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Bureau of Alcohol, Tobacco, Firearms, and Explosives
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Re: Ohio and 21 States' comments in opposition to the proposed rule entitled, "Factoring Criteria for Firearms with Attached 'Stabilizing Braces.'"

Dear Attorney General Garland:

We submit these comments in response to the Department's proposed rulemaking, entitled, "Factoring Criteria for Firearms with Attached 'Stabilizing Braces,'" 86 Fed. Reg. 30826 (June 10, 2021). The proposed regulations purport to implement the National Firearms Act. The Act, as relevant here, subjects short-barreled "rifles" to a registration and taxation scheme, and punishes the failure to follow that scheme with up to 10 years' imprisonment. Congress defined "rifle" to include only "weapon[s] designed or redesigned, made or remade, and intended to be fired from the shoulder." 26 U.S.C. §5845(c). The proposed rule, however, redefines "rifle" to include weapons that are not designed, not made, and not intended to be fired from the shoulder. Specifically, the proposed rule redefines "rifle" to mean any weapon "equipped with an accessory or component purported to assist the shooter stabilize the weapon while shooting with one hand," and designed with features "that facilitate shoulder fire" as determined by a "[w]orksheet." 86 Fed. Reg. at 30851. This will have the effect of prohibiting commonly used, and hitherto legal, combinations of pistols and stabilizing braces *not* intended to be used for shoulder firing. In other words, the proposed rule stretches the Act beyond its permissible meaning.

Reasonable minds may differ on the policy merits of regulating stabilizing braces. That is not why the States are writing. Rather, we are writing because the Department of Justice's arbitrary interpretation of "rifle" has no basis in the statutory text. With the new regulation, the Executive Branch is amending a statutory command, pure and simple. This administrative invention is unconstitutional. And the separation-of-powers problem here is especially stark, because the Department's

definition will have the effect of creating an altogether new crime—one that may sweep up law-abiding gun owners based on actions they already took in full conformity with the law as it existed at the time.

In hopes of urging the Department to withdraw this rule, Ohio and 21 other States submit these comments.

## I. Statutory & Regulatory Background

In the early 20th century, the United States faced a national security threat: gang violence. At one point, the homicide rate increased 78 percent compared to the pre-Prohibition Era.[1] In response, Congress enacted the National Firearms Act in 1934.[2] The Act singles out for special treatment sawed-off shotguns and machineguns—"the preferred weapons of gangsters."[3] The Act, among other things: imposed an annual tax on "firearms" dealers[4]; imposed a $200 tax on the transfer of firearms[5]; required transferees to complete forms identifying themselves and the firearm being transferred[6]; and required those already in possession of "firearms' to register their weapons with the government.[7] But the Act did not use "firearm" in its colloquial sense—the Act did not, in other words, govern the transfer and registration of *all* guns. Instead, it defined "firearms" to include only the weapons favored by gangsters: shotguns and rifles with short barrels and "machine gun[s]."[8] The definition expressly excluded "pistol[s]" and "revolver[s]."[9]

Congress acted quite intentionally when it excluded pistols and revolvers. As Attorney General Cummings explained when introducing an early version of the bill that would become the Act: "There is no desire upon the part of the Department of Justice, or of anyone else, so far as I know, to take over any powers, or exert any administrative functions beyond those absolutely necessary to deal with this situation."[10] Representative Robert Lee Doughton of North Carolina elaborated when introducing the final text: "The ordinary, law-abiding citizen who feels that a pistol or a revolver is essential in his home for the protection of himself and his family should not be classed with criminals, racketeers, and gangsters; should not be compelled to

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[1] Mark Thornton, *Alcohol Prohibition was a Failure*, Cato Institute (July 17, 1991), https://perma.cc/73W9-Z6SP.

[2] 48 Stat. 1236, ch. 757.

[3] *United States v. Dewalt*, 92 F.3d 1209, 1217 (D.C. Cir. 1996) (Henderson, J., dissenting).

[4] 48 Stat. 1236, ch. 757 at §2.

[5] *Id.*, §3.

[6] *Id.*, §4.

[7] *Id.*, §5.

[8] *Id.*, §1(a).

[9] *Id.*

[10] National Firearms Act Before the H. Comm. on Ways and Means, 73d Cong. 4 (1932) (statement of Homer S. Cummings, Attorney General of the United States) (capitalization altered).

register his firearms and have his fingerprints taken and be placed in the same class with gangsters, racketeers, and those who are known as criminals."[11]

To this day, the Act excludes pistols and revolvers from its reach. (For ease of reference, we'll refer to both categories of weapons as "pistols.") As amended in 1968, the Act imposes a registration and taxation scheme on a specific list of weapons—weapons popular with criminals as opposed to law-abiding citizens. That list includes short-barreled rifles—in other words, rifles "having a barrel or barrels of less than 16 inches in length."[12] The Act defines "rifle" as a weapon that fires a single projectile per a single pull of the trigger and is designed and intended to be fired from the shoulder. More precisely, it defines "rifle" to mean:

> a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.[13]

The Act goes on to define "make," and its derivatives, to "include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm."[14]

This definition thus recognizes two elements of every weapon that qualifies as a "rifle" under the Act. *First*, the weapon must be "designed" or "made" to be fired from the shoulder. *Second*, that the weapon must be "intended" to be fired from the shoulder. This definition excludes pistols, which are *not* designed or redesigned, *not* made or remade, and *not* intended to be fired from the shoulder.

Whether a weapon qualifies as a "rifle" under the Act turns out to be quite important. The Act requires the "manufacturer, importer, and maker" to register every covered firearm it "manufactures, imports, or makes."[15] Covered firearms must be registered to the transferee and approved by the Attorney General prior to transfer.[16] The law then imposes a $200 tax for each firearm made and transferred.[17] It is

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[11] 73 Cong. Rec. 11,400 (1934) (capitalization altered); *see also* National Firearms Act Before the H. Comm. on Ways and Means, 73d Cong. 108–10 (1934) (Statement of Maj. Gen. Milton A. Record, National Rifle Association).

[12] 26 U.S.C. §5845(a).

[13] *Id.*, §5845(c).

[14] *Id.*, §5845(i).

[15] *Id.*, §5841(b).

[16] *Id.*, §5841(d).

[17] *Id.*, §§5811, 5821.

unlawful to possess a regulated firearm not registered to the possessor.[18] And importantly, there is no mechanism for a possessor of an unregistered firearm to register it—an illegal firearm remains irreparably illegal.[19]

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In the proposed rulemaking at issue here, the Department of Justice expresses concerns that pistol owners are "circumventing" the National Firearms Act.[20] In particular, the Department says the forearm braces that pistol owners use to help them support and stabilize their pistols make those weapons, in some circumstances, function like short-barreled rifles. And the Department notes that weapons "with 'stabilizing braces' have been used in at least two mass shootings."[21]

Since one circumvents a law by doing something that the law permits, *stopping* circumvention requires legislative action. But the Department has decided to act on its own, proposing a rule that would expand the National Firearm Act's definition of "rifle" to include pistols used with accessories that "facilitate" shoulder fire. Here is the proposed definition

> The term [rifle] shall include any weapon with a rifled barrel equipped with an accessory or component purported to assist the shooter stabilize the weapon while shooting with one hand, commonly referred to as a "stabilizing brace," that has objective design features and characteristics that facilitate shoulder fire, *as indicated on Factoring Criteria for Rifled Barrel Weapons with Accessories commonly referred to as "Stabilizing Braces," ATF Worksheet 4999…*[22]

As this definition indicates, whether a pistol-and-brace combination qualifies as a covered "rifle" turns on the application of factors laid out in a worksheet. So it is important to say a bit more about what that worksheet requires.

As an initial matter, ATF Worksheet 4999 applies to pistols that, without any attachment, constitute a "suitable host firearm."[23] To qualify, a pistol must weigh at least 64 ounces and measure between 12 and 26 inches. If the host firearm is too

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[18] *Id.*, §5861(d).

[19] National Firearms Act, Bureau of Alcohol, Tobacco, Firearms and Explosives (last reviewed Apr. 7, 2020), https://perma.cc/UUD4-UM2X; *see also United States v. Freed*, 401 U.S. 601 (1971); *Haynes v. United States*, 390 U.S. 85 (1968).

[20] 86 Fed. Reg. at 30827.

[21] *Id.* at 30828.

[22] *Id.* at 30851 (emphasis added).

[23] *Id* at 30843.

light or too short, and thus not a "suitable host firearm," combining the pistol with a brace will automatically transform the combination into a "rifle."

Assuming the worksheet applies, it requires evaluating the brace and the firearm for certain features worth specified "points." If the pistol-and-brace combination earn four or more points in either of two categories, or if the Department otherwise thinks the combination seems bad, it qualifies as a "rifle."

The first category deals with the brace's physical characteristics. At this step, one must ask whether the brace is "based" on a known shoulder stock design, or "incorporates" shoulder stock "features," like adjustable length.[24] A brace can accrue up to two points based on the result of this I-know-it-when-I-see-it assessment. And a brace can accrue up to three points depending on whether its rear surface area: "discourage[s]" shouldering; is "useful" for shouldering; or otherwise "makes it difficult" or "allows for" shouldering.[25] A brace will also accrue two points if it is adjustable. The nature of the forearm support that the brace provides also proves significant. If the brace's support mechanism is a "counterbalance" design that pushes against the bottom of the shooter's arm like a fulcrum, and if the brace "folds," it accrues one point. If the brace's support mechanism is a "fin-type" design that rests against the shooter's arm, the brace accrues two points—at least, it accrues those points if it lacks "an arm strap of suitable length or functionality."[26] If the brace's support mechanism is a "cuff-type" design that rests on top of the shooter's arm and then wraps around the arm, and if the cuff partially or fails to wrap all the way around, the brace accrues up to two points. Add three points if the design looks like a shoulder stock that adds a "slot" in the center of the stock for arm support.[27]

The second category on which the worksheet focuses involves the pistol-and-brace *combination*. The first question involves the distance between the trigger and the center of the brace. The pistol-and-brace combination earns up to four points for longer pull lengths.[28] Next, the worksheet requires considering how the brace is attached. Attachments allowing for adjustable lengths or attachments that make the combined weapon difficult to aim with one hand earn up to three points.[29] Though seemingly duplicative with the accessory-review category, the worksheet requires considering whether the brace has been modified to lack sufficient forearm stabilization, such as using a "strap too short to function," or a "strap made out of elastic material."[30] Finally, the worksheet requires looking to additional accessories, beyond

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[24] *Id.* at 30830, 30832.
[25] *Id.*
[26] *Id.* at 30830, 30833.
[27] *Id.*
[28] *Id.* at 30831, 30833.
[29] *Id.*
[30] *Id.*

the brace, that indicate the user wants to fire the completed weapon from the shoulder. Such accessories include a secondary grip for the off hand (four points), an installed scope partially or completely unusable for one-handed firing (up to four points), and compatibility with a bipod/monopod (up to two points).[31] And the unloaded complete weapon must weigh less than 7.5 pounds or accrue four points.[32]

Even if a pistol-and-brace combination earns fewer than four points in both categories, it may still be deemed a "rifle" if the "manufacturer or maker" attempts to "circumvent Federal law by attaching purported 'stabilizing braces' in lieu of shoulder stocks."[33] The Department does not elaborate on what this means.

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This is not the first time the federal government has addressed whether multiple components can combine to form a covered weapon. For example, in 1961, the Commissioner of the Internal Revenue Service—originally responsible for administering the Act—issued the following decree: "a hand gun of the Luger or semiautomatic Mauser type having a barrel less than 16 inches in length with an attachable shoulder stock affixed, or held by the possessor of such a weapon, is a short barrel rifle and, hence, within the purview of the National Firearms Act."[34] While the Commissioner did not explain his reasoning, it appears to go as follows: a covered weapon does not cease to be a covered weapon simply because it consist of two pieces rather than one.[35] The proposed rule is different. The proposed rule would transform an accessory and weapon into a covered firearm based on the Department's assessment of how design informs eventual use. Thus, even a weapon that is *not* designed, made, or intended to be fired from the shoulder would qualify as a "rifle" when it is used in combination with braces indicative of the user's intent to fire the weapon in a particular way.

The proposed rule is also not the Department's first foray into regulating stabilizing braces.[36] Indeed, the Department has applied such an array of administrative interpretations to the same set of accessories and weapons that the applicable statutory definitions seem almost an afterthought. The Department originally blessed stabilizing braces, concluding that they were not designed, made, or intended to facilitate the firing of a weapon from the shoulder.[37] The Department, through the Bureau

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[31] *Id*. at 30831, 30834.

[32] *Id*.

[33] *Id*. at 30834.

[34] Revenue Ruling 61-45 (Jan. 1961).

[35] *See also United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 511–12 (1992) (op. of Souter, J.).

[36] 86 Fed. Reg. at 30828.

[37] Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms, and Explosives (Nov. 26, 2012), https://perma.cc/K9NN-34ZT.

of Alcohol, Tobacco, Firearms, and Explosives, determined that the stabilizing brace was designed to cling to the forearm and intended to provide the shooter with support while the shooter holds the firearm with one hand.[38] In 2014, the Department went one step further, clarifying that misuse—firing the weapon and brace from the shoulder—does not reclassify the weapon and brace as a short-barreled rifle. The Department explained that it "classifie[s] weapons based on their physical design characteristics," *not* based on the way in which they are used. "While usage/functionality of the weapon does influence the intended design," the Department wrote, "it is not the sole criterion for determining the classification of a weapon."[39]

Less than a year later, the Department changed its mind, determining that using a stabilizing brace "as a shoulder stock constitutes a 'redesign' of the device" and creates an NFA-covered rifle. Citing a present-day version of Webster's II New College Dictionary, the Department reasoned that "redesign" means "to alter the appearance or function of," and because misusing a stabilizing brace changes the function of the brace, the weapon and brace have been redesigned.[40]

Two years later, the Department created yet another interpretation. The Department maintained that a user could redesign a weapon with a stabilizing brace, but denied that use alone could constitute a redesign.[41] Instead, the Department's 2017 position stated that a redesign occurs when the user both "takes affirmative steps to configure the [brace] for use as a shoulder-stock … and then in fact shoots the firearm from the shoulder using the accessory as a shoulder stock."[42] Similar to the 2015 position, the Department appeared to focus on whether the user intended to fire the weapon from the shoulder, not whether the weapon and brace were intended by any manufacturer or assembler to be used that way.

As the Department recognizes, "upwards" of 1.4 *million* brace owners[43] have purchased their accessories in reliance on the Department's nod, only to be told, under the proposed rule, their heretofore lawful activity makes them felons.

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[38] *Id*.

[39] Letter from Earl Griffith, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms, and Explosives, to Sgt. Joe Bradley (Mar. 5, 2014), https://perma.cc/Z46A-SX5F.

[40] Acting Chief Max. M. Kingery, Bureau of Alcohol, Tobacco, Firearms and Explosives, Open Letter on the Redesign of "Stabilizing Braces" (Jan. 2015), https://perma.cc/SZJ2-GQUP.

[41] Letter from Marvin G. Richardson, Assistant Director, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Mark Barnes (Mar. 21, 2017), https://perma.cc/6RHJ-J9AK.

[42] *Id*.

[43] 86 Fed. Reg. at 30846.

## II. The proposed rule does not fit within the text of the statute, and the Department is not entitled to invent its own definition.

Executive agencies necessarily interpret the laws they enforce. And, under Supreme Court precedent, their interpretations may be entitled to deference if they rest on a "permissible construction of the statute."[44] The proposed rule, however, does not rest on a permissible construction of the statute. It amounts to nothing short of a rewriting of the National Firearms Act. Because the Department lacks the power to amend congressional acts, it lacks the power to implement the proposed rule. The Department should abandon it. Americans must not be threatened with jail time for violation of laws that Congress never passed.

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Whether a stabilizing brace, attached to a pistol, constitutes a "weapon designed or redesigned … and intended to be fired from the shoulder," is a question of statutory interpretation. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[45]

With that in mind, here is the relevant text: a weapon qualifies as a rifle, for purposes of the National Firearm Act, only if it is "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder."[46] It is certainly possible that *some* accessory-and-pistol combinations would fit this definition. For example, a pistol marketed and sold with "an attachable shoulder stock" would appear to be designed, made, and intended to be fired from the shoulder, *even if* it can also be fired not from the shoulder.[47] As noted above, a firearm composed of numerous pieces does not cease to be a covered firearm depending on how it happens to be assembled at a given moment.[48] But the question here is not whether some pistol-and-accessory combinations will come within the Act—the question is whether the Department's interpretation identifies those combinations.

It does not. As an initial matter, whatever "designed or redesigned, made or remade, and intended to be fired from the shoulder" means, it does not mean "accrues four or more points under a two-page worksheet"—a worksheet that requires assessing almost 50 distinct features and that the Federal Government created half-a-century after the Act's 1968 amendment. The Department would presumably respond that the worksheet just so happens to pick out the features indicative of a

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[44] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

[45] *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)).

[46] 26 U.S.C. §5845(c).

[47] Revenue Ruling 61-45 (Jan. 1961).

[48] *See Thompson/Ctr. Arms Co.*, 504 U.S. at 511–12 (op. of Souter, J.).

pistol-and-brace combination *designed* and *intended* to be fired from the shoulder. But that is false. For one thing, there is no reason to think that the *ad hoc* two-category and four-point threshold will accurately pick out such designs. More fundamentally, and as the proposed rule recognizes, stabilizing braces *are not* generally designed to facilitate shoulder shooting. Rather, they are "designed to be attached to large or heavy pistols and that are marketed to help a shooter 'stabilize' his or her arm to support single-handed firing."[49] Consistent with that concession, the worksheet does not home in on features indicative of a pistol-and-brace combination designed and intended to be fired from the shoulder—rather, it asks whether the combination has features that would *permit* the user to fire from the shoulder. That is not the question the statute asks.

Indeed, the proposed rule devalues Congress's focus on the intended, rather than actual, use of the weapon. Other provisions in the National Firearms Act *are* keyed to actual use. For example, one provision refers to "any weapon or device *capable of* being concealed on the person from which a shot *can be* discharged through the energy of an explosive."[50] This shows that Congress knew how to make a statute's applicability rise and fall with potential uses rather than intended uses. That it failed to use such language in the definition of "rifle" is thus significant.[51]

The problems continue. The "rifle" definition applies only to "weapon[s]" that were "designed or redesigned, made or remade, and intended to be fired from the shoulder." The brace itself is a not a "weapon." So it cannot be a rifle on its own. A pistol, to be sure, is a "weapon," one the Department defines as designed and intended to be held in one hand.[52] It, too, cannot be a rifle on its own. Thus the Department envisions the brace (which is not a rifle) and the pistol (also not a rifle) *combining* to make a rifle. But a brace and pistol can combine to make a rifle *only if* the combination is a weapon "designed or redesigned, made or remade, and intended to be fired from the shoulder."

The trouble with the proposed rule is that the verbs "designed or redesigned" and "made or remade" imply some degree of permanence. No one would say that a parent "redesigns" a car by installing a child's car seat. Nor would anyone say that an on-deck batter who adds a weight to his bat has "remade" the bat. Nor does a gardener "remake" or "redesign" a hose by attaching a nozzle that eases a particular task. The implied permanence means that the definition of "rifle" cannot possibly apply to temporary combinations of accessories and pistols. The Department itself has recognized that it considers permanence relevant. In 2017, the Department concluded that attaching a forearm brace to a pistol does not make a short-barreled rifle.

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[49] 86 Fed. Reg. at 30827.

[50] 26 U.S.C. §5845(e) (emphasis added).

[51] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

[52] 27 CFR §479.11.

At the same time, it opined that "configuring the brace so as to permanently affix it to the end of a buffer tub, (thereby creating a length that has no other purpose than to facilitate its use as a stock), removing the arm-strap, or otherwise undermining its ability to be used as a brace," would constitute a redesign and as that word is used in the definition of "rifle."[53]

So some firearms, equipped with braces, may have the requisite degree of permanence. But the proposed rule does not address or accommodate this permanence concern at all—the worksheet will cover pistol-and-brace combinations that lack the permanence of a weapon that can fairly be described as having been *designed*, *made*, and *intended* to be fired from the shoulder.

The non-permanence of the combinations the proposed rule covers is at odds with the entire structure of the Act. The Act, as detailed above, requires manufacturers and dealers to pay a tax on the sale of covered firearms. It also requires buyers and owners to register their firearms. Those requirements all envision a degree of permanence—if "rifles" come in and out of existence depending on the accessories to which they are attached, the registration requirements simply make no sense.

For example, the National Firearms Act requires "[e]ach manufacturer and importer and anyone making a firearm" to "identify" each firearm made "by a serial number which may not be readily removed, obliterated, or altered," and by "the name of the manufacturer, importer, or maker."[54] This is an impossible task for many current owners of forearm braces under the proposed regulation. The only relevant maker of the "firearm," as defined under the National Firearms Act, is the individual possessor, as the manufacturer of the pistol has not made a regulated firearm, nor has the manufacturer of the brace. The individual possessor, who purchased and connected the two pieces, now must become an engraver to comply with the identification requirement, but would appear entitled to remove the (unalterable) engraving if the Act-defined firearm ceased to exist, because he's lost, sold, or broken the brace. Even though the ATF waives off this oddity,[55] the fact remains that the scheme set up by the Act envisions a permanent firearm with a permanent serial number. Many pistol-and-brace combinations are not that.

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All of that shows that the statute, fairly read, does not allow the Department to sweep in stabilizing braces (as attached to pistols) under the Act using a multi-factor, quite-unpredictable assessment of how they might be used. The conclusion is

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[53] Letter from Marvin G. Richardson, Assistant Director, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Mark Barnes (Mar. 21, 2017), https://perma.cc/6RHJ-J9AK.

[54] 26 U.S.C. §5842(a).

[55] *See* 18 U.S.C. §923(i).

bolstered by the fact that the definition of "rifle" will subject those affected to criminal penalties—penalties that will be enforced by the very agency proposing the rule.

Recall that the definition of "rifle" has criminal-law implications. The National Firearms Act provides that it "shall be unlawful for any person" to "possess a firearm which is not registered to him," or to "make a firearm" without paying the requisite tax.[56] Failure to do so results in a fine of up to $10,000, imprisonment of up to ten years, or both.[57] What is more, the government may seize the firearm.[58] Thus, once the rule goes into effect, the heretofore law-abiding owner of a covered pistol-and-brace combination would *immediately* be out of compliance with the Act. And he or she would be out of compliance without having done anything except for having purchased (or combined) legal braces and legal pistols when the Department's regulations permitted the combination of those braces and pistols. This is quite different than the purposeful act that precedes possessing an unregistered short-barreled rifle or other Act-defined firearm. A short-barreled rifle must be registered to the transferee before being transferred, so the purchaser of an unregistered short-barreled rifle knows, before he engages in the transfer, that something is amiss. Under the proposed rule, on the other hand, the owner instantly becomes an unregistered possessor of a short-barreled rifle, unwittingly and accidentally becoming a criminal.

Because the definition of "rifle" will determine whether otherwise-lawful weapon owners are criminals, the definition must be read narrowly. "The rule that penal laws are to be construed strictly" is almost as old as statutory "construction itself."[59] Even if the definition of "rifle" *could be* interpreted to encompass pistol-and-brace combinations that meet the ATF worksheet, the statute hardly compels that conclusion. And so the rule of lenity militates against the Department's newest interpretation. Moreover, even if an administrative interpretation of a statute authorizing criminal enforcement could overcome application of the rule of lenity, the administrative interpretation would have to provide the adequate notice the statute lacked.[60] The proposed rule does no such thing. To the contrary, it empowers the Department to apply a two-page worksheet to criminalize the possession of a previously exempt stabilizing brace (attached to a pistol). A brace that receives (for example) 5 or 6 points out of a possible 13 in "accessory characteristics" category is illegal. The possessor's ability to navigate whether her brace's arm strap is "substantial" enough,[61] leaves vast uncertainty. So even if regulations *could* cure an ambiguous

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[56] 26 U.S.C. §5861(d) & (f).
[57] *Id.*, §5871
[58] *Id.*, §5872.
[59] *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).
[60] *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995).
[61] 86 Fed. Reg. at 30832.

statute, and thus allowing for the prosecution of an individual whose actions arguably comply with the statute, the proposed regulatory worksheet lacks any such clarity.

Add to that another concern: the Department should not be in the business of defining "rifle" in the first place. "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[62] It is especially disturbing when executive actors purports to define the prohibitions it is tasked with enforcing.[63] In England, when "James I tried to create new crimes by royal command, the judges responded that 'the King cannot create any offence by his prohibition or proclamation, which was not an offence before.'"[64] True enough, "James I … did not have the benefit of *Chevron* deference."[65] But *Chevron* deference does not entitle agencies to promulgate definitive interpretations of *criminal* laws—that is a matter for courts.[66] Although some courts have deferred to agencies' interpretations of the criminal laws they enforce,[67] the Department has an independent duty to respect the separation of powers. And no case *compels* the agency to promulgate binding regulations of the laws they enforce.

There is no escaping the fact that, by rewriting the definition of "rifle," the proposed rulemaking constitutes a legislative act. But the "nation's chief prosecutor" has no constitutional "power to write his own criminal code governing the lives of" American citizens.[68] Indeed, the executive branch does not have any legislative power at all—only Congress does. Because the proposed rulemaking envisions the executive assertion of power left to Congress, it must be abandoned.

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We understand all too well the harm criminals can inflict with firearms and the desire to do something about it. But the Constitution leaves the task of crafting policies to address that problem largely to the States and to Congress. And there is no reason to think that, with the National Firearms Act, Congress empowered the Department to address the legality of brace-and-pistol combinations through anything resembling the proposed rule.

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[62] The Federalist No. 47, p.324 (Madison) (Cooke ed., 1961).

[63] *Id*. at p.326.

[64] *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (statement of Scalia, J., respecting the denial of certiorari) (quoting *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611)).

[65] *Id*.

[66] *Id*. at 1004–05; *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 462 (6th Cir. 2021), *stay and en banc review granted by* 2 F.4th 576 (6th Cir. June 25, 2021).

[67] *See, e.g.*, *In re Sealed Case*, 223 F.3d 775, 779 (2000).

[68] *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

Yours,

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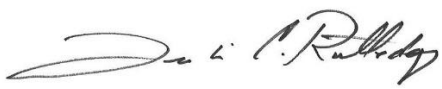

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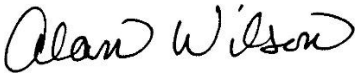

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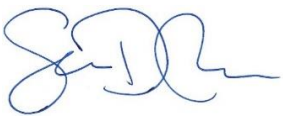

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