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To:
Robert Hinchman, Senior Counsel
Office of Legal Policy
U.S. Department of Justice
Room 4252 RFK Building
950 Pennsylvania Avenue NW
Washington, DC 20530

Via: www.regulations.gov (Docket No. OLP-179; RIN 1105-AB78)

Subject: Comments on Interim Final Rule: Withdrawing the Attorney General's Delegation of Authority (AG Order No. 6212-2025)

Dear Mr. Hinchman,

We submit these comments as Jason Davis and Donald E.J. Kilmer, Jr., California attorneys representing plaintiffs in *Jane Roe #1, et al., v. United States, et al.*, Case No. 1:19-CV-270-DAD-BAM (E.D. Cal.), and as steadfast advocates for individuals unjustly stripped of their Second Amendment rights under federal and California law. We commend the Department of Justice's Interim Final Rule (IFR) for withdrawing the Attorney General's delegation of authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) under 18 U.S.C. § 925(c) and eliminating the long-dormant 27 CFR § 478.144 (Federal Register, March 20, 2025). This bold move confronts a 30-year travesty—rooted in the congressional appropriations rider since 1992 (*Consolidated Appropriations Act, 2024*, Pub. L. 118-42, 138 Stat. 25, 139)—that has stranded law-abiding, rehabilitated citizens

without a federal avenue to reclaim their constitutional firearm rights. Yet, to realize the IFR's vision of a "clean slate" (IFR at 9) and to honor constitutional imperatives, we urge the Department to adopt specific clarifications in the forthcoming rulemaking. In this letter, we detail the IFR's critical necessity, expose the overreach of current law, highlight the practical barriers of cost and complexity, and propose actionable solutions to restore rights effectively.

I. The IFR's Necessity: Addressing a Constitutional Crisis

The IFR stands as a pivotal acknowledgment of a systemic failure that has persisted for decades. By recognizing that § 925(c) has been rendered inoperative since Congress began defunding ATF's ability to process individual relief applications in 1992 (IFR at 6), the Department takes a crucial step toward rectifying a process that has left countless Americans in legal limbo. This aligns seamlessly with Executive Order 14206 (Feb. 6, 2025), which reaffirms the Second Amendment as an "indispensable safeguard" (IFR at 7-8), and echoes the Supreme Court's recent guidance in *United States v. Rahimi*, 144 S.Ct. 1889, 1901-02 (2024), which upheld firearms restrictions only when temporary and tethered to a present, credible danger.

Without this regulatory reset, individuals like our clients—such as a woman honorably discharged from the Army with no current mental health issues, or a man cleared by a California court in 2018—remain ensnared under 18 U.S.C. § 922(g)(4)'s lifetime ban, despite no evidence of ongoing risk. The IFR's assertion that § 925(c) offers an "appropriate avenue" for restoration (IFR at 8) is not just prudent policy—it's a constitutional mandate. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022), demands that such prohibitions be justified by historical tradition, a standard unmet here, as colonial laws targeted only active threats, not past, resolved incidents (*Range v. Attorney General*, 69 F.4th 96, 104-06 (3d Cir. 2023)). The IFR is thus essential to begin dismantling this unconstitutional status quo.

This necessity stems from more than procedural breakdown—it reflects a deeper flaw in how the law captures individuals who pose no danger today.

II. The Law's Overreach: Capturing the Non-Dangerous

The current legal framework, particularly § 922(g)(4), casts an excessively wide net, ensnaring individuals based on outdated or inadequately adjudicated events rather than current risk. This statute prohibits those "adjudicated as a mental defective" or "committed to a mental institution" (27 C.F.R. § 478.11), often relying on decades-old holds that lack meaningful due process. In California, Welfare and Institutions Code (WIC) §§ 5150 and 5250 amplify this problem, imposing bans based on brief detentions—sometimes just 72 hours—triggered by probable cause, frequently without counsel or notice of lifelong consequences.

Consider these real-world examples from our practice: a woman detained as a minor in New Jersey in 1988 or 1989, with no adjudication record, now barred despite a distinguished military career and a spotless record; a man held in California in 2012 under ambiguous authority, denied counsel or appellate notice, yet prohibited despite rehabilitation by 2017; and another cleared by a California court in 2018, only for the federal NICS system to ignore the ruling. *District of Columbia v. Heller*,

554 U.S. 570, 626-27 (2008), deemed restrictions on the "mentally ill" presumptively lawful, but *Rahimi* clarified that such measures must be temporary and linked to a present threat (144 S.Ct. at 1903). No historical precedent justifies lifetime bans on rehabilitated individuals—colonial disarmament targeted active dangers, not distant pasts (*Bruen*, 597 U.S. at 29-30; *Linton v. Bonta*, No. 18-cv-07653-JD, at 20-21 (N.D. Cal. Feb. 28, 2024)).

This overreach is compounded by a stark absence of relief mechanisms, leaving the rehabilitated without recourse.

III. The Restoration Void: A Practical and Legal Failure

The absence of a viable restoration process is the linchpin of this constitutional and practical failure. The appropriations rider has neutered § 925(c), stripping ATF of funds to review applications since 1992 and leaving no federal relief pathway (*United States v. Bean*, 537 U.S. 71, 75-77 (2002)). California's WIC § 8103 offers a state-level petition process, but it falls woefully short. The federal NICS system refuses to recognize state restorations unless California participates in the NIAA grant program (34 U.S.C. § 40915), which it has declined to do, rendering court orders—like the 2018 clearance of one of our clients—meaningless on a federal level. Worse, § 8103(g)(4)'s requirement that petitioners prove they'll use firearms "in a safe and lawful manner" mirrors the "responsible person" standard struck down in *Rahimi* as unconstitutionally vague (144 S.Ct. at 1903).

A particularly vexing dimension of this restoration void affects individuals who lost their firearm rights due to a California event—such as a mental health hold under WIC § 5150—and subsequently relocated to another state. While California's WIC § 8103 ostensibly allows petitions to restore rights, its practical application presumes residency or a substantial nexus to the state, leaving non-residents with scant recourse to directly petition California courts. Even if relief were sought in their new state of residence, such as through an ATF-approved program under 34 U.S.C. § 40915, the federal NICS system often fails to recognize it without California's cooperation as the originating jurisdiction, perpetuating the § 922(g)(4) ban. This jurisdictional tangle, compounded by the absence of a functional § 925(c) process, underscores the urgent need for a federal solution that transcends state residency barriers and ensures uniform relief for all affected individuals, regardless of where they now reside.

This dual failure—federal inaction and state inefficacy—violates due process, as *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2020), upheld § 922(g)(4) only where initial proceedings met procedural fairness, a threshold often unmet in our clients' cases. It also flouts *Bruen*'s demand for historical grounding (597 U.S. at 24), leaving individuals in a perpetual bind with no exit.

Beyond legal defects, the restoration void imposes tangible burdens that render rights illusory for many.

IV. Costs and Complexity: Barriers to Justice

Even where a restoration process exists, its cost and complexity erect insurmountable walls for most affected individuals. Pursuing a WIC § 8103 petition in California can cost between $5,000 and $10,000, factoring in attorney fees, court filings, and often expert testimony to demonstrate

rehabilitation. The process demands sophisticated navigation of superior court proceedings and, for those with out-of-state holds, coordination across jurisdictions—adding travel and legal expenses. For example, a client detained in New Jersey decades ago faces not only these costs but also the impracticality of litigating in a state she no longer resides in, only to find federal law still bars her from purchasing firearms in California (18 U.S.C. § 922(a)(3), (b)(3)).

Compounding this, many attorneys refuse such cases due to political stigma surrounding gun rights advocacy, shrinking the pool of available counsel. This financial and logistical gauntlet disproportionately harms rehabilitated individuals—like a client denied a peace officer position due to an unyielding prohibition—turning a constitutional right into a privilege for the wealthy and well-connected.

These barriers underscore the urgency of the IFR's reform promise. To make restoration meaningful, the DOJ must adopt specific clarifications.

V. Proposed Clarifications for Effective Restoration

The IFR's "clean slate" must translate into a robust, accessible restoration framework. We urge the DOJ to consider the following clarifications in its rulemaking:

1. Revive § 925(c): Fund a Process with a "Clear and Convincing" Standard

- **Description**: Restore funding and establish a relief process under § 925(c) using a "clear and convincing" evidence standard for current danger, replacing the statute's "public interest" criterion.
- **Can It Be Done by Regulation?**: **Yes.**
    - **Reasoning**: Section 925(c) explicitly vests authority in the Attorney General to grant relief if "the applicant will not be likely to act in a manner dangerous to public safety" and relief is "not contrary to the public interest" (18 U.S.C. § 925(c)). However, since 1992, Congress has prohibited ATF, but not the FBI, from using appropriated funds to process individual applications (*Consolidated Appropriations Act, 2024,* Pub. L. 118-42, 138 Stat. 25, 139). The Supreme Court in *United States v. Bean*, 537 U.S. 71, 75-77 (2002), held that this defunding bars judicial review absent an agency decision, effectively halting the process. The IFR acknowledges this "moribund" status (IFR at 6) and withdraws prior regulations, but the DOJ cannot unilaterally restore funding or revive the program without congressional appropriation—a legislative act beyond regulatory power (*U.S. Const. art. I, § 9, cl. 7*; *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)).
    - **Regulatory Limit**: The DOJ could, via regulation, define procedural standards (e.g., "clear and convincing" evidence) *if* funding were restored, as agencies can interpret ambiguous statutory terms (*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), though limited post-*Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024)). And, by authorizing the FBI with the authority to grant relief, not ATF, this is feasible.

2. Mandate NICS Updates: Require NICS to Reflect State Relief

- **Description**: Mandate that the National Instant Criminal Background Check System (NICS) update records to reflect state relief orders (e.g., WIC § 8103), bypassing NIAA grant dependency.
- **Can It Be Done by Regulation?**: **Yes, largely within DOJ authority.**
    - **Reasoning**: The FBI administers NICS under 28 C.F.R. § 25.1 et seq., pursuant to the Brady Handgun Violence Prevention Act (18 U.S.C. § 922(t)). The Attorney General has broad authority to "establish procedures" for NICS operations (28 C.F.R. § 25.3), including data integrity (28 C.F.R. § 25.6). While the NIAA (34 U.S.C. § 40915) incentivizes states to establish relief programs for federal recognition, it doesn't prohibit the DOJ from independently requiring NICS to accept valid state relief orders. The DOJ could issue regulations directing NICS to update records upon receipt of certified state court orders, interpreting "prohibited person" under § 922(g)(4) to exclude those relieved by state processes (*Linton v. Bonta*, No. 18-cv-07653-JD, at 12-13 (N.D. Cal. Feb. 28, 2024) (suggesting state relief should influence federal status)).
    - **Limit**: Congressional intent in the NIAA suggests a preference for state program certification, but it's not a statutory mandate precluding broader DOJ action. Funding constraints could limit implementation scale, though existing NICS operations suggest feasibility.

3. Uniform Standard: Apply a Federal Dangerousness Test

- **Description**: Establish a uniform federal standard assessing current dangerousness, ensuring equal protection across states.
- **Can It Be Done by Regulation?**: **Yes, if tied to an existing process; otherwise, requires Congressional action.**
    - **Reasoning**: If § 925(c) were funded, the DOJ could regulate its implementation, defining "dangerous to public safety" with a uniform test (e.g., "clear and convincing" evidence of current risk), leveraging its authority to interpret statutes (5 U.S.C. § 301; *Chevron*, supra, as modified by *Loper Bright*).

4. Reduce Barriers: Fee Waivers, Pro Bono Support, Administrative Hearings

- **Description**: Offer fee waivers, pro bono legal support, and administrative hearings to lower costs and complexity.
- **Can It Be Done by Regulation?**: **Partially, yes; fully, no—requires Congressional action.**
    - **Reasoning**:
        - **Fee Waivers**: The DOJ could regulate fees for any future § 925(c) process, waiving them for indigent applicants under its general authority (5 U.S.C. § 301), if funded.

5. Retroactive Relief: Review Old Holds, Purge Invalid Bans

- **Description**: Allow review of old holds lacking due process, purging invalid prohibitions from NICS.
- **Can It Be Done by Regulation?**: **Yes, partially; full scope requires Congressional action.**
    - **Reasoning**: The DOJ can regulate NICS to review and purge records deemed invalid (e.g., lacking due process) under its data management authority (28 C.F.R. § 25.6(h) (corrections); *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2020) (due process requirement)). It could issue rules requiring states to submit updated records or allowing individuals to petition NICS directly for review. However, a comprehensive retroactive relief process—e.g., hearings to assess old holds—requires a funded mechanism like § 925(c), which Congress must enable.
    - **Limit**: Purging can occur now, but proactive review and relief need legislative backing.
- **Congressional Need**: Full retroactive relief with hearings requires funding and statutory authorization.

These measures balance public safety with individual rights, grounding restoration in *Bruen*'s historical test and *Rahimi*'s due process lens, while dismantling practical obstacles.

6. State Restoration of Rights Reciprocity.

- Description: Institute a policy of state restoration reciprocity, whereby NICS must recognize and honor any valid restoration of firearm rights granted by any state, irrespective of the originating jurisdiction or NIAA participation. This would ensure that an individual restored in their current state of residence—say, Nevada—sees their California-originated prohibition under § 922(g)(4) lifted federally, without the current reliance on California's cooperation or residency.
    - **Reasoning:** The DOJ can begin this via regulation under its NICS authority (28 C.F.R. § 25.6), promoting equal protection and aligning with *Bruen's* demand for historically grounded, temporary restrictions (597 U.S. at 24).
- **Congressional Need**: We further urge Congress to codify this reciprocity, providing funding and statutory backing to eliminate jurisdictional disparities and ensure uniform relief nationwide.

7. **Federal Preemption of State Prohibitions**:

- Enact federal preemption to ensure that a restoration of firearm rights under § 925(c) or a new federal mechanism supersedes state prohibitions, such as California's persistent bans under Penal Code § 29800 or WIC § 8103, even where states refuse to align. This would guarantee that rehabilitated individuals, once federally cleared, reclaim their Second Amendment rights nationwide, preventing states from perpetuating unconstitutional lifetime bans (Bruen, 597 U.S. at 24).
    - **Reasoning:** While the DOJ can lay groundwork via regulation—e.g., directing NICS to disregard state bans post-federal relief (28 C.F.R. § 25.6).

- **Congressional Need:** we urge Congress to legislate this preemption, providing explicit authority and funding to enforce uniformity and constitutional supremacy over state recalcitrance.

VI. Conclusion

The IFR marks a vital reckoning with a broken system that has unjustly stripped rehabilitated Americans of their Second Amendment rights for too long. We implore the DOJ to seize this opportunity and craft rulemaking that restores those rights, aligning with *Bruen* and *Rahimi*, and tearing down the walls of cost and complexity. Our clients—veterans, workers, and citizens seeking to reclaim their constitutional birthright—and countless others deserve no less than a fair, workable path forward.

Respectfully submitted,

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