No. 24-10743

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-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF OF FIREARMS REGULATORY ACCOUNTABILITY COALITION, INC. AND PALMETTO STATE ARMORY, LLC AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

No. 24-10743; *Mock, et al. v. Garland, et al.*

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

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

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

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

Dated: November 13, 2024

/s/ Stephen J. Obermeier
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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

For more than a decade, ATF authorized the public to use pistols equipped with stabilizing braces, a popular firearms accessory, without substantially heightened federal regulation. During that time, ATF repeatedly issued letter rulings assuring manufacturers and the public that attaching a stabilizing brace would not alter the classification of a pistol or other non-NFA firearm. As a result, millions of Americans for years lawfully purchased stabilizing braces, and pistols equipped with stabilizing braces, from authorized, legitimate manufacturers with ATF's full knowledge and express approval.

Then everything changed. Frustrated with perceived congressional inaction, President Biden ordered ATF to abandon a decade of practice under an established statutory framework and "to treat pistols modified with stabilizing braces" as short-barreled rifles "subject to the National Firearms Act." President's Remarks on Gun Violence Prevention Efforts, 2021 Daily Comp. Pres. Doc. 298, at 3 (Apr. 8, 2021). ATF complied, issuing the Rule at issue here, which purports to provide "factoring criteria" to "clarify" how ATF will determine whether any particular firearm is

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No entity or person, aside from *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E).

subject to heightened regulation. Factoring Criteria for Firearms with Attached "Stabilizing Braces," Final Rule, 88 Fed. Reg. 6,478 (Jan. 31, 2023) ("Rule").

In *Mock v. Garland*, 75 F.4th 563 (5th Cir. 2023) ("*Mock I*"), this Court preliminarily enjoined the Rule. It held that ATF's promulgation of the Rule "was not a logical outgrowth of the Proposed Rule" and "therefore must be set aside." *Id.* at 586. The court below held the same and vacated the Rule. ROA.1951-52. As Appellants explain (at 13-25), that holding was correct and compelled by *Mock I*.

But *Mock I* was not the only court of appeals to hold the rule unlawful. *Amicus* Firearms Regulatory Accountability Coalition ("FRAC") and a coalition of twenty-five states, companies, and individuals also challenged the Rule where FRAC is based, in North Dakota. The FRAC-led coalition argued that the Rule's vague standards were incomprehensible and made it impossible to comply with the law. The result was an invitation for unchecked discretion by the agency and an unworkable regulatory landscape for the public and FRAC's member-companies, including *amicus* Palmetto State Armory.

The Eighth Circuit agreed. *See FRAC v. Garland*, 112 F.4th 507 (8th Cir. 2024). Relying on this Court's decision in *Mock I*, the court held that the Rule was arbitrary and capricious because it "makes it nigh impossible for a regular citizen to determine what constitutes a braced pistol," and "allows ATF to reach whatever result[s] it wants." *Id.* at 524 (cleaned up). The Eighth Circuit's holding confirms

that this Court should affirm the lower court's finding that the Rule's standards are arbitrary because they are "impermissibly vague." ROA.1955-56.

The Rule's incomprehensibility is not the only reason it is unlawful. ATF also failed to consider reliance interests—including the reliance interests of FRAC's members and their customers. The record below showed that ATF did not consider the millions of individuals that purchased braces after 2020. And on appeal, ATF does not dispute that it ignored these reliance interests. Indeed, the phrase "reliance interests" does not even appear in the agency's brief. Because ATF has forfeited any argument against this independent basis for the lower court's judgment, the Court should affirm on this ground alone. ROA.1953-55.

This Court should also affirm because ATF has misread the NFA and GCA. Both statutes require the agency to assess the function for which a brace was "designed." 26 U.S.C. § 5845(c); 18 U.S.C. § 921(a)(7). ATF for years read this term to mean that it must look to evidence of whether a brace facilitated non-shoulder fire. It used that analysis to repeatedly find that braces designed by FRAC members did not convert pistols into short-barreled rifles. Yet, in the Rule, ATF now claims that evidence of non-shoulder fire is irrelevant, and the agency will assess only whether a brace facilitates shoulder fire.

That one-sided assessment is contrary to Supreme Court precedent. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the

Court held that statutory "design" inquiries require assessment of whether an item is "principally used" for lawful or unlawful purposes. *Id.* at 501. And in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), the Court held that ATF could not classify a product as a heavily-regulated NFA "firearm" where the product served a "useful purpose" that did not trigger NFA regulation. *Id.* at 512-13, 517-18. By limiting ATF's inquiry to only a brace's potential for unlawful use, the Rule flouts both *Hoffman*'s "principal use" assessment and *Thompson/Center*'s lawful "useful purpose" inquiry.

Finally, this Court should affirm the lower court's remedy: vacatur of the Rule. This Court has squarely and repeatedly held that vacatur is the "default" APA remedy for unlawful agency action. *Rest. L. Ctr. v. U.S. Dep't of Lab.*, No. 23-50562, 2024 WL 4609380, at *11 (5th Cir. Aug. 23, 2024). ATF simply ignores that precedent and insists (at 47) the opposite: that vacatur is only available in "extraordinary circumstances." This Court should reject the agency's attempt to break from blackletter law.

The Court should affirm.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THE RULE UNLAWFUL.

A. The Rule Is Arbitrarily Vague.

"An agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'" *Ohio v. EPA*, 603 U.S. 279, 292 (2024).

Agency action flunks this requirement where it "fails to provide comprehensible guidance about what falls within the bounds" of its regulations. *Hikvision USA, Inc. v. FCC*, 97 F.4th 938, 950 (D.C. Cir. 2024). While a "'totality of the circumstances' test" is "not 'necessarily arbitrary and capricious,'" it is when the resulting standard is "incoherent" or acts as "a cloak for agency whim." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 458 (5th Cir. 2021). Agency action is impermissible under this standard where it is "unworkable," *Hikvision*, 97 F.4th at 950, "'offers no meaningful guidance' to affected parties," *ACA International v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018), or results in "a failure to engage in reasoned decisionmaking." *FRAC*, 112 F.4th at 525 (quotations omitted).

Incomprehensible standards also create "fair notice" concerns. *Snyder v. United States*, 603 U.S. 1, 15-17 (2024). Both this Court and the Supreme Court routinely reject the Government's attempts to interpret statutes in ways that result in "no clear federal rules," *id.* at 16, or that would require parties to ascertain the legality of their conduct "with extraordinary intuition or with the aid of a psychic." *Inhance Techs., L.L.C. v. EPA*, 96 F.4th 888, 894-95 (5th Cir. 2024) (quotations omitted) (same). These notice requirements are particularly important in the firearms regulatory context, where "[f]ailure to comply" with ATF's rules "carries the potential for ten years' imprisonment," "fines," and "a lifetime ban on ownership of firearms." *Mock I*, 75 F.4th at 570-71.

Under either rubric, ATF's multifactor test falls well short. The Eighth Circuit, relying on this Court's previous decision in *Mock I*, held that the "Final Rule is arbitrary and capricious" because the Rule makes it "nigh impossible for a regular citizen to determine what constitutes a braced pistol." *FRAC*, 112 F.4th at 524 (quoting *Mock I*, 75 F.4th at 584-85). Although ATF was a party to that case, it inexplicably fails to cite this on-point decision from a sister circuit that reaches the same conclusion as the court below. The Eighth Circuit's decision confirms that ATF's multifactor test is arbitrary both holistically and as to the individual factors.

1. The Factors Are Holistically Arbitrary.

ATF's factors are arbitrary when considered together. The Rule requires ATF to "consider[ ]" surface area, weight, length, length of pull, sights, rearward attachments, marketing materials, and community use to determine "whether [a] weapon is designed, made, and intended to be fired from the shoulder." Rule, 88 Fed. Reg. at 6,575. But ATF does not say *how* it considers those factors, reserving the prerogative to make a judgment based on "th'ol' 'totality of the circumstances' test"—that is, the test "most feared by [regulated parties] who want to know what to expect." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). Worse, ATF admits that it will use its self-conferred discretion to ensure that "99% of stabilizing braces on the market" are subject "to enhanced regulations." *Mock I*, 75 F.4th at 583-84.

This amorphous, unweighted balancing test does not offer a comprehensible standard. Instead, as this Court has already found, it "vests the ATF with complete discretion to use a subjective balancing test to weigh six opaque factors on an invisible scale." *Mock I*, 75 F.4th at 584. The result is that ATF's "six-part test provides no meaningful clarity about what constitutes an impermissible stabilizing brace" and makes it "nigh impossible for a regular citizen to determine what constitutes a braced pistol." *Id.* at 585. In other words, the Rule is not a regulatory standard but "a Sword of Damocles hanging over the heads of American gun owners." *VanDerStok v. Garland*, 86 F.4th 179, 197 (5th Cir. 2023) (Oldham, J., concurring), *cert. granted*, 144 S. Ct. 1390, (2024).

Confirming that ATF's multifactor test is a mere "cloak for agency whim," *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.), ATF issued "60 contemporaneous adjudications … classifying various configurations of firearms with stabilizing braces as rifles" without any "explanations" whatsoever. *Mock I*, 75 F.54th at 574-75, 585. Perhaps most egregiously, ATF's *proposed* rule classified "an AR-type firearm with an SB-Mini accessory … as an approved braced handgun, not a rifle." *Id.* at 574. Yet, "under the Final Rule," it "adjudicated" the exact same product as a short-barreled rifle. *Id.* at 575. The agency apparently felt so unconstrained that it reversed course without so much as a word of explanation. *See ibid.* As the Eighth Circuit found, these

unexplained adjudications "reveal[ ] that the Final Rule, as a whole, is arbitrary and capricious because it allows the ATF to arrive at whatever conclusion it wishes without adequately explaining the standard on which its decision is based." *FRAC*, 112 F.4th at 525 (cleaned up).

The Rule's standardless nature also reveals fundamental failures of explanation. Because misapplying the Rule carries severe criminal consequences, ATF recognized the need for "clear and unambiguous objective design features that can be readily assessed." Rule, 88 Fed. Reg. at 6,513. It thus purported to "allow members of the firearm industry and the public to evaluate whether a weapon incorporating a 'stabilizing brace' or other rearward attachment is, in fact, a short-barreled rifle subject to the NFA." *Id.* at 6,551. But the resulting test that "provides no meaningful clarity about what constitutes an impermissible stabilizing brace," *Mock I*, 75 F.4th at 585, contradicts the agency's purported goals and betrays a "clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And by announcing a readily assessable test and then failing to offer any meaningful clarity, the Rule also contains an "unexplained inconsistenc[y]" and thus must be "set aside." *Abbott v. Biden*, 70 F.4th 817, 826 (5th Cir. 2023).

2. The Factors Are Individually Arbitrary.

a. Rear Surface Area

The Rule's "surface area" factor is arbitrary. That factor requires assessment of whether a braced pistol "provides surface area that allows the weapon to be fired from the shoulder." Rule, 88 Fed. Reg. at 6,574. But, as the Eighth Circuit explained, this factor does not "specify a quantifiable metric for what constitutes surface area that allows for shouldering of the weapon." *FRAC*, 112 F.4th at 520. Indeed, ATF offers "no standard whatsoever for determining when a stabilizing brace's rear surface area would allow the shouldering of a weapon." *Id.* at 521 (quotations omitted). The lack of "comprehensible guidance" alone renders the Rule arbitrary. *Hikvision*, 97 F.4th at 950.

And once again, the Rule's substantive arbitrariness begets failures of explanation. Most fundamentally, the agency has not "adequately explained why it adopted" this non-standard. *Huawei*, 2 F.4th at 458. Indeed, "ATF does not deny it could" have offered a more precise metric. *FRAC*, 112 F.4th at 521. And its only asserted basis for hiding the ball was "to prevent circumvention of the law." *Ibid.* But, the Eighth Circuit explained, "[t]hat the regulated parties wish to see more specific metrics does not mean they wish to skirt or circumvent the law, as ATF insinuates." *Ibid.* Instead, "[t]hey may simply wish to comply with the law, by producing or equipping stabilizing braces that do not have a rear surface area that

allows for shoulder firing a weapon."[2] *Ibid.* ATF's failure to acknowledge or address this important aspect of the problem is "arbitrary and capricious." *Ibid.*; *accord Hikvision*, 97 F.4th at 950 (holding arbitrary incomprehensible standard where agency "provide[d] no justification for imposing such a burden on" regulated parties).

This error is compounded by the record. Commenters raised significant and unrebutted concerns that the agency's proposed surface-area criterion lacked "information regarding" how to apply the factor, was "subjective," and "would not assist the public or industry to determine if a firearm" is covered. Rule, 88 Fed. Reg. at 6521-22. These commenters explained that the problem stemmed from "no metric for quantifying the surface area" and thus requested "specific metrics." *Ibid.* ATF summarily asserted—without any explanation—that it was not "appropriate or necessary to specify" a metric. *Id.* at 6,529. "That falls well short of what is needed to demonstrate the agency grappled with an important aspect of the problem before it or considered another reasonable path forward." *Spirit Airlines, Inc. v. FAA*, 997 F.3d 1247, 1255 (D.C. Cir. 2021); *see Louisiana v. DOE*, 90 F.4th 461, 470-77 (5th

[2] This supposed need for vagueness is also belied by the statutes themselves where Congress consistently uses clear metrics to delineate the scope of criminal liability. *See, e.g.*, 26 U.S.C. § 5845(a)(1) ("barrel or barrels of less than 18 inches in length"); 18 U.S.C. § 921(a)(17)(B)(ii) ("larger than .22 caliber"). Bright-line rules facilitate Congress's intent not "to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, 1214 (Oct. 22, 1968).

Cir. 2024) (holding agency action arbitrary and capricious for "inadequate consideration of important aspects" of the problem and "failure to consider alternatives").

ATF's refusal to provide a specific metric also contradicts the reasons the agency gave for abandoning its original proposal. According to the preamble, ATF abandoned its worksheet proposal from the Notice because it was "open to subjective interpretation and application" and "did not provide a particular metric to quantify the rear surface area." Rule, 88 Fed. Reg. at 6,522. ATF chose to instead proceed with "objective design features" that are "readily ascertainable." *Id.* at 6,552. But ATF's new test—enough surface area to "allow" shouldering—is still "open to subjective interpretation and application" and lacks a "metric." Thus, "[b]ecause [ATF's] decision is internally inconsistent, it is arbitrary and capricious." *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018); *see Abbott*, 70 F.4th at 826.

This factor is arbitrary.

b. Weight, Length, and Length of Pull

The Rule requires ATF to assess whether a weapon has a weight, length, or length of pull "consistent with the weight or length of similarly designed rifles." Rule, 88 Fed. Reg. at 6,575. According to ATF, these factors "are quantifiable, easily measured metrics." *Id.* at 6,513 ("quantifiable and easily assessed"). As with

rear surface area, however, that is not the case at all. The Rule fails to provide specific measurements that satisfy these factors or to otherwise offer a comprehensible standard.

Consider the preamble. ATF says that these factors will assess whether a braced pistol's weight, length, and length of pull are "consistent with" the metrics of "similarly designed rifles." Rule, 88 Fed. Reg. at 6,575. But ATF's list of comparator rifles is its non-public database of "more than 12,000 firearms." *Id.* at 6,514 n.103. Although the preamble includes a table that purports to provide "example" weights, lengths, and lengths of pull from the database, *id.* at 6,514-18, 6,535-37, these are underinclusive by thousands of guns and encompass broad ranges from 2 pounds to 10 pounds (weight), 18-1/2 inches to 38-1/2 inches (length), *id.* at 6,514-19, and 11 inches to 19-1/2 inches (length of pull), *id.* at 6,535-37.

ATF confirms the Rule's unworkability in its discussion of how it will select comparators. ATF considers relevant only "similarly designed rifles." *Id.* at 6,575; *see also id.* at 6,518 & n.104 (asserting ATF will compare braced pistols to rifle "variant," defined as a "similar" rifle). But the Rule says nothing about *how* it will determine whether a rifle is "similarly designed." Further, ATF does not suggest that a pistol will be compared to one "similar" rifle, but an entire subset, e.g., "AK-type rifles." *Id.* at 6,535. ATF also does not say how it will determine the comparator weight, length, or length of pull from the rifles in this subset. Is it the

average? The median? The heaviest? The lightest? The Rule leaves the public "as well as other regulated parties, and reviewing courts[,] guessing." *Innovator Enterprises, Inc. v. Jones*, 28 F. Supp. 3d 14, 25 (D.D.C. 2014).

And it is not just the comparator. Even if a gun owner can determine the relevant weight(s), length(s), and length(s) of pull from the 12,000 rifles in ATF's non-public database, he or she then must determine whether his or her braced gun is "consistent with" that baseline. Rule, 88 Fed. Reg. at 6,575. But again, the Rule offers no guidance on how to conduct that inquiry. How different must the metrics be to avoid being "consistent with" the comparator? Does it matter if the braced pistol is lighter (rather than heavier) or shorter (rather than longer) than the comparator? Again, there are no answers. The result is a test that is "incoherent," *Huawei*, 2 F.4th at 458, because it "allows ATF to reach whatever result it wants" without meaningful review, *FRAC*, 112 F.4th at 525 (cleaned up).

Worse still, these factors are patently inconsistent with ATF's claims of "readily ascertainable" criteria, Rule, 88 Fed. Reg. at 6,552, and ATF failed to consider or explain why it rejected the alternative of providing more workable "minimum or maximum weight," length, and length-of-pull criteria, *id.* at 6,521.

These factors are arbitrary.

c. Marketing Materials and Community Use

The Rule permits ATF to assess "[t]he manufacturer's direct and indirect marketing and promotional materials indicating the intended use of the weapon" and "[i]nformation demonstrating the likely use of the weapon in the general community." Rule, 88 Fed. Reg. at 6,575. Both are arbitrary.

First, consider the marketing factor. ATF does not explain how it will apply this factor in a predictable or objective way. Instead, it zeroes in on a years-old website banner displayed on FRAC-member SB Tactical's website that read "Stiff Arm the Establishment." Rule, 88 Fed. Reg. at 6,544-45. With no analysis, the agency suggests this generic anti-establishment message indicates that pistols equipped with SB Tactical braces are intended to be shoulder-fired. *See id.* That conclusory analysis reveals that the marketing factor, like the others, "offers no meaningful guidance to affected parties." *Hikvision*, 97 F.4th at 950. Further, SB Tactical disputed that interpretation of its anti-establishment message, and, as the Eighth Circuit explained, that interpretive dispute "reveal[s] a flaw with the marketing factor: neither the Final Rule nor the ATF address how they will evaluate alternative explanations for the same marketing materials." *FRAC*, 112 F.4th at 523; *accord Louisiana*, 90 F.4th at 473 (holding arbitrary agency's failure to consider "important aspect of a problem").

Equally arbitrary is the agency's factor purporting to analyze information "in the general community." Rule, 88 Fed. Reg. at 6,575. Under this factor, ATF depicts in the preamble two individuals who appear to be misusing a stabilizing brace and cites these isolated examples as supposed evidence of "community information." *Id.* at 6,546. But under this factor, ATF tries to eat its cake too; it elsewhere contends "the method in which a 'stabilizing brace' may be used, in isolated circumstances or by a single individual" for non-shoulder firing, is *not* "relevant to examining whether a firearm is designed, made, and intended to be fired from the shoulder." *Id.* at 6,519. Thus, ATF both claims and disclaims that it "will consider 'isolated circumstances' to be probative of intent." *FRAC*, 112 F.4th at 524 ("Which is it?").

This "unexplained inconsistenc[y]" permits ATF to discount evidence establishing a brace's proper use as mere anecdote but then to count isolated evidence of improper use as dispositive community information. *Abbott*, 70 F.4th at 826; *ANR Storage Co.*, 904 F.3d at 1028. Coupled with ATF's utter failure to explain how it will "evaluate" or "weigh different examples of community use," these deficiencies allow ATF "to reach any decision it wishes by only looking to specific evidence of community misuse." *FRAC*, 112 F.4th at 523-24. This factor is thus arbitrary.

Finally, both "the marketing and community-use factors" are arbitrary because they "require analyzing third parties' intent and attributing their intent to any individual who affixes a stabilizing brace to a weapon." *Id.* at 524. As this Court explained, the result would be to "hold citizens criminally liable for the actions of others, who are likely unknown, unaffiliated, and uncontrollable by the person being regulated." *Mock I*, 75 F.4th at 586. ATF offers no explanation to justify this "serious infirmit[y]" that "vastly expand[s]" the Rule's scope. *Id.* at 585. That too renders the Rule arbitrary.

* * *

ATF offers only cursory, unpersuasive answers to these fundamental flaws identified by the lower court, this Court, and the Eighth Circuit. First, ATF says (at 37) that "[s]tatutory intent" standards are not necessarily unconstitutionally vague. But the lower court's holding was under the APA—not the Constitution—and the challenge here concerns "the text of the Final Rule, not the text of the statute." *VanDerStok*, 86 F.4th at 209 (Oldham, J., concurring).

Next, ATF says (at 37-39) that its Rule is permissible because its standards are "comprehensible and actionable." But that simply assumes the conclusion and makes no effort to address the Rule's numerous shortcomings or this Court's finding that the Rule "provides no meaningful clarity" and is "nigh impossible for a regular citizen to" apply. *Mock I*, 75 F.4th at 585.

Lastly, ATF accuses (at 39) the lower court of assessing "vagueness in a vacuum." However, there is no vacuum: the lower court looked to the text of the Rule, *see Hikvision*, 97 F.4th at 950 (holding regulatory text arbitrarily vague), *and* at ATF's application of the Rule in "approximately sixty adjudications," ROA.1954. The district court did not err in holding, like the Eighth Circuit, that these "adjudications … evince that the Final Rule is arbitrary and capricious because it allows ATF to reach whatever result it wants." *FRAC*, 112 F.4th at 524 (cleaned up); *Mock I*, 75 F.4th at 585 (similar); *accord LeMoyne-Owen*, 357 F.3d at 61 (explaining that application of "multi-factor test" in "adjudication[s]" can reveal test is "a cloak for agency whim").

Thus, the court below did not err in holding "that the standards set forth in the Final Rule are impermissibly vague." ROA.1955.

B. The Rule Arbitrarily Failed To Consider Reliance Interests.

The Court below correctly recognized that "[w]hen an agency changes course, as the ATF did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." ROA.1953 (cleaned up) (quoting *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020)). It also correctly recognized that "[i]t would be arbitrary and capricious to ignore such matters." ROA.1954 (quoting *Regents*, 591 U.S. at 30).

ATF failed to consider reliance interests when it promulgated the rule. Specifically, ATF failed to consider the impact of its Rule on millions of individuals who purchased braces sold in 2020, 2021, and 2022. ROA.1094 (ECF No. 100 at 24); *see* Appellees Br. 30-31. That is because although the Rule was issued in 2023, ATF inexplicably considered the Rule's impact only as to braces sold "between the years 2013 and 2020." Factoring Criteria for Firearms with Attached "Stabilizing Braces," *Final Regulatory Impact Analysis and Final Regulatory Flexibility Analysis*, at 18 (Jan. 2023), *available at* https://tinyurl.com/3t3d3ewy. Using this arbitrary cutoff, ATF estimates "3 million" affected braces in circulation. *Ibid.* But the record below showed that FRAC-member SB Tactical alone sold more than *2.3 million* braces from 2020 until ATF published the Rule. *See* ROA.1176 (ECF No. 103 at 22); ROA.681 (ECF No. 73-5 ¶ 15). Thus, ATF "obviously failed" to consider the "reliance interests" of *millions* who purchased braces after 2020. *BNSF Ry. Co. v. FRA*, 105 F.4th 691, 701 (5th Cir. 2024). The district court was thus correct in holding as much. ROA.1954 (ATF "ignore[d]" reliance interests).

This Court should affirm because ATF does not dispute that it ignored these interests. Indeed, "the words" *reliance interests* "appear nowhere in [ATF's] opening brief." *Mock I*, 75 F.4th at 579 n.38. Because ATF "fail[ed] to adequately brief" this "argument on appeal," it has "forfeit[ed]" it. *Ibid.* Moreover, the court below made clear that each of plaintiffs' APA "claims" were "dispositive."

ROA.1956. Thus, because ATF has "fail[ed] to challenge properly" one of "multiple, independent grounds" for relief, the decision below must "be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

C. The Rule Is Contrary To The Statute.

In addition to the lower court's APA grounds, the Court should also find that the Rule exceeds ATF's statutory authority. *See* Appellees' Br. 36-38; *accord Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015), *as revised* (Nov. 25, 2015) ("this court may affirm the district court's judgment on any grounds supported by the record.").

Under the NFA and the GCA, a "rifle" is "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder." 26 U.S.C. § 5845(c); 18 U.S.C. § 921(a)(7). The Rule purports to clarify when a braced pistol becomes "designed" for shoulder fire, but its analysis is inconsistent with the plain meaning of that term.

The Rule misinterprets "designed" because it declines to consider evidence that a brace is designed to facilitate stabilizing support. In ATF's estimation, "stabilizing support" for non-shoulder firing is "not relevant to determine whether a firearm is designed, made, and intended to be fired from the shoulder." Rule, 88 Fed. Reg. at 6,510; *see also id.* at 6,503 (asserting it is "incorrect to focus on whether

a 'stabilizing brace' can be used, in some circumstances, to support two-handed, non-shouldered fire.").

ATF is wrong. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the Supreme Court interpreted a statute prohibiting sale of items "designed … for use with illegal cannabis or drugs." *Id.* at 491. The Court found it "plain" and "clear" that "designed" includes "an item that is principally used with illegal drugs" but *not* "items which are principally used for nondrug purposes." *Id.* at 501. Thus, the statute would cover a pipe "typically used to smoke marihuana" but not "ordinary pipes"; a "roach clip" but not "paper clips sold next to *Rolling Stone* magazine." *Id.* at 494, 501-02; *accord Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 518 (1994) (holding that the "Court's decision in *Hoffman* … govern[ed]" statutory meaning of "designed").

The Supreme Court has applied similar reasoning under the NFA. In *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), the plurality explained that someone did not "make" a "firearm" by packaging components that could "be converted not only into a short-barreled rifle, which is a regulated firearm, but also into a long-barreled rifle, which is not." *Id.* at 513. Because the "aggregation of parts" served a "useful purpose" other than "the assembly of a[n NFA] firearm," lenity required the conclusion that the parts had "not been 'made' into a short-barreled rifle for purposes of the NFA." *Id.* at 512-13, 517-18.

Applied here, both *Hoffman Estates* and *Thompson/Center* stand for the same principle: ATF cannot read the term "designed" to exclude all evidence that a stabilizing brace is suitable for unregulated use as a brace. Just like Illinois could not overlook that a paperclip is "designed" for holding documents, ATF cannot criminalize braces by ignoring evidence they are "designed" for non-shouldered use. And just like ATF could not in *Thompson/Center* overlook that the packaged parts could be assembled for an unregulated use, ATF cannot here willfully overlook evidence of design features that show a stabilizing brace likewise has an unregulated use.

ATF used to read the statute lawfully, even during this rulemaking proceeding. It declared in its 2021 Notice of Proposed Rulemaking that "[s]tabilizing support is a vital characteristic because it provides evidence to evaluate the purported purpose of the attached device." 86 Fed. Reg. 30,826, 30,832 (June 10, 2021) ("Notice"). That interpretation was consistent with a decade of ATF rulings that assessed design by analyzing a device's effectiveness at "provid[ing] the shooter with additional support of a firearm." Comments of SB Tactical, et al., Ex. 1 at 1, Docket No. ATF 2021R–08 (2012 classification letter), *available at* https://tinyurl.com/bdf8azmm. For example, ATF previously found probative "flaps" and a "strap" that "wrap[] around the shooter's forearm" because such "designs were clearly devised to secure the firearm to the shooter's forearm and were

effective in doing so." Notice, 86 Fed. Reg. at 30,832-33; *accord* U.S. Patent No. 8,869,444 B2 (explaining intended design).

The absurd results that ATF's new interpretation would produce confirm it is wrong. Under the Rule, ATF will not even consider evidence that a stabilizing brace is effective at non-shoulder firing. Thus, if the objective design features established that an accessory was "the world's greatest" stabilizing brace—"100% effective at" stabilizing non-shoulder fire—ATF would ignore that evidence. *See Innovator Enters.*, 28 F. Supp. at 25 (rejecting similar ATF test for classifying silencers). But that effectiveness is plainly "relevant." *Contra* Rule, 88 Fed. Reg. at 6,510. If a brace serves a "useful purpose," as an unshouldered brace, *Thompson/Center*, 504 U.S. at 512-13, it suggests that the potential for shouldered fire is "incidental," Rule, 88 Fed. Reg. at 6,544, rather than a capability "designed by the manufacturer," *Hoffman*, 455 U.S. at 501.

At minimum, lenity requires that the Rule be set aside. Lenity is an interpretive maxim "used by this Court and others to construe ambiguous statutes against imposing criminal liability." *VanDerStok*, 86 F.4th at 196 n.26 (quotations omitted). Because the NFA and GCA authorize criminal penalties, lenity applies even "in a civil setting." *Thompson/Center*, 504 U.S. at 517-18 (plurality); *id.* at 519 (Scalia, J., concurring); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *VanDerStok*, 86 F.4th at 196 n.26. Here, ATF's construction of the statutes is

foreclosed by the unambiguous meaning of "designed." But if the Court disagrees, then ATF's flip-flop on the meaning of that term—and on the regulatory classification of braces more broadly—shows that the statutes are at least grievously ambiguous as applied to braces. *See, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 469-71 (5th Cir. 2023) (en banc), *aff'd*, 602 U.S. 406 (2024); *VanDerStok*, 86 F.4th at 196 n.26; *Hardin v. ATF*, 65 F.4th 895, 897-98 (6th Cir. 2023).

II. THE COURT BELOW CORRECTLY VACATED THE RULE.

When agency action violates the APA, this Court's "default rule is that vacatur is the appropriate remedy." *Rest. L. Ctr.*, 2024 WL 4609380, at *11 (collecting cases). Exceptions to this default apply only in "rare cases." *Ibid.* And where a rule "suffers from a fundamental substantive defect that the [agency] could not rectify on remand," vacatur is compelled. *Ibid.*

The lower court's analysis followed these principles to a tee. First it identified that vacatur was the "default rule" in this Circuit. ROA.1957. Next, it explained that the agency's errors were fundamental: by violating "the APA's procedural requirements," ATF's Rule was "void *ab initio*" such that "there is nothing for the agency to justify" on remand. ROA.1958. Indeed, it is hard to imagine a more "fundamental substantive defect," *Rest. L. Ctr.*, 2024 WL 4609380, at *11, than the promulgation of a rule carrying felony criminal penalties that is "nigh impossible for a regular citizen to" apply, *Mock I*, 75 F.4th at 585. And that fundamental

unworkability would make it more disruptive to leave the rule in place than to simply vacate and return to "the status quo … that existed for decades prior to the Final Rule going into effect." ROA.1958.

ATF's objections to this straightforward analysis are, in reality, objections to long-settled precedent. First, ATF suggests (at 44) that the APA does not "authorize[ ] vacatur." Yet, in the same breath, it candidly admits that "this Court's precedents identify vacatur as an available remedy for a successful APA challenge to a regulation." Indeed, courts across the country—including this Court—have repeatedly and unambiguously affirmed that "vacatur" is the "default rule" in APA cases. *E.g.*, *Rest. L. Ctr.*, 2024 WL 4609380, at *11; *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). And the Supreme "Court has affirmed countless decisions that vacated agency actions, including agency rules." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2463 (2024) (Kavanaugh, J., concurring).

ATF thus offers a truly "radical" position that is squarely "inconsistent with" the long "established practice under the APA." Transcript of Oral Argument at 35:16-25, *United States v. Texas*, No. 22-58 (U.S. Nov. 29, 2022) (quote from Roberts, C.J.). Indeed, if ATF were correct, an agency could continue to openly flout any of Congress's statutes or the Constitution—as adjudicated by this Court or

even the Supreme Court—because remedies for unlawful agency action would be party-limited. This Court should reject ATF's attempt to gut the APA's function as a "a check upon administrators whose zeal might" result in "excesses not contemplated in legislation creating their offices." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring); *accord* 92 Cong. Rec. 2149 (1946) (statement of Sen. McCarran) (explaining APA is a "bill of rights" for "the hundreds of thousands of Americans whose affairs are controlled or regulated" by federal agencies).

Next, ATF claims (at 47) that vacatur should "be reserved for 'truly extraordinary circumstances.'" But that is completely backwards. Once again, this Court has repeatedly instructed that this "court's *default rule* is that vacatur is the appropriate remedy," while non-vacatur is reserved for "rare cases." *Rest. L. Ctr.*, 2024 WL 4609380, at *11 (quotations omitted) (emphasis added) (collecting cases). A "default rule" is, by definition, not limited to "extraordinary circumstances." This Court should again reject ATF's invitation to flout settled precedent.

ATF then proceeds (at 47-50) from its misguided view to argue that vacatur is inappropriate "under the relevant equitable principles." But this Court has squarely held that its "precedent" does not "require consideration of the various equities at stake before determining whether a party is entitled to vacatur" under the APA. *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 952 (5th Cir. 2024).

Rather, because "Section 706 … provides that a 'reviewing court *shall*' set aside unlawful agency action," "vacatur" is not "a remedy familiar to courts sitting in equity." *Id.* at 952 & n.104. The Court should again reject ATF's attempt to rewrite this Circuit's precedent.

But even if this Court applied traditional equitable principles to vacatur, *contra ibid.*, they require universal relief here. *See* Appellees' Br. 51-52. Indeed, one of the plaintiffs in this case—Maxim Defense—is a "manufacturer[ ]." ROA.1103 (ECF No. 100 at 33). As such, Maxim Defense is "only one link in a complex supply chain consisting of suppliers, designers, importers and exporters, transportation and logistics companies, retailers, and, ultimately, the gun-owning public." ROA.653 (ECF No. 73-1 at 12) (quoting declarations from Maxim Defense and FRAC). Thus, "a party-specific remedy cannot work because others in the chain would still be subject to unlawful regulation, rendering relief incomplete." ROA.653-55. After all, businesses and customers who remain covered by the rule are unlikely to do business with Maxim "if it means risking felony prosecution for unlicensed possession." ROA.654. "A remedy that leaves a company without business partners or customers is plainly no remedy at all." *Ibid.*

Even for the non-commercial plaintiffs, a party-limited remedy "would provide unwieldy and only cause more confusion." *Feds for Medical Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023). After all, how is law enforcement supposed "to

know someone is a Plaintiff to th[e] lawsuit with permission to" own or transfer a braced pistol? *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1176-77 (M.D. Fla. 2022). ATF offers no answer. In reality then, "[t]he difficulty of distinguishing the named Plaintiffs from millions of other" gun owners and businesses means a party-limited remedy "would be no remedy at all" for any of the Appellants. *Ibid.* Thus, vacatur is necessary "to provide complete relief to the plaintiffs." *Mock I*, 75 F.4th at 587 (quotations omitted).

Finally, the Court should reject ATF's last-ditch attempt (at 40-43) to avoid this Circuit's default vacatur rule with the Tax Anti-Injunction Act ("AIA"). In *CIC Services, LLC v. IRS*, 593 U.S. 209 (2021), a case that ATF ignores, the Supreme Court squarely held that the AIA does not bar challenges that seek to "set aside" a rule for "violation[s] of the APA." *Id.* at 223. The Court found relevant that the challenged agency action there imposed "obligations" and "costs separate and apart" from taxation, *id.* at 220, that the rule and tax obligations were "several steps removed from each other," *id.* at 220-21, and that "violation of the" rule was "punishable not only by a tax, but by separate criminal penalties," *id.* at 221-22.

CIC Services controls this case. Plaintiffs do not challenge tax obligations but instead a change in regulatory classification that carries criminal penalties for gun owners. Thus, here, as in *CIC Services*, Appellant may properly seek to "set aside" the Rule. *Id.* at 223. And ATF knows all this. As recently as 2016, it represented

to another federal court that its classifications under the NFA are "reviewable under the Administrative Procedure Act." *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 600 n.1 (1st Cir. 2016).

For these reasons, the court below was right to vacate the Rule.

CONCLUSION

In light of the foregoing, this Court should affirm.

Dated: November 13, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fifth Circuit Rule 29.3 and Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,459 words.

This brief also complies with the typeface requirements of Fifth Circuit Rule 32.1 and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Fifth Circuit Rule 32.2 and Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font.

Dated: November 13, 2024

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CERTIFICATE OF SERVICE

I certify that on November 13, 2024, I caused the foregoing to be served upon all counsel of record via the Clerk of Court's CM/ECF notification system.

Dated: November 13, 2024

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