



MOUNTAIN STATES LEGAL
FOUNDATION
CENTER TO KEEP AND BEAR ARMS

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VIA Federal eRulemaking Portal

Denise Brown
Office of Regulatory Affairs, Enforcement Programs, and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Ave. NE, Mail Stop 6N-518
Washington, DC 20226
ATTN: ATF 2021R-08

Re: Notice of Proposed Rulemaking; Request for Comment; Factoring Criteria for Firearms with Attached “Stabilizing Braces”; ATF 2021R-08. 86 Fed. Reg. 30,826 (June 10, 2021) (“Proposed Rulemaking”)

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

The following comments are submitted by and on behalf of Mountain States Legal Foundation’s Center to Keep and Bear Arms. We appreciate the invitation to provide comment, especially given the deeply flawed nature of this Proposed Rulemaking.

The Proposed Rulemaking seeks to implement a Worksheet in order to re-classify pistols with stabilizing braces as rifles, many of which would then be treated as short-barreled rifles and regulated under the National Firearms Act (“NFA”) as well as under the Gun Control Act (“GCA”). While the proposed Worksheet purports to provide objective guidance in this mass reclassification of pistols, nearly all of the Worksheet is based on subjective criteria that are unsupported by any information, analysis, citation, or other data in the Proposed Rulemaking. In fact, in the five-page discussion laying out these criteria there are only four citations, two of which are to Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) letters and two of which are to patents. *See* 86 Fed. Reg. at 30,830–34. This lack of support and critical reasoning is even more concerning in light of the criminal penalties this rulemaking would impose on peaceable Americans should it be finalized in anything even similar to its current form. Worse, those criminal penalties will be enforced upon individuals without any form of clarity or certainty, given the Proposed Rulemaking seeks to grant the ATF and the Director the ability to reclassify millions of legally acquired and owned pistols, without providing individuals any means of accurately determining whether their weapons are affected. The indefinite, discretionary nature of the Worksheet, combined with the lack of any actual analysis within the Proposed Rulemaking, is wholly insufficient to support this proposed change. If the ATF and Department of Justice (“DOJ,” and collectively, “Agencies”) wish to engage in an appropriate and legally sufficient rulemaking in this space (at least one that is a logical outgrowth of this Proposed Rulemaking), the Agencies have no choice but to start anew.

Furthermore, the Agencies are charged with regulating the items Congress mandates; not

with deciding what items to regulate. Congress's explicit charge to the Agencies is to focus on regulating firearms and frames or receivers. This Proposed Rulemaking seeks to end-run that charge, by not explicitly regulating stabilizing braces, but regulating every firearm that has one equipped and anyone that chooses to attach a mere accessory to their weapon. A stabilizing brace, nothing more than a firearm accessory, should not be a means to thrust a firearm into a regulatory quagmire with no hope of knowable resolution for even the most educated firearms owners.

These comments will focus on specific errors and issues with the Proposed Rulemaking's attempted expansion of the Agencies' congressionally mandated authority, failure to support the Agencies' proposed Worksheet criteria, failure to engage in any recognition of the rights of Americans as assessed against the goals of the Proposed Rulemaking, flawed regulatory review, and 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); *Syracuse v. ATF*, No. 21-191 (2d Cir., docketed Feb. 1, 2021). 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); as well as providing expertise on proposed rulemakings, *see Comments from Cody J. Wisniewski, Director, Center to Keep and Bear Arms to Andrew Lange, Office of Regulatory Affairs, Enforcement Programs, and Services, ATF, Definition of "Frame or Receiver" and Identification of Firearms*, 86 Fed. Reg. 27,720 (May 21, 2021) (comments submitted on August 19, 2021 on behalf of CKBA, Frederick Barton, and Zachary Fort). The Agencies' final rule in this matter, should it proceed to one, will assuredly affect The Center's current and future clients.

COMMENTS

The Agencies' Proposed Rulemaking is nothing less than an attempt to reclassify millions of lawfully manufactured, sold, purchased, and possessed pistols equipped with stabilizing braces as rifles, thus making many of those weapons short-barreled rifles subject to the NFA's expansive federal requirements. This Proposed Rulemaking will force millions of Americans, whether manufactures, retailers, or owners of stabilizing braces, to completely upend their currently lawful business and personal practices, based on the Agencies' purported, but completely pretextual, concern that these pistols may be subverting the NFA's requirements and intent. Manufacturers and retailers will be forced to tiptoe around the ATF's incomprehensible Worksheet, submitting

sample after sample to the ATF in order to determine what firearms may or may not earn the 4 points necessary to instantaneously convert a pistol into a rifle. Individuals will be forced to attempt to correctly interpret the ATF's Worksheet, with criminal fines, imprisonment, and a forfeiture of their right to possess arms facing them if they're incorrect. *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 NFA).

I. THE AGENCIES SHOULD ABANDON THEIR ATTEMPTED RECLASSIFICATION OF CERTAIN PISTOLS AS SHORT-BARRELED RIFLES BECAUSE IT EXCEEDS THEIR STATUTORY AUTHORITY

The proposed redefinition of "rifle" in 27 C.F.R. sections 478.11 and 479.11 by including "any weapon with a rifled barrel and equipped with an attached 'stabilizing brace' that has objective design features and characteristics that indicate that the firearm is designed to be fired from the shoulder, as indicated on ATF Worksheet 4999," exceeds the Agencies' statutory authority, as mandated by Congress,¹ and exceeds the scope of the GCA and the NFA. *See* 86 Fed. Reg. at 30,829.

Current federal regulations define a "rifle" as "a weapon designed or redesigned, made or remade, and *intended to be fired from the shoulder*, and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger." 27 C.F.R. §§ 478.11, 479.11 (emphasis added). An NFA regulated rifle, referred to as a short-barreled rifle, is a "rifle having one or more barrels less than 16 inches in length, and any weapon made from a rifle, whether by alteration, modification, or otherwise, if such weapon, as modified, has an overall length of less than 26 inches." *Id.* These definitions closely follow the definitions set forth by Congress in the GCA and NFA. 18 U.S.C. § 921(a)(7), (8) (GCA definitions); 26 U.S.C. § 5845 (a), (c) (NFA definitions).

A pistol, on the other hand, is defined as:

A weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock *designed to be gripped by one hand* and at an angle to and extending below the line of the bore(s).

¹ "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).

27 C.F.R. §§ 478.11, 479.11 (emphasis added).

Now, the Agencies seek to alter the definition of “rifle” to inject Worksheet 4999 into its analysis in an attempt to provide “objective criteria” to determine intent when classifying pistols with stabilizing braces. This alteration, however, broadly expands the definition of “rifle” and would improperly subject millions of pistols to regulation as NFA items due to its uncertainty, overbreadth, and arbitrary nature.

First, the Agencies’ attempt to regulate pistols as if they were rifles materially alters the congressionally defined terms “rifle” and “pistol,” which neither the ATF nor DOJ has the authority to alter. Currently, 27 C.F.R. sections 478.11 and 479.11 nearly repeat Congress’s definitions, codified at 18 U.S.C. § 921(a)(7) and (8) as well as 26 U.S.C. § 5845 (a) and (c). While the ATF is the agency charged with administering the GCA and the NFA, the ATF does not have congressionally delegated authority to redefine a “rifle” (or, by effect “short-barreled rifle,” or “pistol”)—only to apply that definition. *See* 28 C.F.R. § 0.130(a)(1), (2). By altering the definition of “rifle” in 27 C.F.R. sections 478.11 and 479.11 to include some pistols equipped with stabilizing braces, the ATF would exceed its authority to “administer” the GCA and the NFA, and instead would, in effect, amend the statutory text of both of those Acts—a power reserved to Congress.² The Agencies are not “carry[ing] out the provisions” of the GCA or the NFA, but rather are acting in the place of Congress and attempting to rewrite federal law. *See* 18 U.S.C. § 926(a) (“The Attorney General may prescribe *only such rules as are necessary* to carry out the provisions of this chapter . . .”) (emphasis added). The Proposed Rulemaking fails to cite any authority conveying this power or to even acknowledge this aspect of the problem caused by this proposed amendment.

Second, even if the Agencies have the authority to effectively alter the text of the GCA and the NFA, the Agencies have failed to adequately explain their change in legal position. As addressed by the Proposed Rulemaking, the ATF has regulated pistols with stabilizing braces as pistols since 2013. *See* 86 Fed. Reg. at 30,828, 30,845. But now, to “compensate for negative externalities caused by commercial activity,” the Agencies are reversing position. *See id.* at 30,845. While the Proposed Rulemaking attempts to exist as a clarification of current law, if finalized, this rulemaking would amend rather than clarify federal law. The Proposed Rulemaking even goes to length to discuss the 3 million stabilizing braces that will be affected and the “3,881 Manufacturers of ‘short-barreled rifles’ that have a ‘stabilizing brace’ attachment”—and yet the ATF also proudly asserts that it has only “brought 3 actions against manufacturers of firearms with ‘stabilizing braces’ that do not comply with the intent of the law.” *Compare id.* at 30,845 with Office of Regulatory Affairs, *Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis* (“RIA”),³ RIN 1140-AA55, at 16 (June 2021). The Agencies fail to explain how there

² The Proposed Rulemaking’s attempt to amend congressionally defined terms—and thus federal criminal law—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); FEDERALIST NO. 48 (Madison) (“[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

³ The RIA is available at: <https://www.regulations.gov/document/ATF-2021-0002-0002>.

are 3,881 firearms manufactures that are allegedly in violation of current federal law and the Agencies have only managed to attempt to hold 3 liable. More likely, the Agencies recognize that those manufacturers are not in violation of current federal law and that the Agencies must change their position to treat the pistols produced by those manufactures as if they were short-barreled rifles. The Agencies must adequately explain why their change in position is both necessary and legally appropriate. The Agencies cannot claim they have been correctly applying federal law for 9 years, and are merely clarifying that application now, when the two results are obviously in conflict.

Finally, the Proposed Rulemaking fails to account for manufacturers, retailers, and individuals' reliance on the Agencies' current statutory application. The Proposed Rulemaking asserts that there are likely, "8 Manufacturers of affected 'stabilizing braces,'" "3,881 Manufacturers of 'short-barreled rifles' that have a 'stabilizing brace' attachment," 13,210 retailers of "'short-barreled rifles' that have a 'stabilizing brace' attachment," and "1.4 million firearm owners who have purchased pistols with 'stabilizing braces' attached and those who intend to purchase them in the future." 86 Fed. Reg. at 30,845. And yet, the Proposed Rulemaking fails to adequately account for those parties' reliance on the Agencies' long-held position.⁴ The Agencies cannot merely look to the monetary impact in evaluating entities and individuals' reliance on an affirmative federal position. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (finding the Department of Homeland Security's failure to consider reliance interests "was arbitrary and capricious in violation of the APA").

With this Proposed Rulemaking, the Agencies are, in reality, seeking to abandon the legally correct application of the GCA and the NFA and to reverse the position the Agencies have held since 2013. The Proposed Rulemaking fails to adequately address the Agencies' limited, congressionally mandated authority; how the Agencies' currently held position, and the newly proposed rule (which are directly in conflict with one another) can both operate as accurate legal applications of the GCA and the NFA; and entities and individuals' reliance on the current statutory regime. Accordingly, the Agencies should abandon this Proposed Rulemaking or, at minimum, begin anew with this process.

II. THE PROPOSED RULEMAKING'S "OBJECTIVE CRITERIA" ARE VAGUE, UNSUPPORTED, AND ARBITRARY

The Proposed Rulemaking seeks to apply a number of newly established "objective criteria" to evaluate whether a pistol with a stabilizing brace is actually a rifle for the purposes of the GCA and the NFA. 86 Fed. Reg. at 30,829–34. These criteria, however, are far from objective. Moreover, the Proposed Rulemaking fails to cite to *any* authority explaining how the Agencies crafted the proposed criteria, any data they analyzed related to the criteria's need or usefulness, or any consideration of the breadth of those criteria (and thus their impact on individuals' rights). Accordingly, the Proposed Rulemaking stands wholly unsupported and without any logical

⁴ Not only has the ATF held the position that stabilizing braces do not convert a pistol into a rifle since 2013, but that span has covered nearly the entire product life of stabilizing braces thus far.

reasoning. At minimum, if the Agencies are going to propose a rulemaking that would make millions of Americans into felons, they must show their work.

A. Worksheet 4999’s Prerequisites are Completely Arbitrary, and their Purported Necessity is Unsupported

Prior to reaching the newly proposed criteria, the Proposed Rulemaking seeks to apply a prerequisite test to determine if a firearm would be subject to evaluation under the Agencies’ newly crafted Worksheet. Those pre-requisites, related to weight and length, are arbitrarily offered as important factors by the Agencies without any measure of support or analysis.

First, the Proposed Rulemaking asserts that the ATF must consider the weight of a pistol with a stabilizing brace because those braces were “originally marketed as being designed to assist persons with disabilities and others lacking sufficient grip strength to control heavier pistols.” 86 Fed. Reg. at 30,831. And yet, the Proposed Rulemaking also asserts that “classifying a firearm based on a limited or singular characteristic (*i.e.* the marketing label of the manufacturer that the item is a ‘stabilizing brace[’]’), ‘has the potential to be significantly overinclusive or underinclusive.’ *Id.* at 30,828 (citation omitted). If that is the case, the ATF should not be using the marketing of stabilizing braces to establish their criteria for evaluation. This inconsistency in treatment is arbitrary and undermines the Agencies’ emphasis on weight for classification.

Second, the Proposed Rulemaking uses an “unloaded 1911-type pistol” and a fully loaded “polymer Glock 17” as exemplars for the weight of lighter pistols (both of which are intended to be able to be fired with one hand) to establish a standard of 39 ounces,⁵ or about 2.4 pounds.⁶ The Proposed Rulemaking provides no justification as to why these exemplars are used, which particular model of 1911-type pistol or Glock 17 was weighed, why the 1911-type pistol was weighed unloaded while the Glock 17 was weighed loaded, nor why other pistols or configurations were not considered.⁷ The same is true of the “standard weight” of larger handguns, which are

⁵ This weight is also factually inaccurate. According to the manufacturer, a fully loaded Glock 17 weighs 32.28 ounces. *G17*, GLOCK, <https://us.glock.com/en/pistols/g17> (last accessed Sept. 8, 2021).

⁶ Of note, while these are intended to be able to be fired with one hand, no major firearm training program teaches individuals to fire handguns with one hand as the best way to fire a handgun. *See, e.g.*, Warrior Poet Society, *How to Grip a Pistol: The How and the Why*, YOUTUBE (Nov. 5, 2016), https://www.youtube.com/watch?v=n4c7JDXQOB8&ab_channel=WarriorPoetSociety (specifically contrasting the differences between one-handed and two-handed shooting); Tactical Rifleman, *How to Hold a Pistol | Special Forces Instruction | Tactical Rifleman*, YOUTUBE (Sept. 29, 2017), https://www.youtube.com/watch?v=4vY5B2Hjwkk&ab_channel=TacticalRifleman. Indeed, even the ATF trains its agents to fire handguns with two hands placed on the firearm. *See, e.g.*, Special Agent Training, ATF (Sept. 26, 2016), <https://www.atf.gov/careers/special-agent-training> (depicting multiple ATF agents firing handguns two-handed during special agent training); @ATFHQ, TWITTER (Mar. 14, 2016 4:25 PM), <https://twitter.com/atfhq/status/709505673697075200> (ATF agents demonstrating “firearms proficiency” while firing handguns two-handed). While pistols may be intended to be fired with one hand, that is not the safest method of firing and should not be the requirement by which the Agencies evaluate firearms—especially given this would have the effect of making firearms’ operation less safe.

⁷ For example, the Springfield Armory 1911 EMP Handgun weighs just 27 ounces or 1.69 pounds, while a fully loaded Rock Island Trac Ultra FS chambered in .45 ACP weighs in at 52 ounces or 3.25 pounds. *1911 EMP*

also pistols that are intended to be able to be fired with one hand. The Agencies do nothing more than state “[t]he AR-type pistol, a popular large handgun design, for example, weighs approximately 5 to 7 pounds.” *Id.* at 30,831. Again, the Proposed Rulemaking provides no justification as to why only an AR-type pistol was used, which particular models of AR-type pistols were weighed, what configurations resulted in weights between 5 and 7 pounds, whether the firearms were weighed loaded or unloaded, or why no other heavy pistols or configurations were considered.⁸ This is particularly puzzling given the Agencies consider additional models of heavier pistols to evaluate length, but not weight. *See id.* The Agencies cannot base a single, determinative factor on such arbitrary and unsupported figures. Moreover, given the Agencies are considering individuals with disabilities and those lacking sufficient grip strength when evaluating weight, the Proposed Rulemaking fails to provide any analysis as to why those individuals can easily and effectively operate a firearm that weighs 63 ounces without a stabilizing brace. The Agencies entirely omit this analysis from the Proposed Rulemaking. Accordingly, the application of weight as a determinative criterion, as set forth in the Proposed Rulemaking, is arbitrary and unsupported.

Third, the Proposed Rulemaking fails to support the Agencies’ contention that overall length should be a determinative criterion nor why 12–26 inches is the correct figure for that determination. The Proposed Rulemaking indicates that stabilizing braces are intended to aid with one-handed firing of pistols, but then asserts that “firearms exceeding 26 inches in overall length are impractical and inaccurate to fire one handed, even with a ‘stabilizing brace,’ due to imbalance of the weapon.” 86 Fed Reg. at 30,831–32. The Proposed Rule does not provide any analysis as to why it uses 26 inches as a cutoff, why a firearm that is 27 inches in overall length cannot be effectively fired using a stabilizing brace, nor how the Agencies evaluated accuracy or “imbalance.” This is insufficient analysis when the Agencies are proposing implementing a determinative criterion that would affirmatively classify a pistol with a stabilizing brace as an NFA regulated short-barreled rifle. Moreover, the Proposed Rule fails to consider the breadth of individuals’ disabilities in setting 12 inches as a minimum limit. The Agencies fail to provide any analysis as to whether some individuals must use stabilizing braces to brace firearms with an overall length of 11 inches because they are physically unable to fire those firearms without stabilization. Just because the Agencies say it is so, does not make it so.

Handgun, SPRINGFIELD ARMORY, <https://www.springfield-armory.com/1911-series-handguns/1911-emp-handguns/1911-emp-9mm-handgun-stainless> (last accessed Sept. 8, 2021); *Tac Ultra FS – 45 ACP*, ARMSCOR, <https://www.armscor.com/firearms/ria/tac-series/tac-ultra-fs-45-acp/> (last accessed Sept. 8, 2021).

⁸ There are numerous AR-type weapons available on the market that weigh less than 5 pounds. *See, e.g., Honey Badger Pistol*, Q, <https://liveqordie.com/honey-badger-pistol/> (last accessed Sept. 8, 2021) (AR-type pistol weighing 4.5 pounds); *Enyo Rifle*, Master of Arms, https://www.masterofarms.com/index.php?main_page=product_info&products_id=65 (last accessed Sept. 8, 2021) (AR-type weapon weighing 3.65 pounds); *BATTLEARMS OIP 002 Ultra Lightweight Rifle Gen2*, BATTLE ARMS DEVELOPMENT, <https://www.battlearmsdevelopment.com/shop/product/oip-002-battlearmstm-oip-r-002-ultra-lightweight-rifle-gen2-3741?search=oip#attr=> (last accessed Sept. 8, 2021) (AR-type weapon weighing 3.8 pounds). The Proposed Rulemaking also fails to account for individual configurations that may be built with weights outside the ATF’s approximate range. *See, e.g., Daniel Thompson, How to build a ultra-lightweight AR-15*, AEROSPACE ARMS (Apr. 20, 2017), <https://aerospacearms.com/blog/how-to-build-a-ultralightweight-ar15/> (last accessed Sept. 8, 2021) (providing a build list for an AR-type rifle weighing 3.94 pounds).

Finally, while the Agencies express concern that looking at a singular characteristic for classification purposes “has the potential to be significantly overinclusive or underinclusive,” the Agencies fail to acknowledge that argument cuts both ways. *See* 86 Fed. Reg. at 30,828 (citation omitted). The Proposed Rulemaking would seemingly automatically consider any pistol with a stabilizing brace weighing less than “64 ounces/4 pounds,” with an overall length shorter than 12 inches, or with an overall length over 26 inches as a rifle.⁹ But, the Agencies fail to give any justification why a single characteristic of weight or length is sufficient to further regulate a weapon when it “has the potential to be significantly overinclusive or underinclusive.” *See Id.* at 30,828 (citation omitted). Indeed, as addressed above, those factors are almost certainly overinclusive. The Agencies must abandon these unsupported, vague, arbitrary considerations when following their congressional mandates under the GCA and the NFA.

B. The Agencies’ Proposed Criteria to Evaluate Pistols with Stabilizing Braces are Unsupported, Vague, Overbroad, and Arbitrary

Should a pistol meet the determinative criteria, the firearm is then evaluated under Worksheet 4999, which contains 2 sections with 8 different subsections and a total of 46 separate criteria. 86 Fed. Reg. at 30,831. Each iteration is given a point value. *Id.* If a firearm receives more than 4 “points” in either of the 2 sections, the Agencies will consider that firearm to be a rifle—and thus likely a short-barreled rifle regulated by the NFA. *Id.* These criteria, however, are unsupported, vague, overbroad, and arbitrary.

First, instead of attempting to address each of the 46 factors, The Center notes that they all suffer from a similar problem—the Agencies provide no support for their inclusion. In the entire discussion of how the Agencies intend to alter the ATF’s regulatory regime, and thus criminal law, there is not a single citation to any data, analysis, or other authority outside of two ATF letters and two patents. *See id.* at 30,831–34. Instead, the Proposed Rulemaking presents an unending stream of unsupported conclusions. And yet, the Proposed Rulemaking, by proposing to treat at least 3 million pistols as if they were unregistered NFA items, would alter a significant portion of the regulatory regime surrounding firearms and could expose millions of individuals to criminal liability, including felony charges, prison time, vast fines, and a forfeiture of their firearm rights. *See* 18 U.S.C § 922(g)(1) (right forfeiture), § 924 (GCA criminal penalties); 26 U.S.C. § 5871 (NFA criminal penalties). The Agencies cannot alter their regulatory regimes based on bare assertions.

Second, even if the Agencies had adequately supported their conclusions in the Proposed Rulemaking, the final criteria remain arbitrary. Some of the most obvious instances include:

⁹ This treatment is not certain given the Proposed Rulemaking does not actually specify what happens if a pistol with a stabilizing brace weighs less than 64 ounces or if pistols have an overall length shorter than 12 inches or longer than 26 inches. Instead, the Proposed Rulemaking merely states that those pistols “are not considered weapons suitable for use with a ‘stabilizing brace’ accessory,” or “are impractical and inaccurate to fire one handed . . .” 86 Fed. Reg. at 30,831–32. This lack of clarity must be rectified should this Proposed Rulemaking proceed to a final rule.

- “Accessory Design”: The Agencies provide no real guidance on what constitutes a “known” shoulder stock design. While the proposed rule mentions three design features, those are not offered as exhaustive and provide little guidance. 86 Fed. Reg. at 30,832. The Proposed Rulemaking does not provide individuals with any ability to assess this criterion and essentially requires manufactures to submit sample after sample to the ATF for classification. The Proposed Rulemaking also does not consider whether a “known” shoulder stock design may provide better design features for stabilizing braces as well, making them more effective at bracing pistols.
- “Adjustability”: The Proposed Rulemaking fails to consider whether adjustability is an important element of stabilizing braces, allowing individuals to adjust the brace to the best location on their forearm.¹⁰ *See id.*
- “Stabilizing Support”: The Proposed Rulemaking proposes adding 2 points if a firearm has a “fin-type” design without an arm strap, but that will have broad effects. *See id.* at 30,832–33. What happens if an individual has a pistol that would score 2 points and then the strap is removed for cleaning, or breaks during use? According to the Worksheet, that pistol is instantly transformed into a rifle.¹¹ This is an obviously absurd result. This criterion also presumably prevents individuals from removing the arm strap and replacing it with a different, potentially more effective fastener. Further, the Agencies, when reviewing “cuff-type” designs, fail to consider the benefits to individuals with different arm sizes being able to choose between full cuffs and partial cuffs. *See id.* at 30,833. Again, given the ATF is evaluating these braces in light of individuals with disabilities and grip impairments, that is an important—but omitted—consideration.
- “Attachment Method”: While manufactures may have the institutional knowledge to differentiate between different types of buffer tubes, many firearm owners cannot. This is technical knowledge based on minute differences that, under the Proposed Rulemaking, could be the sole difference between owning a non-NFA regulated pistol and an NFA-regulated short-barreled rifle. The Proposed Rulemaking fails to explain how different buffer tubes materially alter the character of a firearm. *See id.* at 30,833.

While this list is far from exhaustive, it effectively demonstrates not only the arbitrariness of the Proposed Rulemaking, but also the Agencies’ failure to consider a significant number of important aspects related to the regulation of pistols with stabilizing braces. Accordingly, the Agencies should abandon this Proposed Rulemaking and this method of regulating pistols with stabilizing braces in its entirety.

Finally, the Proposed Rulemaking exposes producers and sellers of pistols with stabilizing braces, as well as the purchasers of these firearms, to liability based upon completely undefined criteria.¹² Worse, this is not mere civil liability. Instead, producers, sellers, and purchasers would

¹⁰ This same problem, and lack of consideration, is also present in the “Length of Pull” portion of the Proposed Rulemaking. *See id.* at 30,833.

¹¹ This same problem, and lack of consideration, is also present in the “Stabilizing Brace’ Modifications/Configuration” portion of the Proposed Rulemaking. *See id.* at 30,833.

¹² Many members of the public have already begun to express concern with the confusing nature of the regulatory regime, as well as the inconsistencies and/or absurdities introduced in the Proposed Rulemaking, which

risk felony charges, prison time, and a possible forfeiture of their constitutionally protected firearm rights for the slightest misstep. *See* 18 U.S.C § 922(g)(1) (right forfeiture), § 924 (GCA criminal penalties); 26 U.S.C. § 5871 (NFA criminal penalties). 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,¹³ and the effect this will have on ordinary people caught up in the Agencies' attempt to prevent individuals from supposedly circumventing the NFA by using pistols equipped with stabilizing braces—a practice that the ATF has signed off on since 2013.

The ATF and DOJ should abandon their attempts to reclassify stabilizing brace equipped pistols as rifles, and thus likely NFA regulated short-barreled rifles, or at minimum, must completely reconstrue the factor analysis so that those criteria are based on well-reasoned, supported, and legally sufficient bases that are understandable by a reasonable person.

III. 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,

concerns the Agencies must take into account prior to proceeding to a final rule. *See, e.g.,* Brett Cooper, *ATF's New Pistol Brace Rule Would Create as Many as 40 Million New Felons Over Night*, THE TRUTH ABOUT GUNS (July 12, 2021), <https://www.thetruthaboutguns.com/atfs-new-pistol-brace-rule-would-create-as-many-as-40-million-new-felons-over-night/>; Dan Zimmerman, *The ATF's Arbitrary Regulation of Pistol Braces is an Intolerable State of Governance*, THE TRUTH ABOUT GUNS (June 16, 2021), <https://www.thetruthaboutguns.com/the-atfs-arbitrary-regulation-of-pistol-braces-is-an-intolerable-state-of-governance/>; Tom Knighton, *Disabled Vets Push Back Against Proposed Pistol Brace Ban*, BEARING ARMS (Aug. 25, 2021, 8:30 AM), <https://bearingarms.com/tomknighton/2021/08/25/pistol-brace-ban-n49272/>; Forrest Cooper, *New ATF Pistol Brace Ban Explained*, RECOIL (June 23, 2021), <https://www.recoilweb.com/new-atf-brace-ban-explained-168620.html>; Michael Brendan Dougherty, *Brace Yourself*, NATIONAL REVIEW (June 9, 2021, 6:30 AM), <https://www.nationalreview.com/2021/06/brace-yourself/>; Firearms Policy Coalition, *Decoding the ATF's proposed BAN on pistol braces*, YOUTUBE (June 8, 2021), https://www.youtube.com/watch?v=wJ2wtbPCHsI&ab_channel=FirearmsPolicyCoalition; Colion Noir, *ATF New Proposed Rule on Pistol Stabilizing Braces is Absolutely Ridiculous*, YOUTUBE (June 15, 2021), https://www.youtube.com/watch?v=EZH11XWsWLc&ab_channel=ColionNoir; Reno May, *Your AR Pistol will be an SBR if you don't act now! – ATF comment period open*, YOUTUBE (June 10, 2021), https://www.youtube.com/watch?v=NpB1prTezsQ&t=219s&ab_channel=RenoMay; TheGunCollective, *New ATF Pistol Brace Rule Would Turn Millions to Felons | Fight for Gun Rights*, YOUTUBE (June 9, 2021), https://www.youtube.com/watch?v=-58EpYn2xlw&t=541s&ab_channel=TheGunCollective; Gunscom, *How to Fill Out the Proposed ATF Form 4999*, YOUTUBE (June 24, 2021), https://www.youtube.com/watch?v=orX0g6P3JmA&ab_channel=Gunscom.

¹³ “The rule that penallows 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).

the Agencies must also consider the impact on individuals' natural, fundamental, unalienable right to possess arms. Given the Agencies failure to conduct this analysis in any meaningful way, The Center provides 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)
- 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)

IV. 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 is rife with unsupported assumptions based on unidentified "subject matter experts" ("SME"), using undisclosed methodologies, relying on unknown data points.

First, Chapter 2 makes a number of assumptions, based on unknown and unprovided data, that minimize the already massive economic impact of the Proposed Rulemaking. For example, the RIA notes that "anecdotal evidence" from stabilizing brace manufactures indicates between 3 million and 7 million affected stabilizing braces have been sold between 2013 and 2020.¹⁴ RIA, at 16. And yet, the ATF's unidentified SMEs "estimate that the manufacturers may have likely inflated their sales estimates, and therefore, estimate the number sold to be 3 million." *Id.* The RIA goes further and states: "Additionally, based on overall manufacturing of all firearms in general, ATF estimates that 3 million is likely to be the primary estimate."¹⁵ *Id.* But the RIA fails to indicate why the ATF chose to use the lowest end of the estimate, what the SMEs or the ATF based their conclusion on, the manufactures' actual statements regarding sales, or any other data that could lead the ATF to a legitimate conclusion. If, in fact, the ATF is incorrect and there are 7 million affected stabilizing braces possessed by individuals or retailers, the economic impact of this Proposed Rulemaking would be more than double the current estimate. And the difference is not mere pennies, but rather, this single "estimate" could mean the Agencies' regulatory analysis is off by millions of dollars.

¹⁴ The RIA does not indicate how many unaffected stabilizing braces have been sold between 2013 and 2020, nor how the ATF determined which stabilizing braces would be, as a matter of rule, unaffected.

¹⁵ The RIA also indicates the ATF believes the demand for stabilizing braces will diminish in the coming years because of three pending legal actions the ATF has brought against manufactures of firearms with stabilizing braces. RIA, at 17. The RIA does not indicate why the ATF believes these currently pending enforcement actions will affect the market, especially given the fact that the ATF has yet to prevail in those actions. If the ATF is unsuccessful, then individuals could be more inspired to exercise their rights, as vindicated by a court of law, and sales could increase. *See, e.g.*, John Boch, *Californians Purchased Over ONE MILLION Magazines in One Week of Freedom*, THE TRUTH ABOUT GUNS (Apr. 14, 2019), <https://www.thetruthaboutguns.com/californians-purchased-over-one-million-magazines-in-one-week-of-freedom/> (reporting Californians' response to a court striking down California's magazine ban as unconstitutional); David Lane, *California Ammo "Freedom Day"*, PEW PEW TACTICAL (Apr. 25, 2020), <https://www.pewpewtactical.com/california-ammo-freedom-day/> (detailing Californians' response to a court striking down California's direct ammunition purchase prohibition as unconstitutional). Further, if the ATF is successful, many individuals could seek out similar, non-violative options to find alternative ways to exercise their natural right to self-defense. *See, e.g.*, AWR Hawkins, *Company Invents 'Patriot Mag Release' to Defy California Gun Laws*, BREITBART (July 6, 2016), <https://www.breitbart.com/local/2016/07/06/california-gun-laws-patriot-mag-release/> (discussing the invention of the "Bullet Button Reloaded" to create a fixed-magazine AR-type rifle); Richard Johnson, *Multiple California Compliant Magazine Release Options*, THE FIREARM BLOG (July 6, 2016), <https://www.thefirearmblog.com/blog/2016/07/06/multiple-california-compliant-magazine-release-options/> (addressing Californians' response to restrictive California firearm regulations). The RIA fails to account for the market increase that would likely result in either scenario and thus does not contain an accurate economic impact analysis.

Second, Chapter 2.1 assumes that the mean individual ownership of stabilizing braces is two per owner, based on “information gleaned from the disposal of bump-stock-type devices.” RIA, at 18. The ATF believes the demand for stabilizing braces and bump-stock-type devices “would have been similar” because “the demand for both items stems from the desire to have NFA items without paying for and undergoing the NFA regulatory regime.” *Id.* This assumption is based on no support. The ATF acknowledges that stabilizing braces were specifically created to allow individuals with mobility problems to brace heavier pistols. 86 Fed. Reg. at 30,827 (“According to [the first individual to submit a forearm brace], the brace concept was inspired by the needs of combat veterans with disabilities who still enjoy recreational shooting but could not reliably control heavy pistols without assistance.”). Bump-stock-type devices, however, were created to assist individuals with bump firing. Those motivations are vastly different and could greatly affect the market. The fact that both are firearm accessories does not mean they have the same demand. Furthermore, the RIA continues to employ the low estimate of 3 million stabilizing braces sold. RIA, at 18. As such, the RIA estimates that only approximately 1.4 million individuals would be affected by the proposed rulemaking. *Id.* The RIA fails to even consider potential broader ownership of stabilizing braces by more individuals. Accordingly, the RIA fails to adequately estimate the number of individual stabilizing brace owners.

Third, the purported justification for this proposed regulation is deeply flawed. The Proposed Rulemaking states that the need for this agency action is “the failure of the market to compensate for negative externalities caused by commercial activity.” 86 Fed. Reg. at 30,845. Namely, the Agencies are concerned that “individuals and manufacturers may try to use purported ‘stabilizing braces’ and affix them to firearms to circumvent the requirements of the NFA, which requires registration and taxes to be paid on the making and transfer of NFA items.” *Id.* Even if the Agencies were correct, and individuals and manufactures have been circumventing the NFA using stabilizing braces, the Agencies’ entire argument about the dangerousness of short-barreled rifles is completely undermined. Between the years 2013 and 2020, which the Agencies examine, the Proposed Rulemaking points to only two specific criminal acts where pistols with stabilizing braces were allegedly used. And yet, the Agencies propose to undergo this rulemaking, at a cost of, at minimum, more than \$100 million, in order to regulate stabilizing braces.

Lastly, the RIA suffers from numerous other flaws:

- Chapter 3 estimates that not a single individual would turn in a firearm equipped with a stabilizing brace because individuals could “simply permanently remove or alter the ‘stabilizing brace’ such that it cannot be reattached, while retaining the firearm.” RIA, at 21. While sense may dictate that most individuals would follow this path, the ATF does not provide any support for its contention. It is also foolish, and arbitrary, to assume that some small percentage of the minimum of 1.4 million owners of pistols with stabilizing braces would not turn them over to the ATF—especially given that the ATF repeatedly discusses the fact that individuals turned in “bump-stock type devices” when the Agencies used a similar rulemaking process to designate those devices as machine guns. *See id.*
- Chapter 4 relies on unidentified SMEs using undisclosed data and information to determine that only 10% of an estimated 17,091 affected FFLs would convert affected pistols with

stabilizing braces to rifles.¹⁶ The RIA also estimates this would only affect 150,000 of the 1.4 million owners with 300,000 of the 3 million affected firearms, again without providing any actual data or reasoning. These estimates cannot be accurately reviewed unless the ATF provides the methodology for its determination.

- Chapter 4, in estimating the cost of converting a stabilizing brace equipped pistol into a rifle, only cites to 4 retailers, out of tens, if not hundreds, of thousands of retailers in the United States to establish the average cost of a “long barrel.” *Id.* at 24-25, 24 n.10. The RIA also fails to define what constitutes a “long barrel.” The same is true of handrails, where the RIA similarly only cites to 4 retailers. *Id.* at 25, 25 n.11. Given the ATF, likely on the low end, projects this will affect 305,127 firearms, any deviation in price will have a large effect on the overall economic impact of this Proposed Rulemaking. The Agencies must provide better established estimates for the cost of conversion.
- Chapter 5 estimates that only 25 percent of individuals would register their newly regulated NFA items with the ATF, but that estimate is based solely on the unidentified SMEs using undisclosed data and information. The same is true of the number of FFLs estimated in Chapter 5, along with the number of affected firearms those FFLs possess. The Agencies must disclose their data and methodology for the public to meaningfully comment on the actual regulatory impact.
- Chapter 6 fails to account for the businesses that will fail, the jobs that will be lost, the materials that will go unpurchased, and the losses to various other industries touched by pistol brace manufactures due to effects of the Proposed Rulemaking. Those effects will be far beyond \$49.8 million per year.

Overall, at every stage of the RIA, the ATF “requests comments regarding the population, methodology, and scope of this scenario.” *See, e.g.*, RIA, at 18. The Center’s response is simple—the ATF must actually provide its methodology so that the population, methodology, and scope can be reviewed and commented upon. While The Center points 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 30,845.

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

The Proposed Rulemaking fails to engage in a federalism analysis of the Agencies’ “constitutional and statutory authority for the action,” where the regulatory change will certainly affect states’ policy making discretion; likely to the detriment of enforcement of federal law. 86 Fed. Reg. at 30,847.

¹⁶ The RIA uses the term “long-barreled rifle,” which is not defined by federal law or regulation and is entirely without meaning. RIA, at 24.

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.

Here, the Proposed Rulemaking fails to account for the significant changes in and training needed for law enforcement purposes that will result from this rulemaking. By creating a nearly unintelligible test to determine if a pistol with a stabilizing brace is actually a rifle, the Agencies are altering federal law that the states often rely on as a basis for their own laws, or which states cooperate with federal agencies to enforce (or at minimum refer to the relevant federal law enforcement office). Because of the ill-defined nature of the Worksheet, local law enforcement will have to become classification experts, under the ATF’s understanding, to determine whether a pistol with a stabilizing brace is actually a rifle. Alternatively, local law enforcement may choose to not engage in the tedious and incomprehensible classification process, thereby frustrating the intent of the Agencies. In either scenario, the Proposed Rulemaking may frustrate the policy making discretion of the state by forcing it to guess how the ATF may apply the Worksheet to a particular firearm, to provide the firearm to the ATF for individual classification in countless scenarios, or to force state agencies to simply not cooperate with the ATF out of sheer inability. All of this is heightened in light of the significant issues, as addressed above, with the Agencies’ assertion of constitutional and statutory authority to regulate stabilizing braces in this manner.

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

CONCLUSION

Mountain States Legal Foundation’s Center to Keep and Bear Arms appreciates the opportunity to submit these comments on the ATF and DOJ’s Proposed Rulemaking, ATF 2021R-08. The Center submits 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 because there can be no legally sufficient final rule that is a logical outgrowth of this Proposed Rulemaking.

Respectfully submitted by,

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