In the Matter of
"Definition of 'Frame or Receiver' and Identification of Firearms"
ATF 2021R-05

August 19, 2021

On behalf of Firearms Policy Coalition, Inc. ("FPC") and its members and supporters, the undersigned respectfully submit these comments regarding Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Proposed Rule no. ATF 2021R-05 (the "Proposed Rule").

FPC is a nonprofit organization whose purposes include defending and promoting the People's rights, especially, but not limited to, the fundamental, individual Second Amendment right to keep and bear arms, advancing individual liberty, and restoring freedom. FPC serves its members and the public through legislative advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs. As such, FPC, along with its members and supporters, have a vested interest in the ATF's Proposed Rule, which seeks to, inter alia, provide new definitions of "firearm frame or receiver" and "frame or receiver."

The Proposed Rule is inconsistent with the relevant statutory language, makes no principled distinction between precursor materials and manufactured frames or receivers, was adopted in a procedurally improper fashion, and is arbitrary and capricious.

I. THE PROPOSED RULE EXCEEDS THE LIMITS OF AUTHORITY GRANTED TO THE ATF UNDER THE GUN CONTROL ACT

As relevant to this rulemaking, the Gun Control Act, 18 U.S.C. § 921, et seq. ("GCA"), defines the term "firearm," in part, as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). As it concerns the "frame or receiver," in order to fit within the statutory definition such item must be part "of any such weapon." The critical statutory question, therefore, is whether incomplete precursor materials are part of a

"weapon" that expels projectiles through explosive force or can be readily converted to do so. But an incomplete precursor is not part of a weapon at all, much less one capable of firing projectiles. Nor is it part of any weapon that can "readily be converted to act in such a manner."

In asserting that certain precursor materials are "kits" "readily convertible into a frame or receiver," ATF conflates the terms of § 921(a)(3)(A) into § 921(a)(3)(B). Nothing in the reference to a frame or receiver discusses or includes items "readily convertible" into a frame or receiver. Indeed, the very fact that Congress used such language with respect to a "weapon" as a whole, but not with respect to a frame or receiver, demonstrates that it did not intend such a reading given that it selectively included such language in an earlier and intentionally separated part of the definition. Had Congress intended to regulate "readily convertible" frames or receivers, it was more than capable of doing so. The Agency's interpretation here thus violates the principle of *expressio unius est exclusio alterius*, and on this alone, is inappropriate for rulemaking.

And it is hardly surprising that Congress would not include in its definition of a particular firearm part the concept of anything readily convertible to such a part given that such an inclusion would then expand the universe of items regulated in an exponential fashion. Given that the statute already includes a "weapon" that can be converted to expel a projectile via an explosive, this attempt to include materials that *might* one day be converted into the frame or receiver for such a weapon extends the scope of the definition into far broader and more uncertain realms.

That the "readily convertible" language was never intended to translate across to the other subsections of the "firearm" definition is apparent from the fact that numerous objects and materials are "readily convertible" into "firearm mufflers" or "explosive devices." Anyone who watches movies, or has an infantile understanding of how sound travels, understands that a pillow can be used to muffle the sound of a firearm, as can a plastic soda bottle, or even a potato. Likewise, ordinary matches, not to mention gasoline, lighter fluid, and dozens of other combustible substances, can be readily converted into an explosive device, yet standing alone do not constitute "firearms." To accept ATF's claims that the readily convertible language of § 921(a)(3)(A) is commutative beyond that section thus leads to utterly absurd results that would render the definition grotesquely overbroad.

More than that, though, the logic of the proposed rule simply does not square with the intent of the law. The language the agency seeks to import from § 921(a)(3)(A) was obviously in consideration of those articles being imported from overseas which were, at the time, already "weapons" when manufactured but not quite "firearms" when imported. This is clear from the inclusion of "(including a starter gun)" in the text of the law, and the underlying circumstances of the time, where firearms with simply plugged barrels were sent into the country as starter guns and the like.[1] The clear intent of this language was to prevent the circumvention of import controls on complete *weapons*, not to enable the agency to rewrite § 921(a)(3)(B) and transform it into an effective prohibition on a nebulous conception of pre-firearm parts.[2]

A. The Proposed Rule Invents a New Category of Pre-Firearms

The agency admits, as well, that Congress did *not* want all parts to be considered firearms,[3] but here purports to give itself the authority to consider virtually all parts of a firearm to be the "frame or receiver" until the agency gets hold of a particular firearm.

The simple fact is that items, even if they may one day become weapons, are not weapons until that time comes. An incomplete frame or receiver is just that—incomplete—and is not part of any "weapon" that can expel projectiles via explosive force. To suggest that Congress intended the limiting language of "any such weapon" to include an incomplete receiver tube or forging, whose only utility as a weapon would be as a blunt object, is an absurd reading of that language. The Tenth Circuit made much the same point in connection with so-called 'AK flats,'

---

[1] Zimring, Franklin E. "Firearms and Federal Law: The Gun Control Act of 1968," J. OF LEGAL STUD. 4, no. 1 (1975).

[2] 86 Fed. Reg. at 27729 (purporting to include any article "clearly identifiable as an unfinished component part of a weapon" in the definition of a "frame or receiver" of a weapon).

[3] 86 Fed. Reg. at 27720 ("Congress recognized that regulation of all firearm parts was impractical").

which were merely flat pieces of metal that may eventually become receivers but had not in fact become receivers in that state of being:

> The court finds that the metal flat shipped to Prince is not a firearm. The court carefully considered the expert testimony of Agent Adam Galbraith, and reviewed the material submitted by the government concerning ATF opinions. However, the court simply does not believe that a flat piece of metal with laser perforations and holes constitutes a "receiver," i.e., a "firearm." Rather, the flat piece of metal is somewhat akin to a piece of paper with lines drawn on it as a guide to make a paper airplane. Although making the paper airplane might be the intended use, it is not an airplane until it is properly folded. Until that time, it is a patterned piece of paper. Simply put, this court has no evidentiary or legal basis for holding that a flat piece of metal with laser perforations and some holes constitutes, ultimately, a "firearm." It may become part of a firearm at some point, but not until further work has been accomplished to allow it to secure the stock, chamber, barrel and other parts. Until that time, it is not even a true component of a firearm, only a potential component of a firearm. The statute, as written, does not extend that far.[4]

B. The Law Refers to The Frame or Receiver, not Multiple Receivers

ATF suggests that firearms may have multiple regulable "frames or receivers," yet the law clearly suggests a firearm should have only one part treated as such. The statutory reference to "the" frame or receiver, as opposed to "a" frame or receiver, renders ATF's broader reading contrary to the law, but also leads to an absurd result.[5] Under the proposed definition, any new "modular" or otherwise

[4] *See U.S. v. Prince*, 593 F.3d 1178 (10th Cir. 2010) (citing with approval lower Court's discussion that an incomplete AK receiver was not a firearm).

novel design would—in practical effect—have to be submitted to ATF's Firearms and Ammunition Technology Division ("FATD"). Until such a time, by ATF's own logic, all novel designs would be treated as multiple "firearms,"[6] requiring duplicative paperwork to transfer and multiple, confusing entries in a Federal Firearm Licensee's (FFL's) Acquisition and Disposition (A&D) record.[7] This is directly contrary to the changes made between the Federal Firearms Act of 1938 and the GCA – changes which ATF recognized in its own rulemaking.[8] Nothing in the GCA can reasonably be construed to invite ATF to *require* individuals to submit new designs to ATF for classification or an arbitrary determination on which component ATF might consider the "frame or receiver;" but here, ATF attempts to

---

[5] 86 Fed. Reg. at 27734, 35.

[6] 86 Fed. Reg. at 27729 ("if there is a present or future split or modular design for a firearm that is not comparable to an existing classification, then the definition of "frame or receiver" would advise that more than one part is the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF").

[7] For example, if an FFL lists a firearm only once in his acquisition A&D record, an ATF Industry Operations Investigator (IOI) will have to research whether that particular firearm is comprised of a single "firearm," or multiple "firearms," which may, depending on ATF's final rule, depend on the date of manufacture. If, on the other hand, the firearm is listed twice, was it purposely done or an inadvertent duplicative entry? What happens if the FFL thought it was a multiple-firearm firearm, but it was, in fact, a single-firearm firearm? Or, better yet, what happens when a person sells one firearm (e.g., the upper half of their novel firearm) of their multiple-firearm-firearm to another, who then assembles that firearm onto their multiple-firearm-firearm (e.g. the lower half of their novel firearm) and that person later decides to sell it to an FFL or another person? Now, the upper and lower receiver will have different markings, including serial numbers. In the situation involving an FFL, during a compliance inspection, the IOI is not going to know whether the entries are accurate or not, nor whether the FFL correctly input the inconsistent data into its A&D Record.

[8] 86 Fed. Reg. at 27720.

do exactly that by threatening that a whole host of parts will be considered receivers until ATF gets hold of the design and elects to make a determination.[9]

That ATF's proposed rewriting of the definition of a frame or receiver would lead to such absurd results, would make compliance with the law a trap for the unwary, and demonstrates that the definition is not remotely reasonable, particularly for a statute with severe criminal penalties for non-compliance. If the law is to be changed in such a sweeping and threatening manner, that is the ambit of Congress, not the executive branch. And even there, it is questionable whether Congress could write such a broad law with criminal applications consistent with due process, vagueness principles, the Second Amendment, and the rule of lenity.

II. THE PROPOSED RULE RAISES SERIOUS CONSTITUTIONAL CONCERNS

The rule of lenity is a basic principle of statutory interpretation requiring the courts to construe any unclear or ambiguous criminal laws in a narrow manner.[10] The basic principle is that, if the People are to be subject to severe criminal consequences for crossing a line, it is the job of the legislative branch to make the relevant condemnatory judgment and to draw a clear line when doing so.

ATF has admitted that its own previous regulation was vague, and that they brought criminal prosecutions under that vague regulation.[11] This comment explores, *infra* and *supra*, the extreme degrees to which the proposed regulation would render the state of the law, and thus its enforcement, unconscionably and unconstitutionally vague. ATF appears to be taking a definition which, though not

[9] It is the experience of one of the undersigned that FATD is taking in excess of a year and a half to render a determination – hardly a timely proposition.

[10] This basic principle predates the existence of our nation. *See Ex parte Davis*, 7 F. Cas. 45, 49 (N.D.N.Y. 1851) ("This excellent principle our law has adopted, in the construction of penal statutes; for whenever any ambiguity arises in a statute, introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favor of natural right and liberty").

[11] 86 Fed. Reg. 27727.

itself a model of clarity and hence properly subject to the rule of lenity as well, had some degree of consistency and understanding, and has now tortured it into a multi-faceted, cross-referenced morass completely incomprehensible to the common man. If eight words of the GCA—"the frame or receiver of any such weapon"—cannot be understood without cross-references to other areas of the law and a range of its own vague sub-definitions,[12] then the statute itself would be void for vagueness. That the purported regulatory definition of that language is itself vague and incomprehensible and has the potential to cover literally every major component of a firearm, just compounds the vagueness and due process concerns and flies in the face of the rule of lenity.

A. Rather than Resolving an Ambiguity, the Proposed Rule's Definitions Injects a Host of Them

In some fifty years of enforcement, ATF's rule regarding firearm frames or receivers has posed more than its share of problems. The only legitimate function of the agency in this situation would be to narrow, rather than expand upon, the scope of the definition and any further ambiguities introduced by past ATF regulatory efforts. Instead, in this very rulemaking, the agency bizarrely contends that its present regulations are vague thus presumably in violation of the rule of lenity and due process and hence seemingly concedes the constitutional flaws of numerous criminal convictions under such vague rules.[13] But rather than remedy the situation, ATF instead offers a new rule that would begin with a "non-exclusive" list of examples to illustrate a new, cross-referenced, pages-long definition.[14] That is hardly a constitutional improvement.

In all of its new definition, ATF still seeks to avoid giving any walls to what constitutes a "frame or receiver," going so far as to list a series of common fire control parts that were never understood to constitute frames or receivers, only to

[12] For example, the seemingly limitlessly defined word "readily" that ATF itself injected to do incredibly heavy lifting.

[13] 86 Fed. Reg. 27720.

[14] 86 Fed. Reg. 27727.

immediately go even further and state that "the definition is not limited to those particular fire control components."[15]

In the discussion surrounding "partially complete, disassembled, or inoperable" frames or receivers, ATF suggests that, in order to divine at what point raw materials become a regulated article, "the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials."[16] What this leaves out, of course, is how a lawyer, let alone a layperson, could conceivably separate what is a frame or receiver, and what is, for example, a length of exhaust pipe[17] or shovel.[18] Instead of clarifying the law, the proposed rule establishes a non-exclusive, vague, due process-less framework, subject almost entirely to the Director's unfettered discretion when deciding whether a hunk of metal is in actuality a frame or receiver that could trigger severe criminal penalties for anyone possessing such materials. That is not a framework, much less a valid law or regulation, but instead an amorphous series of "guidelines" that ATF can use to bend the law to its desires. Boiled down to its most simplistic terms, the proposal seeks to redefine a frame or receiver as whatever ATF decides it to be, at any given time, without regard for past determinations, reliance on those determinations, or the non-clairvoyant nature of the public. Such claimed authority not only conflicts with the rule of lenity and due process, but, if in fact authorized by the statute, would constitute an unlawful delegation of legislative authority.

---

[15] *Id*.

[16] 86 Fed. Reg. 27729.

[17] The tube guns ATF mentions, such as STEN guns, have a receiver composed of drawn steel tubing with holes in it.

[18] Many are aware of individuals crafting AKM receivers from shovels. *See* https://www.northeastshooters.com/xen/threads/diy-shovel-ak-photo-tsunami-warning.179192/.

Moreover, despite suggesting that the ruling is "not intended to reverse earlier determinations" on what is a "frame or receiver,"[19] ATF appears to be changing its mind on at least one firearm right on the face of the proposed rule. In the case of the Beretta AR-70, ATF has long held that the upper receiver was the "firearm" and that the lower receiver and other parts were not themselves firearms. In reliance on that definition, numerous lower receivers and other parts have been sold as parts that thus were not considered firearms and hence were entirely lawful to sell and purchase. Yet now ATF lumps the AR-70 in with the AR-15 and declares that the lower receiver is the "frame or receiver."[20] This is glossed over with a degree of flippancy, saying nothing about the many persons who have had these components trade hands under ATF's previous determination. In addition to being arbitrary and capricious in its lack of explanation, the entire exercise illustrates how ATF's claimed malleability of the definition violates the rule of lenity and the void-for-vagueness doctrine.

B. The Proposed Rulemaking Poses Commerce Clause Concerns

With respect to privately made firearms ("PMF"), ATF has no authority under the GCA or NFA to require the serialization of PMFs, much less to compel FFLs to modify the lawfully owned private property of their customers.[21] Additionally, ATF in a document entitled "Most Frequently Asked Firearms Questions and Answers," states that "markings are not required on firearms manufactured for personal use (excluding NFA firearms)."[22]

---

[19] 86 Fed. Reg. 27726.

[20] 86 Fed. Reg. 27729.

[21] *See* 18 U.S.C. § 923(i) (imposing a requirement on *licensed importers and manufacturers* to "identify by means of a serial number…[on] each firearm imported of manufactured by such importer or manufacturer." 18 U.S.C. § 921, *et seq*. is *devoid* of any duty or requirement that a PMF be marked in *any* manner.).

[22] https://www.atf.gov/resource-center/docs/0813-firearms-top-12-qaspdf/download. *See also* 86 Fed. Reg. at 27722 ("these privately made firearms ('PMFs'), when made for personal use, are not required by the GCA to have a serial number placed on the frame or receiver.").

Moreover, interstate commerce is not necessarily at play when it comes to PMFs in the hands of their original owners, which is required under the GCA for it to apply to any person. Furthermore, due to the lack of interstate commerce, the Congress lacks the power, let alone a federal administrative agency, to regulate such conduct.

III. THE AGENCY'S RE-DEFINITION OF "FRAME OR RECEIVER" IS ARBITRARY AND CAPRICIOUS, BOTH FACTUALLY AND PROCEDURALLY

The Gun Control Act of 1968 ("GCA") established and mandated a system of licenses for those engaged in the business of interstate commerce in arms. Over the GCA's relatively short tenure, the definition of "firearm" has been relatively consistent in its understanding at the time of adoption and its enforcement by ATF. The GCA defines the term "firearm" as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.[23]

Regarding the terms at issue here, the "frame or receiver of any such weapon," ATF promulgated regulations defining that phrase as:

> That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.[24]

[23] 18 U.S.C. § 921(a)(3).

[24] 27 C.F.R. 478.11.

A. ATF Relies on Factually Incorrect Assertions in Justifying the Re-Definition

In the proposed rulemaking, ATF makes a series of extremely troublesome assertions to justify its rulings. For example, in attempting to justify it expansion of the phrase "frame or receiver" to separately cover multiple parts on a single weapon, ATF asserts that:

> At the time these definitions were published around 50 years ago, single-framed firearms such as revolvers and break-open shotguns were far more prevalent for civilian use than split/multi-piece receiver weapons, such as semiautomatic rifles and pistols with detachable magazines.[25]

In reality, ATF and its precursors were patently aware of striker-fired, self-loading firearms which were so tremendously popular they, in large part, led to the adoption of the very law ATF purports to be interpreting.[26] Many of the popular imported firearms targeted by the GCA, which ATF enforced, meet the exact factors ATF here claims it could not have known about.[27] In addition to this, hundreds of

---

[25] 86 Fed. Reg. 27721.

[26] The Gun Control Act of 1968, 18 U.S.C. ch. 44, § 921, was largely in response to small, inexpensive handguns that had been imported from Europe. These so-called "Saturday night specials," which the Act prohibited the importation of, were small caliber guns incredibly popular with the American working class. *See* The New York Times, "Saturday Night Specials," Mar. 14, 1970, https://nyti.ms/3wZ4g6p.

[27] Some examples of popular, striker-fired, self-loading firearms whose importation was prevented by the GCA: Walther Model 9 (Approximately 200,000 produced 1921-1945); FN Model 1910 (Produced 1910-1983) which saw tremendous popularity and had to be developed into the Model of 1971 after its importation was stopped by the GCA (over 700,000 produced); Manufacture d'Armes de Bayonne Modèles A, B, C, D, and E, all of which saw significant popularity in the United States before their importation was stopped by the 1968 GCA, some of which were quickly updated with adjustable sights and larger grips to enable importation immediately thereafter (approximately 300,000 produced); Mauser models 1910 and

thousands of American made striker-fired pistols were flooding the market by 1968.[28] To suggest that these firearms were so rare in what ATF terms "civilian use" compared to revolvers and break-open shotguns, despite their popularity literally preceding the very law ATF is presently interpreting, is disingenuous if not outright dishonest.

Similarly, ATF states that the AR-15 platform was "originally manufactured almost exclusively for military use,"[29] and yet was acutely aware of the AR-15 as being intended for civilian use as early as 1963.[30] Furthermore, the concept of a "split receiver" was nowhere near new. In fact, self-loading firearms invited, or even required, "split" components as early as their introduction.[31] These firearms were

---

1914 (approximately 1 million produced). *See* Ian V. Hogg, John S. Weeks, PISTOLS OF THE WORLD: THE DEFINITIVE ILLUSTRATED GUIDE TO THE WORLD'S PISTOLS AND REVOLVERS, 1992.

[28] While popular striker-fired pistols were commonly imported from Europe, the American firearms industry was making piles of these firearms before the GCA, and far more of them afterward. For example, the 1905-designed Savage model of 1907 is not hammer-fired, but features an internal striker identical to the complained-of firearms simply with an external striker status indicator or manual charger and boasts a 10-round magazine. From 1907 to 1928, approximately 300,000 of these firearms were produced in Utica, New York, and released primarily onto the civilian market. Paul Scarlata, "Savage Model 1907 Automatic Pistol," *Shooting Times* (January 3, 2011) https://bit.ly/3zepaRo.

[29] 86 Fed. Reg. 27721.

[30] *See* Halbrook, Stephen P., *Firearms Law Deskbook: Federal and State Criminal Practice* (1996).

[31] For example, the Remington Model 8, popular with American outdoorsmen since 1905, consisted of a split receiver, the lower portion of which housing the fire control and magazine, and the upper the locking mechanism, saw over a hundred thousand produced before the passage of the GCA. The Winchester Model 1907, another early self-loading rifle, incorporated similar design features. Most poignantly, the U.S. M1 Carbine saw over 6 million produced, and were already being surplused to the U.S. Civilian market to extreme fanfare long before 1968. In fact, before 1968,

incredibly common, undisputedly in common lawful use, and thus very unlikely to have gone unnoticed by ATF and its predecessor. Once again, reliance on palpably false claims of changed circumstance to justify a radical change in the definition of a "frame or receiver" is arbitrary and capricious and undoubtedly masks the true, and likely unlawful, reasoning behind the change.

Because even a cursory review of the historical record demonstrates that many of the "facts" cited by ATF are either unsupportable or demonstrably false, its rulemaking is irretrievably defective. A rulemaking based on patently false information is arbitrary and capricious.

B. ATF Failed to Make Available the Underlying Determinations, Evidence, and Other Information Upon Which it Purportedly Relied in Formulating its Proposed Rule

Regarding PMFs, ATF's claims that they are involved in crimes and difficult to trace is unsupported by any cited evidence and ATF has declined to make available the evidence on which it purportedly relied.[32] The agency cites no documents elucidating this alleged problem, instead resting this assertion on uncited statistics. Surely, with the specific numbers ATF asserts, it has documents that ought to be made available to the interested public.

Failing to bring forth any such material in support of a final rule not only deprives all interested persons preparing public comments to consider those materials but precludes them from investigating the veracity of the materials and challenging the putative instances and calculation methodology employed. If ATF intends to take any further action relative to this rulemaking, it needs first to lay the foundation for a proposal and then expose that foundation to meaningful review and critique.

---

several American firms began producing their own versions of the rifle, all of which feature a distinctly split receiver. *See* John Henwood, THE GREAT REMINGTON 8 AND MODEL 81 AUTOLOADING RIFLES, Collector Grade Publications, Jan 1, 2003; Leonard Speckin, WINCHESTER MODEL 07 SELF-LOADING .351 CALIBER: ITS PAST AND ITS FUTURE WITH MODERN BRASS, BULLETS AND POWDERS, 2013; Roger Larson, COMPREHENSIVE GUIDE TO THE M1 CARBINE, 2d Ed, 2010.

[32] 86 Fed. Reg. 27724. *See also* 86 Fed. Reg. 27722, FN 17 (pertaining to PMFs recovered from *potential* crime scenes and citing a variety of news articles but no police reports or other official government sources).

In publishing the Notice of Proposed Rulemaking ("NPRM"), ATF has declined to make public any necessary supporting documents. It has long been understood that "[t]he process of notice and comment rule-making is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982). "If the [NPR] fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Id*. at 530. Providing access to the materials that ATF has acknowledged in the NPRM as the basis for the rulemaking – has long been recognized as essential to a meaningful opportunity to participate in the rulemaking process.

The Administrative Procedure Act ("APA") "'requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.'" *American Medical Ass'n, v. Reno,* 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (quoting *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)). In order to ensure that rules are not promulgated on the basis of data that to a "critical degree, is known only to the agency," the agency must make available the "methodology" of tests and surveys relied upon in the NPR. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.3d 375, 392-93 (D.C. Cir. 1973).

An agency commits serious procedural error when it fails to reveal the basis for a proposed rule in time to allow for meaningful commentary. *Connecticut Power & Light*, 673 F.2d at 530-31. The notice and comment requirements

> are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

International Union, United Mine Workers of America v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

C. The Agency's Requirement That Individuals Include Their Name and Address to Comment Violates Their First Amendment Rights and Chills Public Participation

The APA requires government agencies to allow the public to submit "written data, views, or arguments" regarding a proposed rule. Here, though, ATF has placed, among other things, strict self-identification requirements on public comments to the NPRM, which severely limit both the degree and amount of public participation.

The Supreme Court has long recognized that the right to anonymous speech is protected by the First Amendment.[33] Courts have consistently held that restrictions on anonymous speech are subject to "exacting scrutiny" under the First Amendment, where the government must show a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest justifying the ban on anonymous speech.[34]

Unlike those instances where the government's interest was held to be sufficient to prohibit anonymous speech, ATF cannot here meet that burden. Many government agencies accept anonymous comments in identical circumstances.[35] Further, the APA does not require that agencies authenticate comments. Indeed, the focus of agency review of public comments under the APA is on the substance of

---

[33] *See, e.g.*, *Talley v. California*, 362 U.S. 60 (1960) (striking down ban on anonymous handbills); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (striking down ban on anonymous campaign literature).

[34] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (interest in deterring corruption and avoiding appearance of corruption sufficient to uphold disclosure of campaign contributors); *Doe v. Reed*, 561 U.S. 186 (2010) (interest in integrity of electoral process sufficient to uphold disclosure of signatories to state referendum).

[35] *See* U.S. Gov't Accountability Office, Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process, at 18-19. (GAO-19-483, June 2019).

comments.[36] The identity of the commenters has nothing to do with the concerns raised in comments, and thus ATF has no important interest in obtaining it.

Compounding this problem, ATF is doubtlessly aware of the tumultuous relationship between itself and American gun owners. It is not controversial to observe that American gun owners have a perfectly rational fear of retaliation by ATF for innocent acts or omissions. In light of this, it seems ATF's requirement that the public provide a full name and address in order to submit a comment is predictably likely to chill the gun owning public from weighing in and exercising their right to participate. Indeed, this requirement will sharply discourage members of the public who may be uncertain of how the new regulations would apply to them, and hence have the most relevant comments concerning proper line-drawing and the like, from commenting. Indeed, even the stoutest of commenters likely would not be foolhardy enough to raise any issues close to the line lest they flag themselves for investigation by ATF when it later ignores their concerns and enacts a broad and vague definition of a frame or receiver

Because ATF, in this NPRM, discouraged the submission of anonymous comments, we have no way of knowing what information would have been presented absent the speech restriction. Thus, ATF should re-open the comment period, making it clear that anonymous comments will be accepted and considered in developing any final rule.

[36] *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment").

IV. CONCLUSION

For all the reasons discussed above, the ATF's Proposed Rule is procedurally and substantively flawed, unconstitutional, and arbitrary and capricious. It should be withdrawn.

Respectfully submitted by:

ADAM KRAUT
MATTHEW LAROSIERE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
akraut@fpclaw.org

ERIK S. JAFFE
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, D.C. 20006
(202) 415-7412
ejaffe@schaerr-jaffe.com
Of Counsel

JOSHUA PRINCE
CIVIL RIGHTS DEFENSE FIRM, P.C.
646 Lenape Road
Bechtelsville, PA 19505
(888) 313-0416
joshua@civilrightsdefensefirm.com
Of Counsel

August 19, 2021