CASE NO. 24-3200

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLEES' MOTION TO DISMISS

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TABLE OF CONTENTS

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THIS CASE IS NOT MOOT. 5

A. Defendants' Actions Reek of Voluntary Cessation. 5

1. Defendants Do Not Make It "Absolutely Clear" This Case Is Moot. 6

2. Defendants' Continued Defense of Zero Tolerance Is Relevant Evidence of Potential Future Conduct. 13

B. Zero Tolerance Is Capable of Repetition, Yet Evading Review. . . .17

1. Defendants' Zero Tolerance Policy Is "Capable of Repetition" . .18

2. Defendants' Zero Tolerance Policy "Evades Review" 21

II. THIS COURT MAY STILL GRANT EFFECTUAL RELIEF. 24

CONCLUSION 26

Pursuant to Federal Rule of Appellate Procedure 27, Plaintiffs-Appellants Morehouse Enterprises, LLC d/b/a Bridge City Ordnance, Gun Owners of America, Inc., and Gun Owners Foundation ("Plaintiffs"), by and through counsel, file this Response in Opposition to Defendants-Appellees' ("Defendants") Motion to Dismiss. Because Defendants have failed to bear their burden of demonstrating that this case is moot, this Court should deny their motion.

INTRODUCTION

This case involves a challenge to the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") promulgation of a so-called "zero tolerance" firearm dealer license revocation policy during the previous presidential administration. ATF wielded this policy as a political weapon to revoke the licenses of hundreds of firearm dealers across the nation, and to intimidate hundreds of others into "voluntary" surrender in lieu of unaffordable revocation proceedings. ATF pursued these "zero tolerance" revocations on the theory that certain regulatory violations "inherently demonstrate" the statutory *mens rea* of "willfulness."

After this Court granted an abeyance pending the new Attorney General's review of this case (Order (Feb. 21, 2025)), Defendants reported

that they had rescinded their "zero tolerance" revocation policy. *See* Defendants-Appellees' Status Report (Apr. 22, 2025). Plaintiffs disagreed that it moots the case. *See* Plaintiffs-Appellants' Status Report at 3 (May 7, 2025). Defendants have now moved to dismiss this appeal on mootness grounds. *See* Appellees' Motion to Dismiss ("MTD") (July 18, 2025).

SUMMARY OF ARGUMENT

Defendants have now promulgated their *fifth* firearm license revocation policy in as many years. They claim that this one is "new and different," but never concede their prior policy was wrong, or even problematic. Rather, by all appearances, Defendants seem to stand by the prior Administration's "zero tolerance" agenda.

But no matter – nothing to see here – Defendants say. Because Version H (Apr. 22, 2025) has now replaced Version G (Aug. 29, 2024), which replaced Version F (Jan. 13, 2023), which replaced Version E (Jan. 28, 2022), which replaced Version D (Oct. 2, 2019), Defendants claim "this case is moot" and this Court cannot grant any effective relief. Of course, the doctrines of (i) voluntary cessation, and (ii) actions capable of repetition yet evading review, exist precisely to allow affected parties to

challenge – to finality – the sort of whack-a-mole approach to administrative law that has come to define Defendant ATF. Were it otherwise, then Defendants could simply adopt a "new and different" policy anytime their actions were subjected to legal challenge.

Both of these mootness exceptions apply here, and Defendants have failed to bear their "heavy burden" to prove otherwise. First, mootness requires that Defendants make it "absolutely clear" that there is "no reasonable expectation that the alleged violation will recur." Instead, Defendants equivocate, claiming that it is only "*unlikely*" they will reoffend in the future. And instead of seizing this opportunity to disavow their past conduct, Defendants demand "more leeway" because they are the government. Then they point to "differen[ces]" between their current and prior AAPs, as if that proves something about their future conduct. Either way, they claim, even if they *were* to reimplement zero tolerance in the future, a subsequent challenge would differ from this one, warranting dismissal now. But none of these theories makes it "absolutely clear" zero tolerance is dead, with Defendants' reluctance to repudiate their unlawful policy providing further confirmation. Indeed, Defendants remain able to "internal[ly]" issue, modify, or rescind their

AAP at will, entirely behind closed doors and without public notice or input.

Second, mootness demands that a governmental action not be "capable of repetition, yet evading review." Defendants claim that their new policy is based on changed "circumstances and administrative priorities." But that merely proves Plaintiffs' point – informally promulgated administrative action, implemented, undone, and reimplemented based on whatever "circumstances" an agency chooses to "priority[ze]," is precisely the sort that is "capable of repetition." As for "evading review," Defendants demur that ATF's "zero tolerance" policy "remained in effect for nearly four years," ignoring that they have promulgated multiple versions of the AAP (E, F, G) during that period, none of which lasted more than 19 months. When it comes to "evading review," courts – including this Court – are uniform that "'complete judicial review,' including 'plenary review' by the Supreme Court," is required. Because the sort of agency policy challenged in this case can be issued, unissued, and reissued within minutes, it is quintessentially the sort of agency action that evades review and whose inherently impermanent rescission does not moot this case.

ARGUMENT

I. THIS CASE IS NOT MOOT.

Defendants' argument is simple, and simply wrong. They claim that, since they have changed direction (for now), and that their newly minted Administrative Action Policy ("AAP") "reflect[s] the[ir] new enforcement policy," then "this case is moot." MTD at 3, 6. Thus, Defendants seek to evade review based not on any intervening change in the law, but rather Defendants' own voluntary attempt to deprive this Court of jurisdiction. But this is precisely what the well-settled exceptions to the mootness doctrine were designed to prevent, and Defendants' arguments to the contrary are unavailing.

A. Defendants' Actions Reek of Voluntary Cessation.

It is "well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A defendant's cessation of challenged conduct "will moot a case only if the defendant can show that the practice cannot 'reasonably be expected to recur,'" a standard which "holds for governmental defendants no less than for

private ones." *FBI v. Fikre*, 601 U.S. 234, 241 (2024). The standard is met "only if" the government's showing makes it "absolutely clear" that its conduct will not recur. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam). Importantly, mootness is a "defendant's 'burden to establish.'" *Fikre*, 601 U.S. at 243. This Court has explained the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Felts v. Green*, 91 F.4th 938, 941 (8th Cir. 2024). Finally, and as applicable here, "[w]hat matters is not whether a defendant repudiates its past actions, but what the defendant can prove about its future conduct." *Fikre*, 601 U.S. at 244. All told, this is a "formidable standard" (*id.* at 243) that Defendants' empty proffers do not begin to meet.

1. Defendants Do Not Make It "Absolutely Clear" This Case Is Moot.

Defendants begin by demanding preferential treatment, claiming they are entitled to "more leeway" on the theory that the government is presumptively "unlikely to resume illegal activities." MTD at 9 (quoting *Prowse v. Payne*, 984 F.3d 700, 703 (8th Cir. 2021)). But this Court's prior statement about "leeway" is difficult to square with the Supreme Court's recent pronouncement that the standard "holds for governmental

defendants no less than for private ones." *Fikre*, 601 U.S. at 241. But even this Court's pre-*Fikre* cases explained that the standard was only "*slightly* less onerous when it is the government that has voluntarily ceased the challenged conduct." *Prowse*, 984 F.3d at 703 (emphasis added). Defendants cannot paper their way around their "heavy burden."

Defendants' reliance on *Troiano v. Supervisor of Elections*, 382 F.3d 1276 (11th Cir. 2004), similarly fails. Defendants cite *Troiano* for the proposition that the Supreme Court often finds mootness in voluntary cessation cases – and so this Court should too. MTD at 9. But *Troiano* explained that "a challenge to a government policy [is] moot when it has been replaced by a new policy that 'appears to have been the result of substantial deliberation' on the part of the alleged wrongdoers and has 'been consistently applied' in the recent past." *Troiano*, 382 F.3d at 1284. Defendants cannot say the same about their recently rescinded AAP, on either prong.

First, Defendants have not even claimed, much less proved, that their reversal resulted from "substantial deliberation." Defendants never explain *why* they reversed course or *what* their underlying thought process was, other than to note that they "conducted a review" following

the change of administrations. MTD at 7. But neither this "review" nor Defendants' briefing contains an admission that "zero tolerance" was erroneous, or any explanation of why their current policy is better. Instead, Defendants vaguely proffer that "ATF … concluded that 'zero tolerance' should not be the enforcement policy going forward." *Id.* at 6. Translation? Defendants refuse to explain their thought process, and they are loath to admit they were wrong even now. *See* Section I.A.2., *infra*. In such cases, "[c]ourts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule." *Dow Chemical Co. v. EPA*, 605 F.2d 673, 678 (3d Cir. 1979).

Second, Defendants have not shown that they have "consistently applied" their new AAP. Far from it, ATF recently stopped publishing "revoked FFL inspection reports [on] ATF's public website,"[1] leaving the public little way to gauge the impact of ATF's new policy. Not to mention, Defendants' latest AAP marks their *fifth* unilateral change in *five* years. Constant change is the opposite of "consisten[cy]."

[1] https://www.atf.gov/rules-and-regulations/atf-launches-new-era-reform.

Next, Defendants highlight "[m]ultiple features of this case" that they claim cut against a finding of voluntary cessation. MTD at 9. None is persuasive. First, they observe that "ATF has reversed the zero-tolerance policy 'not in response to this lawsuit, but' years later...." *Id.; see also id.* at 10 ("ATF is unlikely to reinstate the policy...."). But the timing of Defendants' reversal does not make their voluntary cessation "genuine," or their conduct "unlikely to recur." Rather than *saying* they will not reoffend in the future – much less meeting their burden to provide evidence proving the same – Defendants merely theorize that it is "*unlikely*." In other words, they cannot say for sure.

Such equivocation[2] certainly does not make it "absolutely clear" that zero tolerance will not recur. *Friends of the Earth*, 528 U.S. at 190; *see also Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (no mootness when "the defendant voluntarily ceases an allegedly illegal practice *but is free to resume it at any time*") (emphasis added); *United Food & Com. Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir.

[2] Of course, "[s]uch a profession does not suffice to make a case moot," as even the "disclaime[r]" of "any intention to revive" unlawful conduct is just "one of the factors to be considered." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Defendants do not even disclaim any such intention here.

1988) ("'a hesitant, qualified, equivocal and discretionary present intention not to prosecute'" means that "the state's position could well change"). Defendants' brief is the model of equivocation, and a new ATF revocation policy could be issued at any time.

Second, Defendants double down on the 'unlikelihood' of recurrence, this time by pointing to certain features of their new enforcement policy. Whereas zero tolerance amounted to "strict liability," Defendants note their new policy "requires a 'fact-specific analysis'" instead. MTD at 10. But highlighting differences demonstrates nothing about future conduct. If the government need only show that its new policy differs somehow from its old policy, then no case would ever survive a mootness challenge. And yet Defendants simply offer the *non sequitur* that, because their current policy *differs* from zero tolerance, that means "there is no reasonable prospect that the zero-tolerance policy will be reinstated." *Id.* Notably absent is any actual repudiation of zero tolerance or any acknowledgement that it was unlawful. To the contrary, Defendants maintain vestiges of their old policy on their website to this day.[3]

[3] *See* https://perma.cc/9XX7-WGM9.

Third, Defendants claim that, even if ATF *were* to reimplement zero tolerance "at some point in the future," that "future action likely would not present substantially the same legal controversy" as this one, as it would present "different factual circumstances, be justified on the basis of a different administrative record, and may be implemented in many different ways...." MTD at 10-11. But the Supreme Court's voluntary cessation cases do "not stand for the proposition that it is only the possibility that the *selfsame*" policy would be reimplemented "that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing … and replacing it with one that differs only in some insignificant respect." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Rather, courts focus on "whether *the legal wrong* … is reasonably likely to recur," not "whether the *precise historical facts* … are likely to recur...." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009) (emphasis added). In fact, Defendants already concede the possibility of precisely the same "legal wrong" recurring. MTD at 10.

Finally, Defendants point to the focus of this appeal – whether the zero tolerance policy "constitutes final agency action subject to review

under the APA" – to suggest that recurrence would "not present substantially the same legal controversy." MTD at 10. But Defendants' prior briefing on "final agency action" confirms that they can change course entirely of their own volition, and at a moment's notice. Indeed, Defendants previously minimized the AAP as an informal exercise of their "broad enforcement discretion." Brief for Appellees at 9. They described it as an "internal decision." *Id.* at 11. And even if a court enjoined the "guidance document" itself, Defendants threatened, "ATF could still exercise its authority to revoke" under a zero tolerance theory anyway. *Id.* at 17. In other words, Defendants themselves made the case that ATF's revocation policy is quintessentially the sort of "ad hoc, discretionary, and easily reversible action" the Sixth Circuit warned about in *Speech First, Inc. v. Schissel*, 939 F.3d 756, 768 (6th Cir. 2019).[4]

History confirms the transience and inherent secrecy of Defendants' conduct. Prior to Plaintiff Gun Owners of America's ("GOA") acquisition and publication of the zero tolerance AAP, the AAP was "an

[4] *See also id.* ("If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude [for the government] is necessary to show that the voluntary cessation moots the claim.").

internal document that ATF … refused to make publicly available," which made it difficult for members of the firearms industry to know *what* rules even applied to them, much less how to comply. Compl. ¶50. And even after challenges to zero tolerance were initiated, Defendants continued to modify their AAP in private. In *Kiloton Tactical v. BATFE*, No. 3:23-cv-23985-MCR-ZCB (N.D. Fla.), Defendants waited *five months* to inform the court and plaintiffs of their replacement Version G.[5] *Id*. at ECF #63. And despite ATF sanitizing Version G of its most egregious language in an apparent effort to make it appear more palatable, ATF representatives later confirmed that "nothing has changed." Plaintiffs' Response to the Court's Order at 3, in *Kiloton Tactical*, ECF #66. This sort of conduct does not make it "absolutely clear" that zero tolerance is gone for good.

2. Defendants' Continued Defense of Zero Tolerance Is Relevant Evidence of Potential Future Conduct.

To be sure, Defendants say many things about zero tolerance. They claim that it has been "repealed," "supersede[d]," and that it "no longer

[5] Such non-legislative, administrative action is inherently transitory. When issuing a new AAP, ATF does not notify the public of an intended change, seek input from stakeholders, or provide written reasons justifying its policy shift. Rather, ATF simply acts.

has any effect." MTD at 5, 7. Defendants claim that their new policy "bears no resemblance" to zero tolerance, but instead is "new and different" with "more stringent criteria" than before. *Id.* at 1, 5. Defendants even assert that their new revocation policy "expressly disclaim[s]" the zero tolerance feature of "strict liability," replacing it with a regime of "fact-specific analysis." *Id.* at 10.

But what Defendants never admit is that zero tolerance was wrong, much less unlawful – in contravention of the statute. Had Defendants wanted to admit wrongdoing, they certainly know how. In another brief filed in a similar case just days ago, Defendants asserted mootness and argued that ATF's prior "determination was incorrect," promising they would "not 'continue[] to defend'" it. Brief for Appellees at 15, 14, *Gun Owners of Am., Inc. v. DOJ*, No. 24-1881 (6th Cir. June 23, 2025), Doc. 31. Apparently unwilling to similarly wash their hands of zero tolerance here, Defendants seem to justify it. They claim that zero tolerance applied only "if the licensee willfully committed certain violations." MTD at 1. But as Plaintiffs explained, "whether the AAP has eliminated the statutory 'willfulness' requirement … is a matter of contention between

the parties...." Opening Brief at 12. It seems that contention still exists, ATF's new policy notwithstanding.

Indeed, the challenged AAP asserted that certain violations "inherently demonstrate willfulness," meaning "zero tolerance" is the polar opposite of willfulness – "requir[ing] … predetermined punishment regardless of individual culpability...." *Id.* at 30, 33-34 n.22. Defendants never once back down from that position. In fact, Defendants expressly imagine a "hypothetical" world in which zero tolerance could again rear its ugly head. MTD at 10.

The Supreme Court recently held that "[w]hat matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct." *Fikre*, 601 U.S. at 244. Indeed, the Court noted that "a party's repudiation of its past conduct may sometimes help demonstrate that conduct is unlikely to recur." *Id.* And although "often a case will become moot even when a defendant 'vehemently'" defends its prior conduct, it is obvious that such defense is far from irrelevant. Indeed, "abandonment is an important factor...." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Thus, various courts have considered such evidence when examining the likelihood of offending "future conduct." *See Porter v. Clarke*, 852 F.3d 358, 360 (4th Cir. 2017) ("Defendants repeatedly have refused to rule out a return to the challenged policies."); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) ("the government has not even bothered to give … any assurance that it will permanently cease engaging in the very conduct that [is] challenge[d]"); *Speech First*, 939 F.3d at 770 ("Significantly, the University continues to defend its [actions]"); *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 307 (2012) ("since the union continues to defend" its actions, "it is not clear why the union would necessarily refrain from [similar actions] in the future").

Recently, the Supreme Court reached a similar conclusion, refusing to dismiss a case where "'[t]he only conceivable basis for a finding of mootness … is [the respondent's] voluntary conduct,'" and "the Government 'nowhere suggests that if this litigation is resolved in its favor it will not' reimpose [the challenged action] … indeed, it 'vigorously defends' the legality of such an approach." *West Virginia v. EPA*, 597 U.S. 697, 719-20 (2022); *see also Aladdin's Castle*, 455 U.S. at 289 (case not moot where government's "repeal of the objectionable language would

not preclude it from reenacting precisely the same provision if the" case were dismissed). Even now, Defendants have not retreated from their zero tolerance policy, and admit that it is entirely plausible that one could be reimplemented in the future.

B. Zero Tolerance Is Capable of Repetition, Yet Evading Review.

A defendant's action is "capable of repetition, yet evading review" – and therefore a challenge to it is not moot – when "(1) the challenged conduct is of too short a duration to be litigated fully prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Nat'l Right to Life PAC v. Connor*, 323 F.3d 684, 691 (8th Cir. 2003). The ultimate "question is 'whether the controversy was *capable* of repetition,'" not whether it was "probable." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 795 (8th Cir. 2016). Finally, only a "reasonable showing" of recurrence likelihood is required. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

1. Defendants' Zero Tolerance Policy Is "Capable of Repetition."

Defendants claim that "there is no reasonable expectation that plaintiffs will be subject to the same challenged action again" – and so it is incapable of repetition – "for largely the same reasons" as their voluntary cessation argument. MTD at 11-12. But because Defendants' voluntary cessation argument fails for the reasons discussed above, so too does their repetition argument. And in any case, the "context and substance of ATF's new policy" (*id.* at 12) both support Plaintiffs.

First, Defendants speculate that "ATF is not *likely* to reverse itself in the near future." MTD at 12 (emphasis added).[6] But history indicates otherwise – none of Defendants' recent AAPs has lasted longer than 19

[6] Defendants' reference to the "near future" says nothing of the "foreseeable future," and Plaintiffs maintain an interest in ensuring that their statutory right to have their licenses revoked only for "willful" violations persists beyond the day, the month, or even the current presidential administration. In contrast, the only "foreseeable future" that Defendants can foresee is the "near future" *in which they are in charge*. And as the Sixth Circuit explained in *Speech First*, "there is no evidence in the record that" any University official "has control over whether the University will reimplement the challenged definitions." 939 F.3d at 769 (rejecting proffer not to reenact old policies, a "statement [without] any binding or controlling effect"). The same is true here. No rule or statute vests any particular ATF official with control over ATF's AAP decisions. Even if it did, no ATF official can guarantee that a successor will not simply change course.

months, and Defendants can change course at any time, for any reason. *See Idaho Conservation League v. Bonneville Power Admin.*, 2025 U.S. App. LEXIS 15852, at *11 (9th Cir. June 26, 2025) ("The repetitive nature of BPA's actions demonstrates … a reasonable expectation of facing … allegedly illegal conduct again.").

At this point, it seems clear that ATF's revocation policy will mirror whatever administration controls the Executive Branch. Within a few months of the Biden Administration taking power, zero tolerance was implemented (from the top down) to crack down on supposed "rogue firearms dealers."[7] Then, only a few months into the Trump Administration, the White House changed course (again, from the top down), noting that ATF had been "weaponized to end the livelihoods of law-abiding small business owners in an effort to limit Americans' ability to acquire firearms."[8] There is every reason to believe that a subsequent administration, holding a dimmer view of Second Amendment rights, will

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[7] https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/.

[8] https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-is-protecting-americans-second-amendment-rights/.

simply reverse course again. Indeed, anti-gun groups have widely touted the perverted success of the zero tolerance policy, which forced many hundreds of gun stores out of business.[9] Plaintiffs, and the thousands of American businesses they represent,[10] deserve to be protected against this swinging pendulum of ATF's revocation policy.

Second, Defendants claim their prior AAP "'was a product of' specific circumstances and administrative priorities," and thus any future agency action would be "unlikely" to present "this [dispute] in a similar form again." MTD at 12. But that argument fails for the reasons already discussed. *See* Section I.A.1., *supra*. Defendants need not reimpose the "selfsame" policy for a challenger to maintain standing. *Ne. Fla. Chapter*, 508 U.S. at 662.

Ultimately, ATF's checkered past should give this Court cause for concern. Indeed, ATF is *infamous* for changing horses – not because Congress changed the law, but merely because an administration changed hands – or simply because ATF officials changed their minds.

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[9] https://giffords.org/press-release/2025/04/trump-revokes-atfs-zero-tolerance-policy/; https://www.bradyunited.org/press/atf-rogue-gun-dealers.

[10] *See* Compl. ¶¶11, 274.

Thus, dealing with ATF has been described as a "regulatory roller coaster" and "a whiplash-inducing regulatory odyssey."[11] A sister circuit has noted "the ATF's frequent reversals on major policy issues...." *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 461 (6th Cir.), *superseded*, 19 F.4th 890 (6th Cir. 2021). Unsurprisingly, multiple courts have held ATF's actions arbitrary and capricious.[12] Given the opportunity, a subsequent administration could (and likely will) simply repeal ATF's *current* position with another stroke of a pen. Plaintiffs need not wait for harm to befall them *again* before obtaining relief.

2. Defendants' Zero Tolerance Policy "Evades Review."

Next, Defendants claim that the AAP is not of such "inherently short duration" that Plaintiffs cannot challenge it. MTD at 12. Of course, that claim is belied by the facts of this case – after more than two years, all Plaintiffs have is a district court dismissal claiming that Plaintiffs

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[11] Testimony of Alex Bosco at 10, *ATF's Assault on the Second Amendment: When Is Enough Enough?*, Joint Hearing Before the Subcommittee on Economic Growth, Energy Policy, and Regulatory Affairs (Mar. 23, 2023), https://tinyurl.com/4sjut6za.

[12] *See, e.g.*, *Texas v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 737 F. Supp. 3d 426 (N.D. Tex. 2024); *Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507 (8th Cir. 2024); *Mock v. Garland*, 2024 U.S. Dist. LEXIS 105230 (N.D. Tex. June 13, 2024).

cannot challenge the policy in the first place. Defendants demur that ATF's AAPs "do not come with any inherent expiration date," claiming that "the zero-tolerance policy … remained in effect for nearly four years – more than enough time to fully litigate a challenge to the policy." *Id.* But that claim fails for two reasons.

First, it is a straw man. Just because a particular AAP *might* remain in effect for years, as a theoretical matter, is no guarantee that one *will*, as a practical matter. Since there is no fixed process or timeline for issuing or rescinding any iteration of the AAP, there is nothing stopping a revocation policy from being effective for four years – versus *four minutes*. Agency action that can be done and undone at will, in secret, is inherently transitory, of indefinite duration, and therefore is capable of evading review.

Second, ATF's claim that zero tolerance has been in effect since 2021 is misleading. Although the Biden Administration announced DOJ's "new policy" in June of 2021, it was not until July that ATF issued a memorandum to field offices,[13] and January of 2022 when the AAP

[13] If Defendants claim that ATF's AAP does not constitute "final agency action," it seems unlikely they would agree that Plaintiffs had standing to challenge an internal memorandum between staff.

Version E (challenged here) was promulgated. Moreover, Version E did not last "four years" – rather, it was replaced by Version F less than a year later, and by Version G less than two years after that.[14]

Defendants next assert that *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316 (D.C. Cir. 2009), supports their view, claiming that court has "suggest[ed] that agency actions of ***over*** two years duration are generally not capable of evading review." MTD at 12 (emphasis added). But that blatantly misrepresents that decision. Rather, the D.C. Circuit explained that "[t]his court has held that agency actions of ***less than*** two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action." 570 F.3d at 322 (emphasis added). Another circuit "held three years to be insufficient" to afford complete review. *Hamamoto v. Ige*, 881 F.3d 719, 723 (9th Cir. 2018). And because a short lifespan is "typical" of at least the last *four* iterations of ATF's revocation policy – none lasting longer

[14] In *Kiloton Tactical v. BATFE*, No. 3:23-cv-23985-MCR-ZCB (N.D. Fla.), the plaintiffs were required to brief whether Version G rendered the case moot. *See* ECF #64. That question remains pending, even though ATF has now promulgated Version H.

than 19 months – it is clear that any given policy "cannot be 'fully litigated'" before it is replaced.

Moreover, as the Supreme Court has made clear, its language "evading review" means "considered plenary review in this Court." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976). Thus, it is "complete judicial review" that is required, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978) – not one district court's erroneous dismissal. *See also Simes v. Ark. Jud. Discipline & Disability Comm'n*, 734 F.3d 830, 835-36 (8th Cir. 2013) (implied).[15]

II. THIS COURT MAY STILL GRANT EFFECTUAL RELIEF.

Defendants claim this case is moot because "the court may no longer grant effectual relief" because "ATF has now reconsidered the policy" and therefore "ATF's previous policy no longer has any effect...." MTD at 6-7. Having thus reversed their latest "ad hoc, discretionary, and easily reversible action," *Speech First*, 939 F.3d at 768, Defendants claim that "ATF is not *likely* to reverse itself in the near future." MTD at 12

[15] Other courts are uniform on this issue. *See, e.g.*, *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 746 F. App'x 131, 134 (3d Cir. 2018); *Empower Texans, Inc. v. Geren*, 977 F.3d 367, 370 (5th Cir. 2020); *Walters v. Dale*, 53 F.4th 176 (6th Cir. 2022).

(emphasis added). But Defendants' shortsightedness does not moot this case. This Court may still grant effectual relief.

As this Court has explained, "[t]he 'test for mootness … is whether the relief sought would, if granted, make a difference to the legal interests of the parties[.]'" *Lang v. SSA*, 612 F.3d 960, 966 (8th Cir. 2010). The obvious corollary is that, if Plaintiffs have "not obtained everything [they] ask[] for," then "the Court can still grant effectual relief. Thus, the case is not moot."[16] *Browder v. Wormuth*, 2024 U.S. Dist. LEXIS 229365, at *10 (D.D.C. Dec. 19, 2024). Indeed, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 567 U.S. at 307-08. Here, resolution of Plaintiffs' appeal on the merits would certainly "make a difference" to Plaintiffs' legal interests.

Consider the lasting effects of Defendants' zero tolerance policy, even now. Former licensees who had been revoked under zero tolerance

[16] Even if this Court finds this appeal is moot (it is not), the district court's decision and judgment should be vacated. *See* MTD at 6, n.1 ("the government would not oppose any request from plaintiffs to vacate the district court's judgment."). *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (vacatur proper when mootness "results from unilateral action of the party who prevailed below.").

remain out of business today – including some members of Plaintiff GOA. And Plaintiff Morehouse's legal defense against zero tolerance revocation proceedings cost tens of thousands of dollars alone – to say nothing of the scores of other licensees that incurred the same. This Court has the "power to determine the legality of the practice" that caused these harms, and to "enjoin the defendant from renewing the practice" in the future. *Aladdin's Castle*, 455 U.S. at 289.

CONCLUSION

Defendants' mootness arguments fail. For the foregoing reasons, this Court should deny their Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Response in Opposition to Defendants-Appellees' Motion to Dismiss complies with Fed. R. App. P. 27(d)(2)(A) because it includes 5,141 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

3. This document was scanned for viruses using Bitdefender Total Security and no viruses were detected.

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Stephen D. Stamboulieh
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