



MOUNTAIN STATES LEGAL
FOUNDATION
CENTER TO KEEP AND BEAR ARMS

2596 SOUTH LEWIS WAY, LAKEWOOD, COLORADO 80227 • (303) 292-2021 • WWW.MSLEGAL.ORG

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VIA Federal eRulemaking Portal

Andrew Lange
Office of Regulatory Affairs, Enforcement Programs, and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Ave. NE, Mail Stop 6N-528
Washington, DC 20226
ATTN: ATF 2021R-05

Re: Notice of Proposed Rulemaking; Request for Comment; Definition of “Frame or Receiver” and Identification of Firearms; ATF 2021R-05. 86 Fed. Reg. 27,720 (May 21, 2021) (“Proposed Rulemaking”)

Dear Department of Justice & Bureau of Alcohol, Tobacco, Firearms, and Explosives:

The following comments are submitted on behalf of Mountain States Legal Foundation’s Center to Keep and Bear Arms, Frederick Barton, and Zachary Fort (“Commentors”). While we appreciate the invitation to provide comment, we have deep concerns with the Proposed Rulemaking.

In effect, the Proposed Rulemaking operates as a complete revision of the regulatory framework surrounding the identification and treatment of firearms and firearm frames or receivers by giving complete, discretionary power to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) and the Director of the ATF. The Proposed Rulemaking conveys the ultimate “I’ll know it when I see it” power to the Director of the ATF without any recognition of the rights of the American people, any respect for the rule of law, any acknowledgement of limits of the ATF nor Department of Justice’s (“DOJ,” and collectively, “Agencies”) statutory authority, or any attempt to uphold the duty of agencies entrusted with the enforcement of criminal law to ensure that the enforcement of that law is not ill-defined and arbitrary. While the current rule is imperfect, at best, the proposed changes do not meet the goals articulated by the Agencies, and instead, if adopted, will infringe on the rights of millions of peaceable Americans. Moreover, the Proposed Rulemaking operates on a logical fallacy—the Proposed Rule argues that the ATF must regulate certain “unregulated firearms” because the Proposed Rulemaking identifies them as “firearms,” but the reason they are not currently regulated is that those items are not considered to be firearms and thus cannot be regulated as firearms. The Proposed Rulemaking seeks to expand the definition of “firearm” and “frame or receiver,” and create new legal terms and definitions for “readily,” “complete weapon,” and others, in order to regulate these currently unregulated items. The ATF and DOJ are, however, charged with regulating the items Congress mandates; not with deciding what items should be regulated. This Proposed Rulemaking is laced with policy making at every turn, which policy making must be left to the People’s elected representatives.

These comments will focus on specific errors and issues with the Proposed Rulemaking's various new terms and definitions, the limits of the ATF and DOJ's statutory authority, the Agencies' failure to engage in any recognition of the rights of Americans as assessed against the goals of the Proposed Rulemaking, the Proposed Rulemaking's effect of undermining its stated goal of promoting safety, the incorrect factual information, the flawed regulatory review, and the error in omitting a federalism summary impact statement.

STATEMENT OF INTEREST

The Center to Keep and Bear Arms ("The Center") is a project of Mountain States Legal Foundation ("MSLF"), a Colorado-based nonprofit, public interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. The Center was established in 2020 to advance MSLF's litigation in protection of Americans' natural and fundamental right to self-defense. The Center represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms. *See, e.g., Caldara v. City of Boulder*, No. 20-416 (U.S., petition for writ of *certiorari* denied Nov. 16, 2020). MSLF's work also includes filing *amicus curiae* briefs with courts across the nation. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing *amici* Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Teter v. Connors*, No. 20-15948, ECF No. 15 (9th Cir. Aug. 28, 2020); *Syracuse v. ATF*, No. 20-cv-06885, ECF No. 108-1 (S.D.N.Y. Feb. 5, 2021).

The Center represents Frederick Barton and Zachary Fort as proposed intervenor-defendants in two cases challenging the ATF's current application of the definition of the term "firearm" as defined in the Gun Control Act of 1968 ("GCA").¹ Those cases are both ongoing. In *Syracuse v. ATF*, Everytown for Gun Safety Support Fund, Everytown for Gun Safety Action Fund, and four United States cities sued the ATF and Department of Justice ("DOJ") in the U.S. District Court for the Southern District of New York in an attempt to force the ATF and DOJ to regulate certain items as if they were firearms. *See generally Docket, Syracuse v. ATF*, No. 20-cv-06885 (S.D.N.Y.). The district court denied Commentors' intervention, which denial Commentors are currently appealing to the U.S. Court of Appeals for the Second Circuit. *See generally Docket, Syracuse v. ATF*, No. 21-191 (2d Cir.). On the other side of the country, Giffords Law Center to Prevent Gun Violence, the state of California, and two individuals filed a nearly identical lawsuit against the ATF and DOJ in the U.S. District Court for the Northern District of California to the same ends. *See generally Docket, California v. ATF*, No. 20-cv-06761 (N.D. Cal.). Commentors' intervention in that matter is pending.

Commentors have substantial legal and economic interests in the outcome of that litigation and this Proposed Rulemaking. The Southern District of New York found that if the ATF were to engage in the regulation plaintiffs seek—regulations that the ATF and DOJ are now considering in the Proposed Rulemaking—"producers, sellers, purchasers, and possessors of unfinished frames and receivers including Mr. Fort, Mr. Barton, and 80% Arms—will be impacted." *Memorandum*

¹ The Center also represents BlackHawk Manufacturing, Inc., d/b/a 80% Arms, and Firearms Policy Coalition, Inc. in that litigation. Those organizations have submitted separate comments on this Proposed Rulemaking.

Opinion and Order, Syracuse v. ATF, No. 20-cv-06885, ECF No. 83, at 5. That court also acknowledged that Commentors' property and "existing business practices will be made illegal" and the result "may put some entities out of business entirely." *Id.* (citing *Mem. in Support of Proposed Intervenor's Motion to Intervene, Syracuse v. ATF*, No. 20-cv-06885, ECF No. 44, at 18–19). Just as in that litigation, Commentors present a unique perspective on this issue, as producers, retailers, purchasers, and possessors of some of the items at issue in this Proposed Rulemaking. *See Amici Br., Syracuse v. ATF*, No. 20-cv-06885, ECF Nos. 108, 108-1.²

COMMENTS

I. THE AGENCIES SHOULD ABANDON THEIR REDEFINITION OF "FIREARM"

The ATF and DOJ's proposed redefinition of the term "firearm" suffers from numerous, irreconcilable flaws. First, the proposed redefinition of "firearm" abandons the ATF and DOJ's longstanding legal interpretation of 18 U.S.C. § 921(a)(3), thereby expanding the items the ATF is charged with regulating under the GCA. Second, the proposed addition of "weapon parts kits" to 27 CFR 478.11 exceeds the Agencies' statutory authority, as mandated by Congress,³ and exceeds the scope of the GCA. Finally, the proposed expanse of the application of "weapon parts kits" in footnote 45, covering multiple shipments, is unacceptably broad, vague, unenforceable, impractical, and beyond the ATF and DOJ's authority.

A. The Proposed Redefinition of "Firearm" Departs from the ATF and DOJ's Longstanding, Legally Accurate Interpretation of 18 U.S.C. § 921(a)(3)

The Proposed Rulemaking accurately states the federal definition for a firearm, but adopts a new legal interpretation of the definition that departs from the long-held position of the ATF and DOJ—a position the Agencies have taken as recently as this year in federal court litigation. The Agencies in the Proposed Rulemaking have failed to explain or justify the reason for this departure.

The GCA defines a "firearm" as:

- (A) any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive;
- (B) the frame or receiver of any such weapon;

² *See also Notice of Motion to Intervene, Syracuse v. ATF*, No. 20-cv-06885, ECF No. 43 (S.D.N.Y. Nov. 12, 2020) (including concurrently filed memorandum and declarations in support, ECF Nos. 44–48) and *Motion to Intervene, California v. ATF*, No. 20-cv-06761, ECF No. 24 (N.D. Cal. Nov. 24, 2020) (including the concurrently filed memorandum and declarations in support, ECF Nos. 24-1–24-5).

³ "Congress instructed that the 'administration and enforcement' of the National Firearms Act of 1934 (NFA) 'shall be performed by or under the supervision of the Attorney General.' 26 U.S.C. § 7801(a)(2)(A). With this, the Attorney General was given the authority to 'prescribe all needful rules and regulations for the enforcement' of the Act. 26 U.S.C. § 7805. Congress then granted the Attorney General the authority to 'prescribe only such rules and regulations as are necessary to carry out the provisions' of the Gun Control Act of 1968 (GCA). 18 U.S.C. § 926(a). The Attorney General in turn delegated to the ATF the duties to '[i]nvestigate, administer, and enforce the laws related to' the NFA and GCA. 28 C.F.R. § 0.130(a)." *Brief of Amici Curiae Firearms Policy Coalition and the Center to Keep and Bear Arms in Support of Appellant and Reversal, Cargill v. Garland*, No. 20-51016 (5th Cir. Mar. 15, 2021).

- (C) any firearm muffler or firearm silencer; or
- (D) any destructive device.

18 U.S.C. § 921(a)(3). Interestingly, as the ATF and DOJ have recognized in litigation, “[t]he GCA specifically revised the definition of “firearm” used in prior federal law, the Federal Firearms Act (“FFA”), to exclude firearms parts other than the ‘frame’ or ‘receiver’ of a firearm.” *Mem. of Law in Supp. of Defendants’ Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment* (“*Fed. Def. MSJ*”), *Syracuse v. ATF*, No. 20-cv-06885, ECF No. 98, at 4 (S.D.N.Y. Jan. 29, 2021) (citing S. Rep. 90-1097, 1968 U.S.C.C.A.N. 2112, 2200 (Apr. 29, 1968)).⁴

Instead of summarizing the Agencies’ previously argued legal position, the direct quote is as follows:

As relevant here, pursuant to the above statutory definition, a device is a firearm if it is either: (1) a frame or receiver or (2) a device that is designed to or can readily be converted into a device that expels a projectile. Importantly, the “designed to” and “readily be converted” language are only present in the first clause of the statutory definition. 18 U.S.C. § 921(a)(3)(A). Therefore, an unfinished frame or receiver does not meet the statutory definition of “firearm” simply because it is “designed to” or “can readily be converted into” a frame or receiver. Instead, a device is a firearm either: (1) because it *is* a frame or receiver or; (2) it is a device that is designed to or can readily be converted into a device that “expel[s] a projectile by the action of an explosive.” *Id.* § 921(a)(3)(A)-(B).

Id.

But now, the Agencies seek to abandon this legally correct interpretation of the GCA. The ATF is, by its own legal argument, limited to the regulation of firearm frames or receivers and devices that are designed to or can be readily converted into a device that expels a projectile by the action of an explosive. *Id.* But the Proposed Rulemaking seeks to regulate many types of non-firearms, such as:

- “Weapon parts kits,” which do not contain a frame or receiver and are not a “device” that is designed to be or readily convertible into a device that expels a projectile (as further demonstrated *infra*, Section I(B));
- So-called “partially complete frames or receivers,” which do not meet the level of manufacturing necessary to be legally considered a frame or receiver (as further demonstrated *infra*, Section II); and
- Parts constituting a “complete weapon,” which imparts a level of constructive possession to otherwise unassembled and unregulatable parts (as further demonstrated, *infra*, Section IV).

⁴ The Proposed Rulemaking also recognizes this, in part: “The intent of Congress, as indicated by the plain language and the statutory scheme of the GCA, is to regulate—as a firearm—the frame or receiver of a firearm.” 86 Fed. Reg. at 27,722 (citing 111 Cong. Rec. 5527 (March 22, 1965)).

The Proposed Rulemaking does not explain the ATF and DOJ's shift in legal position on their interpretation of the congressionally defined term "firearm" in the GCA. The Proposed Rulemaking also fails to explain how the Agencies' currently held position, and the newly proposed rule, which are directly in conflict as to the level of regulation, can both operate as an accurate legal interpretation of the GCA.

B. The Proposed Addition of "Weapon Parts Kits" to 27 CFR 478.11 Exceeds the ATF's Statutory Authority, as Delegated by Congress, and Exceeds the Scope of the Gun Control Act of 1968

The Proposed Rulemaking seeks to add a "sentence at the end of the definition of 'firearm' in 27 CFR 478.11 providing that '[t]he term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive.'" 86 Fed. Reg. at 27,726. This addition poses significant problems.

First, the proposal operates as an expansion of the congressionally defined term "firearm," which neither the ATF nor DOJ has the authority to alter. Currently, 27 CFR 478.11 nearly repeats Congress's definition, codified at 18 U.S.C. § 921(a)(3), with one addition, that "[i]n the case of a licensed collector, the term shall mean only curios and relics." 27 CFR 478.11. While the ATF is the agency charged with administering the GCA, the ATF does not have congressionally delegated authority to legally redefine a "firearm," only to apply the definition. *See* 28 CFR § 0.130(a)(1), (2). By altering the definition of firearm in 27 CFR 478.11 to include "a weapon parts kit," the ATF would exceed its authority to "administer" the GCA, and instead would, in effect, amend the statutory text of the GCA—a power reserved to Congress.⁵ The Proposed Rulemaking fails to cite any authority conveying this power or even acknowledge this aspect of the problems caused by the proposed amendment.

Furthermore, the Proposed Rulemaking does not define what constitutes a "weapon parts kit." The Proposed Rulemaking merely describes "some of these parts kits," as containing "most or all of the components (finished or unfinished) necessary to complete a functional weapon within a short period of time." 86 Fed. Reg. at 27,726. Further, the Proposed Rulemaking states "[s]ome of them include jigs, templates, instructions, drill bits, and tools that allow the purchaser to complete the weapon to a functional state with minimal effort, expertise, or equipment." *Id.* The Proposed Rulemaking fails to provide any actual metric by which an ordinary American, or even a sophisticated firearms manufacturer or retailer, could determine what constitutes a weapon parts kit—and yet, the ATF proposes regulating such kits as if they were firearms. What if the kit does not contain a jig, but contains everything else? What if it doesn't include any tools, but provides a list of tools that can be purchased at a local hardware store? What if a kit includes everything except what the ATF calls a "partially complete frame or receiver"? The Proposed Rulemaking exposes producers and sellers of unregulated parts, as well as the purchasers of these parts, to liability based upon an undefined standard. Worse, this is not mere civil liability. Instead, producers and purchasers would risk felony charges, prison time, and a possible forfeiture of their

⁵ A practice that also raises significant nondelegation and separation of powers concerns that the Agencies fail to address at any point in the Proposed Rulemaking. *See, e.g.,* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J.L. & POL. 211 (2017).

constitutionally protected firearm rights for the slightest misstep. *See* 18 U.S.C. § 922(g)(1) (prohibiting firearms possession by those who have been convicted of a crime punishable by more than one year’s imprisonment), § 924 (establishing criminal penalties for violations of the GCA); 26 U.S.C. § 5871 (establishing criminal penalties for violations of the National Firearms Act (“NFA”)). Not only does the Proposed Rulemaking fail to consider this aspect of the regulation, but it entirely fails to acknowledge or consider the rule of lenity problem this creates,⁶ and the effect this will have on ordinary people caught up in the Agencies’ attempt to prevent individuals from “purchasing firearms parts kits with incomplete frames or receivers, commonly called ‘80% receivers,’ either directly from manufacturers of the kits or retailers, without background checks or recordkeeping”—a practice that is not currently illegal.

Finally, this entire practice violates congressional intent. The ATF and DOJ have recognized—and argued in federal court—that “[t]he GCA specifically revised the definition of ‘firearm’ used in prior federal law, the Federal Firearms Act (‘FFA’), to exclude firearms parts other than the ‘frame’ or ‘receiver’ of a firearm.” *See, e.g., Fed. Def. MSJ, Syracuse v. ATF*, No. 20-cv-06885, ECF No. 98, at 4 (S.D.N.Y. Jan. 29, 2021) (citing S. Rep. 90-1097, 1968 U.S.C.C.A.N. 2112, 2200 (Apr. 29, 1968)) (emphasis added). By adding an inclusion for weapon parts kits to 27 CFR 478.11, the Proposed Rulemaking violates this Congressional mandate and would require the ATF to regulate firearms parts other than the frame or receiver. The GCA establishes limits on the ATF’s authority and the Proposed Rulemaking’s inclusion of ill-defined “weapon parts kits” exceeds that limitation.

Accordingly, the Proposed Rulemaking should abandon any attempt to alter the definition of “firearm” to include “a weapon parts kit” and should ensure the ATF remains limited to Congress’s charge of applying the GCA and regulating actual weapons or the frame or receiver of such weapons.

C. The Proposed Treatment of “Weapon Parts Kits” as Across Multiple Shipments in Footnote 45 is Inappropriately Broad, Vague, Unenforceable, Impractical, and Beyond the ATF and DOJ’s Authority

While the addition of “weapon parts kits” to 27 CFR 478.11 poses significant issues, Footnote 45 makes the addition utterly indefensible.

Footnote 45 reads, in pertinent part:

⁶ “The rule that penallaws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also United States v. Bass*, 404 U.S. 336, 348 (1971) (the rule of lenity is driven by the need to provide “fair warning . . . of what the law intends to do if a certain line is passed” and assurance that “legislatures . . . define criminal activity”); *McNally v. United States*, 483 U.S. 350, 359–60 (1987) (“[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”) (citations omitted); *Yates v. United States*, 574 U.S. 528, 547–48 (2015) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”) (citation omitted).

Additionally, persons who engage in the business of selling or distributing such weapon parts kits cannot avoid licensing, marking, recordkeeping, or excise taxation by selling or shipping the parts in more than one box or shipment to the same person, or by conspiring with another person to do so. *See, e.g., United States v. Evans*, 928 F.2d 858 (9th Cir. 1991) (conspiracy to cause and aid and abet the possession of unregistered machineguns where one defendant sold parts kits containing all component parts of Sten machineguns except receiver tubes, and the other sold customers blank receiver tubes along with detailed instructions on how to complete them); Internal Revenue Service Technical Advice Memorandum 8709002, 1986 WL 372494, at 4 (Nov. 13, 1986) (for purposes of imposing Firearms Excise Tax it is irrelevant whether the components of a revolver in an unassembled knockdown condition are sold separately to the same purchaser in various related transactions, rather than sold as a complete kit in a single transaction).

86 Fed. Reg. at 27,726 n.45. The expanse of Footnote 45 is almost unknowable. Essentially, the Proposed Rulemaking seeks to regulate weapon parts kits as if they were firearms—without defining what constitutes a parts kit—*and* seeks the power to treat multiple shipments or orders as one for the purposes of application of the GCA and NFA. Not only will individuals, producers, and retailers be left guessing what exactly constitutes a weapon parts kit, but they would also have to somehow determine if multiple orders could constructively constitute a weapon parts kit over a period of time. And again, a simple misstep bears potential prison time, felony charges, and a forfeiture of individuals’ constitutionally protected firearm rights. *See* 18 U.S.C § 922(g)(1) (right forfeiture), § 924 (GCA penalties); 26 U.S.C. § 5871 (NFA penalties). This expansion suffers from the same flaws demonstrated above, but has the potential for much broader effect—an effect not presented, contemplated, or analyzed by the Proposed Rulemaking.

Some specific unanswered questions stand out:

- How many shipments will the ATF consider constructively as a single parts kit?
- How much time may or may not pass between shipments?
- Must the seller maintain a record of each sale that contains a part that may constitute a portion of a weapon parts kit?
- If so, does the ATF intend to access those records, under what authority, and what retention requirements would be in place?
- Under what authority is the ATF regulating individual parts that do not qualify as firearms or weapons themselves?

While this list is far from exhaustive, it is illustrative of the many problems raised by the Proposed Rulemaking’s constructive treatment of multiple shipments or orders from multiple retailers or by multiple buyers as singular “weapon parts kits.”

Overall, the Proposed Rulemaking’s offered redefinition suffers from numerous flaws and should be abandoned. At minimum, the Agencies must address the numerous flaws and craft a

definition, with the bounds of the GCA, NFA, and the Agencies' authority, that does not violate individuals' constitutionally protected firearm and property rights.

II. THE ATF AND DOJ SHOULD ABANDON, OR SIGNIFICANTLY ALTER, THEIR PROPOSED REDEFINITION OF “FRAME OR RECEIVER”

The proposed multi-part definition of “frame or receiver” to be added to 27 CFR 478.11 and 479.11 (as referencing 478.11), is so exceptionally broad as to create a regulatory nightmare. The redefinition suffers from a significant logical flaw—that because certain items fall outside the current definition of “frame or receiver” the ATF and DOJ must crack down on the sale of those items—without any recognition of the circular nature of the Agencies' justification.

A “frame or receiver” is not defined by federal law, but instead was defined by the Agencies via regulation “several decades ago” as “that part of a firearm that provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.” 86 Fed. Reg. at 27,720–21 (citing 27 CFR 478.11 and 27 CFR 479.11).

The Proposed Rulemaking would define a “frame or receiver” as:

A part of a firearm that, when the complete weapon is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure. Any such part identified with a serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be a frame or receiver. For purposes of this definition, the term “fire control component” means a component necessary for the firearm to initiate, complete, or continue the firing sequence, including any of the following: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails.

Id. at 27,741. Going further, the proposal includes adding “four nonexclusive examples with illustrations of common single-framed firearms.” *Id.* at 27,727. The proposed definition also contains four subsections, which each have their own definitions, and some of which have their own individual factors and nonexclusive examples. *Id.* at 27,741–46.

The proposed redefinition—mutating the current single sentence definition into a multipart rule laced with discretionary factors—is so broad as to encompass multiple parts of a single firearm and a significant number of parts the ATF does not currently regulate and has no authority to regulate. The Proposed Rulemaking does not point to any specific statutorily mandated goal or charge that is accomplished with this change. Instead, the Proposed Rulemaking puts the burden on manufacturers, federal firearms licensees, and everyday Americans to determine how to comply with a multi-page interpretative regulation that creates a multiple- frame and receiver regulatory scheme.

A. The Amendment of the Current “Frame or Receiver” Definition Serves no Legitimate Purpose

While the ATF attempts to justify the need for this change in definition based on courts following the letter of the law in applying the definition of frames and receivers, the Proposed Rulemaking fails to adequately justify, or even consider, the regulatory nightmare it would create.

First, the agencies claim the proposed redefinition of frame or receiver is necessary because technological advances have led to the advent of “firearms” that some courts have held do not have frames or receivers that meet the ATF’s current regulatory definition. 86 Fed. Reg. at 27,727. If that is the case, only two scenarios could be true. The first: the courts are incorrect, and the ATF has the current authority to regulate those frames and receivers. But if that were the case, then the entire rulemaking would be an exercise in futility; creating a regulatory nightmare where the ATF has no need or concern. The second: the courts are correct, and the ATF is currently regulating a vast number of non-frames and non-receivers as if they were frames and receivers. While that would better explain the impetus for this Proposed Rulemaking, it unveils a more concerning issue—namely, that the ATF is seeking to amend its regulations in order to expand its authority over millions of objects that it does not currently have authority over. If that were the case, then that vast expansion of the ATF’s criminal regulatory power would certainly be a question that is reserved to Congress for resolution. The fact that the law and regulations, as they exist, do not make the ATF’s job easy, or cover all items the Agencies believe they should, does not bestow those same Agencies with the authority to expand their congressionally delegated power. Where Congress sought to have the ATF regulate firearms by focusing on “frames and receivers” rather than parts, the Agencies cannot now redefine “frame or receiver” so broadly as to allow them to regulate anything they wish. Certainly, some objects that the Director may decide constitute frames or receivers fall outside of Congress’s charge and constitute parts that the ATF was never intended to regulate.

Second, the Agencies’ contention that the regulations as they exist today are outdated because they were drafted prior to the advent and popularization of certain firearms, such as striker-fired pistols or AR-style rifles, is factually incorrect. *See* 86 Fed. Reg. at 27,720–21. The ATF defined “frame or receiver,” as it is defined today, via regulation in 1968. *See* 30 Fed. Reg. 18,555, 18558 (Dec. 14, 1968). But commercially successful strike-fired pistols have been existence since the late Nineteenth Century.⁷ Additionally, the AR-style rifle was invented in 1955, beginning with the AR-10, and then was modified into the AR-15 by 1958.⁸ Colt produced 8,500 AR-15

⁷ *See, e.g., Wheelgun Wednesday: A Striker Fired Revolver From The Past – Meet the Kufahl*, THEFIREARMSBLOG.COM (May 5, 2021), <https://www.thefirearmblog.com/blog/2021/05/05/wheelgun-wednesday-kufahl/> (“While not used by any militaries of the time, the Kufahl/Dreyse revolver was used by some police and Grenzer (border guard) units and was commercially popular. Production commenced in 1852 and continued until roughly 1880.”).

⁸ *See, e.g.,* DAVID HARSANYI, FIRST FREEDOM 217–22 (2018); Sam Bocetta, *The Complete History of the AR-15 Rifle*, SMALL WARS JOURNAL (July 12, 2017 10:18 AM), <https://smallwarsjournal.com/jrnl/art/the-complete-history-of-the-ar-15-rifle>; Sam Jacobs, Eugene Stoner: *The Forgotten History of the Man Who Created "America's Rifle" – the AR-15*, AMMO.COM (accessed Aug. 19, 2021), <https://ammo.com/articles/eugene-stoner-creator-ar-15-americas-rifle-forgotten-history>; Ammodotcom, *Eugene Stoner: The Forgotten History of the Man Who Created*

rifles for the Air Force in 1961, after which the AR-15 was modified into the M16 and became standard issue in 1963.⁹ Based on actual, factual evidence, it is clear that a number of the firearms that the Agencies complain could not be accounted for when they defined “frame or receiver” in 1968 were well known and in common use at that time.

The Proposed Rulemaking either is entirely unnecessary or would result in the vast expansion of the Agencies’ authority—it cannot be both. Accordingly, without further explanation, the redefinition of “frame or receiver” should be stricken.

B. The Newly Crafted Definition of a “Split or Modular Frame or Receiver” is Inappropriately Broad and Vague, and Subject to Abuse

The Proposed Rulemaking’s newly crafted definition of a “split or modular frame or receiver” creates an indefinite, seven factor test to purportedly aid in determining “whether one or more specific part(s) of a weapon is the frame or receiver . . . ,” but in reality, would establish an uncertain test that can be applied arbitrarily to many commonly owned arms and to multiple parts of those arms. Worse, the definition burdens individuals and manufactures to determine the application of the regulation on their own—with a felony as the penalty for error—or to consult the ATF on each type of weapon, which consultation the ATF retains the discretion to refuse. 86 Fed. Reg. at 27,728, 27,734.

The Proposed Rulemaking seeks to define a “split or modular frame or receiver” with a three-part definition, the first part of which has a seven-factor discretionary implementation test:

(1) In the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential internal components (e.g., a split frame with upper assembly and lower assembly as in many semiautomatic rifles, upper slide assembly and lower grip module as in many semiautomatic handguns, or multiple silencer modular pieces), the Director may determine whether a specific part or parts of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. In making this determination, the Director will consider the following factors, with no single factor being controlling:

- (i) Which component the manufacturer intended to be the frame or receiver;
- (ii) Which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms;
- (iii) How the component fits within the overall design of the firearm when assembled;
- (iv) The design and function of the fire control components to be housed or integrated;

"America's Rifle" – the AR-15, YOUTUBE (Nov. 24, 2020), https://www.youtube.com/watch?v=mRZkmLm22cY&ab_channel=ammodotcom.

⁹ HARSANYI, FIRST FREEDOM 220.

- (v) Whether the component may permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed;
 - (vi) Whether classifying the particular component is consistent with the legislative intent of the Act and this part; and
 - (vii) Whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.
- (2) Frames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.
- (3) The Director has previously determined that a specific part is the frame or receiver with respect to certain weapons with split or modular frames or receivers.

Id. at 27,743 (omitting the nine nonexclusive examples under subsection (3)).

First, the newly proposed definition specifies, in subsection (1), that “the Director may determine whether a specific part or parts of a weapon is the frame or receiver,” and notes that of the seven factors provided, “no single factor [is] controlling.” *Id.* The definition creates a regulatory regime that is impossible to follow by individuals, manufacturers, and retailers alike; yet again bearing criminal penalties and rights forfeiture for errors. The Agencies cannot premise criminal penalties on a regulation that amounts to nothing more than “what the Director says goes.” Individuals, manufactures, and retailers cannot even rely on the fact that a single piece of a firearm clearly meets the definition of a “frame or receiver” because multiple parts of a firearm can be regulated as a frame or receiver under this definition and, under subsection (2), frames and receivers retain their status as a regulated “firearm” even if they are removed and combined with another, distinct frame or receiver from a separate weapon. The unconstitutionally vague nature of the proposed regulation cannot stand.

Second, the ATF cannot rely on its voluntary classification program to remedy the problems with this definition. In the Proposed Rulemaking, the Agencies note that “manufacturers may wish to submit samples to ATF for classification of one or more particular components as the frame or receiver so that they need only mark a specific part or parts of a weapon, rather than all qualifying parts . . . or obtain a marking variance” *Id.* at 27,728. As an initial matter, the idea that manufacturers will be functionally forced to provide samples to the ATF just to figure out what this incomprehensible definition may mean is an abuse of the Agencies’ power and authority. The ATF cannot, nor is it intended to, decide when and how to regulate frames or receivers on a whim. More importantly, however, the Proposed Rulemaking makes clear that the “ATF’s decision whether to classify an item voluntarily submitted *is entirely discretionary.*” *Id.* at 27,734 (emphasis added). In other words, the Proposed Rulemaking establishes a definition for a “split or modular frame or receiver” that it all but acknowledges is incomprehensible and advises manufacturers to seek the ATF’s guidance to determine its discretionary classification of a particular sample, but the ATF retains the right to refuse to classify that same sample.

Finally, it is further unclear if the Agencies considered:

- Whether the newly proposed definition will encompass constitutionally protected property the Agencies do not have the authority to regulate;
- Whether the newly proposed definition will unconstitutionally incumber currently, legally owned and possessed property;
- The effect of additional manufacturers seeking ATF classifications, due to the nature of the regulation, on the ATF's limited resources;
- The effect of delays as businesses await the ATF classification process on manufacturing, marking, and sales;
- The effect of training law enforcement officers on how to recognize a frame or receiver under this proposed regulation on costs for federal, state, and local agencies; and
- The effect of firearms that may contain two or more frames or receivers, which frames or receivers may bear different serialization because of subsection (2), on the ATF's limited resources.

While this list is far from exhaustive, it illustrates the many secondary and tertiary effects that the Agencies fail to consider—including market impacts, impacts on individuals' rights, and impacts on law enforcement efforts and training.

The Proposed Rulemaking's nearly-page long definition of a "split or modular frame or receiver" raises more questions than it answers and places people and businesses in a regulatory trap with no hope of escape. The regulation would place all of the burden on the People for the Agencies' inability to draft a coherent definition. The ATF and DOJ should abandon this definition, or, at minimum, work to remove the extensive discretionary power the Agencies attempt to confer to themselves.

C. The Supplemental Definition for a "Partially Complete, Disassembled, or Inoperable Frame or Receiver" is Ill-Crafted, Overbroad, and Subject to Substantial Abuse

The only portion of the newly proposed redefinition of "frame or receiver" that is worse than a "split or modular frame or receiver" is the newly created subsection for a "partially complete, disassembled, or inoperable frame or receiver." 86 Fed. Reg. at 27,729.

The full, proposed definition of a "partially complete, disassembled, or inoperable frame or receiver" is:

The term "frame or receiver" shall include, in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state. In determining whether a partially complete, disassembled, or inoperable frame or receiver may readily be assembled, completed, converted, or restored to a functional state, the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials. For purposes of this definition, the term "partially complete," as it modifies "frame or receiver," means a forging, casting, printing, extrusion,

machined body or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.

86 Fed. Reg. at 27,746.

First, the newly crafted definition is inappropriately broad, defining a “‘frame or receiver’ to include . . . ‘a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state.’” *Id.* This definition seeks to regulate any “forging, casting, printing, extrusion, machined body or similar article that has reached a stage in manufacture where it is *clearly identifiable* as an unfinished component part of a weapon.” *Id.* (emphasis added). There is no indication of what may or may not be clearly identifiable. The definition is so vague as to be unenforceable. And if it were enforceable, it would cover a vast expanse of everyday, ordinary items that are well beyond the regulatory authority of the Agencies.

Second, the proposal specifies that the Director “may consider *any available* instructions, guides, templates, jigs, equipment, tools, or marketing materials.” *Id.* The Proposed Rulemaking does not define what “available” means or can be interpreted to mean. Presumably, without clarification, the Director could consider information available only online, not provided with an item, or even by the item’s producer, and the mere existence of that information could convert an otherwise unregulated piece of material into a firearm. Such results are clearly absurd.

Finally, the Agencies fail to explain their abandonment of their previously held legal position on the application of the definition of “firearm” and “frame or receiver.” The Proposed Rulemaking fails to adequately explain, or even address, the Agencies’ technical justification for abandoning the ATF’s mechanistic approach. As an initial matter, according to the Agencies: “[A] device is a firearm either: (1) because it *is* a frame or receiver or; (2) it is a device that is designed to or can readily be converted into a device that ‘expel[s] a projectile by the action of an explosive.’” *Fed. Def. MSJ, Syracuse v. ATF*, No. 20-cv-06885, ECF No. 98, at 4 (S.D.N.Y. Jan. 29, 2021) (quoting 18 U.S.C. § 921(a)(3)(A)-(B)). With respect to so-called “unfinished” frames or receivers, the Agencies have previously argued, in federal court: “Pursuant to longstanding precedent, ATF applies a rule whereby the degree of machining to the device—in other words, its degree of completeness—determines whether the device is a firearm pursuant to the GCA.” *Id.* at 6. For example, when seeking to classify an item, the ATF looks specifically to the mechanistic characteristics of the item and those processes left to be performed:

For example, as noted in one of the Polymer80 Classification Letters where a device was not found to be a firearm, the following machining operations—each of which require skills, tools, and time—still had to occur: 1) drilling of the block pin holes; 2) drilling of the trigger pin holes; 3) cutting of the rail slots that allow for the installation of the slide; 4) machining of the side walls that allow for the installation of the slide; and 5) machining of the walls that allows for the installation of the barrel and recoil spring. [Administrative Record (“AR”), *Syracuse v. ATF*, No. 20-cv-06885, ECF No. 60,] at 253; *see also* AR. at 231 (Polymer80 Classification Letter listing machining that still needed to occur). Additionally, as noted above,

ATF will treat any “indexing”—the inclusion on the unfinished frame or receiver of visual or physical indicators regarding the two-dimensional or three-dimensional parameters of the machining that must be conducted—as rendering the unfinished device a firearm. *See [Fed. Def. MSJ,] supra* at 8–9. This prevents the makers of receiver blanks from annotating the blank to instruct the purchaser as to the precise measurements needed, in three dimensions, to machine the critical components of the unfinished frame or receiver. The need to conduct this machining from scratch, without indexing, means a working gun cannot be produced “without difficulty.” And the work to excavate the cavities and drill holes in an unmachined substrate requires care rather than speed to avoid doing so raggedly or in the wrong area. Therefore, the receiver cannot be completed “without delay” or “without difficulty”—even leaving aside the further assembly with (and procurement of) the other parts needed to create a weapon that can expel a bullet by explosive action. A receiver blank therefore may not “readily be converted” into a firearm.

Id. at 27–28. To be clear, this is consistent with ATF’s approach dating back, at minimum, 19 years.¹⁰ The Agencies must explain why they are abandoning their currently held position that classifies “frames or receivers” based on the actual machining completed and left to be performed—especially when that abandonment is in favor of a malleable definition that relies on mutable characteristics, externally available tools or information, and aesthetics. That justification is especially important where, as here, the Agencies argue their current implementation of the definition of “firearm” is correct as a matter of the plain, unambiguous meaning of the GCA. *Id.* at 20–29 (“In short, unfinished frames and receivers are not designed to expel a projectile, even if they are designed to be finished and later incorporated into another device that expels a projectile.”).

III. THE AGENCIES SHOULD REMOVE THEIR DEFINITION OF “READILY” OR MODIFY THE DEFINITION TO AVOID EXCEEDING THEIR AUTHORITY

The Proposed Rulemaking seeks to craft new regulatory guidance on how to define “readily,” as used in the GCA, by adding this new term to 27 CFR 478.11 and 479.11. The proposed definition is a mushy and non-sensical seven factor analysis that is almost entirely based on subjective, transitory criteria.

The Proposed Rulemaking seeks to define “readily” as “a process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy

¹⁰ Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to Mark Malkowski, Continental Machine Tool Company, Inc. (Jan. 29, 2004) (“However, a solid AR-15 type receiver casting, without having the critical internal areas machined (magazine well and central area for the fire control components) or crosspin holes drilled, would not constitute a ‘firearm’ as defined in the NFA.”); Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to Justin Halford (July 1, 2003) (“Based on our examination of the unfinished receiver, it is our opinion that the subject sample *has received sufficient machining* to be classified as the frame or receiver for a ‘firearm’”) (emphasis added); Letter from Edward H. Cohen, Jr., Chief, Firearms Technology Branch, to Robert Bower, Jr., Philadelphia Ordnance, Inc. (May 26, 1992) (“The receiver is basically complete except that the interior cavity has *not been completely machined.*”) (emphasis added).

process.” 86 Fed. Reg. at 27,730. But the Proposed Rulemaking would also list seven factors in the CFR to consider when applying the definition:

- (a) Time, i.e., how long it takes to finish the process;
- (b) ease, i.e., how difficult it is to do so;
- (c) expertise, i.e., what knowledge and skills are required;
- (d) equipment, i.e., what tools are required;
- (e) availability, i.e., whether additional parts are required, and how easily they can be obtained;
- (f) expense, i.e., how much it costs;
- (g) scope, i.e., the extent to which the subject of the process must be changed to finish it; and
- (h) feasibility, i.e., whether the process would damage or destroy the subject of the process, or cause it to malfunction.

Id.

First, each of these factors, with potentially the exception of scope, is entirely subjective in nature. The time, ease, and expertise needed (which also affects feasibility) to manufacture something from an unregulated item into a firearm or into a frame or receiver will necessarily vary—greatly at times—from item to item and from individual to individual.¹¹ Other factors, like equipment, availability, and expense will vary greatly based on the current market, the geographic location, and other factors.¹² The Proposed Rulemaking’s attempt to define “readily” does the opposite of providing a certain or objective metric. Instead, it injects the term with uncertainty, to the point where it makes the term “readily” incomprehensible to individuals and manufacturers who are required to abide by the letter of the law or face criminal penalties. Under this definition, what

¹¹ Compare Joe Larson, *AR - 15 Build Using an 80% Lower Receiver*, FIELD N FEATHERS (March 6, 2021), <https://webcache.googleusercontent.com/search?q=cache:0ux9xjrvRywJ:https://www.fieldnfeathers.com/blog/ar-15-build-using-an-80percent-lower-receiver+&cd=29&hl=en&ct=clnk&gl=us> (“I am now almost 7 hours into this build I thought was going to take me 4 hours tops.”) with AR-15LowerReceivers.com, *What is an 80 Lower?*, AR-15 LOWERS (June 16, 2020), <https://www.ar-15lowerreceivers.com/80-lower-news/what-is-an-80-lower/> (“Total machining time can vary, but most first-timers get the job done in 2 hours or less. Experienced builders can complete a lower in around 30 minutes with the right tools.”); see also *Untraceable “Ghost Guns” On the Rise, But Are They Legal?*, US LAWSHIELD (December 5, 2016), <https://www.uslawshield.com/untraceable-ghost-guns-on-the-rise-but-are-they-legal/> (“A milling machine (or at least a milling guide kit), for example, can cost around \$1,500, and it could take weeks to complete an AR-15 kit.”); Juggernaut Tactical, *JT-15 80 Percent Lower Finishing Guide*, YOUTUBE (Apr 25, 2013), <https://www.youtube.com/watch?v=ZKz2sLJUvGU> (“It will probably take 3 hours to complete this project but could take 4 or 5 depending upon your skill level and the tools you are using.”); Andy Greenberg, *I Made an Untraceable AR-15 ‘Ghost Gun’ in My Office—and It Was Easy*, WIRED (June 3, 2015, 7:00 AM), <https://www.wired.com/2015/06/i-made-an-untraceable-ar-15-ghost-gun/> (“All I needed for my entirely legal DIY gunsmithing project was about six hours, a 12-year-old’s understanding of computer software, an \$80 chunk of aluminum, and a nearly featureless black 1-cubic-foot desktop milling machine called the Ghost Gunner.”).

¹² Walter Salvati, *How Much is Aluminum Per Pound?*, SCRAP GATORS (January 2, 2019), <https://www.scrapgators.com/how-much-is-aluminum-per-pound/> (demonstrating the price of raw materials varies from place to place, customer to customer); Tim Cooper, *Ammunition Update: How the National Ammunition Shortage is Going*, FREE RANGE AMERICAN (July 27, 2021), <https://freerangeamerican.azurewebsites.net/ammunition-update/> (demonstrating that volatile commodities, such as ammo, can be impossible to find in some places, while accessible for reasonable prices in others).

is “readily” for a female machinist in Texas may not be “readily” for a male office assistant in New Hampshire. A legal definition that is necessarily mutable based on the individual is no real definition. The ATF and DOJ cannot inject this level of uncertainty into criminal law and then rely on a deference doctrine to have the regulation construed in their favor.

Furthermore, the Agencies have failed to explain or justify their shift in their legal interpretation of the term “readily.” Both have argued, in federal court, for a much simpler, straightforward definition—which they also argue is correct as a matter of law:

Dictionary definitions are virtually unanimous in the definition of “readily.” “Readily” means something that can be done “without much difficulty” or “with fairly quick efficiency.” See [*Plaintiff’s MSJ, Syracuse v. ATF*, No. 20-cv-06885, ECF No. 62,] at 26 (quoting Webster’s Third New International Dictionary of the English Language Unabridged (1965)); see also READILY, Funk & Wagnall’s Standard College Dictionary 1121 (1973) (“In a ready manner, promptly, easily”). This definition is consistent with that found in a major unabridged dictionary issued in 1966, the same year the new definition of “firearm” appears in S. Rep. 89-1866: “promptly; quickly; easily.” READILY, Random House Dictionary of the English Language, Unabridged 1195 (1966).

Fed. Def. MSJ, Syracuse v. ATF, No. 20-cv-06885, ECF No. 98, at 26–27. Furthermore, as addressed above in Section II(C), when applying the term “readily” to classify frames and receivers, the ATF looks specifically to the mechanistic characteristics of the item and those processes left to be performed. See *id.* at 27–28. The Proposed Rulemaking provides no justification or basis for the abandonment of the Agencies’ previously held definition of “readily”—a much more reasonable definition based on plain meaning and objective characteristics rather than one that relies on subjective assessments and discretion.

The ATF and DOJ should abandon their attempts to redefine “readily,” or at minimum, must reconstrue the definition in such a way as to provide actual guidance and justify their departure from their prior legal position.

IV. THE ATF AND DOJ MUST ABANDON THEIR PROPOSED ADDITION OF AND DEFINITION FOR A “COMPLETE WEAPON”

The Proposed Rulemaking’s inclusion of a new legal term “complete weapon,” and definition of that term as “a firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed *whether or not assembled or operable*,” is ill-defined; overbroad; beyond the Agencies’ statutory authority; and could result in disastrous, unintended consequences. 86 Fed. Reg. at 27,730 (emphasis added).

First, by treating unassembled component parts as a complete weapon, this single sentence added to the CFR could result in millions of unintended consequences and criminal penalties. For example, if an individual has an AR-type, fully built lower and a fully built upper, current law (which the ATF states it seeks to maintain under this Proposed Rulemaking) treats the lower as a

receiver (and thus the firearm) and the upper as an unregulated part. Once the two pieces are joined, it becomes a complete weapon. But if the ATF begins treating the individual pieces constructively, those two disassembled parts would constitute a complete weapon. This becomes hugely problematic when individuals and manufactures try to comply with the myriad of federal firearm laws. Under the new definition, if that lower had a rifle stock and that upper had a 7-inch barrel installed, the individual would be in possession of a “complete weapon” that is also an NFA-regulated short barrel rifle. 26 U.S.C. § 5845(a).



Image: <https://themillermeister.blogspot.com/2012/10/part-1-how-to-register-short-barrel.html>

Today, an individual would not be in violation of federal law for possessing these two pieces. Under this Proposed Rulemaking, however, that individual would be required to register the item (although it is unclear which item, given the upper is unregulated and the lower, alone, is not an NFA item), pay a \$200 tax, undergo an extensive background check, and wait to receive an NFA tax stamp—or be subject to up to 10 years in a federal prison, up to a \$100,000 fine, and possible forfeiture of the right to possess arms. *See* 18 U.S.C § 922(g)(1) (right forfeiture); 26 U.S.C. § 5871 (NFA penalties). Clearly, this is an unintended consequence. Individuals around the United States legitimately have multiple pieces that unassembled or uncombined offend no law, but under the constructive possession proposed by the “complete weapon” definition could be combined in any manner of ways to result in multiple violations of federal law.¹³ Even if that were the

¹³ Additionally, the possession of some unregulated parts that are considered to be parts of fully-automatic weapons may create the same problem. For example, individuals building AR-type rifles often use a bolt carrier group (“BCG”) designed for a fully-automatic weapon because those BCGs are more robust, reliable, and safe (due predominately to the materials used and their weight). The BCG itself does not and cannot convert a semi-automatic rifle to a fully-automatic, regulated machinegun. But under the definition of a “complete weapon” provided in the Proposed Rulemaking, it is unclear if possession of parts with tolerances for fully-automatic use would be construed as possession of a complete, fully-automatic weapon.

Agencies' intent, the Proposed Rulemaking does not contain any mention of these effects, the need for them, the impact of them, or the argued benefits of them—the Proposed Rulemaking is completely silent.¹⁴ The entire section proposing the definition is a single paragraph, without citation or footnote. This single section would have a broader impact on the entirety of firearms regulation in the United States than the remainder of the Proposed Rulemaking combined. The Agencies cannot engage in this level of regulation without examining the effects and impact of that regulation.

Additionally, the definition of complete weapon fails to define at what point unassembled parts would constitute a “complete weapon,” and would, in effect, allow the ATF to regulate every individual piece of a firearm, so long as an individual or retailer possessed enough parts to assemble a single, operable firearm. This is an absurd result that exceeds the Agencies' authority. By including “all component parts necessary to function . . . *whether or not assembled or operable*,” not only would possession of a complete AR-style upper and lower expose an individual to liability, but possession of an entirely disassembled short barrel rifle could also be considered a “complete weapon” under this definition. Such effects certainly exceed the statutory and congressionally limited authority of the ATF and DOJ; as well as infringe upon the constitutionally protected firearms and property rights of millions of peaceable Americans.

The ATF and DOJ must abandon their attempted addition and definition of the term “complete weapon.”

V. THE ATF AND DOJ SHOULD NOT IMPOSE REGULATIONS, INCLUDING MARKING REQUIREMENTS, ON PRIVATELY MADE FIREARMS

While the ATF and DOJ state their proposed goal in imposing marking requirements on Privately Made Firearms (“PMF”) is to improve safety—predominately through law enforcement investigation of PMFs used in crime—the marking requirements will actually harm the stated safety goals by discouraging individuals from bringing their PMFs to licensed and experienced gunsmiths or from safely disposing of PMFs with FFLs. *See* 86 Fed. Reg. at 27,722–25.

First, the Proposed Rulemaking indicates that only “approximately 23,906 *suspected* PMFs [were] reported to ATF as having been recovered by law enforcement from *potential* crime scenes,” over a five-year span from January 2016 through December 2020. *Id.* at 27,722 (emphasis added). Of those suspected PMFs recovered from potential crime scenes, 325 incidents, or 1.35%, included attempted homicides or homicides. *Id.* While these numbers may sound large, by comparison, between 2015 and 2019, 51,258 firearms were used in homicides, meaning at most, even without accounting for firearms used in attempted homicides, PMFs account for 0.63% of

¹⁴ Furthermore, the Agencies should be deeply concerned if their intent was to draft a regulation so broad that any interpretation would receive deference—a practice known to occur in federal agencies. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1066 (2015) (“When surveyed, two in five agency officials whose job duties include rule-drafting confirmed that “Auer deference plays a role in drafting” their regulations.”).

firearms used in homicides over a similar, five-year span.¹⁵ In just 2018, 95,281 firearms were used in armed robberies and 186,543 in aggravated assaults according to the FBI.¹⁶ Additionally, the Bureau of Justice Statistics determined, in 2016, that the majority of firearms used in crime were stolen, found at the crime scene, or obtained from the underground market.¹⁷ But the Proposed Rulemaking fails to provide any context for the numbers it provides of *suspected* PMFs recovered from *potential* crime scenes. The Proposed Rulemaking fails to analyze crime data from the same period related to currently regulated firearms, or even non-firearms, to determine if the extent of the PMF regulations would have any beneficial effect on crime. Moreover, the Proposed Rulemaking fails to consider any of the benefits of PMFs, such as those used in self-defense situations.

Second, the ATF does not have statutory authority to regulate PMFs in any manner. The Proposed Rulemaking does not—and cannot—point to a single federal law giving it authority to regulate firearms manufactured by individuals for personal use within the borders of the United States. That is because no such law exists. In fact, the Agencies recognize that they do not have the authority to impose marking requirements on PMFs: “[P]rivately made firearms [], when made for personal use, **are not required by the GCA to have a serial number placed on the frame or receiver . . .**” 86 Fed. Reg. at 27,722. Instead, as justification, the Proposed Rulemaking makes broad statements about public safety and the ATF’s need to track firearms used in crime. Ease of law enforcement operations is not the sole goal of the GCA and NFA. Federal firearm regulations seek to establish a delicate balance—setting the scope of constitutionally protected rights against the powers granted to the federal government in the Constitution. Whatever one thinks of how that balance is struck now, the Proposed Rulemaking certainly goes too far. The People have a longstanding right—which has been exercised since before our Founding—to self-manufacture self-defense tools for their own defense.¹⁸ The Proposed Rulemaking does not consider those rights; does not consider the extent of the ATF’s regulatory, congressionally mandated authority; and does not address how the Proposed Rulemaking is a viable exercise of its power in light of the extent of the infringement on individuals’ constitutionally protected rights.

Finally, the ATF fails to consider the chilling effect that the marking requirement will have on individuals attempting to ensure their PMFs are as safe as possible. While the proposed marking requirement only applies to PMFs that are brought into an FFL or gunsmith, those entities are also experienced in repairing firearms, remedying safety concerns, and counteracting the

¹⁵ Given the Federal Bureau of Investigation (“FBI”) has yet to release 2020 crime numbers, the five-year analysis includes 2015. See <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls>; see also <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-offense>.

¹⁶ <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-15>.

¹⁷ <https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf>.

¹⁸ See, e.g., NICHOLAS J. JOHNSON *ET AL.*, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 112–37 (2d ed. 2018) (detailing that prohibition of local and individual firearm manufacturing was part of the disarmament agenda pursued by British monarchs, but rejected by our Founders and Framers), 220–34 (explaining that privately manufactured firearms were a crucial part of American life and culture from colonial times); HARSANYI, FIRST FREEDOM 28–30 (demonstrating the individually crafted Kentucky Long Rifle was an important piece of American history and crucial to the Revolutionary War).

effects of prolonged use.¹⁹ If the ATF requires every PMF brought to an FFL or gunsmith to be serialized in some manner, even if that is limited to when the PMF would need to be recorded in their Firearms Acquisition and Disposition Record (“A&D record,”) many individuals will choose to not bring their PMFs to licensed dealers or gunsmiths. Some may avoid this because of the costs associated with serializing, others in order to preserve their privacy, which is a major reason many individuals craft PMFs.²⁰ That reason of privacy extends to the avoidance of being harassed, SWATed, or doxed for owning constitutionally protected property—a growing concern of firearm owners.²¹ But the Proposed Rulemaking does not consider a single potential downside of the PMF

¹⁹ See, e.g., Steve Adelman, *AR-15 Inspection: 15 Wear & Failure Points to Check*, NRA SHOOTING ILLUSTRATED (September 8, 2018), <https://www.shootingillustrated.com/articles/2018/9/8/ar-15-inspection-15-wear-failure-points-to-check/> (“Like any other tools that are used heavily, AR-style firearms’ parts occasionally wear out or fail under stress, even with a strict maintenance and cleaning routine.”); *Customer Gunsmithing: A Must for Gun Owners!*, SPRING GUNS & AMMO (accessed August 18, 2021), <https://www.springgunsandammo.com/custom-gunsmithing-a-must-for-gun-owners/> (“Sometimes, guns can become cracked or have weather damage due to negligence. But most of the time, guns break due to everyday wear and tear With a gunsmith, you don’t have to worry about messing up a repair. Instead, you can leave your gun in the hands of a professional”); *Maintenance & Zeroing*, BEST PRACTICE GUIDANCE (February 7, 2018), https://www.bestpracticeguides.org.uk/wp-content/downloads/firearms_maintain.pdf (“Ensure rifles are serviced annually by a competent gunsmith.”).

²⁰ See, e.g., Max Archer, *Skip the Registration with Polymer80—An easy to finish 80% Lower*, GUNS AMERICA DIGEST (August 28, 2014), <https://www.gunsamerica.com/digest/polymer-80/> (discussing the customizability and privacy offered by PMFs); JSD Supply, *How and Why to Build Your Own Gun*, JSD SUPPLY BLOG (September 6, 2019), <https://jsdsupply.com/how-and-why-to-build-your-own-gun/> (discusses the privacy and educational benefits of PMFs).

²¹ See, e.g., Editorial Board, *Should you know if your neighbor owns a gun?*, THE BOSTON GLOBE (July 3, 2021, 4:00 AM), <https://www.bostonglobe.com/2021/07/03/opinion/should-you-know-if-your-neighbor-owns-gun/> (“Last year, the San Francisco Chronicle submitted a government records request to nearby counties for information about individuals who had applied for and obtained a concealed-weapons permit.”); Fernando Alfonso III, *Lawyer Doxes 50 Journalists Who Doxed Gun Owners*, DAILY DOT (Mar. 2, 2020, 11:25 PM), <https://www.dailydot.com/unclick/christopher-fountain-journal-news-gun-owners/> (“On Dec. 22, The Journal-News published two interactive maps featuring the names and addresses of gun owners in Westchester and Rockland County.”); Squiggly Line Guy, *GOA Files Restraining Order To Stop Doxing Of Gun Owners*, THE LIBERTARIAN REPUBLIC (April 23, 2019), <https://thelibertarianrepublic.com/goa-files-restraining-order-to-stop-doxing-of-gun-owners/> (“A Freedom of Information Request was filed in Washington State requesting the names and addresses of everyone who had participated in the buyback program who was mailed a check for \$150.”); Editorial Staff, *Gawker Posts Full List Of All New York City Licensed Gun Owners*, THE WASHINGTON EXAMINER (Jan 9, 2013, 9:06 AM) <https://www.washingtonexaminer.com/red-alert-politics/gawker-posts-full-list-of-all-ahole-new-york-city-licensed-gun-owners/> (“Gawker has now published a complete list of every licensed gun owner in New York City.”); K.C. Maas and Josh Levs, *Newspaper Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders*, CNN (Dec. 27, 2012, 10:23 AM), <https://www.cnn.com/2012/12/25/us/new-york-gun-permit-map/index.html> (“An interactive map showing the names and addresses of all handgun permit holders in New York’s Westchester and Rockland counties has infuriated many readers since it was posted Saturday on a newspaper’s website.”); Perry Chiaramonte, *Gun Control Groups Accused of ‘Swatting’ Open-Carry Permit Holders, Putting Lives at Risk*, FOX NEWS (Sept. 1, 2015, Updated Jan. 12, 2017), <https://www.foxnews.com/us/gun-control-groups-accused-of-swatting-open-carry-permit-holders-putting-lives-at-risk> (“‘If you see someone carrying a firearm in public—openly or concealed—and have ANY doubts about their intent, call 911 immediately and ask police to come to the scene,’ the group wrote on its widely followed Facebook page . . . [Critics] liken the tactic to ‘swatting,’ or the act of tricking an emergency service into dispatching responders based on a false report.”); Bob Owens, *Gun Control Group Tells Followers to “SWAT” Gun Owners*, BEARING ARMS (Dec. 15, 2015, 3:24 PM), <https://bearingarms.com/bobowens-bearingarms/2015/12/15/gun-control-groups-tells-followers-swat-gun-owners-n24126> (“SWATting is the practice of making a 911 call in order to draw police attention to someone you don’t suspect of committing a crime . . . Sadly,

marking requirement.²² In reality, given the fact that PMFs are popular specifically because individuals can retain their privacy, it is highly likely that the Proposed Rulemaking will discourage more individuals from bringing their PMFs in for safety checks, service, and modification than the marking requirement will ever benefit.

VI. THE PROPOSED RULE SHOULD AUGMENT ITS ANALYSIS WITH ADDITIONAL SOURCES

The Agencies failed to consider several relevant sources in the preparation of the Proposed Rule. Specifically, when reviewing the extent of the Agencies expansion of the GCA and NFA, the Agencies must also consider the impact on individuals' natural, fundamental, unalienable right to possess arms. Given the Agencies fail to conduct this analysis in any meaningful way, Commentors provide a few beneficial sources that can guide the Agencies examination and understanding of the People's right to possess arms. The following list is not intended to be exhaustive:

- THE DECLARATION OF INDEPENDENCE (U.S. 1776) (establishing the foundation of our Republic on a recognition of the natural, individual rights of the People)
- U.S. CONST. Amend. II (formally establishing a constitutional protection of the People's right to keep and bear arms)
- THE FEDERALIST NOS. 29 (Alexander Hamilton), 46 (James Madison) (discussing the Framers' view of the extent and importance of the right to possess arms)
- CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE (2006) (reviewing the American history of firearm possession and ownership)
- DAVID HARSANYI, FIRST FREEDOM (2018) (examining the history of firearms, including firearms possession and crafting, in the United States)
- NICHOLAS J. JOHNSON, *ET AL.*, FIREARMS LAW AND THE SECOND AMENDMENT (2d ed. 2018) (setting forth an in-depth analysis of the foundation of the natural right to possess and bear arms, the history of regulation of that right, and inappropriate treatment of the right during the modern era)
- David Kopel, *The Second Amendment and the Nineteenth Century*, 1998 BYUL REV. 1359 (1998) (examining the status of the right to keep and bear arms during the Nineteenth Century in the United States)

after being warned repeatedly about the dangers of SWATting to both law enforcement and citizens, CSGV continued promoting the dangerous practice again on Facebook today.”).

²² Further regulating PMFs may also disincentivize individuals from crafting them, thereby stifling innovation. *See, e.g.,* Tom Roeder, *Army might have found its new rifle in Colorado Springs garage*, COLORADO SPRINGS GAZETTE (September 30, 2018; updated June 16, 2020), https://gazette.com/military/army-might-have-found-its-new-rifle-in-colorado-springs-garage/article_96cd214c-c290-11e8-9d41-27b5a0e767a4.html (“The Army adopted its battle rifle in 1963 and has spent 55 years looking for a replacement for the M-16 and its variants. They might have found it in Martin Grier’s Colorado Springs garage. Grier, a self-described inventor who has worked at a local bed and breakfast, built the new ‘ribbon gun’ with a hobbyist’s tools.”).

- David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193 (2017) (reviewing federal circuits' analysis, and often misanalysis, of the individual right after the *Heller* decision)
- David B. Kopel & Joseph G.S. Greenlee, *Federal Circuit Second Amendment Developments 2018*, 7 L.M.U. L. REV. 21 (2020) (conducting an update of the analysis from the prior paper)
- Eugene Volokh, *Textualism and District of Columbia v. Heller*, 37 HARV. J.L. & PUB. POL'Y 729 (2014) (reviewing the textual analysis of the Second Amendment from the Supreme Court's *Heller* decision)
- James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2002) (examining the expansive firearm ownership in the early Republic)
- Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) (exploring "Second Amendment issues in light of the Afro-American experience, concluding that the individual rights theory comports better with the history of the right to bear arms in England and Colonial and post-Revolutionary America.")
- Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) (examining the Founders and Framers understanding of and basis for the Second Amendment)

VII. THE REGULATORY IMPACT ANALYSIS OF THE PROPOSED RULE IS FLAWED AND MUST BE REVISITED AND REEVALUATED BY THE PUBLIC BEFORE ANY RULEMAKING CAN OCCUR

The ATF's Regulatory Impact Analysis ("RIA") is flawed because it relies on outdated figures, assumes too low a number of affected firearms and non-firearms, and is rife with unsupported assumptions based on unidentified "subject matter experts" ("SME"), using undisclosed methodologies, relying on unknown data points.

First, Chapter 4 significantly underestimates the gunsmithing costs that will result from the Proposed Rulemaking, in current form. "ATF estimates it would take an FFL gunsmith 15 minutes to record a firearm into their A&D records. At a loaded, hourly wage rate of \$26.92. ATF estimates that it would cost the industry \$45,212 to enter A&D records." Office of Regulatory Affairs, *Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis* ("RIA"),²³ RIN 1140-AA, at 32 (April 2021).²⁴ But this math is deeply flawed. If entering A&D record takes 15 minutes, at an hourly rate of \$26.92, a gunsmith could enter 4 A&D records for an industry cost of \$26.92. At a cost of \$45,212, the ATF is estimating a total of *only* 6,718 A&D record entries. The ATF gives no justification for such a low number. If the ATF requires every PMF or "complete or partially complete firearm kit" to receive a serial number and be entered into A&D records if the item passes through an FFL or gunsmith overnight, that number would be

²³ The RIA is available at: <https://www.regulations.gov/document/ATF-2021-0001-0002>.

²⁴ Of note, the Proposed Rulemaking indicates that "[t]he proposed rule would result in a one-time cost for contract gunsmithing estimated to be \$180,849. For more details, please refer to Chapter 4 of the Regulatory Impact Analysis." 86 Fed. Reg. at 27,736. The RIA indicates an estimate of \$45,212 in Chapter 4. RIA, at 32. There is no justification or explanation for this discrepancy.

significantly higher than only 6,718 entries.²⁵ The Proposed Rulemaking requires FFLs to enter every firearm they have in inventory that has new record keeping requirements into their A&D records. 86 Fed. Reg. at 27,734–35. The ATF’s unsupported number is insufficient for the purposes of the regulatory impact analysis. The ATF must conduct an actual analysis, based on real world data, to determine the accurate number of items that will need to be entered into A&D records across the country. Moreover, the ATF determined the loaded hourly wage rate to be \$26.92 for an FFL gunsmith. That rate was based on an Occupation Employment and Wages table from May 2019, prior to the Coronavirus pandemic.²⁶ These numbers are significantly out of date. For example, in July 2021, the same U.S. Bureau of Labor Statistics reported that “[c]ompensation costs for private industry workers increased 3.1 percent,” from July 2020 to July 2021.²⁷ The out-of-date loaded wage rate combined with the underestimated number of A&D entries demonstrates that the ATF grossly underestimated the A&D entry costs of the Proposed Rulemaking.

Second, Chapter 6 of the RIA also heavily underestimates costs to the industry. First, the ATF assumes that only 5,298 Type 1 FFLs have “firearms kits” out of the total 52,976 Type 1 FFLs in the United States, but cites only to the unknown SMEs, using their undisclosed knowledge and data to assume 10% of Type 1 FFLs deal in “firearms kits.” RIA, at 39. The ATF further assumes 50 percent of Type 1 FFLs would mark “firearms kits” in-house and 50 percent would send them to another FFL for marking. The RIA provides no justification for this assumption. Even worse, the ATF suggest that an in-house “salesclerk” could take “15 minutes” to mark a kit “on an existing embedded serial number plate” using a number and letter punch kit purchased off Amazon or Google marketplace. *Id.* at 41. The ATF also estimates each retailer to only have 2 kits on hand. *Id.* at 41–42. The RIA provides no support for why these kits would have “existing embedded serial number plate(s),” especially when they are not required to be serialized under current regulation. *Id.* There is also no analysis on how expensive it would be to embed a number plate or why an average of 2 kits was used. *See id.* When addressing PMFs, the ATF estimates there are an average of 2 per Type 2 FFL, held by only 710 Type 2 FFLs out of the total 7,103 Type 2 FFLs in the nation. *Id.* at 43, 43 n.38. In other words, the ATF estimates there are only 1,410 PMFs sitting in gun stores across the entire nation. There is no included basis for why only 10% of Type 2 FFLs in the nation have PMFs or why that 10% only has an average of 2 PMFs in stock. Finally, the ATF notes that it “estimates all non-FFL retailers (36 retailers)” will choose to outsource serializing, but does not include an estimate for this industry cost—it is completely omitted from the RIA.

Lastly, the RIA suffers from numerous other flaws:

- Chapter 2 fails to account for Type 7 FFLs that do not submit requests for determination, or to which the ATF decides to not issue a determination, that will be required to mark multiple different “frames or receivers” on a firearm due to the Proposed Rulemaking instead of a single frame or receiver as they would now. *See RIA*, at 23–26.

²⁵ While the RIA considers PMFs in Chapter 6 as well, that chapter does not consider the costs associated with the Proposed Rulemaking’s A&D record requirements that will also apply to PMFs. Chapter 6 only considers the marking requirements.

²⁶ <https://www.bls.gov/oes/2019/may/oes514022.htm>.

²⁷ <https://www.bls.gov/news.release/eci.nr0.htm>.

- Chapter 3 assumes, without support, that not a single non-FFL producer of “partially complete kits” would apply to become an FFL based solely on the “primary marketing scheme of some of these non-FFL manufacturers.” *See* RIA, at 28. This fails to consider any other forces at play, including non-FFL producers that may choose to provide the same product, despite the Proposed Rulemaking, due to market demand, customer familiarity, brand loyalty, etc. The ATF cannot conclude there will be no cost based on an assumption. If several larger manufacturers choose to go this route, it could cost the industry millions in compliance fees and additional product costs.
- Chapter 3 also fails to predict the alternative, namely how much a company would lose in revenue by “choosing” to sell “unregulated items” or “parts kits that do not contain a frame or receiver.”²⁸ Again, the ATF does no work to make an accurate assessment. “Overall, ATF is unable to determine the specific impact on revenue per company that this rule would have but expects that this rule would not have a large impact on the overall industry or market of kits containing unregulated raw materials or molds, components, accessories, tools, jigs, or instructions.” RIA, at 29. First, if there is not a large impact, why is the ATF engaging in this Proposed Rulemaking? But more importantly for the RIA, the ATF cannot simply abdicate its duty to engage in the mandated analysis because it is difficult. The ATF fails to even appeal to its unnamed SMEs on this topic. The ATF must engage in an actual analysis, with actual support, to analyze these effects.
- Chapter 7 assumes that less than 10 percent of Type 1 or 2 FFLs are not storing records beyond 20 years. RIA, at 46. Again, this estimate is based on no support other than an appeal to unknown SMEs, using an unknown methodology, relying on unknown data. This Chapter also assumes that each of those FFLs would choose to send their records to the ATF, rather than storing the records themselves; yet again, without any discussion as to why. Such an assumption means the RIA only estimates additional storage costs for the ATF, and not a single FFL.

Overall, at every stage of the RIA, the ATF “requests public comments on the costs and methodology.” Commentors’ response can be stated succinctly—provide your methodology so that it can actually be reviewed and commented upon. While Commentors point out many of the unsupported assumptions herein, this list is far from exhaustive. The unsupported assumptions relied on by the ATF at every turn cannot be used to accurately analyze the regulatory impact of the Proposed Rulemaking, especially when the ATF acknowledges there is no financial benefit to the Proposed Rulemaking. *See* 86 Fed. Reg. at 27,736.

²⁸ Interestingly, the ATF in its RIA assumes that a kit without a frame receiver would not be regulated under the Proposed Rulemaking, while the text of the Proposed Rulemaking, as addressed above, does not convey this same assumption or certainty. *Compare* RIA, at 29, *with* 86 Fed. Reg. at 27,726.

VIII. THE ATTORNEY GENERAL ERRED IN NOT PREPARING A FEDERALISM SUMMARY IMPACT STATEMENT PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 13132

Executive Order 13132 requires agencies to analyze policies or rulemakings that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,255 (Aug. 4, 1999).

Section 3(b) notes:

National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

Exec. Order No. 13,132, 64 Fed. Reg. at 43,256. While the Proposed Regulation acknowledges that many states have chosen different policymaking paths to regulate, or not regulate, PMFs or kits, the Proposed Rulemaking fails to engage in a federalism analysis of the ATF and DOJ’s “constitutional and statutory authority for the action.” 86 Fed. Reg. at 27,725, 27725 n. 38. Further, pursuant to Section 4(a), the Proposed Rulemaking fails to acknowledge that the federal re-definition of “firearm,” and the federally mandated marking requirements, will preempt state laws about the same; especially when addressing state laws related to storage and transportation of firearms, and existing state laws related to the marking and/or registration of PMFs.²⁹ Because state laws often rely on federal classifications, states with storage and transportation laws may be directly affected by this Rulemaking.

Accordingly, the Attorney General should have prepared a federalism summary impact statement for this Proposed Rulemaking.

²⁹ See, e.g., Colo. Rev. Stat. § 18-12-114 (2021) (“Firearms must be responsibly and securely stored . . .”); New Jersey State Police, *Firearms Information*, STATE OF NEW JERSEY (accessed Aug. 19, 2021), <https://www.njsp.org/firearms/firearms-faqs.shtml> (“Firearms shall be carried unloaded and contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of the automobile in which it is being transported.”).

CONCLUSION

Mountain States Legal Foundation's Center to Keep and Bear Arms; Frederick Barton; and Zachary Fort appreciate the opportunity to submit these comments on the ATF and DOJ's Proposed Rulemaking, ATF 2021R-05. Commentors submit that, for the foregoing reasons, and based on the cited support, the Proposed Rulemaking is deeply flawed. To avoid violating Articles I and II of the U.S. Constitution; the Second, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution; the NFA; the GCA; the Administrative Procedure Act; the Regulatory Flexibility Act, Executive Order 13132, and more, the Agencies must either abandon the current rulemaking or, at minimum, undergo significant revision of the Proposed Rulemaking with additional public review.

Respectfully submitted by,

/s/ Cody J. Wisniewski

Cody J. Wisniewski

Director, Center to Keep and Bear Arms

MOUNTAIN STATES LEGAL FOUNDATION

2596 South Lewis Way

Lakewood, CO 80227

*Attorney for Mountain States Legal Foundation's
Center to Keep and Bear Arms, Frederick Barton, and
Zachary Fort*