers federal question jurisdiction." Mem. Op., App. Vol. I at 11 (citing *McHugh*, 220 F.3d at 59).

In order for a district court to have jurisdiction for any claim for relief under § 925(c), ATF must have denied an application for such relief. "[T]he absence of an actual denial of [a relief] petition precludes judicial review under § 925(c)[.]" *Bean*, 537 U.S. 78; *see also Pontarelli*, 285 F.3d. at 224 (denial by ATF is an unambiguous jurisdictional prerequisite to district court jurisdiction under § 925(c)). Kelerchian

cites no law to the contrary; indeed, those courts that have found jurisdiction over claims for relief under § 925(c) without the requisite denial by ATF have been reversed. *See Bean* (reversing Fifth Circuit's ruling) and *Pontarelli* (overruling *Rice v. ATF*, 68 F.3d 702 (3d Cir. 1995)).

F. Kelerchian's arguments are unavailing.

Kelerchian asserts a variety of arguments as to why § 925(c) and the appropriations ban are not dispositive of his claims for declaratory and injunctive relief under § 925(c). This Court and others have rejected all of them.

In an attempt to circumvent the binding authority of *Bean* and *Pontarelli*, and other overwhelming jurisprudence, Kelerchian argues that he is not asking the Court to decide his application – but instead to find that because he mailed a Relief Application to ATF, his license is spared the effects of the Gun Control Act. Regardless of how he styles his claims, Kelerchian seeks one result: a declaration from this Court that, in effect, would provide him relief from his federal firearms disabilities under § 925(c). As the district court correctly found in its July 17, 2020 Memorandum Opinion, Congress has forbidden such

relief by revoking § 925(c), and the Court is without jurisdiction to grant it.[7]

Kelerchian also contends that the dispositive findings in *Bean* and *Pontarelli* do not apply to him because the courts in those cases did not expressly address whether "making" or "filing" an application for relief is sufficient to "trigger the safeguards" of § 925(c) so as to allow him to continue his firearms business indefinitely. Appellant's Br. at 17. In so arguing, Kelerchian disregards the rulings in both cases, and the comprehensive legislative record affirming that in enacting the appropriations ban, "Congress intended to prevent individual felons from regaining firearms privileges," and to "prohibit any federal relief – either through ATF or the courts." *Pontarelli*, 285 F.3d at 230-31. Moreover, the felons in *Bean* and *Pontarelli* had both "made" and "filed" applications for relief under § 925(c). If those actions alone were sufficient to entitle them to any relief from federal firearms disabilities

[7] At issue in *Bean* was the legal implications of precisely the same actions by ATF – the return of an application made under § 925(c) with a letter explaining that, due to the appropriations ban, ATF could take no action on it. *Bean*, 537 U.S. at 75. The Court in *Bean* found such "inaction" was insufficient to satisfy the jurisdictional prerequisites of § 925(c), and the appropriations ban did not alter those prerequisites.

under § 925(c), reason suggests that the *Bean* and *Pontarelli* courts would have so held.

Kelerchian also argues that Congress cannot change substantive law through the appropriations process. To the contrary, the Supreme Court has repeatedly held that Congress has authority under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); *United States v. Will*, 449 U.S. 200, 222 (1980); *United States v. Dickerson*, 310 U.S. 554, 555 (1940); *United States v. Mitchell*, 109 U.S. 146, 150 (1883). In *Robertson*, the Court explained that "although repeals by implication are especially disfavored in the appropriations context, …Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly." 503 U.S. at 440. In *Will*, the Court stated that "when Congress desires to suspend or repeal a statute in force, 'there can be no doubt that… it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'"449 U.S. at 222. "The whole question depends on the intention of Congress as expressed in the statutes." *Id.*

As courts now unanimously hold, in enacting the appropriations ban in 1992 and reaffirming it every year since, Congress effectively repealed § 925(c) properly, unequivocally, and completely – and clearly stated its intent to do so. *See, e.g., Logan*, 552 U.S. at 28 n.1 (confirming § 925(c) "has been rendered inoperative"); *Mullis*, 230 F.3d at 218 ("[T]hrough its appropriations measures, Congress intended to suspend all relief available through the ATF," and "suspend[ed] the operation of § 925(c) in its entirety"); *Beers*, 927 F.3d at 156 n. 38 ("Congress effectively wrote § 925(c) out of the statute books"); *Pontarelli*, 285 F.3d at 230 ("Congressional intent to prohibit any Federal relief [under § 925(c)] – either through ATF or the courts – is clear[]"); *Franklin v. Lynch*, No. 3:16-cv-36, 2016 U.S. Dist. LEXIS 160759, at *4-5 n.2 (W.D. Pa. Nov. 18, 2016) ("§ 925(c) does not provide an actual avenue of relief").

The legislative history of the appropriations bar confirms that Congress intended to suspend § 925(c) as a means for seeking relief from firearms disabilities. *See Dickerson*, 310 U.S. at 561. The legislative history reveals that Congress enacted that prohibition because it concluded that determining whether to grant relief "is a very

difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, *supra*, at 19-20. The ban in each annual appropriations law thus reflects Congress's considered judgment that "those who commit felonies should not be allowed to have their right to own a firearm restored." H.R. Rep. No. 104-183, *supra*, at 15.

Kelerchian also argues that the appropriations ban is somehow "ambiguous," in that in enacting the appropriations ban, Congress did not expressly prohibit felons from *applying* for the relief no longer available under § 925(c). Kelerchian argues this must mean that he is still entitled to § 925(c)'s "protections" by virtue of his Relief Application. To the contrary, this Court has expressly rejected any interpretation of the appropriations ban that is contrary to Congress's plainly stated intent in categorically revoking the relief § 925(c) once provided. *See Pontarelli*, 285 F.3d at 220 (overruling *Rice*, 68 F.3d at 707, which had found that the ban did not "expressly preclude" district courts from granting relief under § 925(c), and that "'more explicit language' was required to repeal either § 925(c)'s jurisdictional grant or

the statute as a whole").[8] *Compare Bean*, 537 U.S. at 72 (overturning Fifth Circuit's finding that the appropriations ban was "not the requisite direct and definite suspension or repeal of subject rights" to deprive district courts of jurisdiction over requests for relief under § 925(c)).

While the appropriations ban did not explicitly forbid parties from seeking relief under § 925(c) in district court, "[t]he legislative histories of these appropriations provisions make it clear that Congress believed that 'those who commit felonies should not be allowed to have their right to own a firearm restored.'" *Walker v. United States*, 800 F.3d 720, 729-30 (6th Cir. 2015) (rejecting broad interpretation of felon's rights

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[8] Kelerchian places much weight on Judge McKee's remark, concurring in *Pontarelli*, that following the appropriations ban, "persons seeking relief from the federal firearms-disability can still petition the Secretary for relief from that disability under § 925(c)." Appellant's Br. at 18 (citing *Pontarelli*, 285 F.3d at 236 (McKee, J., concurring)). Yet Judge McKee still agreed with the rest of his colleagues that: (1) § 925(c) prohibits district courts from exercising jurisdiction over requests for relief from federal firearms disabilities unless and until ATF had denied an applications for such relief; and (2) the appropriations ban effectively ensured this jurisdictional prerequisite could never be met. 285 F.3d at 237-38 (confirming that the Court was "unable to exercise jurisdiction under § 925(c)," and that the then-pending decision by the Supreme Court in *Bean* would resolve the issue with finality).

that contravened the intent of the appropriations ban; affirming judgment on the pleadings). Thus, as the district court held, while the appropriations ban "speak[s] in terms of the ATF's ability to spend appropriated funds, the effect on the agency is obvious: the ATF cannot grant, deny, or do anything else with Section 925(c) applications" – including acknowledge one that has been "made" and therefore act as though the applicant's license remains in force more than thirty days after the applicant's conviction becomes final. Mem. Op., App. Vol. I at 10 (citing *McHugh*, 220 F.3d at 58).

Kelerchian correctly notes that the appropriations ban does not apply to Relief Applications filed by corporations. Appellant's Br. at 23. In 1993, Congress inserted a sentence immediately following the appropriations ban that restored funding for ATF to investigate corporations' applications for relief. Treasury, Postal Service and General Government Appropriations Act, 1994, Pub. L. 103-123, 107 Stat. 1228 ("Such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."). Kelerchian asks the Court to find that this creates ambiguity as to his rights under § 925(c) as an

individual. To the contrary, as this Court has held, Congress's restoration of funding to act on corporations' requests for relief "would be superfluous if Congress believed that the appropriations ban permitted district courts to grant relief despite ATF's inability to review applications." *Pontarelli*, 285 F.3d at 226 (citing *McGill*, 74 F.3d at 67-68). If an applicant seeking relief from federal firearms disabilities could obtain that relief simply by completing and mailing a Relief Application to ATF, as Kelerchian contends, there would have been no reason for Congress to restore ATF's authority to investigate and act upon applications for relief filed by corporations. The only explanation for that restoration of authority is that Congress intended for corporations, but not individuals, to have the opportunity to have their firearms privileges restored under § 925(c).

Kelerchian attempts to seek refuge in the "rule of lenity," which applies only when, after consulting traditional canons of statutory construction, the Court still finds the statute to be ambiguous. *See, e.g., United States v. Shabani*, 513 U.S. 10, 17 (1994). Section 925(c), as applied to non-corporate felons, was unambiguously, effectively, and completely repealed. The Supreme Court and this Court – in unanimous

opinions – have so held, and courts across the country agree. Kelerchian cites no law to the contrary.

This Court should affirm dismissal of the Complaint for lack of subject matter jurisdiction.

II. This Court may affirm on the alternative basis that Kelerchian fails to state a claim upon which relief may be granted.

A. This Court may affirm on any basis supported by the record.

This Court may affirm the district court's dismissal of Kelerchian's complaint on any basis supported by the record. *See Davis v. Wells Fargo*, 824 F.3d 333, 350 (3d Cir. 2016). The district court did not reach ATF's motion to dismiss the complaint pursuant to Rule 12(b)(6) because it dismissed for lack of subject matter jurisdiction. Nonetheless, if this Court were to find subject matter jurisdiction, it should nonetheless affirm the district court's dismissal because Kelerchian, in his complaint, fails to state a claim upon which relief may be granted.

B. Standard of Review

The Court's review of a district court's decision on a motion to dismiss a complaint under Rule 12(b)(6) for failure to state a claim is

plenary, and the Court applies the same standard as the district court. *Carino v. Stefan*, 376 F.3d 156, 159 (3d Cir. 2004).

The Court must grant a motion to dismiss pursuant to Rule 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id*. (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

In considering a Rule 12(b)(6) motion, the Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal quotation, citation omitted). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider "exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). The extensive congressional record confirming the intent and

scope of the 1992 appropriations ban – and its renewal every year since – falls squarely within these permitted materials.

C. Kelerchian fails to state a claim under § 925(c), as Congress has nullified that provision and forbidden the relief he seeks.

Even if the Court had jurisdiction to hear Kelerchian's claims, which it does not, Kelerchian fails to state a claim upon which relief may be granted because the provisions under which he seeks relief are void.

Kelerchian bases his claims entirely on the "rights" and "privileges" he contends are afforded him under § 925(c) and its implementing regulations. As courts across the country have confirmed, by virtue of the appropriations ban, § 925(c) has been effectively repealed, along with any "rights" and "privileges" it once conferred. *See Logan*, 552 U.S. 23, 28 n.1 (2007) (by virtue of the appropriations ban, § 925(c) "has been rendered inoperative"). *See also, e.g., Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 682 (6th Cir. 2016) (*en banc*) (by virtue of the appropriations ban, § 925(c) "is currently a nullity"); *Mullis*, 230 F.3d at 218, 221 (through its appropriations measures, "Congress intended to suspend all relief available through the ATF,"

and "suspend[ed] the operation of § 925(c) in its entirety"); *Folajtar v. AG of the United States*, 980 F.3d 897 n.10 (3d Cir. 2020) ("Congress effectively wrote § 925(c) out of the statute books") (citation, internal punctuation omitted); *Pontarelli*, 285 F.3d at 230 ("the appropriations ban demonstrates that Congress wanted to suspend felons' ability to regain their firearms privileges under § 925(c)"); *Owen*, 936 F. Supp. at 1571 ("Thus, while § 925(c) remains on the books and has not been repealed, Congress has effectively suspended its operation."); *Franklin*, 2016 U.S. Dist. LEXIS 160759, at *4-5 n.2 ("In practice, …both 18 U.S.C. § 925(c) and 27 C.F.R. § 478.144 are meaningless; Congress has denied any funding 'to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c).' … Thus, 18 U.S.C. § 925(c) does not provide an actual avenue of relief.").

As this Court has recently noted, "to the extent such a restoration remedy was available, it was a matter of congressional grace" that has since been withdrawn. *Beers*, 927 F.3d at 156; *see also Folajtar*, 980 F.3d at 897 n.10 (any relief available under § 925(c) is a "matter of legislative grace.") Even if this Court had jurisdiction over Kelerchian's

claims, Kelerchian has no enforceable rights under § 925(c) upon which this Court can grant relief.

The district court correctly found that "the provision under which [Kelerchian] seeks relief has been amended by Congress to effectively be written off the books as it applies to individual applicants," App. Vol. I at 11, and as such, the relief he seeks is "impossible." *Id.* at 12 n.4. This Court should affirm the district court's dismissal of the complaint for failure to state a claim upon which relief can be granted.

D. Kelerchian's Relief Application does not entitle him to § 925(c)'s protections, and the Court cannot compel ATF to treat it otherwise.

By asking the Court to find his application "made," "filed," and "pending" sufficient to "trigger[] the safeguards of § 925(c) and 27 C.F.R. § 478.144(i)(1)" (Appellant's Br. at 14; *see also id.* at 17) – and compelling ATF to consider it as such – Kelerchian asks the Court to defy Congress and create a cause of action where Congress has said there is none.

"Congress could not have stated more clearly that the ATF is prohibited from acting on applications submitted by individuals pursuant to § 925(c)." *McHugh*, 220 F.3d at 58. As the district court

properly found, ATF therefore "cannot grant, deny, *or do anything with* Section 925(c) applications" – including process or even hold one that has been theoretically "made" for processing at some further time. App. Vol. I at 10 (emphasis added). Given this congressional edict, it has been the ATF's proper practice for the past nearly three decades, upon receipt of an individual's § 925(c) application, to return it as unable to be filed. *See Bean*, 537 U.S. at 75-76 (unanimously finding this procedure to be mandated by the appropriations ban and not judicially reviewable under § 925(c)).

Kelerchian mailed his application to ATF, and ATF returned it to him with the explanation that the appropriations ban prohibited ATF from taking any action on it.[9] The Supreme Court and courts across the country have held that ATF's action – effectively inaction – on Kelerchian's application is congressionally mandated and does not

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[9] Kelerchian mailed his application to ATF a second time in April 2018. App. Vol. II at 8, ¶¶ 35-36. Having already done the only thing it could with respect to the application – that is, return it with its standard explanation of the impact of the appropriations ban – ATF did not send the application back a second time. ATF's congressionally-imposed inability to act on such applications requires that it not engage in a potentially endless volley of the same document.

create a cause of action under § 925(c) that may be heard in the district court. *See, e.g., Bean*, 537 U.S. at 75-76; *Black*, 272 F. Supp. 2d at 24 ("Bound by this [appropriations] prohibition, ATF now simply returns any individual application that it receives with an explanation that it is permitted to do no more;" dismissing case on summary judgment); *McHugh*, 220 F.3d at 57 ("Even the simple act by the ATF of processing applications in accordance with a straightforward categorical rule (for example, 'all applications shall be denied') would involve the use of appropriated funds. The ATF has been placed in a virtual straightjacket by the plain language of Congress's appropriations statutes precluding it from acting on § 925(c) applications;" denying request for mandamus and ordering case dismissed); *Dreher*, 943 F. Supp. at 684 ("ATF no longer denies relief from firearms disabilities. Rather, the ATF is simply not authorized to act in any way regarding applications for the restoration of gun privileges;" dismissing case); *Owen*, 936 F. Supp. at 1571 ("Until such time as Congress reauthorizes funding, []ATF is legally prohibited from processing applications for relief under section 925(c)" and courts are accordingly precluded from judicial review of such conduct; dismissing case).

Kelerchian argues that the appropriations ban only prohibits ATF from acting on or investigating applications for relief – not from "holding" an application until such time as funds for relief are available and treating applicants as entitled to all the rights and privileges of § 925(c) and 27 C.F.R. § 478.144(i) in the interim. If ATF were to hold his application, and recognize it as having any legal meaning, ATF would for all practical purposes be granting Kelerchian – a convicted felon eight times over, who abused his federal firearms license to illegally traffic machineguns – relief from his federal firearms disabilities. This would amount to "acting" on his application, which Congress has explicitly forbidden ATF to do. It would also effectively require ATF to act contrary to the mandates of the Gun Control Act – including 18 U.S.C. §§ 922(g)(1), 923(d)(1)(B) and (C), and 925(b) – all of which strip Kelerchian of his firearms privileges and all of which carry the full force of law.

As the district court properly held, awarding Kelerchian the injunctive relief he seeks would "subvert legislative fiat" and require ATF "to directly contravene the law." App. Vol. I at 11. It also would grant Kelerchian the outcome that Congress passed the appropriations

ban "to *specifically avoid*" – "allow[ing] convicted felons to retain their firearms licenses." *Id*. at 10 (emphasis in original). Kelerchian states no claim for declaratory or injunctive relief that can be granted.

E. Kelerchian failed to state a claim under the APA upon which relief may be granted.

Kelerchian's APA claim is based on an alleged "internal policy" expressed nowhere but in an alleged statement during a telephone call with ATF counsel. Compl., App. Vol. II at 9-10, ¶¶ 40-42. To be clear, ATF's only "internal policy" regarding requests for relief from federal firearms disabilities is to follow the law. Even if the Court had jurisdiction to hear Kelerchian's APA claims, which it does not, and even accepting Kelerchian's allegations as true, which – if the Court considers such allegations well-pled – the Court must in deciding the sufficiency of a claim under Rule 12(b)(6), Kelerchian states no claim relating to ATF's alleged conduct under the APA.

1. ATF has undertaken no rulemaking subject to APA review.

A reviewing court may invalidate agency rules that were not implemented in accordance with the APA's rulemaking procedures, 5 U.S.C. § 706(2)(D), including publishing notice of a proposed rule in the

Federal Register and providing interested persons with an opportunity to comment on the proposed rule. 5 U.S.C. §§ 553(b); 553(c). Mere statements of internal agency policy, however, such as those Kelerchian alleges, are not subject to APA's public notice and comment requirements. *See* 5 U.S.C. § 553(b)(A); *Reno v. Koray*, 515 U.S 50, 61 (1995) (Federal Bureau of Prisons' program statement was "an internal agency guideline" rather than a published regulation subject to APA's public notice and comment requirements); *Appalachian Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 112-13 (3d Cir. 1996) (agency action that interprets regulations is exempt from APA rulemaking).

Similarly, alleged statements about an alleged "internal policy" – without more – are not the "final agency action" necessary to state a claim under the APA. *See, e,g., New Jersey v. United States HHS*, Civ. No. 07-4698, 2008 U.S. Dist. LEXIS 93310, at *32 (D.N.J. Nov. 17, 2008) (agency letter stating policy guidelines was not final agency action; dismissing complaint); *Hormel Foods Corp. v. United States Dep't of Agric.*, 808 F. Supp. 2d 234, 246-47 (D.D.C. 2011) (where plaintiff failed to allege facts that demonstrate that agency letter is a

final agency action, plaintiff failed state a claim for relief under the APA). Kelerchian fails to allege any conduct or rule that should have been subject to the APA's rulemaking process. Dismissal of his allegations of improper rulemaking may and should be affirmed on this basis.

2. Kelerchian alleges no action or inaction by ATF that is reviewable under the APA.

A district court may generally review an agency's actions (or inactions) under the APA only if the agency action: (1) is final; (2) adversely affects the party seeking review of the decision; and (3) is non-discretionary. *See Pinho v. Gonzales*, 432 F.3d 193, 200 (3d Cir. 2005). ATF's alleged conduct here meets none of these requirements.

First, Kelerchian admits that ATF has made no final decision regarding his Relief Application or its impact on his license, and that due to the appropriations ban, it has been (and remains) unable to. As such, "there is no agency action for a federal court to compel or review." *Mullis*, 230 F.3d at 212 (rejecting contention that 5 U.S.C. § 706 provides a basis for relief under § 925(c)). Second, Kelerchian's license became inoperative when his conviction became final by operation of

law, *see* 18 U.S.C. §§ 922(g)(1) and 925(b), not because of any action or inaction by ATF. He has therefore failed to allege an action by ATF that adversely affected his interest. Third, even if there were a viable cause of action under § 925(c), the ultimate decision on an application for relief is left to ATF's discretion. 18 U.S.C. § 925(c) ("[T]he Attorney General *may* grant such relief if it is established *to his satisfaction* that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.") (emphasis added). He therefore alleges no action by ATF that a court could review under the APA.

3. Even if reviewable, ATF's conduct with respect to Kelerchian's Relief Application is neither arbitrary nor capricious; it is mandated by Congress.

As Kelerchian acknowledged in his complaint, in assessing the sufficiency of an APA claim, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Compl., App.

Vol. II at 11, ¶ 51 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

As such, ATF would be subject to liability only if its actions in returning Kelerchian's application, and not taking some unspecified measures to allow him to operate his license indefinitely despite his felony convictions and the mandates of § 925(b), § 922(g), and other portions of the Gun Control Act, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). ATF's compliance with a statutory directive not to use its resources to process applications for relief, or to recognize any right on the part of a felon convicted of multiple firearms crimes to retain or regain his firearms privileges, is none of those things.

As courts considering the appropriations ban and its impact on felons' rights under § 925(c) have consistently held, "ATF's decision to comply with a congressional directive cannot be said to meet this standard." *McHugh*, 220 F.3d at 61 ("We are aware of no alchemy capable of transforming review of the ATF's decision under [APA] § 706 into the relief the plaintiff seeks – plenary adjudication of his application by the district court."). *See also Bean*, 537 U.S. at 75-78

(rejecting felon's contention that the ATF's inaction on a request for relief under § 925(c) by virtue of the appropriations ban invoked district court jurisdiction under the APA so as to state a claim for relief from federal firearms disabilities); and *Black*, 272 F. Supp. 2d at 27 (§ 925(c) leaves the district court with no power under the APA to compel agency action). "Given Congress's explicit instruction that the ATF should not spend any appropriated funds to process applications for the removal of firearm disabilities, [an applicant] could hardly argue that the ATF has acted unlawfully or unreasonably in failing to process his application." *Mullis*, 230 F.3d at 219.

Here, Congress's intent was clear. ATF's return of Kelerchian's Relief Application, and its inability to consider it "made," "filed," and "pending" such as to allow him to circumvent the Gun Control Act and its plain prohibitions, was not some action by ATF in violation of its regulatory duties, as Kelerchian asked the district court to believe. It was an act mandated by Congress itself.

Following the appropriations ban, "ATF owes the plaintiff no duty under § 925(c)[.]" *McHugh*, 220 F.3d at 58. If ATF had acknowledged Kelerchian's Relief Application as entitling him to relief from his federal

firearms disabilities simply by virtue of "making" and "filing" it, ATF would have violated its duty to act "in accordance with law." Thus, if a court had authority to review ATF's failure to respond to Kelerchian's Relief Application by considering him able to operate under his license indefinitely, the court would be required to sustain ATF's refusal to act on the ground that the refusal was required by the appropriations ban. As the district court correctly found, in that ATF "'is under a statutory duty not to' implement Section 925(c) in any form, it follows that this Court could not subvert legislative fiat and declare that it must so do, thereby requiring the agency to directly contravene the law." Mem. Op., App. Vol. I at 10 (citing *McHugh*, 220 F.3d at 58).

III. Amending the complaint would be futile.

Kelerchian offers no hint as to what amendment to his pleading could create jurisdiction where there plainly is none, or how he might otherwise state a claim under the long-defunct § 925(c) upon which relief could be granted. As the district court correctly found, "the relief [Kelerchian] seeks is impossible," such that amending his claims would be futile. *See* App. Vol. I at 12 n.4. *See also Shane v. Fauver*, 213 F.3d 113, 115 (3rd Cir. 2000).

Regardless of how he styles his claims, Kelerchian seeks one result: an order declaring that his license remains valid despite his multiple federal felony convictions, and enjoining ATF from taking any action to the contrary. Such an order would effectively grant him relief from his federal firearms disabilities under § 925(c). As the district court correctly found in its July 17, 2020 Memorandum Opinion, the Court is without jurisdiction to grant it.

CONCLUSION

"It is inconceivable that Congress – concerned that felons who regained their firearms privileges would commit violent crimes – would want to make the review process less reliable" by allowing felons to request relief from their federal firearms disabilities by applying directly to a court for such relief. *Pontarelli*, 285 F.3d at 231. It is even less conceivable that Congress intended for felons to effectively obtain that same relief, upon request, with no review process whatsoever. Yet this is precisely what Kelerchian asks the Court to find.

Allowing district courts to grant relief from firearms disabilities to convicted felons would create the very dangers that Congress sought to avert by imposing the ban on the use of appropriated funds by ATF. As

this Court had held, "[t]he legislative history of the appropriations ban confirms that Congress intended to prevent individual felons from regaining firearms privileges." *Pontarelli*, 285 F.3d at 231. And as the district court correctly found, the legislative history of the appropriations ban confirms that Congress passed the ban "to *specifically avoid* the outcome [Kelerchian] seeks, *i.e.*, to allow convicted felons to retain their firearms license." App. Vol. I at 10 (emphasis in original).

While Kelerchian does not ask the Court to decide his § 925(c) application, the relief he seeks is the same. He seeks relief from his federal firearm disabilities – relief that Congress, in enacting the appropriations ban and reaffirming it every year since, has prohibited. He asks the Court to find that the relief provisions Congress has effectively nullified somehow still entitle him to maintain his license privileges indefinitely, and avoid the black letter prohibitions preventing a felon from operating under a license thirty days after his conviction becomes final. The contorted statutory construction he offers disregards both the plain terms of § 925(c) and Congress's plainly stated intent in nullifying the relief it once afforded through enacting the

appropriations ban. If the Court were to grant the relief he requests, the Court would be exercising jurisdiction it does not have and granting relief Congress has prohibited.

Whether for lack of subject matter jurisdiction or on the alternative basis of failure to state a claim upon which relief may be granted, the Court should affirm the district court's order dismissing Kelerchian's complaint with prejudice.

Respectfully submitted,

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CERTIFICATION

1. I certify that this brief contains 11,372 words, exclusive of the table of contents, table of authorities, and certifications, and therefore complies with the limitation on length of a brief stated in Federal Rule of Appellate Procedure 32(a)(7)(B), and was prepared in Microsoft Word for Microsoft 365 using 14-point Century Schoolbook font, a proportionally spaced typeface, and therefore complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6).

2. I certify that the electronic version of this brief filed with the Court was automatically scanned by McAfee Data Exchange Layer, version 5.0.1.249, and that no virus was detected.

3. I certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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Dated: February 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, the foregoing Brief for Appellees was served through the Court's ECF system upon:

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