No. 23-10319

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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CERTIFICATE OF INTERESTED PERSONS

No. 23-10319
William T. Mock, et al. v. Merrick Garland, et al.

I certify that the following persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal:

1) Plaintiffs-Appellants:

William T. Mock

Christopher Lewis

Maxim Defense Industries, LLC, a limited liability company, is a wholly-owned subsidiary of Maxim Defense Group, Inc., a Florida S-Corp. Maxim Defense Group, Inc., has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Firearms Policy Coalition, Inc., a nonprofit corporation has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

2) Defendants-Appellees:

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Steve Dettelbach, in his official capacity as the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statute

Regulation

Other Authority

INTRODUCTION

The Agencies assume that braced pistols are short-barreled rifles ("SBRs") subject to the National Firearms Act ("NFA") by ignoring the definition of a handgun throughout their 50 pages of briefing. But the statutory text could not be clearer: A handgun is a short-stocked firearm "designed to be held and fired by the use of a single hand." 18 U.S.C. § 921(a)(30). A stabilizing brace designed to facilitate the single-handed firing of handguns is, definitionally, part of a weapon designed to be fired by one hand, and firearms with such braces are thus handguns or pistols and NFA exempt. The Agencies ignore this obvious textual conclusion by ambiguously expanding the definition of a "rifle" to intrude upon the definition of a handgun whenever the Agencies, applying indeterminate multi-factor discretion, see fit to criminalize any pistol that has, or could be fitted with, a stabilizing brace. But the Agencies' malleable I-know-it-when-I-see-it standard, Brief for Appellees 3-5 ("Appellees' Br."), offers no certainty to law-abiding Americans and gives excessive discretion to the Agencies to create crimes. Whatever the faux aesthetic similarities between the Agencies' cherry-picked pictures of SBRs with stocks and pistols with stabilizing braces, firearms with stocks are rifles, designed and intended to be fired from the shoulder, while firearms with braces are handguns designed to be braced on the forearm and fired with one hand. That each *could* be used in a manner contrary to their design does not convert one into the other.

Nothing in Appellees' rehashed arguments alters the conclusion already reached by the motions panel. Appellants remain likely to win on the merits because a braced pistol is a constitutionally protected bearable arm, and the Agencies have not met their burden of showing that the right to keep and bear arms historically allowed NFA-like regulation of braced pistols or SBRs, however defined. Appellants are also likely to show that the NFA does not authorize the Final Rule and that, if it does, the uncertainty of the Final Rule's requirements (not to mention the statute as interpreted by the Agencies and the district court) triggers the Rule of Lenity or the void-for-vagueness doctrine.

The remaining factors also favor a preliminary injunction. The Final Rule irreparably harms Appellants by infringing on their right to keep and bear arms while threatening them with criminal sanctions if they fail to comply, either knowingly or inadvertently, with the Final Rule's unlawful requirements. And it effectively destroys the market for braced pistols, making it likely that Appellant Maxim Defense and businesses like it will suffer unrecoverable losses or go out of business entirely.

The public has no interest in the unlawful enforcement of such a rule and the irreparable harms that accompany it. This Court should thus reverse the district court and enter a nationwide preliminary injunction to prevent these harms.

ARGUMENT

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

Nothing in the Agencies' brief diminishes Appellants' likelihood of success on the merits.

A. The Final Rule violates the Second Amendment.

The Agencies again argue (at 32) that a stabilizing brace is only a "firearm accessory," not a Second Amendment protected "bearable arm[]." But the sole case on which they rely, *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), is not binding and is poorly reasoned. Other courts have recognized that "the Second Amendment's protections extend beyond arms to encompass corresponding rights to *effective* self-defense." Br. for Amicus Curiae Texas Public Policy Foundation 20-21 ("TPPF Br."). *Cox* should thus be rejected here.

As Appellants explained (at 15 n.10), the Agencies' argument would allow the government to circumvent the Second Amendment in all but a small subset of circumstances. Though the Agencies argue (at 32) that a "stabilizing brace is not integral to the operation of any firearm," that distinction as justification for regulation finds no support in this Court's precedents. And the supposed requirement that a particular configuration choice be "integral" to the firearm's operation to be protected makes no sense; most such choices are not "integral" and could be replaced by a different choice. One grip could be swapped for another, as could different

triggers. A pistol with a stabilizing brace is merely a particular configuration that makes it easier and more stable for many gun-owners to hold and fire their pistols with one hand. That others might choose a differently configured and unbraced grip does not make the brace any less integral to the overall process of single-handed firing for those who use it for stability. The absurd result of the Agencies' argument would be to allow the government to define only a single acceptable handgun configuration and ban any alternative configurations as involving mere differences in "accessories" that are unprotected by the Second Amendment. Appellants' Br. 15 n.10. Thus, even if this Court entertained the Agencies' characterization of stabilizing braces as mere "firearm accessories," it would still need to treat them as within the Second Amendment's scope, otherwise "the right to bear arms would be meaningless." *See generally Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (subsequent abrogation on other grounds omitted). Braced pistols are protected bearable arms, Appellants' Br. 15, and the availability of differently configured pistols does not negate their protection.

The Agencies also claim (at 32-33) that braced pistols or SBRs are unprotected "dangerous and unusual" weapons. But even "dangerous and unusual weapons" remain bearable arms presumptively protected by the Second Amendment, and the Agencies beg the question of how to characterize braced pistols in any event. The "plain text" of the Second Amendment extends to *all* "instruments

that facilitate armed self-defense"; history supports restrictions only of those instruments that are "dangerous and unusual." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132, 2143 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

The Agencies are also wrong that braced pistols or SBRs are "dangerous and unusual." *First*, braced pistols are commonly owned and used for lawful purposes by over a million gun owners. They thus are not even remotely "unusual." And while the Agencies balk at Appellants' discussing (at 35-36) Justice Alito's concurring opinion in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), they ignore that the full *Caetano* Court corrected the Massachusetts court's conclusion that stun guns were uncommon. *Id.* at 411.

Hollis v. Lynch, 827 F.3d 436 (5th Cir. 2016), a pre-*Bruen* case, does not require a different conclusion. *Bruen* "fundamentally changed [this Court's] analysis of laws that implicate the Second Amendment." *United States v. Rahimi*, 61 F.4th 443, 450-51 (5th Cir. 2023) (cleaned up), *petition for cert. filed*, No. 22-915 (U.S. Mar. 17, 2023). *Hollis* is now "obsolete." *Id.* But even under *Hollis*, braced pistols are in common use—regardless of whether they are classified as SBRs. Appellants' Br. 17. *Hollis* addressed only machinegun ownership, *see Bezet v. United States*, 714 F. App'x 336, 341 (5th Cir. 2017), concluding that, "irrespective of the metric used,"

176,000 machineguns did not establish commonality. *Hollis*, 827 F.3d at 450.[1] The 176,000 machineguns at issue there pale in comparison to the "between 10 and 40 million braces" the Congressional Research Service identifies or even the 3 million braces that the Agencies concede are in circulation. *See* TPPF Br. 27 (internal citations omitted); *see also* Appellants' Br. 17. And if the Final Rule is correct that braced pistols are SBRs, then "the weapons are even more common because it would be undisputed that there are at least 3,641,000 of them." TPPF Br. 29; Appellants' Br. 17. The Agencies claim (at 35), without citation, that the possession of unregistered braced pistols has been unlawful the whole time and therefore "cannot create a constitutional right." But a constitutionally questionable law cannot circularly validate itself by claiming that it rendered otherwise protected arms illegal and so they are not protected.[2] *Heller* and *Caetano* instruct courts to look not to the law or interpretation being challenged, but to how common a firearm is when evaluating whether such arm is "unusual" for purposes of deciding whether it is dangerous and unusual such that certain historical limits might be justified. Under

[1] *Hollis* did not contend with the fact that the number of machineguns had been artificially deflated by decades of NFA-enforcement before *Heller*.

[2] This of course begs the question if the Agencies think that a 20th-Century law can limit a right constitutionally protected since 1791.

the proper metric, braced pistols are in common use and not "unusual," whether or not the Agencies are correct that they are SBRs.[3]

The Agencies also cannot show that braced pistols or SBRs are more dangerous than non-braced pistols or semiautomatic rifles. Like other semiautomatic firearms, they fire a single round with each function of the trigger and can be chambered to fire any number of available rounds. Moreover, the Final Rule itself references "only two instances where criminals used stabilizing braces and 272 investigations involving braces." TPPF Br. 28 (discussing Factoring Criteria for Firearms With Attached "Stabilizing Braces," 88 Fed. Reg. 6,478, 6,499 (Jan. 31, 2023), https://www.federalregister.gov/d/2023-01001). And given the purpose of their design, if anything, braced pistols are *safer* for one-handed firing because they provide stabilization to disabled or physically weaker individuals who might struggle to aim and control a handgun. The Agencies thus offer no relevant history to meet their burden to show that the right to keep and bear arms allowed NFA-like regulation of braced pistols or SBRs.[4] Nor could they, given that there is a long

[3] And because the test is conjunctive, *see Caetano*, 577 U.S. at 411-12, commonality is sufficient to preclude reliance on any historical regulation of "dangerous and unusual" weapons.

[4] The statutes the Agencies cite (at 34 n.2) to claim that SBRs are "generally prohibit[ed]" by the States were all enacted *decades* after the Fourteenth Amendment was enacted and most post-date even the NFA in 1934. *None* of those 20th-century statutes are analogous to relevant historical restrictions on the right to keep and bear arms. *See Bruen*, 142 S. Ct. at 2136-37.

history and tradition in this country of modifying firearms and other gunsmithing to facilitate easier firing. ROA.297-98; Br. for Amicus Curiae The State of Texas et al. 13, Doc. 109-1 ("Texas Merits Br.").

The Agencies next claim (at 36) that the NFA does not ban braced pistols, but only subjects them to a "regulatory scheme." That argument ignores that the NFA goes well beyond mere licensing for covered firearms, and severely restricts possession, use, transport, transfer, and more. Appellants' Br. 5 n.1; TPPF Br. 21-22 & n.9 (explaining the "restrictions that apply to a registered pistol"). And the Final Rule is closer to the may-issue regime invalidated in *Bruen* because ATF has repeatedly "argued . . . that it can deny NFA applications for" any or "no stated reason at all." Texas Merits Br. 14. In any event, the Agencies' continued reliance on *Bruen*'s footnote 9 offers no answer to Appellants' showing (at 22) that the Agencies overread that footnote and ignore both the extra burdens and delays of NFA registration. *Bruen* does not condone licensing schemes with such accompanying burdens.

The Agencies next turn (at 39-42) to the same statutes they cited before in a failed attempt to tie NFA restrictions to the Nation's history and tradition. They wrongly claim (at 41) that laws from "more than half of the 13 colonies" are sufficiently analogous to give them cover. Of the colonies and states whose statutes they cite, "New Jersey[] and New York have never enumerated a Second

Amendment analogue," "Virginia did not do so until . . . 1971," *Range v. Att'y Gen.*, No. 21-2835, 2023 WL 3833404, at *10 (3d Cir. June 6, 2023) (en banc) (Porter, J., concurring), and New Hampshire did not do so until 1982, Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 199 & n.48 (2006) (citing N.H. Const. pt. 1, art. 2-a).

And though South Carolina, Georgia, Rhode Island, and Connecticut recognized a right to keep and bear arms earlier than other states, they did not do so until 1868, 1865, 1842, and 1818, respectively—decades after the Second Amendment was ratified. *Id.* at 195, 209-11 (citing S.C. Const. art. I, § 20; Ga. Const. of 1865, art. I, § 4; R.I. Const. art. I, § 22; Conn. Const. art. I, § 15). The laws of states that did not locally recognize a right to keep and bear arms in the relevant period thus "provide little insight about the scope of the Second Amendment right." *Range*, 2023 WL 3833404, at *10 (Porter, J., concurring).

And even in the states that did constitutionally protect a right to keep and bear arms, the right recognized was often an expressly collective right, not the individual right recognized by the Second Amendment. Massachusetts and Maine, for example, protected the collective "right to keep and to bear arms for the common defence." Mass. Const. pt. 1, art. XVII (1780); Me. Const. art. I, § 16 (1819); *see Commonwealth v. Davis*, 369 Mass. 886, 888, 343 N.E.2d 847, 848-49 (1976) (finding that this right was collective); *State v. Friel*, 508 A.2d 123, 125 (Me. 1986)

(same for Maine). States that recognized only a collective right to keep and bear arms likewise provide little insight on the historic scope of the individual right recognized in the Second Amendment.

The other cited statutes (at 39-40) are likewise inapposite. The Agencies fail to cite a single federal law from the relevant period, and the colonial and state statutes they do cite all come from either decades before[5] or decades after[6] the Second Amendment was ratified in 1791. The only cited laws remotely in the right period are *all* in the states discussed above that did not recognize an individual right to keep and bear arms at all. *See* Appellees' Br. 40 (citing New Jersey (1781) Massachusetts (1775); New York (1778); Connecticut (1775)).

But even ignoring the Agencies' overwhelming temporal problems, the substance of each statute they cite differs dramatically from the NFA and all it requires of gun owners. Appellants' Br. 18-19; TPPF Br. 23-27 (discussing the Agencies' statutes).[7] This Court must "reason by analogy" to find regulations that

[5] Virginia (1631); Rhode Island (1667); South Carolina (1747); Massachusetts (1651).

[6] Maine (1821); Georgia (1866); North Carolina (1857); Alabama (1867); Mississippi (1844, 1867); New Hampshire (1820); Massachusetts (1805, 1809).

[7] Further, none of the cited laws require continued interactions with the government even after regulation, and the Agencies "offer[] no evidence the cited laws were enforced, much less that they were enforced with penalties as severe as 10 years' imprisonment" like the NFA, TPPF Br. 26, even though *Heller* and *Bruen*

"impose a comparable burden on the right of armed self-defense and [for which] that burden is comparably justified." *Bruen*, 142 S. Ct. at 2132. Here, the proffered historical regulations neither imposed a comparable burden to the NFA, nor regulated similar conduct. These "isolated" laws, offered with "no detail about their application," are "nothing close to what would satisfy the demanding standard set forth in *Bruen*." *Atkinson v. Garland*, No. 22-1557, slip op. at 8 (7th Cir. June 20, 2023). And any tortured analogies the Agencies might attempt certainly are not *likely* to overcome the presumptive constitutional protection of braced pistols, and therefore do not negate Appellants' likelihood of success on their Second Amendment claim.

B. The Final Rule is not authorized by the NFA.

The Agencies' other attempts to save the Final Rule fail. They begin by arguing that they did not create law but offer their "understanding of the best interpretation of the NFA." Appellees' Br. 15. But because the Final Rule changes the status of millions of formerly non-NFA firearms—that the Agencies themselves said the NFA did not touch—and turned their owners into felons overnight, these arguments fail, notwithstanding their claim that the Final Rule lacks "independent

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instruct courts to also consider the penalties tied to a restriction. *Bruen*, 142 S. Ct. at 2149 (citing *Heller*, 554 U.S. at 633-34).

force and effect of law." *Id.* at 16.[8] It is absurd to claim that neither the earlier guidance nor the current revision impacted the lawfulness of owning a braced pistol. Before January 31, owners could not be prosecuted. But as of January 31, prosecutors will be guided by the Final Rule, and no reasonable person or business would openly engage in conduct that the Agencies have declared illegal and said they would prosecute. An interpretation inconsistent with the statutory text and backed by the threat of prosecution has sufficient "force" to require APA review and rejection.

The Agencies also have no answer to Appellants' showing that the Agencies themselves, because they underwent notice-and-comment rulemaking, acknowledge that the rule is legislative. Instead, they cheekily suggest (at 28) that their entire rights-limiting charade was merely to provide procedural rights to those now treated, in their discretion, as criminals under the Final Rule. To state that argument is to refute it, and the Agencies' *ipse dixit* does not render the Final Rule mere bloviation. The Final Rule is legislative because it governs how the Agencies apply numerous other parts of the statute, how they will prosecute citizens and companies, and how such companies must behave to avoid the severe consequences of being prosecuted.

[8] Moreover, the Final Rule amends the regulatory definition of "rifle," both under the NFA and GCA, thereby facially altering federal law.

1. The NFA's text precludes the Final Rule.

As Appellants explained, the plaint text of the NFA rejects the Final Rule. Ignoring 18 U.S.C. § 921(a)(30)'s definition of a handgun as a device designed to be fired by a single hand, the Agencies (at 17-18) conflate the mere *capability* of firing a firearm from the shoulder with the design of a weapon to fire from the shoulder and the intention that it be so used. But a stabilizing brace is expressly designed to attach to a handgun, wrap around the wrist or forearm, and thus facilitate firing with a single hand.

The Agencies also largely ignore the intent requirement. But the intent or statements of third-party sellers cannot change the intent of the manufacturer. *See Tobacco Accessories & Novelty Craftsmen Merchs. Ass'n of La. v. Treen*, 681 F.2d 378, 385 (5th Cir. 1982). As Appellants explained, the manufacturers' intent, clearly shown in the patent for stabilizing braces, is *not* that they be used from the shoulder, but attached to the forearm. Appellants' Br. 6. And whatever the subjective intent of unverifiable third-parties, subjective intent criteria cannot overcome the design for braces to be used in single-handed firing.

The Agencies misstate Appellants' argument as turning merely on the fact that a braced pistol "*may* be capable of one-handed firing." Appellees' Br. 20 (emphasis added). Not so—braced pistols are not SBRs under the statute because they were expressly *designed* to be fired using a single hand and are neither designed nor

intended to be fired from the shoulder. It is the Agencies that flip the statutory text by suggesting that if a braced pistol *can* be fired from the shoulder, it is therefore a rifle. But a similar argument was rejected in *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505 (1992). *See* Br. for *Amici Curiae* The Firearms Regulatory Accountability Coalition, Inc. et al. 11-12 ("FRAC Br."). Because stabilizing braces are expressly designed to "serve[] a 'useful purpose' other than shouldering," they are not SBRs. *Id.* at 12.

2. If the NFA allows the Final Rule, then the NFA is ambiguous and lenity applies.

As for lenity, the Agencies argue (at 21) that lenity is not triggered because there is no "ambiguity in the NFA." Appellants agree only to the extent that "the plain text of the NFA unambiguously excludes braced pistols from its reach and restrictions." Appellants' Br. 26. It is only the *Agencies'* incorrect reading of the NFA that would render it ambiguous enough to supposedly allow the Final Rule's regulation of stabilizing braces and the pistols to which they attach. But if it is indeed ambiguous enough to permit such a reading, then it is ambiguous enough for the Rule of Lenity to apply and preclude that result.

To avoid ambiguity, the Agencies misstate the record, suggesting (at 23) that they never did an "about-face" at all. The last ten years of guidance belies that claim. *See* Appellants' Br. 8; *see also* Texas Merits Br. 6-7; FRAC Br. 1-2. Citing *Cargill v. Garland*, 57 F.4th 447, 468 (5th Cir. 2023) (en banc), *petition for cert. docketed*,

No. 22-976 (U.S. Apr. 7, 2023), the Agencies ultimately concede (at 23) that if this Court concludes that the Agencies changed their position on braced pistols, the change bars any deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). They incorrectly suggest, however, that *Cargill* precludes using an agency's about-face itself as evidence of ambiguity. But Appellants cited *Hardin v. ATF*, 65 F.4th 895, 898 (6th Cir. 2023), where the Sixth Circuit found as much, and this Court should likewise do so here. *See* Appellants' Br. 28-29. In sum, if the NFA allows the reinterpretation embodied in the indeterminate Final Rule, then the statute is ambiguous, triggers the Rule of Lenity, and should be read narrowly to exclude such broader interpretation.

3. If the NFA allows the Final Rule, then it violates the Non-Delegation Doctrine.

The Agencies (at 26) devote only a paragraph to Appellants' non-delegation arguments, claiming that Congress gave the Attorney General "the authority to prescribe rules and regulations," and he sub-delegated that authority to ATF. But they ignore recent Supreme Court opinions clarifying that agencies are unable to "rewrite clear statutory terms" to suit their "sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

Because the Final Rule treats braces and braced pistols designed to assist with single-handed firing as NFA-regulated SBRs, designed and intended to be fired from the shoulder, the Final Rule rewrites the statute without a clear

delegation from Congress. Given that constitutional anti-delegation concerns generally are heightened when an agency rewrites a criminal statute, the Final Rule reflects an unconstitutional delegation of authority to the Agencies.

4. The Final Rule is unconstitutionally vague.

Like the district court, the Agencies cite (at 23) *Village of Hoffman Estates* to argue that the Final Rule has sufficient clarity. But once more, they conveniently neglect "perhaps the most important factor" demanding a "more stringent vagueness test" is whether a law "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982). Even if the Second Amendment issues are somehow uncertain, the mere threat of Second Amendment encroachment heightens vagueness concerns.

Alternatively, the Agencies argue (at 25) that because braced pistols are only regulated, not banned, and because "individuals can obtain classifications from ATF to ameliorate any such concerns," the Final Rule has no chilling effect. But rights can be chilled in ways that "fall short of a direct prohibition," and the ability to seek time-consuming clarification provides no solace to a gun owner seeking to exercise her rights *now*. Appellants' Br. 23 (quoting *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)). The option to play "Mother May I" does not cure unconstitutional vagueness. And the Final Rule's ongoing consideration of

manufacturers' and others' speech on how braced pistols *can* be fired is impossible to predict and ever changing.

The Agencies thus cannot save the Final Rule by defending (at 24) multi-factor balancing tests generally—particularly by citing cases lacking constitutional vagueness challenges, *Northstar Wireless, LLC v. FCC*, 38 F.4th 190, 218-19 (D.C. Cir. 2022), *petition for cert. filed*, No. 22-672 (U.S. Jan. 17, 2023); *Texas v. EPA*, 983 F.3d 826, 839-40 (5th Cir. 2020). Whatever their validity generally, the Final Rule provides no meaningful clarity about what is, and what is not, considered an SBR by the Agencies. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (recognizing due-process concerns with a conviction stemming from a regulation "so standardless that it authorizes or encourages seriously discriminatory enforcement"). Even the district court recognized that the "six criteria by which ATF will make a weapons classification are non-dispositive, and therefore imprecise." ROA.441, R.E.24. That is enough to show vagueness, particularly given the criminal consequences of non-compliance and the constitutional rights the Final Rule burdens and chills.

C. The Final Rule violates the First Amendment.

As to the First Amendment challenge, the Final Rule does not merely allow the "evidentiary use of speech," as the Agencies contend (at 42), but is considering the speech of unknowable parties to determine whether particular braced pistols are SBRs. Nor is their consideration of third-party speech comparable to "a defendant's

confession," as the Final Rule allows *anyone*'s speech about how a braced pistol might be fired to bear on the Agencies' determination of whether the NFA applies. As Appellants explained (at 34-38), the Final Rule's content- and speaker-based considerations will invariably chill protected speech even though the Final Rule's goals could be furthered without consideration of speech at all, as shown by speech's absence on the Proposed Rule's Worksheet 4999.

D. The Final Rule violates the APA's substantive and notice requirements.

Finally, the Agencies' main response to Appellants' showing that the Final Rule is not a logical outgrowth of the Proposed Rule is that they never needed to conduct notice-and-comment rulemaking in the first place. As discussed above, that is incorrect.

The Agencies' backup claims that the Final Rule's multifactor test was a logical outgrowth of the Proposed Rule then largely turn on their claim that lots of people were unsatisfied with the Proposed Rule. But the Agencies did not have "carte blanche to establish a rule" just because of the dissatisfaction of commentators. Appellants' Br. 43 n.24 (citation omitted). If Worksheet 4999—which the Proposed Rule said was "necessary to enforce the law consistently," Appellants' Br. 44—was as unworkable as the Agencies claim (at 29), then the proper procedural response would be to start over and provide the public with notice of the multi-factor test that the Agencies were considering in its place and allow the

public to offer comments anew on that test. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). If the Agencies were even considering the abandonment of something that they considered *necessary* at the notice-stage, the public deserved a chance to comment on that abandonment.

Nor are the Agencies correct to argue (at 30-31) that "any error would be harmless." *First*, findings of harmless error are "rare" in this circuit because the "absence of prejudice must be clear." *United States v. Johnson*, 632 F.3d 912, 933 (5th Cir. 2011) (cleaned up). The only case from this circuit that the Agencies cite (at 30) finding harmless error, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013), provides the Agencies no harbor because there, the FCC put the petitioners on notice that they were considering a rule change. *Id.* at 235. Here, by contrast, the Agencies scrapped the very part of the Proposed Rule they had previously called "necessary."

Second, the harm Appellants allege is the failure of the process itself, a harm recognized by the very case the Agencies cite, *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (per curiam). The Agencies oddly cite that case (at 30-31) to claim that Appellants needed to show that they would have "submitted additional, different comments" if the proper procedures had been followed. But that case *rejected* such a requirement, explaining that "a rule requiring petitioners in all 'logical outgrowth' cases to show what additional comments they would have

submitted had notice been adequate would *improperly* merge the analysis on the merits of whether the final rule is a 'logical outgrowth' with any applicable prejudice analysis." *City of Waukesha*, 320 F.3d at 246 (emphasis added). "[T]he concepts of logical outgrowth and harmless error merge if the final rule is, in fact, anticipated, whether or not that anticipation was objectively foreseeable." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).[9] The Agencies make no attempt to show that it was, in fact, *anticipated* that Worksheet 4999 would be abandoned or that the Final Rule's indeterminate multi-factor test would supplant it. Accordingly, their harmless-error argument—which presented the wrong test anyway—fails.

II. APPELLANTS FACE IRREPARABLE HARM

Regarding irreparable harm, the Agencies first argue (at 45) that Plaintiffs have not been harmed because the Final Rule does nothing but interpret the NFA. For the reasons explained in detail above, braced pistols are not SBRs. It is thus no answer to say that Plaintiffs have not been harmed because the "NFA has applied to short-barreled rifles for decades." *Id.* For the first time, the Final Rule imposes NFA costs and obligations, under threat of prosecution, on what the Agencies explicitly did not regulate previously. *See* Texas Merits Br. 6-7; Appellants' Br. 8-9.

[9] Even if that were the case, Appellants would have raised several concerns about the legality, constitutionality, and indeterminacy of the Final Rule if given the chance.

They next argue (at 45-46) that "the NFA's penalties for noncompliance are irrelevant" because any injury is "self-inflicted" and the burdens of compliance "de minimis." They err on each point. Starting with the laughable claim that criminal penalties are irrelevant to the irreparable-injury calculus, the Agencies ignore that the threat of indictment is a form of irreparable harm. Appellants' Br. 48 (citing *Richey v. Smith*, 515 F.2d 1239, 1243 n.10 (5th Cir. 1975)). That harm is only amplified by the impossible choice the Final Rule imposes on Appellants—comply with the Final Rule's unconstitutional mandate or face prison. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). Far from being self-inflicted or "manufacture[d]," the irreparable harm from that choice comes directly from the Agencies. And anyone who succumbs to that coercive choice by sacrificing their Second Amendment protected rights is irreparably harmed. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).[10]

And far from a *de minimis* burden, the Final Rule has functionally destroyed the market for braced pistols. Appellant Maxim Defense substantially depends on its braced pistol sales to remain afloat. ROA.336. Without an injunction, Maxim Defense has a clear trajectory: closing shop. ROA.339. That is not a *de minimis*

[10] The Agencies' claim (at 47) that the NFA does "not prevent plaintiffs from keeping and bearing their arms" ignores the many restrictions on those activities and the harms stemming from their imposing an unconstitutional condition on the exercise of that right. *See* Appellants' Br. 20-21.

regulatory burden—the "threat[]" to "the existence of the movant's business" is the epitome of irreparable harm. *See Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989).

Nor are the Agencies correct to argue (at 46) that gun owners may simply avoid all harm by "request[ing], or sue[ing] for, a refund" of the $200 registration fee. As Plaintiffs made clear in their opening brief, the law of this Circuit precludes such an argument, as "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) (citations omitted; emphasis in original). And the $200 tax is only part of the harm—gun owners who comply with the Final Rule will also be harmed by being forever placed on a government registry. The Agencies ignore these additional harms too.

III. THE EQUITABLE FACTORS FAVOR INJUNCTIVE RELIEF

The equitable factors also favor Appellants. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (citation omitted). The Agencies (at 51) cite nothing to support their claim that inchoate assertions of "public safety" can trump this constitutional interest and offer no support for any

threat to such safety from braced pistols or, for that matter, even SBRs.[11] Such bare assertions have never sufficed to overcome the public interest in "due observance of all the constitutional guarantees." *United States v. Raines*, 362 U.S. 17, 27 (1960). And *Heller* expressly rejected such constitutional re-weighing because the Second Amendment had already done the "interest balancing." *Heller*, 554 U.S. at 635. Thus, the Agencies' suggestion (at 48-49) that the equities and public interest could favor them even if the Final Rule is unlawful is little more than a naked suggestion that the Court defer not to the Second Amendment's balancing, but to their own.

The Agencies next claim (at 51-52) a public interest in regulatory clarity and consistent enforcement—even though they recognize that many gun owners may still need to seek clarification on the Final Rule's scope. But the vague and imprecise Final Rule hardly improves clarity for all the reasons listed above. And that confusion harms the reliance interests of gun owners who took the Agencies at their word and harms those who might choose to register, as registration is "conditioned on an implicit admission that the applicant is in current possession of illegal contraband"—the very "sort of information that could be used in a criminal

[11] And though the Agencies cite pg. 6,499 of the Final Rule, the record shows "only two instances where criminals used stabilizing braces and 272 investigations." TPPF Br. 28 (discussing Final Rule, 88 Fed. Reg. at 6,499). If the Second Amendment withers the second time a criminal shoulders a braced pistol contrary to its design, then it is hardly worth the paper it is written on.

prosecution." Texas Merits Br. 18-19. Maintaining the pre-Final Rule status quo thus serves "clarity" far better than the Final Rule. And, as discussed below, if "consistent enforcement" is really the goal of the Agencies, then any injunction should be nationwide.

IV. THE INJUNCTION SHOULD BE NATIONWIDE

The Agencies wrongly suggest that a nationwide injunction would be improper or that any injunction granted here should be narrower than the injunction pending appeal.[12]

The Agencies (at 49) cite *Gill v. Whitford*, 138 S. Ct. 1916 (2018), to suggest a rule that would always forbid lower courts from enjoining unlawful agency action nationwide at the preliminary stages. But as this Court recognized earlier this year, the Supreme Court "has yet to tell" lower courts that nationwide preliminary injunctions are "verboten" because any rule counseling against such injunctions was "subject to exceptions." *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 387 (5th Cir. 2023) (en banc). There, it upheld a nationwide injunction rather than limiting an injunction to "6,000 members spread across every State in the Nation." *Id.* The same rule applies equally here, given the "hundreds of thousands of [FPC] members across the country." ROA.332. And once again, the Agencies' "position on the scope of the

[12] The Agencies do not contest that injunction's application to the family members of the individual plaintiffs.

injunction . . . sits awkwardly with [their] position on the merits" that there is a need for nationwide uniformity. *Feds for Med. Freedom*, 63 F.4th at 388.[13]

That case also shelves the Agencies' argument that an injunction should not be nationwide because "other courts are considering these same issues." Appellees' Br. 50 (quoting *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021) (per curiam)). There, this Court rejected concerns that an injunction would "afford[] relief to parties who have already lost their claims elsewhere" because no party in other cases had "lost their claims *on the merits*." *Feds for Med. Freedom*, 63 F.4th at 388 (emphasis in original). Here, pending cases challenging the Final Rule may continue to judgment even if the status quo is maintained nationwide.[14]

To avoid the conclusion that a nationwide injunction is necessary for uniformity, the Agencies again attempt (at 50-52) to challenge FPC's membership structure, but once more their attempt fails. FPC is a traditional membership organization that allows individuals to become members and defines what membership means. *See* ROA.333-34. One reason for FPC's involvement—guided by its organizational mission—is to provide relief to its members from unlawful

[13] It also sits awkwardly with the fact that, when an agency action is unlawful, the "ordinary practice" is to vacate the action, not let it percolate. *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859-60 (5th Cir. 2022) (citation omitted).

[14] Indeed, a nationwide preliminary injunction would enjoin only the Final Rule, not the Agencies' prior guidance.

government overreach. FPC thus has associational standing for its members who unquestionably have standing to challenge the Final Rule in their own right. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010).

Undeterred, the Agencies argue (at 51) that FPC lacks associational standing because of the need to determine both whether a member has a braced pistol and whether that braced pistol is an SBR. But the only case they cite refutes that claim, as it recognizes that "the participation of individual members is less likely to be required if the association is seeking injunctive relief only." *Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 577 (5th Cir. 2002). It then explained that in cases involving "pure questions of law" including "whether an agency's interpretation of a statute was correct," a case-by-case determination is less necessary. *Id.* (cleaned up). The Agencies' reliance on a case involving "fact-specific tort claims," *id.*, is thus unavailing.[15] This case involves overarching flaws in the Final Rule, not a case-by-case analysis of individual pistols, and FPC is well positioned to raise those claims for its members.

[15] Furthermore, because the Final Rule chills the exercise of the right to keep and bear arms, there is no need to conduct an individualized inquiry into whether a particular braced pistol is an SBR since the Final Rule chills FPC's members from owning them.

Finally, the Agencies argue that an injunction should not cover Maxim Defense's customers and everyone in the chain of sale as the injunction pending appeal does. But Maxim Defense needs complete relief from the Final Rule just like the other Plaintiffs. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see* Appellants' Br. 52. The Agencies' policy arguments against affording Maxim Defense the relief it needs to be kept whole are unavailing and just as inconsistent with their arguments against a nationwide injunction as they were when raised against providing complete relief to FPC.

In short, a nationwide injunction is appropriate here to maintain uniformity, and anything short of such an injunction should be at least as broad as the injunction pending appeal.

CONCLUSION

The Final Rule unlawfully harms gun owners nationwide. This Court should thus enjoin it nationwide.

Respectfully submitted,

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Dated: June 20, 2023

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on June 20, 2023, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Erik S. Jaffe
Erik S. Jaffe

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,472 words excluding those portions exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Additionally, I certify that (1) any required redactions have been made in compliance with 5th Cir. R. 25.2.13; and (2) the document has been scanned with the most recent version of Microsoft Defender virus detector and is free of viruses.

/s/ Erik S. Jaffe
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Dated: June 20, 2023