No. 23-10319

In the United States Court of Appeals for the Fifth Circuit

WILLIAM T. MOCK; CHRISTOPHER LEWIS; FIREARMS POLICY COALITION, INCORPORATED, a nonprofit corporation; MAXIM DEFENSE INDUSTRIES, L.L.C.,

Plaintiffs-Appellants,

v.

MERRICK GARLAND, U.S. Attorney General, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; STEVE DETTELBACH, in his official capacity as the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
Case No. 4:23-cv-00095-O

BRIEF FOR AMICI CURIAE THE FIREARMS REGULATORY ACCOUNTABILITY COALITION, INC., NST GLOBAL, LLC (D/B/A SB TACTICAL), AND PALMETTO STATE ARMORY, LLC IN SUPPORT OF PLAINTIFF-APPELLANT IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Mock v. Garland, No. 23-10319

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiffs-Appellants' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Amicus Curiae Firearms Regulatory Accountability Coalition, Inc. ("FRAC"). FRAC is a non-stock, non-profit corporation. FRAC has no parent corporation. No publicly held company has any ownership interest in FRAC.

Amicus Curiae NST Global, LLC (d/b/a SB Tactical) ("SB Tactical"). SB Tactical has no parent corporation. No publicly held company has any ownership interest in SB Tactical.

Amicus Curiae Palmetto State Armory, LLC ("PSA"). PSA is wholly owned by JJ Capital, LLC, a holding company. No publicly held company has any ownership interest in JJ Capital, LLC.

Counsel for *amici curiae*, Stephen J. Obermeier, Thomas M. Johnson, Jr., Jeremy J. Broggi, Michael D. Faucette, and Boyd Garriott.

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae consist of a trade group and companies that design, produce, and/or sell pistol stabilizing braces and guns equipped with stabilizing braces.[2] The rule at issue in this case threatens to put some *amici* out of business by retroactively declaring their products unlawful and their customers felons. *Amici* support Appellants' arguments and offer this submission focusing on points relating to the statutory and procedural violations committed by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in reversing its longstanding interpretation of the National Firearms Act ("NFA") and the Gun Control Act ("GCA").[3]

INTRODUCTION AND SUMMARY

For more than a decade, ATF authorized the public to use pistol stabilizing braces, a popular firearms accessory, without substantially heightened federal regulation. During that time, ATF repeatedly issued letter rulings assuring manufacturers and the public that attaching a stabilizing brace would not alter the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

[2] A full list of *amici curiae* is attached to this brief.

[3] A subset of *amici* have raised these arguments in a separate challenge to ATF's rule. *See FRAC v. Garland*, No. 1:23-cv-0024-DLH-CRH (D. N.D. filed Feb. 9, 2023).

classification of a pistol or other non-NFA firearm. As a result, millions of Americans for years lawfully purchased stabilizing braces, and pistols equipped with stabilizing braces, from authorized, legitimate manufacturers with ATF's full knowledge and express approval.

Then everything changed. Frustrated with perceived congressional inaction, the President ordered ATF to abandon a decade of practice under an established statutory framework and "to treat pistols modified with stabilizing braces" as "subject to the National Firearms Act." President's Remarks on Gun Violence Prevention Efforts, 2021 Daily Comp. Pres. Doc. 298, at 3 (Apr. 8, 2021). ATF complied, issuing the Rule at issue here, which purports to provide "factoring criteria" to "clarify" how ATF will determine whether any particular gun is subject to heightened regulation. Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. 6,478 (Jan. 31, 2023) ("Rule").

In actuality, the Rule vests ATF with unbounded discretion. According to ATF, the Rule will further result in the destruction or forfeiture of approximately 750,000 firearms and could cost the economy up to almost five billion dollars. Final Regulatory Impact Analysis and Final Regulatory Flexibility Analysis, at 56, 62-67 (Jan. 2023) ("Regulatory Analysis"), https://tinyurl.com/3t3d3ewy. And while the record shows that ATF's past position was instrumental in fostering the thriving market for pistol stabilizing braces, the agency now touts that the Rule will force

four of the five existing brace manufacturers out of business by treating 99% of braced pistols as NFA "firearms" and GCA "short-barreled rifles." *Id.* at 21, 76-77.

Notwithstanding its about-face, ATF defends its new Rule on the specious ground that the NFA and GCA have always unambiguously covered 99% of braced pistols. But the drastic consequences of ATF's sudden change should cause this Court to seriously "question whether [ATF's] current position represents the best view of the law." *Bittner v. United States*, 143 S. Ct. 713, 722 (2023).

It does not. A plain reading of the statutory language, paired with an understanding of Congress's purposes in enacting it, reveals that a pistol or other firearm equipped with a stabilizing brace is excluded from the applicable definitions in the NFA and GCA. Congress enacted these statutes to regulate "sawed-off guns" favored by criminal "gangster[s]" for concealability and indiscriminate accuracy, and left "without any restriction" "pistols and revolvers and sporting arms." H.R. Rep. No. 73-1780 (1934). The Rule, by contrast, undermines public safety by regulating pistols and other firearms based on accessories designed as orthotics that make pistols ***less*** concealable, ***more*** accurate, and ***less*** dangerous. That approach is unambiguously foreclosed by the text, history, and purpose of the NFA.

If the Court disagrees, then the statutes are at least grievously ambiguous, and lenity is required. *Cargill v. Garland*, 57 F.4th 447, 469-71 (5th Cir. 2023); *accord Hardin v. ATF*, 65 F.4th 895, 898 (6th Cir. 2023). ATF's claim now that pistols with

stabilizing braces have always and unambiguously been covered by the NFA is directly contrary to years of agency practice in which it maintained in repeated letter rulings and in criminal prosecutions around the country that attaching a stabilizing brace would not alter the classification of a pistol or other firearm. If the agency charged with administering the NFA believed ***for a decade*** that pistols equipped with stabilizing braces are not subject to NFA controls and now holds the opposite, application of the statute to such braces must at a minimum be grievously ambiguous and deserving of lenity.

Finally, the Rule is arbitrary and capricious in its articulation of the purported factors and in its cost-benefit analysis.

This Court should preliminarily enjoin ATF from enforcing its unlawful Rule nationwide.

ARGUMENT

I. The Rule Exceeds ATF's Statutory Authority.

A. The Statutes Do Not Regulate Pistols Equipped With Stabilizing Braces.

Congress enacted the NFA to regulate "weapons likely to be used for criminal purposes." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517 (1992) (plurality). Confronted with the emergence of professional "gangsters" in the late 1920s and early 1930s favoring sawed-off weapons for close-quarters combat,

Congress determined to regulate these guns more stringently. *See Lomont v. O'Neill*, 285 F.3d 9, 11 (D.C. Cir. 2002); David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 590-92 (1986).

The NFA comprehends short rifles in two ways. First, the text encompasses "a rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. § 5845(a)(3). Second, it covers "a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length." 26 U.S.C. § 5845(a)(4). Taken together, these provisions bring within the NFA "rifles" manufactured with short barrels and "rifles" manufactured with long barrels that are subsequently cut down.

Contrary to the approach taken in the Rule, the NFA does not purport to regulate a pistol equipped with a stabilizing brace. This limitation is clear from the text itself, which says nothing about regulating pistols, accessories, or stabilizing braces. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) ("a matter not covered is to be treated as not covered").

In addition to the text, legislative history confirms this statutory limitation. As initially drafted, the NFA would have regulated "a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun."

H.R. 9066, 73d Cong., 2d Sess. (1934). "During committee consideration," however, "pistols and revolvers were omitted, so that the bill applied to machineguns, sawed-off shotguns and rifles, silencers, and concealable firearms *other than* pistols and revolvers." Hardy, *supra*, 17 Cumb. L. Rev. at 592-93. These omissions were retained in the enacted text, reflecting Congress's judgment that "there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction." H.R. Rep. No. 73-1780. Today, the statute still excludes a rifled "pistol" or "revolver." 26 U.S.C. § 5845(e), (a)(5).

That the NFA does not regulate pistols is also evidenced by Congress's purpose. Congress believed that "a long gun with a shortened barrel is both dangerous, because its concealability fosters its use in illicit activity, and unusual, because of its heightened capability to cause damage." *United States v. Cox*, 906 F.3d 1170, 1185 (10th Cir. 2018) (cleaned up). But Congress determined that these dangers were not present with "pistols and revolvers and sporting arms," and found that "limiting the [NFA] to the taxing of sawed-off guns and machine guns" was sufficient to deprive the "[t]he gangster… of his most dangerous weapon[s]." H.R. Rep. No. 73-1780. Decades later, the GCA followed the NFA and subjected "short-barreled rifles" (but not "handguns") to heightened regulations.

B. The Rule Regulates Pistols Equipped With Stabilizing Braces.

By overlooking the principal statutory definitions and focusing instead on the subordinate definitions of "rifle," the Rule "abandon[s] the statutory text." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). The Rule also misinterprets the term "rifle," by failing to consider the "text in context, along with purpose and history." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality). As a result, the Rule unlawfully subjects braced pistols to heightened regulatory obligations and, consequently, disfavors firearms Congress determined were safer and less likely to be used for criminal purposes.

1. The Rule Overlooks The Principal Statutory Definitions.

As explained, the NFA regulates "a rifle having a barrel or barrels of less than 16 inches in length" and "a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length." 26 U.S.C. § 5845(a)(3), (a)(4); *accord* 18 U.S.C. § 921(a)(8) (GCA). The Rule never addresses these principal provisions, choosing instead to elaborate only the subordinate definition of a "rifle."

The problem with this approach is that it stretches NFA jurisdiction beyond what the operative provisions will allow. Section 5845(a)(4) addresses the specific evil that compelled Congress to enact the NFA—that is, "gangster[s]" using "sawed-off guns" to commit violent crimes. H.R. Rep. No. 73-1780. By addressing weapons

"made from a rifle," section 5845(a)(4) effectively regulates a weapon that is manufactured as a rifle and then subsequently shortened.

But this provision has an obvious shortcoming. By covering weapons "made from a rifle"—that is, weapons manufactured as rifles and subsequently shortened—section 5845(a)(4) does not reach weapons that are manufactured as short-barreled rifles. Section 5845(i) makes this implication express, defining "make" to exclude "manufacturing… by one qualified to engage in such business under this chapter." 26 U.S.C. § 5845(i). Thus, if the NFA contained only section 5845(a)(4), criminals would be required to register and pay tax on sawed-off rifles but would not be required to do so for rifles with short barrels produced that way by qualified manufacturers.

Section 5845(a)(3) plugs this gap. By addressing "a rifle having a barrel or barrels of less than 16 inches in length," section 5845(a)(3) effectively reaches a weapon that is produced by an NFA-qualified manufacturer as a rifle with a short barrel. *See, e.g.*, *United States v. One (1) Colt AR-15 Firearm Serial No. TA03524*, 349 F. Supp. 2d 1064, 1066 (W.D. Tenn. 2004) (holding "original equipment configuration" Colt model AR-15 satisfies 5845(a)(3)). Section 5845(a)(3) thus prevents a criminal from circumventing section 5845(a)(4)'s registration and tax requirements by purchasing a mass-produced short-barreled rifle instead of making one himself. Or put differently, while the NFA covers short-barreled weapons

"*made from*" a rifle, it nowhere covers pistols that in ATF's estimation are *made into* a short-barreled firearm by the addition of accessories such as braces.

The Rule ignores this statutory scheme. Under the Rule, a weapon that is deemed a "rifle" and has a barrel under 16 inches is assumed to satisfy either section 5845(a)(3) or (a)(4) without regard to how it was made. *See, e.g.*, Rule, 88 Fed. Reg. at 6,479, 6,501. By thus abstracting away from the statutory text, the Rule transcends the limitations Congress imposed.

But the text matters. In conflating sections 5845(a)(3) and (a)(4), the Rule "violat[es] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Put differently, if the Rule were correct that any potentially shoulderable short-barreled weapon is subject to NFA regulation, then there would have been no need for Congress to enact separate provisions to encompass sawed-off rifles and rifles produced by a qualified manufacturer.[4]

ATF's strained reading is also inconsistent with the statutory structure. If lengthening a pistol with a stabilizing brace created a short-barreled rifle, then every

[4] These NFA distinctions are reinforced by the GCA, which similarly defines a "short-barreled rifle" as "a rifle having one or more barrels less than sixteen inches in length" and as "any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches." 18 U.S.C. § 921(a)(8).

time a consumer temporarily attached a stabilizing brace to a pistol, he would have to permanently engrave the braced gun with identifying information. *See* 26 U.S.C. § 5842(a). Then, when the consumer detached the brace, he would be entitled to remove this information, but, by law, the information "may not be readily removed." *Ibid.* This absurd result "contravenes the regulatory scheme enacted by Congress." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 753 (5th Cir. 2011) (citation omitted).

ATF overlooked the statutory distinctions because it was focused on the Administration's political objective and not on the text that Congress enacted.

2. The Rule Misinterprets "Designed" And "Intended."

The Rule also misinterprets the statutory definitions of "rifle." NFA section 5845(c) and GCA section 921(a)(7) each provide that a "rifle" is "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder." 26 U.S.C. § 5845(c); 18 U.S.C. § 921(a)(7). The Rule commits fundamental errors in interpreting "designed" and "intended."

First, ATF misinterprets "designed." Specifically, ATF excludes from its future classification decisions all evidence showing that a stabilizing brace functions as such because, in the agency's view, "stabilizing support" for non-shoulder firing is "***not relevant*** to determine whether a firearm is designed, made, and intended to be fired from the shoulder." Rule, 88 Fed. Reg. at 6,510 (emphasis added).

ATF is wrong. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the Supreme Court interpreted a statute prohibiting the sale of items "designed… for use with illegal cannabis or drugs." *Id.* at 492. The Court found it "plain" and "clear" that "designed" includes "an item that is principally used with illegal drugs" but ***not*** "items which are principally used for nondrug purposes." *Id.* at 501. Thus, the statute would cover a pipe "typically used to smoke marihuana" but not "ordinary pipes"; a "roach clip" but not "paper clips sold next to *Rolling Stone* magazine." *Id.* at 494, 501–02; *see also Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (where "items may be used for legitimate as well as illegitimate purposes… a certain degree of ambiguity necessarily surrounds their classification") (citations and quotations omitted). Under *Hoffman Estates*, ATF cannot read the term "designed" to exclude all evidence showing that a stabilizing brace is suitable for use as a brace.

This is critical because, if an item is designed for a non-shouldering function, ATF is ***prohibited*** from regulating it. In *Thompson/Center*, the Supreme Court held that a party did not "make" an NFA firearm by packaging components that could "be converted not only into a short-barreled rifle, which is a regulated firearm, but also into a long-barreled rifle, which is not." *Thompson/Ctr.*, 504 U.S. at 513. Because the "aggregation of parts" could serve a "useful purpose" other than "the assembly of a firearm," the Court found that packaging those components together

did not "make" "a short-barreled rifle for purposes of the NFA." *Id.* at 513-18. Here, as in that case, affixing a brace to a pistol does not "design" a short-barreled rifle so long as the brace serves a "useful purpose" other than shouldering.

ATF also misinterprets "intended." Under the Rule, future ATF classifications will determine a manufacturer's intent based upon, *inter alia*, third-party "marketing materials," as well as third-party "information demonstrating the likely use of the weapon by the general community." Rule, 88 Fed. Reg. at 6,544. But third-party intent is irrelevant to a ***manufacturer's*** intent. *See Record Head Corp. v. Sachen*, 682 F.2d 677 (7th Cir. 1982) (explaining that third-party "advertising" and "opinion" have no "conceivable relevance to the intent of the seller"); *Tobacco Accessories & Novelty Craftsmen Merchs. Ass'n of La. v. Treen*, 681 F.2d 378, 385 (5th Cir. 1982) ("We are persuaded that the 'designed for use' language of the Louisiana Act similarly applies only to manufacturers, for their own acts of design."). Thus, by attributing third-party intent to firearms manufacturers, stabilizing brace manufacturers, commercial retailers, and even to individual gun owners, the Rule's interpretation of "intended" violates the NFA and GCA.

3. The Rule Undermines The Statutes' Purpose.

The "history and purpose" of the statutes confirm that ATF has exceeded its delegated authority. *Gundy*, 139 S. Ct. at 2126 (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)) (brackets omitted). As explained, Congress enacted the NFA to

address the specific problem of criminals sawing down long guns to make them more useful in committing violent crimes. And the GCA embraced that reasoning by adopting substantially similar language, subjecting shortened long guns (but not handguns) to its heightened regulations.

The Rule does the opposite. It is expressly designed to subject braced pistols to burdensome NFA and GCA regulations even though the record confirms that braced pistols are **less** likely than a pistol alone to be used in the commission of a crime, **more** difficult to conceal than an unequipped pistol (rendering them less effective for criminal purposes), and generally **safer** than an unequipped pistol.

There are millions of stabilizing braces in circulation. *See* Rule, 88 Fed. Reg. at 6,560 (estimating "3 million"); William J. Krouse, Cong. Rsch. Serv., *Handguns, Stabilizing Braces, and Related Components* (Apr. 19, 2021), https://crsreports.congress.gov/product/pdf/IF/IF11763 (estimating "between 10 and 40 million"). ATF reports that only "63 firearms with 'stabilizing braces' have been traced in criminal investigations." Rule, 88 Fed. Reg. at 6,499. This figure pales in comparison to the more than 376,690 ***handguns***—i.e., pistols without braces—ATF traced ***in 2021 alone***. ATF, *Firearm Types Recovered and Traced in the United States and Territories* (Sept. 16, 2022), *available at* https://www.atf.gov/resource-center/firearms-trace-data-2021#.

Common sense explains why. As Congress found and "many courts have explained," *Cox*, 906 F.3d at 1185, shortening a long gun "fosters its use in illicit activity" because the shortened gun is more easily "concealed." *United States v. Marzzarella,* 614 F.3d 85, 95 (3d Cir. 2010). But that is not true when a brace is attached to a pistol because a braced pistol is more difficult to conceal. Unlike a sawed-off rifle—which, Congress found, becomes ***more*** suitable for committing crimes than an unmodified rifle—a braced pistol becomes ***less*** suitable for committing crimes than an unbraced pistol.

ATF agrees that the NFA and GCA strictly regulate short-barreled rifles because they are more easily concealed than long-barreled rifles. Rule, 88 Fed. Reg. at 6,495, 6,498-99. Nevertheless, the Rule acknowledges that its purpose is to compel millions of law-abiding citizens to "[p]ermanently remove and dispose of, or alter, the 'stabilizing brace[s]'" attached to their pistols. *Id.* at 6,570. This action will not make the pistol any more or less powerful. It will, however, make the firearm easier to conceal and thus, according to Congress, more suitable for committing a crime. The Rule is thus contrary to a principal objective of the NFA and GCA.

In addition to being more difficult to conceal, a braced pistol is more accurate—as ATF concedes, Rule, 88 Fed. Reg. at 6,557; *see also* President's Remarks at 3 ("pistols modified with stabilizing braces" are "a hell of a lot more

accurate")—and thus less dangerous than an unbraced pistol. Congress believed that shortened long guns possess a "somewhat indiscriminate accuracy" that makes them more dangerous because they are "useful for only violence against another person, rather than, for example, against sport game." *United States v. Amos*, 501 F.3d 524, 531 (6th Cir. 2007) (McKeague, J., dissenting); *see Cox*, 906 F.3d at 1185 (explaining Congress believed "a long gun with a shortened barrel is… unusual, 'because of its heightened capability to cause damage'" (quoting *Marzzarella*, 614 F.3d at 95)). ATF's reasoning is therefore contrary to Congress's reasoning.

In short, the statutes were intended to penalize access to more easily concealable and less accurate rifles. The objective of the Rule is precisely the opposite, contradicting the statute's "history and purpose." *Gundy*, 139 S. Ct. at 2126 (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)) (brackets omitted).

C. The Rule Violates The Rule Of Lenity.

At a minimum, the rule of lenity requires that the Rule be set aside. As this Court recently confirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cargill*, 57 F.4th at 469 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *accord Hardin*, 65 F.4th at 901.

In this case, the statute's text, history, and purpose all point in the same direction. The NFA and GCA cover rifles produced with short barrels and rifles produced with long barrels that are later cut down—not pistols that are equipped

with stabilizing braces. For that reason, the Court should hold that the NFA and GCA unambiguously exclude from heightened regulation pistols that are equipped with stabilizing braces.

If the Court disagrees, then the statutes are at least grievously ambiguous. The Rule's preamble explains why. When ATF first considered stabilizing braces, it understood that their attachment to a pistol "would not alter the classification of a pistol or other firearm" and that "such a firearm *would not be* subject to NFA controls." Rule, 88 Fed. Reg. at 6,479 (quoting Letter from ATF #2013-0172 (Nov. 26, 2012) (emphasis in original letter). Furthermore, ATF recognized that a stabilizing brace differs from a stock because a "'brace,' when attached to a firearm, d[oes] 'not convert that weapon to be fired from the shoulder.'" *Ibid.*

ATF maintained this position for over a decade, issuing many interpretation letters stating its position. *Id.* at 6,502 n.84; *see also* Letter from the Honorable Mitch McConnell et al. to the Honorable Merrick Garland (June 24, 2021), https://tinyurl.com/5e33wcdm (explaining ATF's "repeated letter rulings approving stabilizing braces, created a thriving market for these stabilizing braces"). The Department also asserted this position in criminal prosecutions, telling courts that "the type of device placed on the firearm is also dispositive of what type of firearm, whether it's a rifle or whether it is a pistol and so the ATF letters do correctly state that they consider a *firearm with a pistol brace to not be a rifle under the NFA* for

purposes of the NFA." Sentencing Hr'g Tr. at 38:9–15, *United States v. Kamali*, No. 18-cr-288, Dkt. #110 (Sept. 24, 2019) (emphasis added). And even the Notice of Proposed Rulemaking took a similar approach, attempting to reconcile these past decisions through a points system. 86 Fed. Reg. 30,826, 30,829-32 (June 10, 2021).

Then, between June 2021—when the Notice was issued—and a few months ago, ATF reversed course. Apparently "realizing" for the first time that pistols with stabilizing braces have always and unambiguously been covered by the NFA, ATF decided to effectively render all brace-equipped pistols short-barreled rifles. ATF's reversal of its longstanding position demonstrates at the very least that the NFA is ambiguous with respect to whether it covers brace-equipped pistols and that the rule of lenity should apply.

This Court's en banc *Cargill* decision shows why lenity requires the Rule to be set aside. In that case, the Court considered an ATF rulemaking that purported to reinterpret the federal prohibition on machineguns to extend to bump stocks. The lead opinion found that a bump stock is not a machinegun under "the statute's unambiguous language." *Cargill*, 57 F.4th at 464. Turning to the rule of lenity, thirteen of the sixteen judges on this Court then held, assuming a "grievous" ambiguity standard, that even if the statute "does not unambiguously exclude non-mechanical bump stocks, its inclusion of [non-mechanical bump stocks] is at the

very least ambiguous." *Id.* at 470. Because the rule was at least ambiguous, "the rule of lenity demand[ed]" that it be set aside. *Id.* at 471.

The same is true here. Just like in *Cargill*, ATF is reversing its long-held position with respect to a particular firearms accessory. "The law hasn't changed, only [the] agency's interpretation of it." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.). And here, just like in *Cargill*, the impact of ATF's sudden reversal is to subject to criminal penalties any individuals who continue to obey ATF's previous rulings. Where the agency charged with administering the NFA believed ***for years*** that pistols equipped with stabilizing braces are not subject to NFA or GCA controls, its "own flip-flop in its position" shows that "the statute is 'subject to more than one interpretation'" and thus "ambiguous." *Hardin*, 65 F.4th at 898; *accord Bittner*, 143 S. Ct. at 722 ("[T]he government has repeatedly issued guidance to the public at odds with the interpretation it now asks us to adopt…. [S]urely that counts as one more reason yet to question whether its current position represents the best view of the law."). Lenity thus demands that the Rule be set aside.

II. The Factors Adopted By The Rule Are Otherwise Unlawful.

A. The Factors Are Holistically Arbitrary.

ATF's factors are also arbitrary and capricious when considered holistically. The Rule first requires ATF to determine whether a weapon "provides surface area"

for shouldering. Rule, 88 Fed. Reg. at 6,575. If so, ATF "consider[s]" six additional factors to determine "whether the weapon is designed, made, and intended to be fired from the shoulder." *Ibid.* But ATF refuses to say which are outcome determinative, reserving the prerogative to make a judgment based on "th'ol' 'totality of the circumstances' test." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

The infinitely malleable nature of the Rule renders it arbitrary and capricious. It is well settled that when an agency intends to apply "a multi-factor test through case-by-case adjudication," some explanation is required to provide "predictability and intelligibility" to regulated parties. *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.). Otherwise, those seeking to conform their conduct to the regulation cannot know "which factors are significant and which less so, and why." *Ibid*.

ATF's "factors, which are both general and unweighted, invite inquiry into areas of doubtful relevance rather than make the [regulated] conduct any clearer." *Rec. Head Corp.*, 682 F.2d at 677. ATF describes its factors as enabling an "objective" assessment of certain "design features common to rifles." Rule, 88 Fed. Reg. at 6,513. Throughout the preamble, however, ATF undermines that description by stating that its articulated factors "are not themselves determinative," *id.* at 6,518, that ATF "may" elect not to use them, *id.* at 6,512, 6,531, 6,537, and that its

determinations are made "on a case-by-case basis." *Id.* at 6,495. In other words, classification as a short-barreled rifle is ultimately based on discretion.

Federal courts have previously invalidated ATF's attempts to devise discretionary, multi-factor tests that would authorize it to make NFA classifications without a workable standard. In *Innovator Enterprises, Inc. v. Jones*, 28 F. Supp. 3d 14 (D.D.C. 2014), the court held unlawful ATF's attempt to classify a "stabilizer brake" as a "silencer" based upon "six characteristics that are allegedly common to 'known silencers.'" *Id.* at 25. The agency's six-factor test was meaningless, the court said, because ATF had never explained "how many characteristics in common are necessary to be classified as a 'firearm silencer.'" *Ibid.* Without any guidance on how to weigh the factors, ATF left "regulated parties, and reviewing courts[,] guessing" at how to apply the agency's purported standard. *Ibid.* Therefore, ATF's classification decision under its unworkable standard was arbitrary under the APA. *Id.* at 26.

The similarities between the Rule and the standard rejected by *Innovator Enterprises* are obvious. Here, just like there, ATF has developed a list of six factors to enable comparisons between the object in question and an NFA-regulated item. And here, just like there, the agency has failed to explain how many factors must be satisfied to bring the item within the NFA. The result, as in *Innovator Enterprises*,

is that ATF has propounded an amorphous regulation that leaves "regulated parties, and reviewing courts[,] guessing." *Id.* at 25.

If the reservation of discretion were not enough, ATF has indicated that it will use its self-conferred discretion not for fair determinations, but to accomplish the Administration's political goal to "treat pistols modified with stabilizing braces" as "subject to the National Firearms Act." President's Remarks at 3. Indeed, ATF's final regulatory impact analysis predicts that future classification decisions under the Rule will result in ATF deeming 99 percent of pistols equipped with stabilizing braces as subject to NFA regulation. Regulatory Analysis at 21; *see also* Rule, 88 Fed. Reg. at 6,479 ("a majority of" braced guns "fall under the purview of the NFA").

ATF is already making good on its prediction, issuing more than 60 contemporaneous adjudications that purport to apply the Rule to various weapons and platforms. *See* ATF, Common Weapon Platforms With Attached 'Stabilizing Brace' Designs that are Short-Barreled Rifles, https://tinyurl.com/3ut7vm92; ATF, Commercially Available Firearms Equipped with a 'Stabilizing Brace' that are Short-Barreled Rifles, https://tinyurl.com/2p95jn8r. These adjudications find that 100% of examined items are "short-barreled rifles" under the Rule. And they are arbitrary because they provide no explanation for ATF's conclusions—consisting solely of pictures—confirming that "application of" ATF's Rule is "a cloak for

agency whim." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 458 (5th Cir. 2021) (citations and quotations omitted). The adjudications demonstrate that the Rule is arbitrary and should, themselves, also be set aside as arbitrary.

B. The Factors Are Individually Arbitrary.

1. Rear Surface Area

The Rule establishes that the term "rifle" "shall include a weapon that is equipped with an accessory, component, or other rearward attachment… that provides surface area that allows the weapon to be fired from the shoulder." Rule, 88 Fed. Reg. at 6,575. Numerous commenters asked the agency to clarify the amount of surface area it deems sufficient. *See, e.g.*, *id.* at 6,521. But ATF rejected those pleas, asserting—without explanation—that it is "not… necessary to specify a quantifiable metric for what constitutes surface area that allows for shouldering of the weapon." *Id.* at 6,529.

That is arbitrary and capricious. In *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75 (D.C. Cir. 2006), the D.C. Circuit held unlawful ATF's determination that hobby rocket fuel "deflagrates" because "the agency [had] never define[d] a range of velocities within which materials will be considered to deflagrate." *Id.* at 81. "[A]s a reviewing court," the D.C. Circuit explained, "we require *some* metric for classifying materials not specifically enumerated in the statute, especially when, as here, the agency has not claimed that it is impossible to be more precise." *Ibid.*

The flaw the D.C. Circuit identified is evident in the Rule. It states "ATF will not attempt to precisely measure or quantify the surface area or make the determination based on the existence of any minimum surface area," 88 Fed. Reg. at 6,529, but does not say why nor claim that it would be impossible to provide "a concrete standard," *Tripoli Rocketry*, 437 F.3d at 77. Therefore, the surface area prerequisite is arbitrary.

2. Weight and Length.

The Rule requires ATF to assess whether a weapon "has a weight or length consistent with the weight or length of similarly designed rifles." Rule, 88 Fed. Reg. at 6,575. According to ATF, "the weight and length of a firearm are quantifiable, easily measured metrics." *Id.* at 6,513. As with rear surface area, however, the Rule fails to provide a metric that satisfies this factor or to otherwise meaningfully "articulate[ ] the standards that [will] guide[ ] [ATF's] analysis." *Tripoli Rocketry*, 437 F.3d at 81.

Consider the preamble. ATF says this factor will assess the "weight and length of the firearm as compared to the length of similarly designed rifles." Rule, 88 Fed. Reg. at 6,552. But ATF's list of comparators is its database of "more than 12,000 firearms." *Id.* at 6,514 n.103. Although the preamble includes a table which purports to provide "examples of weights and lengths consistent with rifles" from the database, *id.* at 6,514, these are not helpful because they encompass broad ranges

from 2 pounds to 10 pounds and 18-1/2 inches to 38-1/2 inches, *id.* at 6,514–19. Nowhere does the agency explain what it considers "comparable" to these ranges.

ATF also fails to explain why having a similar "weight or length" to a rifle facilitates shouldering. And simply having "characteristics in common with some category may not be very helpful in determining whether the object in question belongs in that category." *Innovator Enters.*, 28 F. Supp. 3d at 25–26 ("Bud Light is not 'Single-Malt Scotch,' just because it is frequently served in a glass container, contains alcohol, and is available for purchase at a tavern."). This factor is arbitrary.

3. Length of Pull

The Rule requires ATF to consider whether a "weapon has a length of pull… that is consistent with similarly designed rifles." Rule, 88 Fed. Reg. at 6,575. As with the previous factor, ATF claims that "length of pull is a quantifiable and easily assessed measurement" and purports to provide a list of comparators. *Id.* at 6,513, 6,535-38. But also like before, ATF reserves the option to pick and choose other comparators from more than 12,000 other firearms, failing to explain what it means to be "consistent with" a comparator.

ATF offers no reason why it cannot be "more precise," *Tripoli Rocketry*, 437 F.3d at 81, by, for example, quantifying a range of lengths of pull that can facilitate shouldering. Additionally, this factor uses the faulty logic of identifying

"characteristics in common" with rifles without explaining why that commonality matters. *Innovator Enters.*, 28 F. Supp. 3d at 25-26.

4. Marketing and Community Information

The Rule permits ATF to assess "[t]he manufacturer's direct and indirect marketing and promotional materials indicating the intended use of the weapon" and "[i]nformation demonstrating the likely use of the weapon in the general community." Rule, 88 Fed. Reg. at 6,575. But it does not explain how ATF will assess this information, permitting the agency to reach arbitrary and capricious results.

Indeed, ATF contends "the method in which a 'stabilizing brace' may be used, in isolated circumstances or by a single individual" is not "relevant to examining whether a firearm is designed, made, and intended to be fired from the shoulder." *Id.* at 6,519. But under its "general community" factor, ATF tries to eat its cake too, citing as probative two individuals who appear to be misusing a stabilizing brace. *Id.* at 6,545-46. This "internal[ ] inconsisten[cy]"—which permits ATF to cherry-pick evidence—is "arbitrary and capricious." *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. 2018).

C. The Cost-Benefit Analysis Is Arbitrary.

ATF concedes it was required to consider costs and benefits, Rule, 88 Fed. Reg. at 6,571-74, consistent with its statutory requirement to determine whether the

Rule was "needful" and "necessary." 26 U.S.C. § 7805(a); 18 U.S.C. § 926(a)); *see Michigan v. EPA*, 576 U.S. 743, 752 (2015). A deficient cost-benefit analysis renders a rule arbitrary and capricious. *See Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 203-06 (D.C. Cir. 2007).

Here, ATF failed to consider two relevant costs. *First*, ATF excluded from its assessment all stabilizing braces sold in 2020, 2021, and 2022. *See* Regulatory Analysis at 18. That oversight is significant because ATF acknowledges these are three of the six highest-production years. *See* Rule, 88 Fed. Reg. at 6,560 (brace production "t[ook] off" in 2017). Indeed, at least ***2.3 million*** braces have been sold since 2020. *See FRAC v. Garland*, No. 23-cv-0024 (D. N.D. Feb. 9, 2023), Dkt. #1, ¶ 173. *Second*, ATF failed to "carefully consider[] possible reliance interests," Rule, 88 Fed. Reg. at 6,508, because, again, ATF excluded from consideration all individuals who purchased braces since 2020. ATF's failure to account for these relevant "costs" and "reliance interests" was arbitrary and capricious. *Texas v. United States*, 40 F.4th 205, 226-28 (5th Cir. 2022); *see DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-15 (2020).

In addition to omitting known costs, ATF made no effort to quantify purported benefits. At most, ATF points to trace data showing that "NFA weapons are less likely to be used" by criminals, Regulatory Analysis at 68, but this observation makes no effort to establish a causal link between the Rule and any observed or

predicted decrease in gun-related violence. The correlation could just as easily be explained by the possibility that law-abiding citizens are more likely to purchase NFA-regulated weapons or more likely to comply with federal rules. And even if ATF had established that traceability reduces gun-related crimes, it still would have had an obligation to determine whether any incremental benefit would justify the significant costs. But at no point did ATF analyze "whether the benefits expected from the standard bear a reasonable relationship to the costs imposed." *Am. Petroleum Inst. v. OSHA*, 581 F.2d 493, 503 (5th Cir. 1978), *aff'd sub nom. Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980). ATF's failure is reversible error.

III. Nationwide Relief Is Warranted.

To remedy an APA violation, "vacatur of an agency action is the default rule in this Circuit." *Cargill*, 57 F.4th at 472 (citations omitted). Here, "equitable principles" confirm a "nationwide injunction[ ]" is appropriate. *See Feds for Med. Freedom v. Biden*, 63 F.4th 366, 387 (5th Cir. 2023) (en banc).

In *Feds for Medical Freedom*, this Court affirmed a nationwide injunction where (1) an associational plaintiff had thousands of members "spread across every State," (2) the Government emphasized the need for a consistent policy, and (3) the "case only involve[d] a *preliminary* injunction." *Id.* at 387-89 (emphasis in original).

Nationwide relief is appropriate here for the same reasons. *First*, plaintiff-appellant Firearms Policy Coalition has "hundreds of thousands of members across the country." ROA.146. Similarly, plaintiff-appellant Maxim Defense Industries has customers across the country, as do *amici* SB Tactical and PSA. Thus, a party-limited injunction "would prove unwieldy and would only cause more confusion." *Feds for Med. Freedom*, 63 F.4th at 388.

Second, the Government's stated "intent of th[e] rule is to… ensure consistent application of the statutory definition of 'rifle.'" Rule, 88 Fed Reg. at 6,502; *see also* ROA.189 (emphasizing need for "consistent, predictable framework"). Any call now for "piecemeal enforcement" would thus "undermine[] rather than support[] the Government's purported interest in consistency." *Feds. For Med. Freedom*, 63 F.4th at 388.

Third, a preliminary injunction will merely "maintain the status quo until the parties have the chance to adjudicate the merits." *Id.* at 389. Therefore, nationwide relief is appropriate.

CONCLUSION

This Court should reverse the judgment of the district court and enter a nationwide injunction.

Respectfully submitted,

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Dated June 7, 2023

CERTIFICATE OF SERVICE

I certify that on June 7, 2023, I caused the foregoing to be served upon all counsel of record via the Clerk of Court's CM/ECF notification system.

/s/ *Stephen J. Obermeier*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also 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 Word for Windows, version 10 in Times New Roman font 14-point type face.

Dated: June 7, 2022

/s/ *Stephen J. Obermeier*
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LIST OF *AMICI CURIAE*

The **Firearms Regulatory Accountability Coalition, Inc.** ("FRAC") is a non-profit association working to improve business conditions for the firearms industry by ensuring the industry receives fair and consistent treatment from firearms regulatory agencies. FRAC serves as the premiere national trade association representing U.S. firearms manufacturers, retailers, importers, and innovators on regulatory and legislative issues impacting the industry in the United States.

NST Global, LLC (d/b/a SB Tactical) ("SB Tactical") developed the original Pistol Stabilizing Brace® to promote shooting inclusion for service-disabled military veterans. Today, stabilizing braces pioneered by SB Tactical are used by millions of Americans to help them fire guns safely. SB Tactical is a member of FRAC.

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