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

JAY AUBREY ISAAC HOLLIS, individually and as trustee of the Jay Aubrey Isaac Hollis Revocable Living Trust, Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States, and B. TODD JONES, Director, Bureau of Alcohol, Tobacco, Firearms & Explosives, Defendants.	Case No. 3:14-cv-03872-M

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Dated: February 23, 2015

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

JOHN R. PARKER
Acting United States Attorney

/s/ *Eric J. Soskin*
DIANE KELLEHER
Assistant Branch Director
ERIC J. SOSKIN (PA Bar # 200663)
DANIEL RIESS
Trial Attorneys
U.S. Department of Justice
Civil Division, Rm. 7116
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 353-30533
Fax: (202) 616-8460
Email: Eric.Soskin@usdoj.gov
Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTORY LAW

LEGISLATIVE MATERIALS

MISCELLANEOUS

INTRODUCTION

As an important part of its overall system of regulating firearms and dangerous weapons through the National Firearms Act of 1934 ("NFA"), the Gun Control Act of 1968 ("GCA"), and other statutes, Congress has prohibited the manufacture and possession of machine guns by civilians. *See* 18 U.S.C. § 922(o) (prohibition on machine guns); 18 U.S.C. Chapter 44 (GCA); 26 U.S.C. Chapter 53 (NFA). This prohibition, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") enforcement of it, complies with the Constitution, and Plaintiff's challenge does not demonstrate otherwise.

At the outset, the first two counts of Plaintiff's complaint, containing the Second Amendment claim to which Plaintiff dedicates the majority of his brief and his assertion that Congress lacks authority to regulate machine guns, are beyond this Court's jurisdiction because Plaintiff's effort to demonstrate standing contradicts the basis of his merits arguments. Further, Plaintiff's assertion that the Second Amendment guarantees him a nearly-unqualified right to manufacture a machine gun (by converting a semi-automatic AR-15 firearm in his possession into a fully-automatic version of the same weapon) and then to possess such a weapon is in error. The Supreme Court's seminal decision to recognize the Second Amendment as an individual right in *District of Columbia v. Heller*, 554 U.S. 570 (2008), numerous lower court decisions applying *Heller*, and historical sources and analysis similar to those relied on in *Heller*, all reject Plaintiff's view and the panoply of faulty arguments on which he attempts to rely.

Plaintiff's other claims fare no better. His brief contains no section presenting argument on the claim that Congress lacks constitutional authority to regulate machine guns, and the sole support he provides for that claim comprises brief testimony to Congress that predates modern Commerce Clause doctrine. His due process claim relies fatally on the fact that he acted based

on his own idiosyncratic interpretation of federal statutes, despite his knowledge that ATF had set forth a contrary view. And, far from providing a surer footing for his ill-pleaded equal protection claim, Plaintiff's brief makes clear that this claim has no foundation in law.

ARGUMENT

I. The Court Should Dismiss Plaintiff's Second Amendment and Commerce Clause Claims for Lack of Subject Matter Jurisdiction Because Plaintiff Fails to Satisfy the Traceability and Redressability Requirements for Standing.

"It is an elementary principle that Article III limits the power of the federal judiciary to 'cases' and 'controversies,' U.S. Const. art. III, § 2," and that the requirement that a plaintiff establish his standing is "'derived directly from' the case-or-controversy requirement." *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 830 (5th Cir. 2014) (*quoting DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Plaintiff's effort to brush aside this failure of his Second Amendment and Commerce Clause causes-of-action as not "a serious claim," Plaintiff's Opposition ("Pl. Br."), ECF No. 23, at 4, understates the importance of this principle and the neglects the precedent that directly warrants dismissal of these two claims for lack of standing.

Plaintiff's response focuses on whether his inability to possess a machine gun constitutes an Article III injury sufficient to support his due process claim. *See* Pl. Br. at 4-8. Yet this question is irrelevant: as Defendants stated in their opening brief, Plaintiff's lack of standing requires dismissal only of his "Second Amendment and Commerce Clause Claims," not necessarily because he has failed to allege an injury in the abstract, but because the injuries he identifies are not "traceab[le] and redressab[le]" through those causes-of-action. Defs.' Mot. to Dismiss ("Defs.' Br."), ECF No. 14, at 9. Like his Complaint, ECF No. 1 ("Compl."), Plaintiff's brief ignores the crucial requirement that he "must demonstrate standing for each claim he seeks to press" and "separately for each form of relief sought." *DaimlerChrysler*, 547 U.S. at 352.

As Defendants have explained, Plaintiff's possession of a machine gun is not only barred by federal law, but by Texas law, and Plaintiff has not sued Texas. The federal laws therefore are not alone in restricting Plaintiff's ability to legally possess a machine gun, the interest which he contends has been injured by Defendants' alleged Second Amendment and Commerce Clause violations. Thus, because Plaintiff would still be unable to own a machine gun if the Court found violations of those constitutional provisions, Plaintiff's allegedly associated injury would not be redressed by success on those claims. *See* Defs.' Br. at 9-10. In circumstances such as these, there is no standing to challenge the federal law alone because the "limitations imposed by [state law] . . . would remain unchanged," and a favorable ruling therefore "would not redress [the] alleged injury." *McConnell v. FEC*, 540 U.S. 93, 229 (2003). For similar reasons, traceability is lacking. *See White v. United States*, 601 F.3d 545, 552 (6th Cir. 2010).

Plaintiff's only argument supporting standing to bring these claims contradicts the substantive arguments he makes, and is therefore inadequate. Plaintiff suggests that, rather than invalidating the machine gun ban as he requests, *see* Compl. ¶¶ 50-62, the Court could "find an appropriate way and manner to allow [him] to manufacture and possess his machinegun" without invalidating the NFA and 18 U.S.C. § 922(o). Pl. Br., at 5-6. Yet in his merits arguments, Plaintiff simultaneously contends that the challenged federal laws effect a "complete[] ban [on] a class of bearable firearms" as the basis for asserting that the laws violate his Second Amendment and Commerce Clause rights. Pl. Br. 14-17. Indeed, Plaintiff even "concedes that the ownership of machineguns can be regulated to a point" without infringing on his constitutional rights, *id*. at 15, underscoring that the key element of his constitutional claims is a challenge to the absoluteness of federal law.[1] Plaintiff cannot have it both ways, and therefore has not

[1] For the same reason, Plaintiff cannot recast his facial challenges to become as-applied challenges and thereby establish standing. Plaintiff does not argue that Congress lacks power to regulate *his* possession of a machine gun,

demonstrated standing for these claims. *See Henderson v. Stalder*, 287 F.3d 374, 386 (5th Cir. 2002) (Jones, J., concurring) (emphasizing importance of whether the "relief sought by [Plaintiff]" can "redress the constitutionally cognizable injury of which [Plaintiff] complains").[2]

II. The Court Should Dismiss Plaintiff's Claims for Failure to State a Claim.

A. The Challenged Laws Are Consistent with the Second Amendment.

In *National Rifle Association, Inc. ("NRA") v. ATF*, 700 F.3d 185 (5th Cir. 2012), the Fifth Circuit held that in cases alleging Second Amendment claims, courts should apply a "two-step inquiry." *Id*. at 194. First, "[i]f the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster." *Id*. at 195. Second, "[i]f the law burdens conduct that falls within the Second Amendment's scope, we then proceed to apply the appropriate level of means-end scrutiny." *Id*. Here, the Court's inquiry can end at Step One because the challenged federal laws do not restrict the possession of weapons protected by the Second Amendment; consequently, these laws do not impose any burden, let alone a substantial burden, on conduct historically protected by the Second Amendment. However, even if the Court were to proceed to the second step in an "abundance of caution," as did the Court in *NRA*, the laws readily pass muster under intermediate scrutiny, the maximum appropriate level of review. *See id.* at 204.

1. There is No Second Amendment Right to Possess Machine Guns.

In analyzing a Second Amendment claim, "the first inquiry is whether the conduct at

---

but that 18 U.S.C. § 922(o) on its face "has nothing to do with commerce." Compl. ¶ 20. Nor does he argue that the Second Amendment requires an exception for *him*, but rather, *inter alia*, that the Second Amendment does not permit restrictions on the possession of "dangerous and unusual weapons" at all, Pl. Br. at 10-11, and that a "complete ban on machineguns is categorically invalid." *Id*. at 14.

[2] Plaintiff also suggests he has standing because Texas law "would have to be amended" if § 922(o) is invalidated. Pl. Br. at 5. This is precisely the kind of "independent action of some third party not before the court" on which Plaintiff cannot ground a theory of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted); *see also San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996).

issue falls within the scope of the Second Amendment right." *NRA*, 700 F.3d at 194. The Supreme Court in *Heller* emphasized that the "right secured by the Second Amendment is not unlimited." *Id*. at 626. Indeed, *Heller* specifically "recognize[d] [an] important limitation on the right to keep and carry arms," namely, that "the sorts of weapons protected were those 'in common use at the time.'" *Id*. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). As *Heller* explained, "that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*.

Though *Heller* did not purport to define the full scope of the Second Amendment right, the Court did examine *Miller*, which had "upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun . . . in violation of the [NFA]." *Heller*, 554 U.S. at 621-22. *Heller* explained that "the Court's basis for saying that the Second Amendment did not apply" in *Miller*:

> was that the *type of weapon at issue* was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*." "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."

Id. at 622 (quoting *Miller*, 307 U.S. at 178) (emphasis in *Heller*). Of particular importance to the present case, the *Heller* Court added:

> We may as well consider at this point (for we will have to consider eventually) what types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. *That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns* (not challenged in *Miller*) *might be unconstitutional*, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind *in common use at the time*. . . ." We therefore read *Miller* to say only that the Second Amendment does not protect those

> weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

Id. at 624-25 (internal citations omitted) (emphasis added).

Thus, *Heller* expressly recognized that categories of weapons are excluded from Second Amendment protection, further explaining that limits on "the sorts of weapons protected" are "limitation[s] on the *right* to keep and carry arms." 554 U.S. at 627 (*quoting Miller*, 307 U.S. at 179) (emphasis added). In addition, anticipating an objection that banning useful military weapons (such as M-16s) would be inconsistent with the Second Amendment, the Supreme Court explained that such an objection would be meritless:

> It may be objected that if weapons that are *most useful in military service – M–16 rifles and the like – may be banned*, then the Second Amendment right is completely detached from the prefatory clause. . . . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Id. at 627-28 (emphasis added). This analysis dispenses with Plaintiff's arguments that an M-16 rifle is protected because it is "part of the ordinary soldier's equipment," or because it is a "militia-styled arm for the modern day."[3] Pl. Br. at 29-30; *see id.* at 28-31.

Consequently, every federal circuit that has reached the issue has considered the limitations set forth in *Heller* and determined that the Second Amendment does not protect the "right to possess a machine gun." *See* Defs.' Br. at 16; *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."); *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (classifying machine guns and short-barreled shotguns as "dangerous and unusual"

[3] *Heller*'s description that it would be "startling" to conclude that "the National Firearms Act's restrictions on machineguns [] might be unconstitutional," likewise strongly indicates that machine guns are precisely the sort of weapons that fall outside the scope of the individual right protected by the Second Amendment. 554 U.S. at 624-25.

weapons); *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) ("We agree with the reasoning of our sister circuits that machine guns are 'dangerous and unusual weapons' that are not protected by the Second Amendment."); *see also Heller v. Dist. of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) ("*Heller II*") ("*Heller* suggests 'M-16 rifles and the like' may be banned because they are 'dangerous and unusual.'") (citation omitted).

Plaintiff's discussion of the history of the common law crime of "affray" cannot supersede this precedent, including the controlling conclusion by the Supreme Court that "dangerous and unusual" weapons fall outside the Second Amendment right. *See* Pl. Br. at 10-14. In identifying this "limitation on the right to keep and carry arms" under the Second Amendment, 554 U.S. at 627, *Heller* looked to historical examples for support, but made clear that the scope of the modern right is not cabined by such historical examples. *See id*. at 582, 627-28. And contrary to Plaintiff's supposition that the scope of the historical tradition is controlling, *Heller* stated only that the common use "limitation is *fairly supported* by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627 (quoting *Miller*, 307 U.S. at 179) (emphasis added) (citations omitted). In *Marzzarella*, the Third Circuit explained this comprehensively:

> In *Heller*, the Court explained that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons," – those commonly owned by law-abiding citizens. This proposition reflected a "historical tradition of prohibiting the carrying of "dangerous and unusual weapons." Accordingly, the right to bear arms, as codified in the Second Amendment, affords *no protection* to "weapons not typically possessed by law-abiding citizens for lawful purposes."

614 F.3d at 90-91 (quoting *Heller*, 554 U.S. at 623, 625, 627) (emphasis added). Indeed, had *Heller* been so strictly restricted to the historic scope of the right to bear arms, the Court could not have reached its central holding affirming that a ban on *handguns* – arms "not in existence at

the time of the founding" – is incompatible with the Second Amendment. *Heller*, 554 U.S. at 582 (rejecting the argument that "only those arms in existence in the 18th century are protected" and emphasizing that the opinion "interpret[ed] constitutional rights" in a "modern" way).[4]

Plaintiff's reliance on language from 1939 in *United States v. Miller* is similarly misplaced because it proceeds from the mistaken premise that *Heller* has not subsequently interpreted and narrowed that decision. As explained above, *Heller* specifically rejected the view that *Miller* could be interpreted to protect "M-16 rifles and the like," *id.* at 627, as "part of ordinary military equipment." *id*. at 624. Instead of the interpretation that Plaintiff employs, *Heller* made clear that, because machine guns are neither weapons "in common use," *id.* at 624, nor "typically possessed by law-abiding citizens for lawful purposes," *id*. at 625, they do not fall within the scope of the Second Amendment's protection, thereby foreclosing an argument that M-16s are protected as ordinary military equipment. *Id*. at 624-25.

In sum, "[m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use." *Fincher*, 538 F.3d at 874. The Court should thus uphold the challenged federal laws at Step One of *NRA*'s analysis.

2. Restrictions on Machine Guns Are Longstanding and Presumed Lawful

The Fifth Circuit has stated that "a longstanding, presumptively lawful regulatory measure – whether or not it is specified on *Heller*'s illustrative list – would likely fall outside the

[4] In any event, Plaintiff's espoused interpretation overlooks aspects of the historical record that demonstrate that prohibitions on dangerous and unusual weapons did not depend on "the manner of how the right is exercised, not the type of weapon [] carried." Pl. Br. at 13. For example, in its entry on "armour and arms," Giles Jacob's influential eighteenth-century law dictionary set forth the rule that "By the Common Law it is an Offence for Persons to go or ride armed with dangerous and unusual Weapons: But Gentlemen may wear common Armour according to their Quality." *A New Law Dictionary* (7th ed. n.p., Henry Lintot 1756); *see also* John N. Pomeroy, *An Introduction to the Law of the United States* 152 (4th ed. rev. 1879) (Second Amendment "certainly not violated by laws forbidding persons to carry dangerous or concealed weapons"). These sources make clear that possession of dangerous and unusual weapons alone could be regulated without reference to the manner with which they were displayed.

ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework." *NRA*, 700 F.3d at 196. Moreover, "*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue. After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage." *Id*. at 196 (internal citations omitted). As these passages from *NRA* demonstrate, Defendants' argument that longstanding bans are presumptively constitutional is not a "misreading" of *Heller*. Pl. Br. 18.

As Defendants explained previously, the actions by 21 States to restrict the purchase or possession of machine guns between 1927 and 1934 illustrate that such laws are longstanding within the meaning of *Heller* and *NRA*. *See* Defendants' Appendix ("Def. App."), ECF No. 15, at 123-149. Plaintiff's contention that these early State laws are not relevant to the Court's inquiry into the validity of a federal statute is a *non sequitur*: the Court in *NRA* similarly determined whether a federal statute "burden[ed] conduct that is protected by the Second Amendment" by examining State laws. *Compare* Pl. Br. 17-18 *with NRA*, 700 F.3d at 188, 200. Nor is it true that the presumptively-lawful nature of longstanding laws would have precluded the result in *Heller*: to the contrary, *Heller* specifically emphasized the outlier nature of the District of Columbia's handgun ban, as contrasted with historical regulations. *Compare* Pl. Br. at 18, *with Heller*, 554 U.S. at 629 ("Few laws in the history of our Nation have come close to the severe restriction of [D.C.'s] handgun ban. And some of those few have been struck down").

3. Because Any Burden Imposed by the Challenged Federal Laws Is Minimal, No Heightened Constitutional Scrutiny Is Warranted.

Several federal Courts of Appeals have declined to apply heightened constitutional scrutiny to regulations that, like the laws challenged here, do not substantially burden the exercise of the Second Amendment right. *See* Defs.' Br. at 20-23; *United States v. Decastro*,

682 F.3d 160, 166 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013); *Heller II*, 670 F.3d at 1253, 1261; *Nordyke v. King*, 644 F.3d 776, 786-88 (9th Cir. 2011), *superseded by* 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc).[5] Nothing in the Fifth Circuit's decision in *NRA* requires applying a different approach here, as Plaintiff argues is appropriate.

The laws challenged in *NRA* prevented 18-to-20-year-olds from obtaining handguns from any licensed dealer anywhere in the United States, and thus, like the laws challenged in *Heller*, imposed more than a *de minimis* burden on the plaintiffs' claimed core constitutional right. *See NRA*, 700 F.3d at 191-92. The Fifth Circuit therefore did not have occasion to address how it might evaluate laws imposing a lesser burden, and it is well-established in the context of both the Second Amendment and other constitutional rights that an incidental burden may call for no elevated scrutiny at all. *See* Defs.' Br. at 20 (citing, *e.g.*, *Heller II*, 670 F.3d at 1253, 1260 (laws that do not "meaningfully affect individual self-defense" do not warrant heightened scrutiny). This Court should thus uphold the challenged laws on the ground that they impose no substantial burden on a right protected by the Second Amendment. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 UCLA L. Rev. 1443, 1488 (2009) (ban on machine guns would "not substantially burden the right to keep and bear arms for self-defense").

Here, as Congress recognized in enacting the NFA, the inability to manufacture or possess a machine gun, as opposed to a similar semi-automatic firearm, poses only an incidental burden on Plaintiff's self-defense rights. *See* H.R. Rep. No. 73-1780, at 1 (1934) (no self-defense need for "anyone except a law officer [to] have a machine gun"). Plaintiff responds by suggesting that, as a United States Marine, he was trained in the use of an M-16 rifle and that his

[5] Commentators have also recognized that a substantial-burden analysis is particularly useful in analyzing Second Amendment claims. *See* Volokh, *Implementing the Right*, 56 UCLA L. Rev. at 1461 ("The best way to protect self-defense rights, I think, is to acknowledge that courts are likely to find slight burdens to be constitutional, to focus on defining the threshold at which the burden becomes substantial enough to be presumptively unconstitutional, and to concretely evaluate the burdens imposed by various gun restrictions.").

self-defense rights are burdened if he cannot now use the weapon with which he was trained. *See* Pl. Br. 29-30. Yet, as Plaintiff himself notes, the semi-automatic AR-15 rifle that he wishes to modify into an automatic rifle is virtually identical to the M-16 in military service, with the only exception being that it lacks an automatic-fire capability. *Id*. at 2, 22; *see generally* Richard A. Mann, *Gun Digest Shooter's Guide to the AR-15* 14-17 (2014); *Shelton v. Trs. of Ind. Univ.*, 891 F.2d 165, 166 (7th Cir. 1989) (discussing familiarity of AR-15 to Marine veteran). For this reason, the use of this AR-15 only minimally burdens Plaintiff's self-defense right because he still may use a rifle with the sighting, operation and feel on which he trained in the Marines.[6]

4. Even If Plaintiff's Suit Implicates His Second Amendment Rights, the Challenged Federal Laws Are Constitutional.

Defendants' opening brief explained that, even if the Court were to conclude that Plaintiff's claims implicate his Second Amendment rights, the challenged provisions readily withstand intermediate scrutiny because they substantially relate to important government interests in protecting public safety and limiting crime. Defs.' Br. at 24-26. In response, Plaintiff urges the Court either to invalidate the challenged laws without applying any means-end scrutiny, Pl. Br. at 14-17, or to apply strict scrutiny, *id*. at 19-23, but he provides no sound reason to depart from controlling Fifth Circuit precedent on this issue. Plaintiff also fails to undermine the reasonable fit between the challenged laws and the important governmental objective at stake. Therefore, Plaintiff's Second Amendment claim fails as a matter of law.

a. Congress May Lawfully Impose Categorical Restrictions on Machine Guns and Other Dangerous and Unusual Weapons.

Plaintiff places much weight on the erroneous supposition that the Second Amendment

[6] Indeed, to the extent that Plaintiff seeks to manufacture a fully-automatic rifle, the semiautomatic AR-15 is arguably closer to the modern Marine Corps M-16 than a fully-automatic rifle would be: in the 1980s, the Marine Corps (followed by the U.S. Army) discontinued fully-automatic M-16s as the standard rifle, instead issuing rifles limited to three-round bursts to improve safety and discourage excessive ammunition usage. *See generally* John Walter, *Rifles of the World* 38 (3d ed. 2006); U.S. Army Field Manual 3-22.9 (2008).

forbids complete bans on a class of weapons. *See* Pl. Br. at 1, 14-17, 19, 23-24, 29. Plaintiff's argument is based on taking a single sentence in *Heller* and stripping it of its surrounding setting. *See id*. at 29. Placed in context, *Heller* does not forbid bans on categories of dangerous and unusual weapons such as machine guns:

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the *quintessential self-defense weapon*. There are many reasons that a citizen may prefer a handgun for home defense . . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of *their* use is invalid.

554 U.S. at 629 (emphasis added). In situ, *Heller*'s language about a "complete prohibition," *id.*, is limited to handguns, and elsewhere, *Heller* specifically "suggests 'M-16 rifles and the like' may be banned because they are 'dangerous and unusual.'" *Heller II*, 670 F.3d at 333 (quoting *Heller*, 554 U.S. at 627). For this reason, federal courts, applying *Heller*, have routinely upheld prohibitions on dangerous and unusual classes of arms, including machine guns. *See, e.g.*, *Fincher*, 538 F.3d at 870, 874 (upholding federal prohibitions on possession of machine guns and unregistered sawed-off shotguns); *Henry*, 688 F.3d at 640 ("[W]e hold that the Second Amendment does not apply to machine guns."); *see also* Volokh, *Implementing the Right*, 56 UCLA L. Rev. at 1488 ("Machine guns, short-barreled shotguns, and still more dangerous military weapons (such as surface-to-air missiles or grenade launchers) are outside the scope of 'arms,' and may thus be banned.") (footnote omitted). Machine guns are not analogous to handguns because they have never been routinely chosen "by law-abiding citizens for lawful purposes," and "therefore fall within the category of dangerous and unusual weapons that the government can prohibit." *Fincher*, 538 F.3d at 874; *accord Henry*, 688 F.3d at 639-40.

The Third Circuit's decision in *Marzzarella*, quoted at length by Plaintiff, likewise does

not hold that the Constitution forbids a complete ban on a class of weapon, such as machine guns. *See* Pl. Br. at 15-16, 23.[7] Rather, as relevant here, *Marzzarella* dispels any conclusion that a machine gun is protected by the Second Amendment with a clear statement to the contrary:

> [I]t cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances. By this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense. Possession of *machine guns* or short-barreled shotguns – or any other dangerous and unusual weapon – so long as they were kept in the home, would then fall within the Second Amendment. But the Supreme Court has made clear the *Second Amendment does not protect those types of weapons*.

614 F.3d at 94 (emphasis added) (citations omitted). Nor does testimony from a 1934 hearing on the NFA, Pl. Br. at 16-17, provide any support for the merits of Plaintiff's Second Amendment claim. Rather, in the cited testimony, the Attorney General merely opined on whether a hypothetical prohibition on machine guns would exceed Congress' Commerce Power. *See* Plaintiff's Appendix ("Pl. App."), ECF No. 24, at 105, 116. Neither the Second Amendment nor *Heller* precludes Congress from imposing a complete ban on machine guns.[8]

b. At Most, the Court Should Apply Intermediate Scrutiny.

As explained above, limitations on machine guns do not "burden[] the core of the Second Amendment guarantee" and are therefore "proportionately easier to justify." *NRA*, 700 F.3d at 205; *see id.* at 206 (intermediate scrutiny is applicable to laws that do not "prevent an individual from possessing a firearm in his home or elsewhere"). Thus, even if the Court concludes that Plaintiff's claims implicate conduct protected by the Second Amendment in more than a *de*

[7] The portion of *Marzzarella* quoted by Plaintiff addresses only a fallacious argument raised in that case that because "firearms in common use in 1791 did not possess serial numbers," it would necessarily follow that "the Second Amendment must protect firearms without serial numbers." *Marzzarella*, 614 F.3d at 93.

[8] Furthermore, to the extent that Plaintiff apparently relies on the dissenting opinion from *Heller II* to suggest that neither intermediate nor strict scrutiny are appropriate in the Second Amendment context, Pl. Br. at 14, that reliance is misplaced, given the Fifth and D.C. Circuit's contrary holdings. *See NRA*, 700 F.3d at 197 ("As for step two [of the two-part analytical framework], by taking rational basis review off the table, and by faulting a dissenting opinion for proposing an interest-balancing inquiry rather than a traditional level of scrutiny, [*Heller*'s] language suggests that intermediate and strict scrutiny are on the table.") (citing *Heller*, 554 U.S. at 628 n.27).

minimis manner, machine gun regulations should be evaluated under no more than an "'intermediate' standard of scrutiny [] that requires the government to show a reasonable fit between the law and an important government objective." *Id.* *Heller*'s designation of the machine gun prohibition as a "presumptively lawful" regulation, as discussed *supra*, also confirms that intermediate scrutiny is the strictest review conceivably required. As explained below, the NFA and GCA survive review under intermediate scrutiny.

Though Plaintiff instead invites the Court to apply strict scrutiny to the challenged laws, he fails to justify that invitation. Pl. Br. at 19, 22-24. Initially, given that the Fifth Circuit in *NRA* has already determined that intermediate scrutiny is appropriate for evaluating Second Amendment challenges, it is irrelevant that a court in another Circuit might have reached a contrary conclusion. *See id.* at 19 (citing *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2014)). In any event, the Sixth Circuit's *Tyler* decision was simply mistaken when it concluded that by rejecting Justice Breyer's proposed "interest balancing" approach of assessing Second Amendment claims, *Heller* also rejected intermediate scrutiny review. *See id*. at 318. As the Fifth Circuit has explained, neither the *Heller* majority nor Justice Breyer identified the approaches used as applying one of the "traditionally expressed levels" of scrutiny. *NRA*, 700 F.3d at 197 ("In rejecting Justice Breyer's proposed interest-balancing inquiry, we understand the Court to have distinguished that inquiry from the traditional levels of scrutiny; we do not understand the Court to have rejected all heightened scrutiny analysis.") (citation omitted); *see also Heller*, 554 U.S. at 634 (characterizing Justice Breyer's approach as "propos[ing], explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)") (citation omitted). In addition, a strict scrutiny standard of review for Second Amendment claims would not square with the *Heller* majority's discussion of presumptively

lawful regulatory measures. *See Heller*, 554 U.S. at 688 (Breyer, J., dissenting) ("[T]he majority implicitly . . . rejects [a 'strict scrutiny' test]"); *Marzzarella*, 595 F. Supp. 2d at 604 ("[T]he Court's willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review.").

c. The Challenged Federal Laws Satisfy Intermediate Scrutiny.

"[T]o withstand intermediate scrutiny," a statute "must be reasonably adapted to achieve an important government interest." *NRA v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013). There can be no doubt that the NFA's regulation of machine guns and other weapons is reasonably directed at the public safety and crime prevention interests in protecting the public from weapons that are "especially dangerous." *RSM v. Herbert*, 466 F.3d 316, 318 (4th Cir. 2006). As the Fifth Circuit has recognized, machine guns and other NFA firearms are "primarily used for violent purposes," *United States v. Serna*, 309 F.3d 859, 863 (5th Cir. 2002), and Congress has specifically concluded that machine guns and other NFA-regulated weaponry constitute "weapons of war and have no appropriate sporting use or use for personal protection." *U.S. v. Jennings*, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (*quoting* S. Rep. No. 90-1501, at 28 (1968)). Indeed, weapons capable of automatic fire are "inherently dangerous," *U.S. v. Golding*, 332 F.3d 838, 840 (5th Cir. 2003), even when used by the law-abiding, let alone when placed in criminal hands to "protect[] commerce in contraband." *U.S. v. Kirk*, 105 F.3d 997, 1004 (5th Cir. 1997) (op. of Higginbotham, J.).[9]

[9] Plaintiff's attempt to downplay the inherent dangerousness of machine guns is also not convincing, and is based on a misreading of Fifth Circuit precedent. *See* Pl. Br. at 18. Though the defendant in *Golding* was a felon, the Fifth Circuit's discussion of the special danger posed by machine guns was not limited to their possession by felons. *See* 332 F.3d at 840 ("We hold that an offense of unlawfully possessing a machine gun in violation of 18 U.S.C. § 922(o) is a 'crime of violence' because it constitutes conduct that presents a serious risk of physical injury to another. This risk is presented by the inherently dangerous nature of machine guns; a determination that is evidenced by Congress's decision to regulate the possession and transfer of this specific type of firearm."). Similarly, Plaintiff's attempt to distinguish *Kirk* on the ground that it involved a defendant who possessed an unregistered machine gun fails because Plaintiff's application to register a machine gun has been disapproved;

Plaintiff's response is unpersuasive. Although Plaintiff disputes whether "machineguns are actually linked to crime," Pl. Br. at 24, he ignores evidence he introduces showing the association of machine guns with criminal activity. For example, as the exhibits attached to Plaintiff's brief demonstrate, as of 1995, at a time when "over 240,000 automatic weapons were registered with the ATF," the National Crime Information Center ("NCIC") reported on "7,700 machine guns and submachine guns" (just two of the classes of automatic weapons) that had been stolen – over 3% of the total. Pl. App. 132. *See also id.* at 134 (noting that, in a 1991 study, "35% of the juvenile inmates reported that they had owned a military-style automatic or semi-automatic rifle just prior to confinement"). In any event, if the eight decades of federal legislation regulating machine guns (including nearly three decades of prohibition on their manufacture) have succeeded in limiting the use of machine guns for criminal purposes, such success would hardly cast doubt on previous findings about the criminal utility of machine guns or their other dangers. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 ("In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress'").

Nor does the training provided to some in the military to use fully automatic weapons render those weapons less dangerous in practice. When used for military purposes – whether on military installations at home or battlefields abroad – military weapons can ordinarily fulfill their purpose without being introduced into domestic, civilian environments where an accidental discharge or a deliberate, but errant, burst of fire carries fatal risks to civilian bystanders. These "dangers in their likely effects" authorize regulation of machine guns separate and apart from

---

consequently, if Plaintiff were to possess a machine gun, it would not be a registered machine gun, and the Court of Appeals' discussion of the dangers of machine guns was not limited to those that are unregistered. *See* 105 F.3d at 1001 ("The destructive capacity of machine guns puts them in the same category as explosives, which the federal government has heavily regulated for over twenty-five years, except machine guns have little lawful use. This fundamental difference between machine guns and other guns is reflected in the long history of machine-gun regulation by Congress.") (opinion of Higginbotham, J.) (internal citations omitted).

their criminal utility. Volokh, *Implementing the Right*, 56 UCLA L. Rev. at 1482. Under intermediate scrutiny, Congress need not tailor its regulation precisely to evaluate whether each prospective machine gun owner has sufficient training to safely use such a "weapon[] of war" in a civilian setting. *See Jennings*, 195 F.3d at 799; *McCraw*, 719 F.3d at 348. In light of the dangers posed by machine guns, there is thus at least a "reasonable fit," *NRA*, 700 F.3d at 207, between the challenged federal laws and the government's interest in protecting the public and law enforcement officers from the dangers of automatic firearms and their high rates of fire.

Plaintiff's other responses are variations on a theme: that the ban on machine guns is unconstitutional because it does not ban all machine guns (*i.e.*, those manufactured prior to 1986, *see* Pl. Br. at 8, 23) or all other "dangerous weapons" (*i.e.*, knives, or handguns, *see id*. at 25-28). As the Fifth Circuit explained in *NRA*, it is well-settled that "a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *NRA*, 700 F.3d at 211 (rejecting argument that "the emergence of unlicensed, private gun owners who are selling handguns to young adults undermine[d] the reasonableness of the fit between" laws prohibiting licensed firearms dealers from selling handguns to persons under 21, and their stated objective"). For similar reasons, that Congress might have gone further in restricting the possession of machine guns, or have left unregulated other firearms that are also dangerous, does not cast into doubt the constitutionality of Congress's regulation of machine guns.[10] *See, e.g.*, *Olympic Arms v. Buckles*, 301 F.3d 384, 390 (6th Cir. 2002) (rejecting argument that import ban of certain semi-

[10] Moreover, Plaintiff cannot simultaneously contend that the challenged laws violate the Second Amendment because their scope allegedly extends too broadly, and also allege that the laws should be struck down under the Second Amendment because they prohibit too little. *Compare* Pl. Br. at 23 ("If the Defendants were serious about banning machineguns, then they would attempt to simply ban them.") *with id.* ("Section 922(o) [] goes too far.").

automatic weapons was irrational when other weapons were allowed, because "Congress may work incrementally in protecting public safety").

In sum, because the challenged laws regulate conduct that falls outside the scope of the Second Amendment and represent a species of "longstanding, presumptively lawful regulatory measure" consistent with that Amendment, they should be upheld at Step One of the Court's analysis under *NRA*. 700 F.3d at 196. In any event, the laws readily survive intermediate scrutiny, the maximum level of appropriate means-end scrutiny. Plaintiff's Second Amendment claim should therefore be dismissed.

B. Congress's Commerce Power Includes Authority to Prohibit Machine Guns.

In their opening brief, Defendants documented the ample precedent underpinning Congress's regulation of machine guns under its Commerce Clause power. *See* Defs.' Br. at 27-30. Notably, "[e]very circuit that has examined 18 U.S.C. § 922(o) – both before and after *United States v. Lopez*, 514 U.S. 549 [] (1995) – has determined that § 922(o) does not exceed the authority granted to Congress by the Commerce Clause." *Kirk*, 105 F.3d at 998 (footnote omitted) (opinion of Parker, J.); *see also Henry*, 688 F.3d at 640-41 (rejecting "assert[ion] that the Commerce Clause does not give Congress the power to prohibit possession of homemade machine guns," and noting that "[e]very other circuit that has reached the issue has similarly held that § 922(o) is constitutional under the Commerce Clause") (collecting cases).

Rather than responding to this authority, Plaintiff turns to testimony provided to Congress in 1934 when the NFA was enacted, erroneously suggesting that doubts raised in testimony then undercut Congress's authority now. *See* Pl. Br. at 16-17. At the time, however, the Attorney General lacked the benefit of the Supreme Court's modern Commerce Clause doctrine, such as *Wickard v. Filburn*, which would not be decided for another eight years. *See* 317 U.S. 111, 127-

28 (1942) (recognizing that Congress's power to regulate production of wheat for commerce extends to wheat intended wholly for the farmer's own consumption); *see also, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 15-22 (2005); *id.* at 26 (Congress has authority to prohibit local cultivation and use of marijuana and "[p]rohibiting the intrastate possession or manufacture . . . is a rational (and commonly utilized) means of regulating commerce") (footnote omitted). Accordingly, the Attorney General's 1934 testimony has little weight regarding Congress's present-day authority.

Certainly, Congress originally enacted the NFA under the taxing power, at least partly out of caution raised by the 1934 testimony. By 1986, however, when Congress adopted 18 U.S.C. § 922(o), Congress had the benefit of an additional half-century of Commerce Clause doctrine, as well as multiple sets of findings about the effects of firearms on interstate commerce. *See* Defs.' Br. at 27-30. It is for this reason that the Fifth Circuit and other Circuits have consistently upheld regulation of firearms, including machine guns, under the Commerce Clause. *See Kirk*, 105 F.3d at 998; *United States v. Rene E.*, 583 F.3d 8, 18 (1st Cir. 2009). Plaintiff does not even attempt to grapple with this precedent, and his claims about the lack of congressional authority should therefore be rejected.

C. ATF's Denial of Plaintiff's Application Did Not Deny a Due Process Right.

Procedural due process challenges must demonstrate that the "'state has deprived a person of a liberty or property interest.'" *Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012) (quoting *Welch v. Thompson*, 20 F.3d 636, 639 (5th Cir. 1994)). Defendants' opening brief demonstrated that there can be no property interest in approval of a form in an area of pervasive government control, particularly where: (1) approval would violate the law; and (2) authorization cannot be transferred, assigned, or sold and otherwise lacks the "crucial indicia of property right[s]." Defs.' Br. at 33; *see generally id.* at 30-34.

In his opposition brief, Plaintiff contends that, as the trustee of an unincorporated trust, his status confers a due process interest in the approval of his Form 1 application to manufacture a machine gun, based on his interpretation of the definition of "person" in the NFA. Yet Plaintiff readily concedes that, prior to the submission of his Form 1 application, he knew that ATF interpreted the statute to treat him, in his capacity as a trustee, no differently than any other individual: "transfer[] [of] an NFA firearm to a trustee or other person acting on behalf of a trust . . . is made to this person as an individual (i.e., not as a trust)." *See* Compl. ¶ 37 & Ex. B at 2. Plaintiff cannot then establish a cognizable property interest by substituting his personal beliefs for ATF's authoritative interpretation, as permitting him to do so would render null the well-established requirement that a cognizable property interest be established by "an independent source" of law. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Moreover, Plaintiff's claim of a cognizable interest also requires that he demonstrate that his interpretation, not ATF's, is correct, which he cannot do. It is well-established that when acting as a trustee:

> [a] natural person . . . has capacity [] to take and hold property in trust to the extent the person has capacity to take and hold the property as beneficial owner; and [] to administer trust property and act as trustee to the same extent the person would have capacity to deal with the property as beneficial owner.

Restatement (3d) of Trusts § 32 (2003). Indeed, "[a] trust is not a legal 'person' which can own property," 76 Am. Jur. 2d Trusts § 3. This principle supports ATF's interpretation of "individual" in the GCA's definition as applicable to trustees in the circumstance in which an unincorporated trust submits an application. ATF's interpretation is therefore consistent with both principles of trust law and with Congress's intent to prohibit the post-1986 manufacture of machine guns except pursuant to an official purpose. *See* 18 U.S.C. § 922(o); *Farmer v. Higgins*, 907 F.2d 1041, 1044 (11th Cir. 1990) ("Congress intended to prohibit the private

possession of machine guns not lawfully possessed prior to May 19, 1986."). As the agency charged with broad authority to administer the complex, nationwide mechanisms of the GCA and NFA, ATF's "interpretation of the statutory provisions" is entitled to substantial deference. *Kuhn v. ATF*, 2008 WL 5069125 (5th Cir. 2008) (*citing Vineland Fireworks v. ATF*, 544 F.3d 509, 514 (3d Cir. 2008); *Chevron USA Inc. v. Natural Res. Defs.' Council*, 467 U.S. 837 (1984)).

Plaintiff also suggests that he can establish a protected property right because he could sell or transfer the machine gun to another person once manufactured. Plaintiff's supposition is not correct. First, unlike the firearms at issue in *U.S. v. Rodriguez*, relied on by Plaintiff, a machine gun manufactured pursuant to ATF's erroneous approval would be a post-1986 firearm, which is proscribed by the NFA to the same extent on transfer as on manufacture. *See* No. EP-08-CR-1865-PRM, 2011 WL 5854369 (W.D. Tex. Feb. 18, 2011). Plaintiff would thus have to apply for approval for a sale or transfer, and absent another error, such an application would likely be denied. *See* 26 U.S.C. § 5812. Moreover, ATF did not seize an actual firearm from Plaintiff; rather, it revoked the faulty approval for Plaintiff to manufacture a firearm. Analysis of ATF's decision therefore turns on Plaintiff's property interest in the *erroneous approval*, not in an actual firearm, which is lacking. *See id*. § 5822 (approvals cannot be sold or transferred); Defs'. Br. 34. Accordingly, Plaintiff's due process claim lacks merit, and should be dismissed.

D. ATF's Actions Do Not Deny Plaintiff the Benefits of Equal Protection.

It is well-established that the Constitution does not require that "things which are different in fact or opinion . . . be treated in law as though they were the same" under the Equal Protection Clause. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). This principle, in addition to Plaintiff's pleading defects, requires dismissal of his equal protection claim. *See* Defs.' Br. at 34-36. As noted in Defendants' opening brief, Plaintiff provided no information in his

Complaint about the "various individuals" with respect to whom he alleges a denial of equal protection. Defs.' Br. at 34-35. Plaintiff now provides a smidgen of additional information, but his complaint cannot be amended through the unverified statement in his opposition brief.[11] *See* Pl. Br. at 35; *Vulcan Capital Corp. v. Miller Energy Res.*, 3:14-cv-3283-B, at *3, n.5 (N.D. Tex. Jan. 22, 2015) ("a complaint cannot be amended by briefs in opposition to a motion to dismiss").

Even if Plaintiff had properly pleaded an equal protection claim by reference to the civilian manufacturers of machine guns and the dealers authorized to demonstrate and distribute them to law enforcement agencies, *see* Compl. ¶ 24, he would have failed to state a cognizable equal protection claim. 18 U.S.C. § 922(o)(2)(A) explicitly exempts from the prohibition on machine guns "possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof." The use of machine guns for military and law enforcement purposes is a legitimate purpose within the scope of the respective sovereign powers of the federal and state governments, and providing the means for these sovereigns to obtain machine guns for these purposes is directly related to this "combination of legitimate purposes." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000); *see Kropp Holdings v. U.S.*, 63 Fed. Cl. 537, 548-49 (2005) (recognizing acquisition of military supplies as a "legitimate interest[] of national defense and national security"); *Bissonette v. Haig*, 776 F.2d 1384, 1388 (8th Cir. 1985) (legitimate government interest in "improv[ing] the efficiency of civilian law enforcement by giving it the benefit of military technologies," an can be "accommodated by acts of Congress"). There is therefore no equal protection violation here. *See* Defs.' Br. at 36 n.23 (citing, *e.g.*, *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014).

[11] Paragraphs 30 and 31, cited in Plaintiff's brief, do not specify the individuals more favorably treated. Elsewhere in the complaint, Plaintiff does mention civilian companies that manufacture machine guns for the government and licensed firearms dealers possessing machine guns under the authority of law enforcement agencies, Compl. ¶ 23, but it remains unclear who, if anyone, Plaintiff intends to include in "various individuals," Pl. Br. at 35, leaving the applicable pleading requirements unsatisfied. *See* Defs.' Br. at 34-36.

Plaintiff's reference to a similar case pending in the United States District Court for the Eastern District of Pennsylvania also provides no basis for his equal protection claim. As the government explained in the case Plaintiff references, the erroneous approval of a Form 1 in that case was also corrected and disapproved. *See Watson v. Holder*, Civ. No. 2:14-06569 (E.D. Pa.), ECF No. 10-1, at 36-37. Thus, Mr. Hollis has not been treated any differently from that person.[12]

Absent the specific pleading required of Plaintiff, ATF can respond only by asserting that any such authorizations were likely erroneous and that such accidental error by a government agency does not give rise to an equal protection claim. *See Kendrick v. Carlson*, 995 F.2d 1440, 1447 (8th Cir. 1993) ("'[M]ere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause' . . . . Were the rule otherwise, if government decisionmakers 'erroneously applied [a statute] in a single case, they could never again apply it correctly without violating equal protection.'") (*quoting E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987)); *Seven Star, Inc. v. U.S.*, 873 F.2d 225, 227 (9th Cir. 1989) ("[E]qual protection principles should not provide any basis for holding that an erroneous application of the law in an earlier case must be repeated in a later one. Moreover, a decision by an administrative agency in one case does not mandate the same result in every similar case"); *Lindquist v. City of Pasadena, Tex.*, 656 F. Supp. 2d 662 (S.D. Tex. 2009) (*quoting Seven Star*). Plaintiff's equal protection claim must therefore be dismissed and he is not entitled to discovery.

CONCLUSION

For the reasons stated above and in Defendants' opening brief, the Court should dismiss this case or enter summary judgment for Defendants.

[12] Plaintiff is also not entitled to discovery into his allegations about unspecified "various individuals." Pl. Br. at 37-38. Rather, the pleading requirements set forth in *Iqbal* and *Twombly* forbid precisely the practice Plaintiff seeks to employ here – namely, asserting a claim based on facts he alleges are in his possession, and then seeking discovery into that information, all without providing the Court or Defendants with the "factual content" to permit a response or an assessment of the credibility of the allegations. *See generally Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

CERTIFICATE OF SERVICE

On February 23, 2015, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2) or the local rules.

/s/ *Eric J. Soskin*
Eric J. Soskin