Nos. 23-11157, 23-11199, 23-11203, 23-11204, 23-40685

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 23-11157

SECOND AMENDMENT FOUNDATION, INCORPORATED; RAINIER ARMS, L.L.C.; SAMUEL WALLEY; WILLIAM GREEN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees

consolidated with

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On Appeal from the United States District Court
for the Northern District of Texas in Nos. 3:21-cv-116, 4:23-cv-95, 2:23-cv-19, and 4:23-cv-578; and from the United States District Court for the Southern District of Texas in No. 6:23-cv-13

COMBINED REPLY BRIEF FOR APPELLEES in Nos. 23-11199, 23-11203, 23-11204, and 23-40685 and RESPONSE BRIEF FOR APPELLANT in No. 23-11157

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Case No. 23-11199

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants

consolidated with

Case No. 23-11203

DARREN A. BRITTO; GABRIEL A. TAUSCHER; SHAWN M. KROLL,

Plaintiffs-Appellees,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Defendant-Appellant

consolidated with

Case No. 23-11204

TEXAS GUN RIGHTS, INCORPORATED; NATIONAL ASSOCIATION FOR GUN RIGHTS, INCORPORATED,

Plaintiffs-Appellees,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Defendant-Appellant

consolidated with

Case No. 23-40685

STATE OF TEXAS; GUN OWNERS OF AMERICA, INCORPORATED; GUN OWNERS FOUNDATION; BRADY BROWN,

Plaintiffs-Appellees,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN M. DETTELBACH, *Director of ATF*,

Defendants- Appellants

STATEMENT REGARDING ORAL ARGUMENT IN NO. 23-11157

Plaintiffs in this case seek preliminary relief prohibiting the enforcement of a Rule issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives. The Rule clarifies that the National Firearms Act's public-safety scheme applies to short-barreled rifles constructed from so-called "stabilizing braces," and provides guidance for determining whether any particular braced firearm is a short-barreled rifle. Given the public safety and regulatory clarity goals furthered by the challenged Rule, the government respectfully requests that the Court hold oral argument in this appeal.

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INTRODUCTION

In *Mock v. Garland*, 75 F.4th 563 (5th Cir. 2023), this Court held that a rule issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) explaining the circumstances under which a firearm equipped with rearward attachment called a "stabilizing brace" is a short-barreled rifle suffered from a procedural defect under the Administrative Procedure Act (APA). This Court did not, however, order relief for the *Mock* plaintiffs, nor did it hold that the Rule suffered from any other infirmity.

The district court in *Second Amendment Foundation, Inc. v. ATF*, No. 3:21-cv-116 (N.D. Tex.), *appeal filed*, No. 23-11157 (5th Cir.), properly rejected plaintiffs' request for preliminary relief following the *Mock* decision. The court first assessed the extent to which *Mock* controlled the issues before the court, evaluating whether the specific plaintiffs could show prejudice from the procedural error this Court identified. Because plaintiffs could not establish that any change between the proposed and final rules prevented them from participating in the rulemaking process, the *Second Amendment Foundation* court rejected plaintiffs' reliance on a logical outgrowth claim and proceeded similarly to reject plaintiffs' litany of meritless statutory and constitutional issues. And on the equities, the court declined to credit plaintiffs' unfounded assertions of harm because they were unsubstantiated by the evidence. The district court's order denying preliminary relief should be affirmed.

In contrast, on remand in *Mock*, and in the three other consolidated cases,[1] district courts in this Circuit awarded at least some preliminary relief on procedural APA grounds (although one district court, in *Texas*, properly concluded that some of the plaintiffs, including the State of Texas, were not entitled to relief). As the government explained in its opening brief, that relief was an abuse of discretion. Two sets of parties did not raise the logical outgrowth claim accepted in *Mock*—and therefore could not benefit from that precedent—and none of the plaintiffs demonstrated that the equitable factors warranted preliminary relief. The government further demonstrated that, at a minimum, the court in *Britto*, No. 23-11203, erred in entering a nationwide stay of the rule and that the nationwide stay must be set aside.

Attempting to justify the district courts' grant of extraordinary relief, plaintiffs advance on appeal a host of other reasons they believe the rule is unlawful, but none of those arguments persuades. The Rule follows directly from the statute, which directs the agency to consider whether a firearm is designed and intended to be fired from the shoulder. And the Rule references the same objective design features that the agency would have to evaluate in determining whether a firearm falls within the National Firearms Act, regardless of the Rule. The Rule is also no doubt

[1] Since these cases were consolidated, two more district courts in this Circuit have addressed motions for preliminary relief against the Rule. One denied the motion, *see Watterson v. ATF*, No. 4:23-cv-80, 2024 WL 897595, (E.D. Tex. Mar. 1, 2024), and the other granted a preliminary injunction as to the plaintiff association's members, *see National Rifle Ass'n of Am. v. ATF*, -- F. Supp. 3d --, No. 3:23-cv-1471, 2024 WL 1349307 (N.D. Tex. Mar. 29, 2024).

constitutional. Short-barreled rifles are not protected by the Second Amendment, as they are not typically possessed by law-abiding citizens for lawful purposes like self-defense, and, in any event, the National Firearms Act is a limited regulation of a subset of dangerous weapons.

This brief is a combined response to the opening brief of the *Second Amendment Foundation* plaintiffs and a reply brief in the remaining consolidated cases. The opening material refers to *Second Amendment Foundation*, but the argument section presents responses and replies on all issues in all cases.

STATEMENT OF JURISDICTION

The district court denied the *Second Amendment Foundation* plaintiffs' motion for a preliminary injunction on November 13, 2023. *See* ROA.23-11157.1193. Plaintiffs filed a timely notice of appeal on the same day. *See* ROA.23-11157.1194. The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

The *Second Amendment Foundation* plaintiffs moved for a preliminary injunction barring enforcement of the Rule, claiming that the Rule is invalid on a host of statutory, administrative, and constitutional grounds. The district court denied that motion, concluding that plaintiffs were unlikely to succeed on the merits of any claim, that plaintiffs had not demonstrated irreparable injury, and that the balance of the

equities and the public interest weighed against preliminary relief. The issue presented is whether the court properly denied plaintiffs' motion for a preliminary injunction.

STATEMENT OF THE CASE

The background of these consolidated suits is laid out in detail in the government's opening brief. *See* Opening Br. 5-12. Accordingly, this brief only describes the relevant history in *Second Amendment Foundation*.

1. Plaintiffs in *Second Amendment Foundation*—two individuals, a retailer of firearms and products marketed as stabilizing braces, and an organization named the Second Amendment Foundation—filed suit and asked the district court to enjoin the Rule. *See* ROA.23-11157.226-253. Plaintiffs argued that they were likely to succeed on claims that the Rule contravened the statute; that the Rule violated the APA by failing to properly analyze whether the Rule comports with the Second Amendment under the framework articulated in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); that the Rule in fact violates the Second Amendment; and that the Rule is void for vagueness. *See* ROA.23-11157.254. Initially, plaintiffs did not move for preliminary relief on a logical outgrowth claim, *see* ROA.23-11157.254, but after this Court's decision in *Mock*, plaintiffs amended their motion to seek relief on a logical outgrowth claim as well, *see* ROA.23-11157.1058.

2. The district court denied plaintiffs' motion for a preliminary injunction after an evidentiary hearing. *See* ROA.23-11157.1152. As an initial matter, the district court concluded that plaintiffs were not likely to succeed on their logical outgrowth claim

because they—unlike the plaintiffs in *Mock*—had not met their burden to demonstrate prejudice. *See* ROA.23-11157.1164. The court explained that plaintiffs had not "delineat[ed] any reasons why their notice interests were harmed when the ATF did not conduct a second notice and comment process." ROA.23-11157.1164. It rejected as insufficient plaintiffs' general assertion that they "would have made due process comments" because plaintiffs did not "provide[] the Court with any examples or particular due process concerns" about the changes made between the Rule and the proposed rule and because the Rule already addressed similar comments regarding due process. ROA.23-11157.1165 (quotation omitted); *see* 88 Fed. Reg. 6478, 6550-52 (Jan. 31, 2023).

Turning to plaintiffs' other merits arguments, the district court concluded that the Rule did not contravene the statute because it was "textually grounded in the inquiry posed by the [relevant] definitional phrase" to determine whether a firearm was designed, made, and intended to be fired from the shoulder. ROA.23-11157.1168. The court dismissed plaintiffs' invocation of the rule of lenity because it perceived no "grievous ambiguity or uncertainty" in the meaning of that statutory intent standard. ROA.23-11157.1169 (citing *United States v. Palomares*, 52 F.4th 640, 647 (5th Cir. 2022)). Likewise, the court held that the Rule is not impermissibly vague because, just like the National Firearms Act (NFA), it "allows a person of ordinary intelligence to assess" whether his firearm is a rifle—that is, whether the firearm is designed, made, and intended to be shoulder-fired. ROA.23-11157.1172.

Considering plaintiffs' other procedural claims, the district court concluded that the Rule adequately responded to comments regarding the Second Amendment. *See* ROA.23-11157.1175 (citing 88 Fed. Reg. at 6548). The court rejected plaintiffs' procedural concerns as a misguided "disagreement with the *outcome* of the ATF's consideration of *Bruen*, not a disagreement with an actual failure to consider *Bruen*." ROA.23-11157.1176. With respect to plaintiffs' claim that the Rule in fact violated the Second Amendment, the district court concluded that the Rule did not implicate the Second Amendment because a stabilizing brace is only an accessory that "cannot cause harm on its own and is not useful independent of its attachment to a firearm," and because the NFA regulates only braced firearms that are short-barreled rifles, which are "dangerous and unusual weapon[s]" outside the scope of the Second Amendment. ROA.23-11157.1179-80 (quotation omitted).

Independently, the district court concluded that plaintiffs had not substantiated irreparable harm warranting a preliminary injunction either in their filings or at the evidentiary hearing. The court explained that the individual plaintiffs and organizational plaintiffs had not identified any concrete cognizable harm tethered to their asserted constitutional claims, *see* ROA.23-11157.1190, and those claims were not likely to succeed in any event, *see* ROA.23-11157.1188. And it rejected plaintiffs' assertion of harm derived from the suggestion that they might destroy their braced firearms as an example of potential self-inflicted harm that was unsubstantiated. ROA.23-11157.1191.

The court also concluded that the individual plaintiffs had not shown harm arising from asserted compliance costs. The court reasoned that the Rule did not ban any braced firearms. ROA.23-11157.1191. Instead, the making and transfer of braced firearms are subject to a relatively small tax of $200, *see* ROA.23-11157.1190, which the government had determined not to collect for previously possessed braced firearms (although plaintiffs did not make clear whether they had chosen to take advantage of that forbearance, *see* ROA.23-11157.1190 n.14).

The district court similarly found that the commercial plaintiff had not substantiated any relevant harm. Considering compliance costs, the court found that the retailer had not shown that it was subject to the relevant taxes. ROA.23-11157.1186. Turning to asserted lost profits, the court explained that past losses from cancelled orders could not justify forward-looking relief. ROA.23-11157.1183. It dismissed the company's bare assertion that it was losing tens of thousands of dollars a month as conclusory and insufficiently detailed. ROA.23-11157.1183. The court also determined that the plaintiff organization made no independent showing of harm. ROA.23-11157.1183.

Balancing the equities, the district court concluded that the public interest in the Rule outweighed purported harms to the plaintiffs. The court explained that the public has "a safety interest in the continued enforcement" of the statute and its regulation of short-barreled rifles and that "there is at least some public interest in having a standard regulatory criterion over brace-equipped firearms, given the

evolution of stabilizing braces." ROA.23-11157.1192. And it reiterated that plaintiffs' purported harms were "unclear or unsubstantiated." ROA.23-11157.1192

Accordingly, the district court denied plaintiffs a preliminary injunction. *See* ROA.23-11157.1193. Plaintiffs timely appealed. *See* ROA.23-11157.1194.

SUMMARY OF ARGUMENT

I. Plaintiffs are not likely to succeed on the merits of any claim.

A. This Court held in *Mock v. Garland*, 75 F.4th 563, 583-86 (5th Cir. 2023), that the Rule was not a logical outgrowth of the proposed rule—and, thus, that the plaintiffs in that case did not have an adequate opportunity to comment on the Rule. The *Second Amendment Foundation* district court properly accepted this holding as binding but nevertheless concluded that the plaintiffs were not likely to succeed on the merits of their logical outgrowth claim because they had not properly demonstrated prejudice from the error.

That conclusion was correct. A plaintiff claiming improper notice is generally required to show that, with proper notice, he "would have presented an argument" that the agency "did not consider in issuing the" regulation. *United States v. Johnson*, 632 F.3d 912, 932 (5th Cir. 2011). The *Second Amendment Foundation* plaintiffs have failed to meet that burden. They state that they would have provided comments related to the Second Amendment and the Due Process Clause, but they fail to explain how the changes made between the proposed rule and the Rule inhibited their ability to make

those comments. And regardless, other commenters did make such comments, and the agency considered and responded to those comments in the preamble.

The plaintiffs in *Texas Gun Rights* and *Britto* are also not likely to succeed on the merits of a logical outgrowth claim, because those plaintiffs have not advanced such a claim. The *Texas Gun Rights* district court thus properly declined to enter relief on that basis, instead addressing the claims that plaintiffs in that case actually brought. By contrast, the *Britto* district court impermissibly entered relief on the basis of a logical outgrowth claim that plaintiffs did not bring. The government has explained why the court's injection of a new claim into the litigation was improper, *see* Opening Br. 23-25, and plaintiffs' feeble attempts to rehabilitate the district court's decision are unavailing.

B. The Rule properly interprets the statute. A weapon constitutes a "rifle" if, as relevant here, it is "designed," "made," and "intended to be fired from the shoulder." 26 U.S.C. § 5845(c). In interpreting that provision, the Rule properly clarifies that ATF need not uncritically accept stated intent but may also consider objective evidence of intent. This approach of using objective evidence to "ferret[] out a party's" true intent is a familiar one in the law and has been approved in the context of the NFA specifically. *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 601-02 (1st Cir. 2016). The Rule also properly identifies evidence that ATF believes will be probative of whether a particular braced firearm is designed and intended to be fired from the shoulder.

Plaintiffs' various contentions that the Rule misinterprets the statutory standard all reflect a misapprehension of the Rule and the statute. Contrary to plaintiffs' views, the Rule directly incorporates all parts of the statutory standard and applies well-established principles of determining a party's intent to the specific context of braced weapons. The NFA employs an intent-based standard common throughout the criminal law, and plaintiffs identify no ambiguity in that standard sufficient to trigger the rule of lenity or the constitutional avoidance doctrine.

C. Nor is the Rule arbitrary and capricious. As the government explained, *see* Opening Br. 26-29, the *Texas Gun Rights* district court erred in concluding that the Rule reflects an unreasoned fundamental shift in ATF's approach to braced firearms. Not only does the Rule hew substantially closer to ATF's previous approach than the district court recognized, but ATF also forthrightly acknowledged the ways in which the Rule's approach differed from some of the previous individual classification letters. The *Texas Gun Rights* plaintiffs spend only one paragraph attempting to defend the district court's conclusion, and they do no more than repeat the analysis that the government has already explained is flawed.

Plaintiffs' remaining attacks are no more persuasive. The agency explicitly considered reliance interests of previous brace purchasers, explained why it believed that those interests were relatively small in this context, adopted compliance options to further minimize any burden on those interests, and ultimately concluded that the Rule's benefits outweighed any remaining burden. ATF also reasonably analyzed the

question whether the Rule infringes Second Amendment rights, properly addressing recent Supreme Court precedent and explaining its conclusion that the short-barreled riles regulated under the Rule fall outside the scope of the Amendment's protection. And ATF correctly described, and reasonably analyzed, the advertisement and various videos in the administrative record that the *Britto* plaintiffs discuss.

D. The Rule also does not violate the Second Amendment. The Rule does not implicate "the Second Amendment's plain text." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). The Second Amendment extends only to bearable arms that are "typically possessed by law-abiding citizens for lawful purposes." *District of Columbia v. Heller*, 554 U.S. 570, 581, 625 (2008). By contrast, the Supreme Court has twice affirmed that short-barreled shotguns are "dangerous and unusual weapons" not protected by the Second Amendment. *Id.* at 626-27 (quotation omitted); *see also United States v. Miller*, 307 U.S. 174, 178 (1939). That conclusion applies equally to the short-barreled rifles also regulated by the NFA. Congress's determination to impose minor regulatory restrictions on small classes of particularly dangerous weapons like short-barreled rifles—while leaving exempt typical handguns and rifles from that regime—does not infringe the Second Amendment's right to armed self-defense.

E. Plaintiffs' remaining constitutional claims—which no court has yet accepted—are also unpersuasive. The NFA is a valid exercise of Congress' taxing power, as the Supreme Court and this Court have both held, and the Rule's implementation of the NFA is similarly supported by that power. The Rule is not

unconstitutionally vague, because it reasonably expands on the underlying statutory intent-based standard, which itself is common in civil and criminal law. Nor have plaintiffs identified any specific applications of the Rule that could trigger vagueness concerns. And the NFA's delegation to the agency comports with nondelegation principles, because it provides clear standards to guide agency decisionmaking.

II. Even if plaintiffs were likely to succeed on the merits of some claim, they have not demonstrated an entitlement to preliminary relief because no plaintiff has shown irreparable harm and the balance of the equities and public interest counsel against enjoining the Rule.

A. At the outset, no plaintiff has identified any injury stemming from the Rule, because the relevant burdens stem from the underlying statute and no plaintiff has identified a particular weapon that the Rule and the statute would classify differently. Thus, an injunction against the Rule could not alleviate any harm, because the NFA continues to require that short-barreled rifles—including those made with braces—be registered and taxed.

Regardless, each plaintiff's specific theories of harm are also unpersuasive. Although the individual plaintiffs claim that the Rule will cause them to suffer compliance costs or increase the risk of criminal prosecution, that is incorrect. Plaintiffs may continue to acquire and possess short-barreled rifles so long as they do so in compliance with the NFA. The statutory registration requirement imposes no more than a de minimis burden, and the statutory tax—which was waived for

previous possessors who registered by May 2023—is recoverable in a refund suit and thus not irreparable. To the extent that plaintiffs might nevertheless choose not to comply with the NFA or to dispose of their braced firearms, any resulting harm is self-inflicted and not irreparable. And plaintiffs' claims of Second Amendment harm are no better, both because the Rule comports with the Second Amendment and because plaintiffs have not demonstrated any concrete, imminent impairment of their fundamental right to armed self-defense.

The commercial plaintiffs' theories of financial harm fare no better. Although the two commercial plaintiffs assert lost revenue following the Rule, one of the two has failed to substantiate its assertion with sufficient evidence, as the district court held. And neither plaintiff can show, in any event, that the lost revenue is fairly traceable to the Rule, rather than to its customers' independent decisions not to continue purchasing braces (or to plaintiffs' own decisions not to sell true braces that would not be subject to the NFA). Nor has either plaintiff demonstrated that relief—much less preliminary relief—against the Rule would induce its customers to resume buying braces; to the contrary, one of the district courts assessed the available evidence from the one plaintiff and found that previous preliminary relief seemed not to prevent the asserted financial harm.

B. The balance of the equities and the public interest also weigh against preliminary relief. The Rule serves important public values in promoting regulatory clarity and ensuring the effective implementation of the NFA's public-safety controls.

Plaintiffs barely contest those important interests. Instead, they primarily urge that those interests should be disregarded entirely if the Court concludes that the Rule is likely unlawful. But that position disregards the tentative nature of preliminary merits conclusions, and it is flatly inconsistent with binding Supreme Court precedent—including, for example, the Court's decision in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), where the Court assumed the challenged agency action was unlawful but nevertheless reversed a preliminary injunction against it on the basis of equitable balancing.

III. At a minimum, this Court should reverse the district courts' grants of relief as overbroad.

A. The *Britto* court erred in staying the Rule nationwide rather than issuing relief tailored to protecting the three individual plaintiffs. In attempting to defend that improper relief, some plaintiffs argue that the APA authorizes universal stays of agency action. But those arguments miss the point; regardless of what the APA may authorize, the relevant question here is whether universal relief was required in this specific case to protect the *Britto* plaintiffs.

In addition, plaintiffs offer a scattershot of bases on which the *Britto* court might have chosen to enter universal relief. None of those bases are actually reflected in the court's decision, which is reason enough to reject plaintiffs' reliance on them here. But in any event, none of them rehabilitates the fundamental problem with the court's overbroad relief: It went well beyond the relief necessary to remedy the specific, individual plaintiffs' asserted irreparable injuries.

B. In addition, the *Mock*, *Texas Gun Rights*, and *Texas* district courts erred in extending relief to unidentified members of plaintiff organizations, and the *Second Amendment Foundation* plaintiffs' request for similar relief is unpersuasive. Plaintiffs do not dispute the fundamental point that no organization has demonstrated that its members have actually delegated authority to the organization to litigate members' individual claims. Without such a delegation of authority, the organizational plaintiffs have no ability to litigate those claims—and without any indication that members have agreed to be bound by a judgment, equity forecloses the possibility of relief to those members.

Rather than grapple with these fundamental problems in the scope of relief they have sought, plaintiffs primarily argue that they have associational standing because they have each identified one or some members on whose behalf they are litigating. But that misses the point. The government does not dispute that the organizational plaintiffs have associational standing to litigate on behalf of their identified members; the relevant question is whether the plaintiffs also may litigate on behalf of hundreds of thousands—or millions—more unidentified members. They do not.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 418-19 (5th Cir. 2001).

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits

A. Plaintiffs in *Second Amendment Foundation*, *Texas Gun Rights*, and *Britto* Have Not Demonstrated a Likelihood of Success on a Logical Outgrowth Claim

1. *Second Amendment Foundation*

a. In *Mock v. Garland*, this Court held that ATF did not properly comply with notice-and-comment requirements because the Rule was not a logical outgrowth of the earlier proposed rule. 75 F.4th 563, 583-86 (5th Cir. 2023). That is so, the panel majority concluded, because the proposed rule "centered entirely on Worksheet 4999," which used "an extensive point system" to determine whether a braced firearm was intended to be shoulder-fired, while the Rule "replaced [the Worksheet] with a six-factor test." *Id.* at 583. The district court in *Second Amendment Foundation* accepted that conclusion as binding precedent but nevertheless correctly concluded that plaintiffs had not demonstrated a likelihood of success on their own logical outgrowth claim because they—unlike the plaintiffs in *Mock*—had not shown any prejudice stemming from that error.

Under the APA, a plaintiff must "demonstrate prejudice from" the agency's asserted error to obtain relief. *City of Arlington v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (quotation omitted), *aff'd*, 569 U.S. 290 (2013). In the specific circumstance where an agency fails to provide adequate notice, a plaintiff attempting to demonstrate prejudice from that error is required to show "that, if given the

opportunity to comment, [the plaintiff] would have presented an argument the [agency] did not consider in issuing the" regulation. *United States v. Johnson*, 632 F.3d 912, 932 (5th Cir. 2011). In other words, without some identification of "any new information [a plaintiff] would have submitted to the agency if given the opportunity," the plaintiff cannot demonstrate that it was prejudiced by any failure to provide an adequate opportunity to comment. *Texas v. Lyng*, 868 F.2d 795, 800 (5th Cir. 1989).

As the district court properly concluded, the *Second Amendment Foundation* plaintiffs have failed to meet their burden of setting forth new information or comments that they would have submitted to ATF if they had been on notice of the changes ATF was planning to make between the proposed and final rules. Plaintiffs' attempt to make the required showing on appeal (at SAF Br. 23-24) consists of little more than "the broad assertion" that plaintiffs would have made "due process comments" and Second Amendment comments if they had received adequate notice. ROA.23-11157.1165 (quotation omitted).

Those vague assertions do not suffice for two reasons. First, plaintiffs have not explained how the change identified by this Court in *Mock* between the proposed and final rule—a move away from the worksheet system—inhibited their ability to make broad comments about the constitutionality of the Rule. *See* ROA.23-11157.247-48. Plaintiffs' due process claim centers primarily around the argument that the agency did not adequately quantify the objective design features identified in the Rule. *See*

SAF Br. 30-35. But although the proposed rule quantified some of the same factors in the proposed worksheet, it similarly included a large number of qualitative factors that were not reduced to precise metrics. *See* 86 Fed. Reg. 30,826, 30,830-31 (June 10, 2021). And because plaintiffs' Second Amendment claim is that the government may not constitutionally apply the NFA's requirements to braced firearms at all, *see* SAF Br. 44-47, that argument is tied in no way to the agency's abandonment of the worksheet. Indeed, plaintiffs admitted in district court that their "Second Amendment argument would have been the same" with respect to the proposed and final rules, just "with some slight"—and unelaborated—"differences." ROA.23-11157.1211. The *Second Amendment Foundation* plaintiffs therefore have failed to show how, "in light of the initial notice," *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021) (quotation omitted), they lost the ability to make relevant comments to the agency.

Second, in any event, the Rule "summariz[ed] and address[ed] public comments regarding due process," ROA.23-11157.1165, and the Second Amendment that were submitted by other commenters. *See* 88 Fed. Reg. at 6548 (Second Amendment comments); *id.* at 6550-52 (Fifth Amendment vagueness). This Court has made clear that, where an agency considered "arguments and responded to them in [its] preamble," a plaintiff cannot claim prejudice based on the lost opportunity to make those same arguments in comments. *Johnson*, 632 F.3d at 932; *see id.* ("[T]he error in failing to solicit public comment before issuing the rule was not prejudicial because the Attorney General nevertheless considered the arguments Johnson has asserted

and responded to those arguments during the interim rulemaking."). And plaintiffs have not even attempted to describe how their proposed comments would have been materially different from those presented to and considered by ATF.

b. Beyond their attempt to demonstrate prejudice, plaintiffs also argue (at SAF Br. 18-23) that the district court should have overlooked any failure to show prejudice, either because no prejudice requirement exists or because the government forfeited the issue. Neither of those contentions is availing.

At the outset, plaintiffs' assertion (at SAF Br. 20) that there is no "party-specific prejudice requirement" is inconsistent with this Court's precedent and with the APA. Congress directed that, in reviewing a claim under the APA, courts must take "due account" of "the rule of prejudicial error," 5 U.S.C. § 706, and prejudice is an inherently party-specific inquiry, *cf. Prejudice*, Black's Law Dictionary (11th ed. 2019) ("Damage or detriment to one's legal rights or claims."). Thus, this Court has repeatedly made clear, including in the deficient notice context, that "the party asserting error" under the APA must "demonstrate prejudice from the error." *City of Arlington*, 668 F.3d at 243 (quotation omitted). And the determination "whether an APA deficiency is harmless demands a case-specific inquiry." *Johnson*, 632 F.3d at 930. Consistent with that understanding of the prejudice requirement, this Court has required a plaintiff advancing a claim that it lacked proper notice to demonstrate that it specifically "would have presented an argument" not considered by the agency if it had received proper notice. *Id.* at 932; *see Lyng*, 868 F.2d at 800 (similar); *see also, e.g.*,

Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1383-85 (Fed. Cir. 2017); *United States v. Reynolds*, 710 F.3d 498, 516 (3d Cir. 2013); *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (per curiam).

Nor do plaintiffs' citations to *Mock* advance their case. In *Mock*, the Court relied upon its conclusion that "plaintiffs have suggested, through briefing, a number of comments they would have liked to have made against the Final Rule." 75 F.4th at 586 n.58. And to the extent that plaintiffs (at SAF Br. 20-22) read *Mock* to hold that no such showing is required, that would be inconsistent with this Court's earlier decisions in *Lyng* and *Johnson*, both of which rejected deficient-notice claims in part on the basis that the challenger failed to identify additional, unconsidered arguments it would have presented to the agency had proper notice been provided.

Plaintiffs' similar argument (at SAF Br. 22-23, 23 n.4) that the "nature and gravity" of the agency error here should relieve them of the prejudice requirement is no more availing. The authorities that plaintiffs cite to support this contention address situations where the agency "entirely failed to comply with notice-and-comment requirements." *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (per curiam); *see also McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (agency "completely failed to comply"). As this Court has explained, "a finding of harmless error" may be "preclude[d]" "where the agency fails to allow any public comment before reaching a decision, thus circumventing the entire purpose of the APA notice and comment provisions." *Lyng*, 868 F.2d at 799; *see also, e.g.*, *Mid Continent*

Nail Corp., 846 F.3d at 1383-85, 1383 n.17 (articulating similar distinction between cases where "the agency has provided some notification and method for commenting" but has nevertheless violated the APA's requirements and cases where the agency "entirely failed to comply with notice-and-comment requirements" (quotation omitted)); *Reynolds*, 710 F.3d at 516 (same); *City of Waukesha*, 320 F.3d at 246 (same). That is, of course, not the case here. ATF issued a proposed rule; solicited comments on the "clarity of th[e] proposed rule" and "the most appropriate criteria" to assess firearms equipped with stabilizing braces, 86 Fed. Reg. at 30,849-50; and thoroughly addressed those comments at length in the Rule.

Separately, plaintiffs assert (at SAF Br. 18-20) that the district court should not have required a showing of prejudice because, in plaintiffs' view, the government forfeited any harmless error argument in district court. But plaintiffs' argument is unpersuasive for two reasons. First, the burden is on plaintiffs to affirmatively prove their entitlement to relief. In attempting to make out a viable APA claim, "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009). And in attempting to justify the entry of preliminary relief, it is the "plaintiff seeking a preliminary injunction" who "must establish that he" meets each of the relevant factors, including likelihood of success on the merits. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). That allocation of responsibility derives from the fact that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear

showing that the plaintiff is entitled to such relief." *Id.* at 22. Thus, before exercising its "equitable discretion," *id.* at 32, to award preliminary relief, the district court was entitled to put plaintiffs to their affirmative burden of demonstrating likelihood of success on the merits and, thus, prejudice from the asserted notice error.

Second, plaintiffs did not argue in the original preliminary injunction motion that they were likely to succeed on their logical outgrowth claim or entitled to a preliminary injunction on that basis. Instead, plaintiffs only addressed their logical outgrowth claim in a short motion to supplement their preliminary injunction motion following *Mock* and an accompanying supplemental brief. *See* ROA.23-11157.1059-60; ROA.23-11157.1062-63. In those circumstances, the government never had a full opportunity to address plaintiffs' logical outgrowth claim (filing only the government's own supplemental brief, which focused on plaintiffs' failure to satisfy the equitable factors necessary for preliminary relief), and the district court did not abuse its discretion in rejecting the belatedly asserted claim.

2. *Britto*

Neither the *Britto* nor *Texas Gun Rights* plaintiffs brought logical outgrowth claims, so this Court's decision in *Mock* had no bearing on their request for preliminary relief. Nonetheless, the district court in *Britto* concluded that it was compelled by *Mock* to find a likelihood of success on the merits. That was error.

a. As the government explained, *see* Opening Br. 23-25, the district court in *Britto* erred because it entered relief based on a claim that plaintiffs did not bring. To

justify preliminary relief, a plaintiff must demonstrate a likelihood of success on the "merits of [his] claims," *Winter*, 555 U.S. at 31. The plaintiffs in *Britto* did not bring a logical outgrowth claim, never pressed an argument that they could not anticipate the changes made in the final rule, and never presented a case that they were prejudicially denied any opportunity to engage in the rulemaking process. To the contrary, plaintiffs informed the court after *Mock* that the "decision on likelihood of success does not control here, as Plaintiffs do not raise a logical outgrowth claim." ROA.23-11203.1276-77. It was therefore an abuse of discretion for the district court to grant plaintiffs' motion on the basis of a claim they did not raise, and its decision to do so violated the party-presentation principle to "decide only questions presented by the parties," *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (quotation omitted). And, as explained *infra*, that error was even further compounded by the extraordinary relief the Court granted.

b. Plaintiffs' brief attempts (at Britto Br. 43-46)[2] to defend the district court's decision fall flat. At the outset, plaintiffs suggest that the district court acted properly because "the logical-outgrowth argument appears in the record," Britto Br. 44—by which plaintiffs appear to mean that this Court's decision and the district court's decision on remand in *Mock*, both of which discuss the logical outgrowth argument, were discussed in the district court filings. But that is irrelevant. Plaintiffs cite no

[2] The *Britto* and *Texas Gun Rights* plaintiffs filed a consolidated response brief. This brief throughout cites to that consolidated brief as the "Britto Brief."

authority to support the proposition that the citation or discussion in briefing of other cases addressing a claim can substitute for the requirement that a party assert and develop its own claims when seeking preliminary relief.

Regardless, nothing about the discussion of those decisions in the record suggests that plaintiffs intended to advance a logical outgrowth claim. Plaintiffs discussed this Court's decision in *Mock* only to disavow its controlling nature because they did not bring a logical outgrowth claim. ROA.23-11203.1276-77. And the district court's decision on remand in *Mock* focuses on the equitable injunction factors, not the merits; plaintiffs' submission of that decision as a supplemental authority does not reflect any intent to assert—for the first time through a post-briefing supplemental citation—an entirely new logical outgrowth claim. *See* ROA.23-11203.1292-320.

Next, plaintiffs urge (at Britto Br. 45) that they adequately raised a logical outgrowth claim in district court because they included in their complaint an arbitrary-and-capricious claim under the APA. But plaintiffs' arbitrary-and-capricious claim concerns the adequacy of the agency's explanation in the Rule for a purported policy shift, *see* ROA.23-11203.28, not the opportunity for notice and comment. Plaintiffs never so much as suggested that they could not "have anticipated the agency's final course in light of the initial notice" and so were denied the opportunity to comment—the basis for a logical outgrowth claim. *See Huawei Techs. USA, Inc.*, 2 F.4th at 447 (quotation omitted). And of course, as explained, plaintiffs' own disavowal of

Mock as controlling the likelihood of success inquiry confirms that plaintiffs did not understand themselves to be raising any claim like the one addressed in that decision.

Similarly unpersuasive is plaintiffs' contention (at Britto Br. 44) that it was nonetheless proper for the district court to insert a logical outgrowth claim into the litigation because by doing so the court could rule narrowly and avoid resolving other "constitutional and statutory questions." But avoidance doctrines direct a district court on the appropriate order in which to resolve claims presented, *see Jean v. Nelson*, 472 U.S. 846, 854 (1985); they do not permit a district court to resolve litigation based on claims that were never asserted. To the contrary, permitting a court to inject a claim into a suit to avoid resolving the actual claims at issue directly contravenes the "fundamental rule of judicial restraint," *id.* (quotation omitted), that underlies the doctrine of constitutional avoidance.

Finally, plaintiffs note (at Britto Br. 45-46) that the party-presentation principle is not "ironclad," and a court can correct a party's "evident miscalculation." *Sineneng-Smith*, 590 U.S. at 376 (quotation omitted). But nothing in the record supports a finding that plaintiffs mistakenly failed to raise a logical outgrowth claim—and, indeed, plaintiffs do not claim any such "miscalculation" in this Court. Instead, as explained, plaintiffs chose not to assert such a claim in the first instance and (unlike the *Second Amendment Foundation* plaintiffs) not to amend their preliminary injunction motion to include such a claim following *Mock*. Plaintiffs therefore made the conscious choice to press other claims and to disavow any logical outgrowth claim,

and nothing in *Sineneng-Smith* suggests that it is appropriate for a court to disregard such a strategic litigation choice.

B. The Rule Comports with the Statute

Rather than defend the reasoning of the district courts below, plaintiffs primarily urge the Court to affirm on a variety of broader claims, but none succeed. Some plaintiffs contend that the Rule is contrary to the NFA. *See* Texas Br. 20-25; Britto Br. 46-51; SAF Br. 26-30. Those plaintiffs are incorrect. The Rule directly incorporates the relevant statutory language and correctly interprets the statutory intent-based standard as requiring an analysis of all relevant evidence—including objective evidence—of intent. Plaintiffs' contrary arguments rest on a fundamental misunderstanding of the Rule and the statute. And their alternative suggestions that the Rule may be invalid even if it reflects the best reading of the statute are equally unavailing.

1. The Rule properly interprets the statutory definition of "rifle." Under the NFA, a firearm is a "rifle" if it is "designed," "made," and "intended to be fired from the shoulder." 26 U.S.C. § 5845(c). The Rule tracks this language: A firearm with a stabilizing brace is a "rifle" when it "provides surface area that allows the weapon to be fired from the shoulder" and other evidence "indicate[s] that the weapon is designed, made, and intended to be fired from the shoulder." 88 Fed. Reg. at 6569. The Rule explains how ATF will apply the statutory definition to a particular context:

assessing whether a weapon equipped with a brace is designed and intended to be shoulder-fired.

Beyond this, the Rule primarily clarifies two features of the statutory inquiry. First, the Rule makes clear that whether a braced firearm is designed and intended to be fired from the shoulder cannot be determined solely by reference to a manufacturer's claimed intent but instead is determined by evaluating other objective evidence of intent. *See* 88 Fed. Reg. at 6495. Second, the Rule catalogs the sort of evidence that ATF considers probative of whether a particular braced firearm is designed and intended to be fired from the shoulder. *See id.* at 6569-70. Both features of the Rule are consistent with the statute.

First, the NFA does not require ATF to uncritically accept a manufacturer's statements about whether its product is designed and intended to be fired from the shoulder—a proposition plaintiffs do not seem to dispute. To the contrary, it is a "very familiar [approach] in the law" to use "objective" evidence to "ferret[] out a party's" true intent, notwithstanding the party's subjective representations. *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 601-02 (1st Cir. 2016) (collecting cases). That approach makes particular sense in the context of the NFA because "it is hard to believe that Congress intended to invite manufacturers to evade the NFA's carefully constructed regulatory regime simply by asserting an intended use for a part that objective evidence" indicates is not "actually" the intended use. *Id.* at 602.

Multiple courts of appeals have therefore held that a product's intended use may be determined by reference to objective evidence of intent, including evidence of design features. For example, in *Sig Sauer*, the First Circuit upheld ATF's determination that a product was a silencer. Although the manufacturer claimed that the product was "intended for use as a muzzle brake"—that is, a "device that is added to a gun to reduce recoil"—ATF examined the product and determined, based primarily on evidence derived from the design of the product, that it was in fact intended for use only as a silencer. *See Sig Sauer*, 826 F.3d at 600, 602.

Similarly, in *United States v. Syverson*, 90 F.3d 227 (7th Cir. 1996), the Seventh Circuit affirmed a conviction for possession of an unregistered and unmarked silencer, in violation of the NFA, based on objective evidence of intent. Although the defendant in that case testified that "he had designed and manufactured" the item in question "to be a muzzle break," not a silencer, the court explained that there was evidence in the record "casting doubt on his professed intentions." *Id.* at 232. The court thus concluded, based on that evidence, that a jury could reasonably infer that the defendant's "description of the [item] was not credible" and that he had made it "to be a silencer." *Id.*

Second, ATF also properly identified evidence that will be probative of whether a particular braced firearm is designed and intended to be fired from the shoulder. In the Rule, ATF identified as potential evidence both the design features of the weapon—such as whether the weapon includes certain features useful for firing

from the shoulder but not useful for one-handed firing—and the way the weapon is marketed and used in the real world. And the Rule's focus on design features and direct evidence is well-supported. As explained, it has long been established—including specifically in the NFA context—that a product's design may be probative of the question how the product is intended to be used. Likewise, it is appropriate for an agency to consider a manufacturer's "marketing materials" and the "likely use of the weapon in the general community" as direct and indirect evidence to test the manufacturer's "stated intent." 88 Fed. Reg. at 6479. "[T]he actual use of the item in the community" may be relevant to whether a product was "primarily intended" for a particular use. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 519-20 (1994) (quotation omitted).

2. Plaintiffs do not appear to dispute the Rule's interpretation of the statute as looking beyond stated intent. Indeed, plaintiffs nowhere assert that ATF must uncritically accept a firearm maker's statements about his intent and eschew objective evidence undermining that stated intend. Nor do plaintiffs develop any argument that the specific design characteristics and other evidence identified in the Rule are in fact not relevant to the question whether a particular firearm is designed, made, and intended to be fired from the shoulder.

Instead, plaintiffs advance a set of related arguments suggesting that the Rule contradicts the statute, either because (in their view) the Rule ignores portions of the "designed," "made," and "intended" statutory standard or because the Rule's

framework would classify as "rifles" firearms that may be fired one-handed. The first of those arguments fails because it fundamentally misunderstands the Rule. And the second fails because it reflects an incorrect interpretation of the statute.

First, plaintiffs advance their belief that the Rule states that a braced firearm is a "rifle" so long as it "may or could be fired from the shoulder," whereas the NFA requires that a "rifle" be designed, made, and intended to be fired from the shoulder. Britto Br. 47-48; *see also* Texas Br. 20; SAF Br. 28. But plaintiffs misread the Rule. As explained, under the Rule, for a braced firearm to be classified as a "rifle," the firearm must "provide[] surface area that allows the weapon to be fired from the shoulder" *and* all other relevant evidence taken together must "indicate that the weapon is designed, made, and intended to be fired from the shoulder." 88 Fed. Reg. at 6569. Thus, in relevant part, the Rule directly implements the statutory language and, like the statute, requires that a firearm be "designed, made, and intended" to be shoulder-fired to be a rifle.

Similarly, the *Second Amendment Foundation* plaintiffs argue (at 26-29) that the Rule violates the NFA because it "violates the individualized nature of the statutory" requirements and because the factors themselves are not in the statute. But these contentions misunderstand the Rule, which articulates a framework to guide the agency when determining whether a specific braced firearm is in fact designed, made, and intended to be fired from the shoulder. That is exactly the "individualized" inquiry that plaintiffs seek.

Nor is it surprising that the individual factors articulated in the Rule are not listed in the statute. As explained, the statutory intent-based standard is a holistic standard requiring consideration of all relevant evidence in a specific case. And it is commonplace for Congress to impose such intent-based standards without delineating specific types of relevant evidence in the statute—but for courts to nevertheless articulate types of evidence that may generally be probative of the question of intent. Thus, for example, this Court has laid out categories of evidence that will be probative of a criminal defendant's "[i]ntent to distribute" controlled substances, such as the possession of a "large" quantity of drugs and the presence of "drug paraphernalia, guns, or large quantities of cash." *United States v. Kates*, 174 F.3d 580, 582 (5th Cir. 1999) (per curiam). This Court did not misinterpret the relevant criminal prohibition by articulating those factors even though they do not appear in the statute itself. *Cf.* 21 U.S.C. § 841(a).

The *Second Amendment Foundation* plaintiffs are also incorrect to argue (at 28-30) that the Rule is contrary to the statute because it impermissibly "conflate[s]" the terms "designed," "made," and "intended" and does not properly state that a firearm is a rifle only if the designer, the maker, and the end user all harbor the relevant intent. But, as explained, the Rule repeats the statute in relevant part and the meaning of the statutory terms thus carries over into the Rule. And plaintiffs cannot reasonably contest that the evidentiary factors identified in the Rule may well be probative of whether a firearm was designed, made, *and* intended to be shoulder-fired—including

the end user's intent, to the extent such intent is relevant. If plaintiffs believe that any future classification decision fails to properly weigh evidence relevant to the statutory inquiry or does not properly consider (for example) evidence of the end user's intent, plaintiffs would be free to challenge that hypothetical future decision. But speculation about how particular evidence might be weighed cannot support plaintiffs' facial attack on the Rule.

Second, a set of plaintiffs erroneously contends (at Texas Br. 20-21; Britto Br. 48) that the Rule is contrary to the statue because, in their view, the statute does not encompass firearms that *could* be fired with one hand. That contention rests on the incorrect premise—repeatedly rejected by courts—that a weapon may be a rifle only if it is designed "to be fired exclusively from the shoulder." *United States v. Rose*, 695 F.2d 1356, 1357-58 (10th Cir. 1982) (collecting cases). Unlike other NFA definitions, the definition of "rifle" does not include any exclusive-intent requirement. *Compare, e.g.*, 26 U.S.C. § 5845(b) (defining "machinegun" to include "any part designed and intended *solely and exclusively*" for "use in converting a weapon into a machinegun" (emphasis added)), *with id.* § 5845(c) (defining "rifle" to include a weapon "designed," "made," and "intended to be fired from the shoulder"). Because the NFA includes no such exclusivity limitation, a braced firearm is a rifle if it is—in the words of the statute and the Rule—"designed, made, and intended to be fired from the shoulder," 88 Fed. Reg. at 6569, even if it can also be fired in other ways.

Equally unavailing is plaintiffs' attempt to support their erroneous reading of the NFA (at Texas Br. 20-21) with a citation to *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 513 (1992) (plurality opinion). There, the plurality construed the word "made" in the NFA as applied to a "pistol and carbine" kit that contained parts that could be used to make a pistol, a short-barreled rifle, *or* a regular rifle. *See id.* at 509, 512-13, 518. Given the multiple possible ultimate configurations of the assembled firearm, the plurality determined that the kit had "not been 'made' into a short-barreled rifle"—at least until the purchaser actually assembled a short-barreled rifle from the components. *Id.* at 517-18. That analysis is unilluminating in this case because the Rule makes clear that ATF will assess whether specific brace-and-platform combinations—not individual components that might or might not be made into such combinations—constitute rifles.[3]

3. Failing to support their claim that the Rule is unlawful with the ordinary tools of construction, plaintiffs fall back on the rule of lenity (at Texas Br. 21-25; Britto Br. 49-50; SAF Br. 29-30), the constitutional avoidance doctrine (at Britto Br. 48-49), and the major questions doctrine (at Britto Br. 49) to suggest that the Court may hold the Rule invalid even if it reflects the best interpretation of the statute. But these attempts to undermine the Rule are meritless as well.

[3] For the same reasons, the *Britto* plaintiffs' citation to *Thompson* (at 50-51) does not advance their rule of lenity argument, which fails for the reasons explained below. *See infra* pp. 34-36.

a. Although plaintiffs assert that the rule of lenity requires construing the NFA in the narrowest possible way, *see* Texas Br. 21-25; Britto Br. 49-50; SAF Br. 29-30, plaintiffs fail to identify any ambiguity in the NFA sufficient to trigger that rule. The Rule articulates ATF's best interpretation of the statute, and the rule of lenity does not apply where, as here, the "traditional tools of statutory construction" support that reading. *Cargill v. Garland*, 57 F.4th 447, 469 (5th Cir. 2023) (en banc), *cert. granted*, No. 22-976 (U.S.).

Moreover, plaintiffs fail to identify any ambiguity in the relevant statutory language—which states that a weapon is a "rifle" if it is "designed" and "intended" to be fired from the shoulder. Many statutes, including numerous criminal statutes and other provisions of the NFA, govern conduct based on a party's intent. Courts routinely apply those provisions in criminal and civil cases alike, and plaintiffs point to no authority to support the remarkable proposition that an inquiry into intent is per se ambiguous and thus prohibited under the rule of lenity.

To the extent that plaintiffs express an additional concern that principles of lenity require relief because the statute as interpreted by the Rule may be challenging to apply to specific firearms, that concern is unavailing. The Supreme Court has made clear that, in a prosecution under the NFA, the government would be "required to prove beyond a reasonable doubt that" the weapon in question was a short-barreled rifle under the statute and that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a" short-barreled rifle.

Staples v. United States, 511 U.S. 600, 602 (1994). That factual burden of proof ameliorates any fair notice concerns that might otherwise accompany borderline cases under the statute, and there is no need to employ the rule of lenity to generate legal ambiguity where none exists. *Cf. Cargill*, 57 F.4th at 478 n.3 (Ho, J., concurring in part and concurring in the judgment) (explaining the "logical" "link between legal and factual doubt," the former of which is addressed through the rule of the lenity and the latter through the high burden of proof in criminal cases).

In any event, "some statutory ambiguity" does not trigger the rule of lenity, *Muscarello v. United States*, 524 U.S. 125, 138 (1998); instead, the rule comes into play only when there is "a grievous ambiguity or uncertainty in the statute," *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quotation omitted). As explained, no ambiguity exists, let alone grievous ambiguity.

Plaintiffs' contention (at Texas Br. 22) that the rule of lenity applies because the agency changed its interpretation is equally misplaced. The Rule does not reflect an about-face by the agency on the legal interpretation of the NFA. *See infra* pp. 39-41. And, in any event, an agency change in legal position alone does not invalidate a regulation that reflects the best interpretation of the statute; otherwise, the agency would be consigned to a state of perpetual error. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156-57 (2000) ("[A]n agency's initial interpretation of a statute that it is charged with administering is not carved in stone." (quotation omitted)). In *Cargill*, this Court cited the agency's change in interpretation

as one reason that "*Chevron* deference does not apply." 57 F.4th at 468. The Court did not, however, suggest that an agency's change in interpretation requires application of the rule of lenity. Traditional tools of statutory construction confirm that the Rule reflects the best interpretation of the statute, and plaintiffs cannot leverage any prior inconsistent interpretation to reach a different result.

Finally, the *Texas* plaintiffs fare no better in contending (at 23) that the Rule violates principles of fair notice and lenity through some "impos[ition of] a constructive possession regime"—by which they appear to mean a regime where an individual may be found to be in constructive possession of a short-barreled rifle if he possesses both a brace and a pistol together. To the contrary, the Rule contains no provision—in the preamble or in the regulatory text—that purports to create a new test for possession. The government may enforce the statute against those who possess a short-barreled rifle if that possession is prohibited by the statute. And any objection the *Texas* plaintiffs have to the notion that an individual may be found to possess a firearm if he possesses all of the unassembled components is an objection that stems from the statute, not from the Rule challenged here.

b. Plaintiffs' remaining contentions are similarly unpersuasive.

Plaintiffs' brief constitutional-avoidance argument (at Britto Br. 48-49) fails. First, the avoidance canon has no role here, because as explained, the statute is not "susceptible of more than one construction" after "ordinary textual analysis." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). Second, plaintiffs have not demonstrated that the

Rule or the statute violates the Constitution, so there is no cause to think that either might "raise[] serious constitutional doubts." *Id.* at 381. And plaintiffs have, in particular, not advanced any reasonable construction of the statute that might avoid the constitutional concerns that they (erroneously) raise against the regulation of braced short-barreled rifles. There is thus no work for avoidance to do.

Second, Plaintiffs' one-paragraph invocation (at Britto Br. 49) of the major questions doctrine fails to advance their case. That doctrine applies when an agency asserts an "[e]xtraordinary grant[] of regulatory authority." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). It is rooted in a presumption that Congress would speak clearly if it meant to "delegate a decision" of vast "economic and political significance" to an agency. *Brown & Williamson*, 529 U.S. at 160.

This case bears none of the hallmarks of the handful of "extraordinary cases" where the Supreme Court has invoked the major questions doctrine. *West Virginia*, 597 U.S. at 723. Most fundamentally, the Rule is nothing "novel," *id.* at 716. ATF has for decades implemented and enforced the NFA by providing regulated entities with the agency's views about how particular products—including, since their first invention a decade ago, braced firearms—would be classified under the statute. The Rule fits comfortably within that decades-old practice by articulating a framework for determining whether any particular braced firearm is a short-barreled rifle under the statute.

Indeed, nowhere do the *Britto* plaintiffs appear to dispute that ATF has authority to classify products in individual adjudications or to issue regulations to guide those classifications. Nor do the plaintiffs develop any argument that the Rule is different in kind from the routine classifications and regulations that ATF has issued for decades or that it otherwise implicates any of the concerns identified by the Supreme Court that attend "extraordinary" claims of agency authority. *See West Virginia*, 597 U.S. at 723. Moreover, Congress' delegation of authority to the Attorney General to implement and enforce the NFA's terms is not framed in "cryptic" terms. *Id.* at 721 (quotation omitted). To the contrary, the NFA expressly authorizes the Attorney General to issue "all needful rules and regulations for the enforcement" of the statute. 26 U.S.C. § 7805(a). And plaintiffs do not seriously contest that the Rule—which, again, articulates ATF's approach to implementing the NFA as applied to braced firearms—fits within that grant of authority.

Instead, plaintiffs' fundamental argument is simply that the Rule misinterprets the statute, not that the agency did not have authority to issue the Rule. The major questions doctrine is thus of no moment here, and it provides no basis to hold that the Rule is invalid.

C. The Rule Is Not Arbitrary and Capricious

Plaintiffs raise a variety of additional claims that the Rule is arbitrary and capricious. These include plaintiffs' assertions that ATF failed to properly acknowledge that the Rule reflects a shift in policy, Britto Br. 52-53; Texas Br. 18-19;

that the Rule fails to properly consider reliance interests, Texas Br. 16-18; that the Rule incorrectly analyzes the Second Amendment implications of applying the NFA to braced firearms, SAF Br. 35-39; and that the Rule cites evidence that plaintiffs believe is unpersuasive, Britto Br. 53-54. None of those challenges succeeds.

1. The district court in *Texas Gun Rights* erred in finding a likelihood of success on plaintiffs' claim that the Rule did not provide a reasoned explanation for an asserted fundamental shift in ATF's position regarding how to classify braced firearms. As the government has explained, *see* Opening Br. 26-29, the district court erred because the Rule satisfies the agency's obligation to "display awareness that" the Rule reflects a shift and to articulate "good reasons for" the Rule's approach. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The district court's assertion that the agency made an unexplained about-face was inaccurate in all respects. The agency's prior guidance and classification letters demonstrate that before the Rule the agency regularly assessed whether submitted samples of firearms equipped with stabilizing braces were designed and intended to be fired from the shoulder—including by looking to objective design features like those discussed in the Rule—and in the majority of cases, the agency concluded that the submitted sample was a rifle. *See* 88 Fed. Reg. at 6479 n.9, 6482-92. And the agency reiterated in the preamble to the Rule that it is possible to design a braced weapon in a way that is not designed and intended to be shoulder-fired. The Rule thus represented no major change in approach.

And, where a shift did occur, the Rule forthrightly acknowledges the change and explains the reasons for the shift. The approach articulated in the Rule differs in some particular respects from some of the agency's previous letters—many of which differed from each other—and explains that some of those letters gave too much credence to the manufacturer's stated intent for the brace rather than the objective design features bearing on the overall firearm, *see* 88 Fed. Reg. at 6494, 6501-02. The preamble further explains ATF's reasons for issuing the Rule, including facilitating its interests in regulatory transparency and consistency and in properly interpreting the statute. *See* Opening Br. 26-29. The agency thus demonstrated awareness of its changed approach and explained the reasons it adopted a new framework in the Rule.

The *Texas Gun Rights* plaintiffs spend only a single paragraph defending the district court's conclusion that the Rule is arbitrary and capricious because the agency purportedly changed its position without explanation. Britto Br. 52-53. And in that paragraph, plaintiffs nowhere engage with the government's Opening Brief. Instead, plaintiffs simply repeat the district court's assertions that the Rule reflects a fundamental shift and that such a shift is arbitrary and capricious. Britto Br. 52-53.

But plaintiffs do not dispute that ATF has concluded for many years that some firearms equipped with "braces" are short-barreled rifles or that, even before the Rule, ATF classified "the majority" of submitted samples as short-barreled rifles. *See* 88 Fed. Reg. at 6479 n.9, 6482-92. Nor do plaintiffs dispute that the Rule recognizes that some braced weapon designs could be true braced weapons and not short-barreled

rifles, *see id.* at 6529-30. And plaintiffs similarly do not dispute that the Rule explicitly acknowledged that its approach was inconsistent with some of the agency's previous classification letters and that ATF explained the reasons for adopting the Rule, including to ensure future consistency. *See id.* at 6494, 6501-06. Plaintiffs thus do nothing to rehabilitate the district court's erroneous conclusions about the Rule.

2. The *Texas* plaintiffs' argument (at 16-18) that ATF failed to consider the reliance interests of individuals who acquired braces or braced firearms before the Rule fails to demonstrate entitlement to relief.

ATF "reasonably considered" any reliance interests and "reasonably explained" its decision to issue the Rule notwithstanding those interests. *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). At the outset, the Rule explains that reliance interests based on the belief that all stabilizing braces were outside the scope of the National Firearms Act were not reasonable. The Rule explains that "ATF never declared," as a categorical matter, "that the marketing of a device as a 'stabilizing brace' when equipped on a firearm removes that firearm from the ambit of the NFA." 88 Fed. Reg. at 6507. Indeed, as repeatedly explained, ATF classified the majority of submitted samples as short-barreled rifles even before the Rule. *See id.* at 6479 n.9, 6482-92.

Moreover, any "individual's reliance on a classification for another person's device or firearm" would be "misplaced," 88 Fed. Reg. at 6507, because "ATF's private classification letters were limited to the particular firearm configured with the

particular device" that ATF was evaluating, *id.* Similarly, any reliance on statements of a "manufacturer—especially statements that may misrepresent the government's position—does not represent reliance on a government policy" and would be "misplaced." *Id.*; *cf. id.* at 6492 (explaining that, in 2018, ATF sent a cease-and-desist letter to one prominent brace manufacturer that "had been marketing many of its 'braces' as 'ATF compliant'" even though ATF "had only evaluated 2 out of approximately 20 of" the brace models). And ATF further explained that "any potential reliance interest is reduced" in this context, because ATF's classification letters "explicitly provide[] notice that" classifications are subject to change. *Id.* at 6507.

Nevertheless, although ATF believed that reliance interests were substantially reduced, the agency acknowledged that it was reversing course as to certain classifications and therefore adopted compliance options to ensure that "any impact of this rule on individuals' perceived reliance interests will be minimal." 88 Fed. Reg. at 6508.[4] Thus, ATF permitted preexisting possessors to register their braced short-

[4] The *Texas* plaintiffs assert (at 24) that the ATF Director made errors in his testimony to Congress regarding the compliance options contained in the Rule. As ATF explained in a letter submitted to Congress, the Director's testimony was limited by the format of the hearing, and he repeatedly directed Congress to the specific, detailed language of the Rule. *See* Letter from Justin D. O'Connell, Acting Assistant Dir., Pub. & Governmental Affairs, ATF, to the Honorable Jim Jordan, Chairman, House Judiciary Committee (May 23, 2023). In any event, compliance options—the subject of these alleged misstatements—are clearly outlined in the Rule, *see* 88 Fed. Reg. at 6570, and plaintiffs have not advanced any argument that the compliance options fail to give fair notice.

barreled rifles without payment of the NFA's tax and permitted them to continue to possess the firearms without penalty while awaiting ATF's approval. And the Rule provided that any individual who did not wish to register—notwithstanding that such registration would be free—was permitted to keep his firearm so long as he took certain steps such as removing and destroying or disposing of the brace. *See generally id.* at 6480-81. In light of the reduced reliance interests in this context and those compliance options, ATF appropriately concluded that "any reliance interests are outweighed by the need to properly and consistently apply the relevant statutes." *Id.* at 6508.

3. The *Second Amendment Foundation* plaintiffs err in contending (at 35-39) that the Rule's analysis of the Second Amendment is deficient. According to plaintiffs, the Rule improperly fails to consider history and employs means-end scrutiny, flouting *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). But plaintiffs are wrong about the Rule's discussion and wrong about the consequences of any error in the agency's legal analysis.

First, plaintiffs misread the Rule's analysis. The Rule engages in an extended discussion of the Second Amendment question, explaining that binding Supreme Court precedent supports the agency's conclusions "that weapons regulated by the NFA, such as short-barreled rifles, fall outside the scope of the Second Amendment." 88 Fed. Reg. at 6548. And the Rule specifically addresses whether *Bruen* affects that analysis, explaining that *Bruen* does not "cast[] doubt on courts' prior conclusions"

that "the Second Amendment does not extend to dangerous and unusual weapons" because those conclusions were "based on historical tradition." *Id.* at 6548 n.145. Finally, contrary to plaintiffs' unsupported suggestion that the Rule improperly employs means-end scrutiny, the Rule expressly acknowledges that "*Bruen* abrogates previous decisions applying the means-end test." *Id.*

In any event, even if the Rule reflected a now-outdated legal test, that would not entitle plaintiffs to relief because neither the Rule nor the statute in fact violates the Second Amendment. *See infra* pp. 47-58. The APA requires courts to take account of the "rule of prejudicial error," 5 U.S.C. § 706, but here plaintiffs cannot be prejudiced by ATF's mode of constitutional analysis when the Rule is in fact constitutional. Plaintiffs' contention that the Rule's asserted failure to correctly apply *Bruen* infected the Rule's process ignores the prejudice requirement.

4. None of the *Britto* plaintiffs' additional contentions (at 53-54) provide any basis for relief.

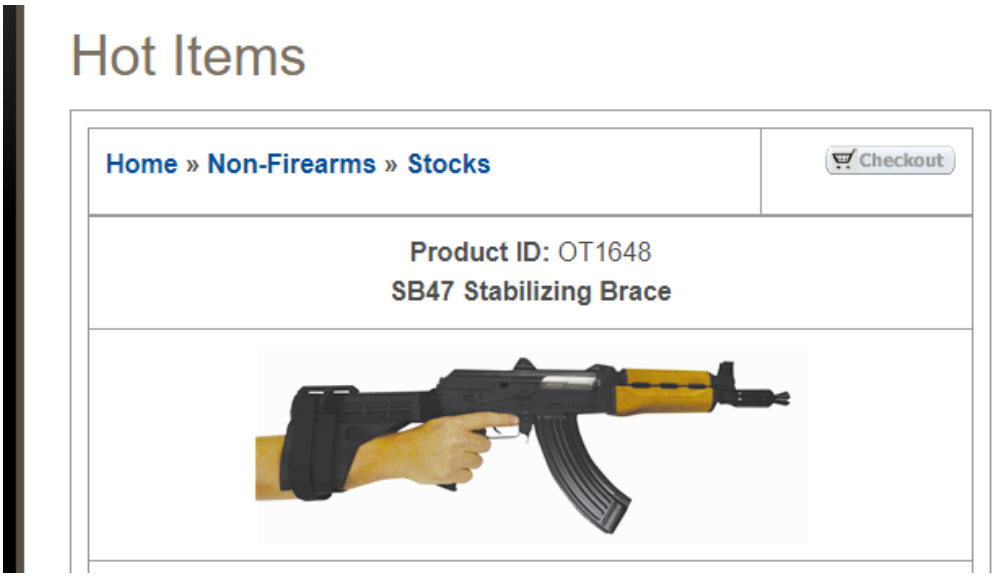
As an initial matter, even if plaintiffs were correct that ATF should not have relied on the videos and advertisement the *Britto* plaintiffs point to, plaintiffs fail to explain how any such errors could possibly have prejudiced them. The Rule throughout includes substantial evidence to demonstrate—and plaintiffs themselves nowhere contest—that many manufacturers and users of braced firearms have for years understood that the firearms may be comfortably fired from the shoulder and have used braces for that purpose.

In any event, even considered on their own terms, plaintiffs' arguments fail. First, the *Britto* plaintiffs attempt to undermine the rule by asserting that ATF should not have relied on certain videos in the record, because, according to plaintiffs, those videos do nothing more than "[s]imply repeat[] a Bureau position that the law means *A*." Britto Br. 53. But plaintiffs misunderstand the Rule's discussion of these videos, which occurs in a portion of the Rule where ATF explains that its pre-Rule approach led to "inconsistenc[i]es and misapplication of the statutory definition" and that many braced firearms "are in fact designed and intended to be fired from the shoulder." 88 Fed. Reg. at 6503. To help explain that conclusion, ATF cited substantial real-world evidence demonstrating that manufacturers and users understand that many braced firearms are designed to be shouldered, including "[n]umerous videos" showing individuals firing braced firearms "from the shoulder." *Id.* at 6506. And ATF further explained that "some of these videos" seemed to reflect an awareness that braces were being used to violate the NFA's requirements—for example, in one video, the individual stated that "he knew what the 'stabilizing brace' was for, *i.e.*, shouldering, but had not said it publicly until now because he did not want to be 'that guy.'" *Id.*

Second, the *Britto* plaintiffs complain (at 53-54) that ATF cited a video and an advertisement as evidence of manufacturers' evasion of the NFA even though neither the video nor the advertisement depicted a braced firearm being fired from the shoulder. But plaintiffs ignore that ATF accurately described both the video and the advertisement. ATF explained that although the video "did not include footage of a"

braced firearm "being fired from the shoulder," the video demonstrated "various firing techniques" of braced firearms that went "far beyond" strapping the brace to the shooter's forearm. 88 Fed. Reg. at 6505. And that is correct. The Rule includes pictures from the video that demonstrate how to rest the brace against the shooter's cheek or against the shooter's sternum. *See id.* at 6504-05. And ATF explained that those pictures "indicate[d] to the general community the ease and practicality of shouldering" the braced firearm. *Id.* at 6505.

In addition, the Rule correctly states that "at least one firearms manufacturer advertised the SB47"—a purported stabilizing brace—"as a shoulder stock." 88 Fed. Reg. at 6505. Although plaintiffs observe that the picture in the cited advertisement shows the brace strapped to a forearm, plaintiffs omit the advertisement's categorization of the brace as a "Stock[]":



Century Int'l Arms Inc., SB47 Stabilizing Brace (Sept. 6, 2013), https://web.archive.org/web/20130906231317/http://centuryarms.biz/proddetail.asp?prod=OT1648 (cited at 88 Fed. Reg. at 6505 n.91).

D. Neither the Rule nor the Statute Violates the Second Amendment

Plaintiffs have also failed to demonstrate a likelihood of success on their claims that the Rule and the NFA violate the Second Amendment. *See* SAF Br. 39-47; Texas Br. 25-27; Britto Br. 23-37. To establish that violation, plaintiffs must show that the Rule implicates "the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 19. Plaintiffs' claims cannot clear that hurdle.

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As *Heller* explained, when properly read against the backdrop of the relevant historical materials, the Second Amendment extends only to "instruments that constitute bearable arms" and that are "typically possessed by law-abiding citizens for lawful purposes." *District of Columbia v. Heller*, 554 U.S. 570, 581-82, 625 (2008). Short-barreled rifles do not qualify.

1. As the *Second Amendment Foundation* district court correctly held, *see* ROA.23-11157.1180-82, short-barreled rifles are not protected by the Second Amendment,

because they are dangerous and unusual weapons.[5] Like other NFA firearms, they have long been regulated due to their "quasi-suspect character," *Staples*, 511 U.S. at 611-12, and Congress has found they can "be used readily and efficiently by criminals," H.R. Rep. No. 83-1337, at A395 (1954). This reality arises from "their concealability" compared to long-barreled rifles and "their heightened ability to cause damage" compared to handguns—"a function of the projectile design, caliber, and propellant powder used in the ammunition and the ability to shoulder the firearm for better accuracy." 88 Fed. Reg. at 6499.

For this reason, the Supreme Court has twice affirmed that short-barreled shotguns are dangerous and unusual weapons not protected by the Second Amendment. Shortly after the NFA's enactment, the Supreme Court rejected a Second Amendment challenge to the statute's restrictions on short-barreled shotguns.

[5] "Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Jean*, 472 U.S. at 854 (quotation omitted). Therefore, if this Court reaches plaintiffs' constitutional claims, it should do so only after addressing and rejecting plaintiffs' statutory claims and, thus, concluding that the firearms regulated by the Rule are properly classified as short-barreled rifles under the NFA. Thus, this section speaks in terms of such short-barreled rifles. Similarly, although the Second Amendment claims were presented to and passed on by the *Second Amendment Foundation* district court, none of the other district courts addressed claims beyond the logical outgrowth and (in the case of *Texas Gun Rights*) arbitrary and capricious claims already discussed. Plaintiffs in those cases have presented no reason why this Court should take the unusual step, if it rejects the district courts' merits determinations on the claims actually addressed, to additionally address plaintiffs' alternative grounds for affirmance. To the contrary, it is generally "for the district court to determine, in the first instance, whether the plaintiffs' showing on a particular claim warrants preliminary injunctive relief." *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011).

United States v. Miller, 307 U.S. 174, 178 (1939). And in *Heller*, the Court reaffirmed that conclusion, explaining that "short-barreled shotguns" are unprotected because they are not "in common use" for "lawful purposes like self-defense." *Heller*, 554 U.S. at 622-27 (quotation omitted). As the courts of appeals have repeatedly concluded, that principle applies equally to short-barreled rifles because there is "no constitutional distinction" between the two. *United States v. Stepp-Zafft*, 733 F. App'x 327, 329 (8th Cir. 2018) (per curiam); *see United States v. Cox*, 906 F.3d 1170, 1185 (10th Cir. 2018); *United States v. Gilbert*, 286 F. App'x 383, 386 (9th Cir. 2008) (unpublished).

This conclusion is confirmed by application of the approach this Court adopted in *Hollis v. Lynch*, 827 F.3d 436, 448-49 (5th Cir. 2016), for evaluating whether a firearm is dangerous and unusual. This approach considers the extent to which the firearm is regulated or banned and the absolute and relative number of that firearm in circulation.

Short-barreled rifles are substantially regulated—or banned—by jurisdictions across the country. Their regulation under the NFA reflects Congress's finding that they are particularly dangerous and "likely" to be "used for criminal purposes." *Thompson/Ctr. Arms Co.*, 504 U.S. at 517; *see United States v. Serna*, 309 F.3d 859, 863 (5th Cir. 2002) ("In enacting gun control legislation Congress expressed the view that a short-barreled firearm, or sawed-off shotgun, when unlawfully possessed, is primarily used for violent purposes."); *United States v. Jennings*, 195 F.3d 795, 799 (5th

Cir. 1999) ("[T]he primary reason that unregistered possession of [NFA] weapons is a crime is the virtual inevitability that such possession will result in violence."). And at least 30 States and the District of Columbia generally prohibit possession of short-barreled rifles outright or unless the NFA is followed,[6] which is comparable to the 34 States that impose similar restrictions on machineguns, *Hollis*, 827 F.3d at 450.

Moreover, out of the hundreds of millions of firearms in the United States, there are only approximately 530,000 registered short-barreled rifles. *See* ATF, P-5390.1, Firearms Commerce in the United States: Annual Statistical Update 2021, at 15-16.[7] Short-barreled rifles thus constitute a miniscule portion of all firearms and exist in numbers far lower than the benchmark numbers this Court and others have

[6] Ala. Code § 13A-11-63(a); Alaska Stat. Ann. § 11.61.200(a)(3), (c), (h)(1)(D) (West); Ariz. Rev. Stat. Ann. § 13-3101(A)(8)(iv), (B); Cal. Penal Code §§ 16590(s), 33215 (West); Colo. Rev. Stat. Ann. § 18-12-102(1), (3), (5) (West); D.C. Code Ann. § 7-2502.02(a)(3) (West); Fla. Stat. Ann. § 790.221 (West); Ga. Code Ann. §§ 16-11-121(4), 16-11-122 (West); Haw. Rev. Stat. Ann. § 134-8(a), (d) (West); 720 Ill. Comp. Stat. Ann. 5/24-1(a)(7)(ii), 5/24-2(c)(7) (West); Iowa Code Ann. § 724.1C (West); La. Stat. Ann. § 40:1785; Md. Code Ann., Pub. Safety § 5-203(a)(2), (c) (West); Mich. Comp. Laws Ann. § 750.224b(1)-(3) (West); Mo. Ann. Stat. § 571.020(1)(6)(b) (West); Mont. Code Ann. § 45-8-340(1)(a), (3)(f), (4) (West); Neb. Rev. Stat. Ann. § 28-1203 (West); Nev. Rev. Stat. Ann. § 202.275(1), (3)(b) (West); N.J. Stat. Ann. §§, 2C:39-1(o), 2C:39-3(b); N.Y. Penal Law §§ 265.00(3)(c), (d), 265.01-b (McKinney); N.C. Gen. Stat. Ann. § 14-288.8 (West); N.D. Cent. Code Ann. § 62.1-02-03 (West); Ohio Rev. Code Ann. §§ 2923.11(F), (K), 2923.17(A), (C)(5) (West); Okla. Stat. Ann. tit. 21, § 1289.18(B)-(E) (West); Or. Rev. Stat. Ann. § 166.272 (West); 11 R.I. Gen. Laws Ann. § 11-47-8(b) (West); S.C. Code Ann. §§ 16-23-230, 16-23-250; Tex. Penal Code Ann. §§ 46.01(10), 46.05(a)(1)(C) (West); Va. Code Ann. §§ 18.2-299, 18.2-300, 18.2-303.1 (West); Wash. Rev. Code Ann. § 9.41.190(1)(a), (4) (West); Wis. Stat. Ann. § 941.28(2)-(4) (West).

[7] *Available at* https://perma.cc/5BMN-LW3Y.

employed to indicate common use. *See Hollis*, 827 F.3d at 449-50 (citing other court decisions—including one later vacated on rehearing en banc—concluding that the possession of "50 million large-capacity magazines" and "8 million AR- and AK-platform semi-automatic rifles" suggested the weapons were in common use (quotation omitted)).

The relatively atypical nature of the short-barreled rifles regulated by the NFA is only underscored by the many firearms that Congress has left unregulated by that statute. In particular, the statute does not reach the most common firearms, including handguns ("the quintessential self-defense weapon," *Heller*, 554 U.S. at 629) and long rifles. Thus, the NFA's restrictions on short-barreled rifles "do not necessarily prevent law-abiding, responsible citizens from exercising their Second Amendment right to public carry." *Bruen*, 597 U.S. at 38 n.9 (quotation omitted).

Congress' ability to regulate more heavily with respect to narrow, atypical classes of firearms it has deemed particularly dangerous—such as short-barreled rifles—is further supported by First Amendment precedent. As *Bruen* explained, "*Heller* repeatedly compared the right to keep and bear arms" to "the freedom of speech in the First Amendment." 597 U.S. at 24. And in that related context, the preservation of "ample alternative channels" of exercising the protected right is indicative of a permissible regulation. *See Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *see also International Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 370-71 (5th Cir. 2010) (upholding fees imposed on certain First

Amendment processions in part because the regulatory regime provided "sufficient alternatives for expression unburdened by fees"). And here, plaintiffs have not (and could not) demonstrate that the ample alternative firearms that they may possess free from the NFA's requirements "are inadequate" avenues of exercising their right to armed self-defense. *Ward*, 491 U.S. at 802. In other words, particularly in comparison to the firearms left unregulated by the NFA—including handguns—short-barreled rifles are not "in common use" (or "typically possessed") "for lawful purposes like self-defense." *Heller*, 554 U.S. at 624-25 (quotation omitted).

In response, plaintiffs nowhere engage with the Supreme Court's analysis in *Miller* and *Heller*, attempt to draw a distinction between short-barreled rifles and the short-barreled shotguns addressed by those cases, or confront the fact that short-barreled rifles are widely regulated and not commonly owned. Instead, the *Texas* plaintiffs briefly take issue (at 26) with the Supreme Court's conclusion that firearms are not protected by the Second Amendment if they are not in common use for lawful purposes. And all plaintiffs argue (at Texas Br. 26-27 ; SAF Br. 45-46; Britto Br. 34-36) that short-barreled rifles are not, in a colloquial sense, "dangerous" or "unusual." None of those arguments is persuasive.

First, the *Texas* plaintiffs argue that the Supreme Court's repeated statements confirming that the Second Amendment protects only those arms "in common use at the time," *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179), reflect nothing more than an "*assumed* historical tradition" limited to "affray" statutes that support

restrictions only on bearing—and not the NFA's restrictions on keeping—arms. Texas Br. 26. They are incorrect.

For one, this Court and the Supreme Court have both understood *Heller*'s discussion to establish, as a matter of binding precedent, that the Second Amendment categorically reaches only arms in common use for lawful purposes. Indeed, in *Hollis*, this Court explicitly rejected a similar argument that *Heller*'s carve-out refers not to "class[es] of weapons" but instead to "the manner in which weapons are used"; that argument, this Court explained, "is tantamount to asking [this Court] to overrule the Supreme Court." *Hollis*, 827 F.3d at 447-48. Thus, this Court held that, under *Heller*, "a law that regulates a class of weapons that are not in common use will be upheld" because "the constitutional right applies only to weapons that are 'in common use at the time' and 'possessed at home' for 'lawful purposes like self-defense.'" *Id.* at 447 (quoting *Heller*, 554 U.S. at 624, 627). And the Supreme Court has confirmed that reading of *Heller* as correct: In *Bruen*, the Court explained that *Heller* properly drew on "historical tradition" to conclude that "the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627).

Regardless, the *Texas* plaintiffs' apparent suggestion that, under *Heller* and *Bruen*, laws regulating the bearing of dangerous and unusual weapons may not implicate the Second Amendment but the NFA's restrictions on keeping such

weapons do implicate the Amendment is inconsistent with precedent. As an initial matter, *Bruen* itself rejects any such distinction: "Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms," and the Amendment protects both "the individual right to possess" arms and the right to "public carry" of those arms. 597 U.S. at 32 (quotation omitted). And in *Miller* and *Hollis*, the Supreme Court and this Court respectively applied the common-use carveout not only to uphold restrictions on possession of arms but to uphold the NFA's restrictions specifically. The *Texas* plaintiffs thus cannot credibly claim that the common-use inquiry has no relevance to assessing whether the NFA's regulation of short-barreled rifles implicates the Second Amendment.

Plaintiffs are on no firmer footing when they suggest that short-barreled rifles fall within the Second Amendment's protection because they are not, in a colloquial sense, "dangerous" or "unusual." At the outset, plaintiffs argue (at Texas Br. 26; SAF Br. 45-46; Britto Br. 34-35) that there are 3 million or more short-barreled rifles possessed in the United States (including braced firearms), which is more than the 200,000 stun guns Justice Alito's concurring opinion in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), concluded sufficient to show common use. But plaintiffs are doubly wrong.

First, the relevant comparator does not include the estimated 3 million stabilizing braces. If those braces have been used to make short-barreled rifles that have not been registered, possession of those weapons is unlawful. A decade of

widespread violation of the NFA cannot create a constitutional right. In any event, even counted on plaintiffs' terms, the number of short-barreled rifles remains well below the relevant benchmarks.

Second, and regardless, the absolute number of firearms is not dispositive of this inquiry under *Hollis*, which binds this Court and which also considers the extent to which the firearm is regulated and the relative number of that firearm in circulation. As explained above, both of those factors confirm that short-barreled rifles—which are heavily regulated by the federal government and States across the country and which are a small fraction of the total number of firearms owned—are not protected. And indeed, *Hollis* itself rejected a similar absolute-number argument based on the *Caetano* concurrence, explaining that Justice Alito's opinion did not rely on "the absolute number by itself" but on the number of weapons "paired with the statistic that stun guns may be lawfully possessed in 45 states." 827 F.3d at 450. That additional consideration is particularly important in this context, where short-barreled rifles may be possessed only because Congress chose 90 years ago to regulate—rather than outright ban—their possession. Congress' decision to permit possession only subject to the NFA's controls of short-barreled rifles that were not in common use—and thus not protected by the Second Amendment—at the time of the NFA's enactment cannot be retroactively undermined by the weapons' proliferation subject to the statutory restrictions.

Separately, the *Britto* plaintiffs argue (at 35-36) that short-barreled rifles are not dangerous because they are not, in plaintiffs' view, particularly concealable and because the Rule only references two mass shooting committed with braced firearms. And the *Texas* (at 27) and *SAF* (at 46-47) plaintiffs suggest that braces make pistols more accurate and, thus, less dangerous. But plaintiffs' speculation about the dangerousness of short-barreled rifles is misguided. As is reflected in the NFA and in 30 States' laws, Congress and State legislatures have properly determined that short-barreled rifles—including short-barreled rifles made from stabilizing braces—are particularly dangerous and require additional regulation. As explained, that legislative judgment correctly rests on the particularly dangerous combination of concealability and lethality that short-barreled rifles (like short-barreled shotguns) embody. *See* 88 Fed. Reg. at 6499. And although plaintiffs say that braced pistols' increased accuracy promotes safety, "accuracy, at least in the hands of killers, is not 'safe'—it is lethal," *Mock*, 75 F.4th at 596 (Higginson, J., dissenting).

Finally, the *SAF* plaintiffs briefly assert (at 44) that the district court erred in conducting the common-use inquiry because it placed the burden on plaintiffs. They are incorrect. *Heller* explained that the Second Amendment "was widely understood to codify a pre-existing right, rather than to fashion a new one." *Heller*, 554 U.S. at 603. Because the Second Amendment "codified venerable, widely understood liberties," *id.* at 605, courts cannot look at the Amendment's text in isolation but must instead consider the text "according to the understandings of those who ratified it," *Bruen*,

597 U.S. at 28. And, as *Heller* explained, the right to bear arms was not understood in 1791 as "a right to keep and carry any weapon whatsoever," *Heller*, 554 U.S. at 626, but only as a right to possess firearms "'in common use at the time,'" *id.* at 627 (quotation omitted). Because the "common use" inquiry relates to how the "pre-existing right" was understood at the time of the founding, it is part of *Bruen*'s textual inquiry. Regardless, the Court need not address this issue because the burden question is irrelevant here; as explained in this section, Supreme Court and this Court's precedent makes clear that short-barreled rifles are not protected by the Second Amendment.

2. Separately, some plaintiffs suggest (at Britto Br. 24-26, 27-28; SAF Br. 43) that stabilizing braces alone are protected by the Second Amendment. That is incorrect. A stabilizing brace is "not a weapon in itself"; regulation of braces thus does not implicate conduct protected by the Amendment's plain text, just as a "silencer is a firearm accessory" and so is not "protected by the Second Amendment." *United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018). And although plaintiffs suggest that braces are component parts of arms that should be protected, they fail to recognize that unlike protected components—such as a barrels or triggers—braces are not integral to the operation of any firearm and are thus unprotected accessories.

More importantly, however, plaintiffs' suggestion is beside the point. As plaintiffs themselves acknowledge (at Britto Br. 27; SAF Br. 41-42), neither the NFA nor the Rule regulates stabilizing braces standing alone; instead, the statute and

regulation reach only braced firearms that are short-barreled rifles. And such firearms are, as this section explains, unprotected by the Second Amendment.

E. Plaintiffs' Remaining Constitutional Claims Fail

Plaintiffs advance additional constitutional claims that no district court or court of appeals has yet accepted. These include that the Rule's application of the NFA violates Congress' taxing power, Texas Br. 28-30; that the Rule is void for vagueness, Britto Br. 37-40; SAF Br. 30-35; and that the NFA violates the nondelegation doctrine, Britto Br. 40-42. None of those arguments has merit.

1. At the outset, the *Texas* plaintiffs contend (at 28-30) that the NFA, as implemented by the Rule, violates Congress' taxing power, either because the Rule reflects an intent to "regulat[e] and punish[]" rather than raise revenue, Texas Br. 28-29 (quotation omitted), or because the Rule taxes the exercise of a Second Amendment right, Texas Br. 29-30. Neither argument withstands scrutiny.

First, the Supreme Court and this Court have upheld many aspects of the NFA's scheme as valid exercises of Congress' taxing power. Shortly after the statute's enactment, the Supreme Court upheld the NFA's registration requirement for firearms dealers as a valid exercise of the taxing power because that requirement is "obviously" "in aid of a revenue purpose." *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). The Court further rejected the petitioner's argument that the NFA tax "is not a true tax, but a penalty imposed for the purpose of suppressing traffic in" covered firearms, explaining that "[e]very tax is in some measure regulatory" and that "it has

long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." *Id.* at 512-13. And this Court has squarely held—in the context of a criminal defendant challenging his conviction for possession of an unregistered NFA firearm—that the NFA implements a permissible tax and that the NFA's additional requirements are validly "part of the web of regulation aiding enforcement of" the "tax provision." *United States v. Gresham*, 118 F.3d 258, 263 (5th Cir. 1997) (quotation omitted).

Plaintiffs have no convincing response to this binding precedent. Instead, they simply speculate that the Rule is about "regulation" and not "revenue collection." Texas Br. 28. But as *Sonzinsky* makes clear, every tax is, to some degree, "regulatory" and even taxes with a regulatory purpose fall within Congress' power. 300 U.S. at 513.

And plaintiffs do not advance their argument by noting (at Texas Br. 28-29) that ATF exercised its discretion to forgo collecting the tax for short-barreled rifles registered before May 31, 2023. This Court's decision in *United States v. Ardoin*, 19 F.3d 177, 180 (5th Cir. 1994), makes clear that the absence of the collection of a tax does not invalidate the congressional power to impose the tax. In *Ardoin*, this Court considered a similar challenge to the NFA's requirements as applied to post-1986 machineguns. Although the possession of such machineguns is prohibited—and ATF will thus not collect taxes on them—this Court explained that "the basis for ATF's authority to regulate—the taxing power—still exists; it is merely not exercised." *Id.*

Second, plaintiffs' brief suggestion (at Texas Br. 29-30) that the NFA, as implemented in the Rule, exceeds Congress' taxing power because Congress cannot tax the exercise of a constitutional right is unavailing. For one, plaintiffs cite no authority to support the proposition that it would violate Congress' taxing authority—rather than the independent constitutional right—to tax the exercise of a constitutional right. To the contrary, the two cases they cite to support their argument—*Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)—involved challenges to a local licensing fee and a State tax, respectively, and thus are irrelevant to Congress' power to tax.

Regardless, plaintiffs' argument that the NFA impermissibly taxes the exercise of a Second Amendment right fails on its own terms. For one, short-barreled rifles are unprotected by the Second Amendment. *See supra* pp. 47-57. In any event, even in the First Amendment context, the Supreme Court and this Court have not held that all taxes or fees affecting constitutional rights are impermissible. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (rejecting First Amendment challenge to requirement that parades or processions on public streets pay license fee); *International Women's Day March*, 619 F.3d at 370-71 (similar).

2. Plaintiffs' argument that the Rule is void for vagueness fares no better.

a. The Rule proceeds from the statute's "comprehensible normative standard"—whether a weapon is designed, made, and intended to be fired from the

shoulder. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) (quotation omitted). Statutory intent standards, which are common in civil and criminal law, have a generally "settled legal meaning[]," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (quotation omitted); *see also Village of Hoffman Estates*, 455 U.S. at 500-01 (rejecting vagueness challenge to "designed for use" standard). And plaintiffs do not appear to claim—much less point to any authority to support the notion—that such a focus on design and intent is itself unconstitutionally vague.

The Rule then builds on the statutory intent-based standard by "defin[ing] and explain[ing] the criteria" ATF considers relevant to a party's intent. *Catawba County v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009) (per curiam). That additional explanation—layered on top of a statutory standard that no party contends is itself vague—is more than enough to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. 2020) (quotation omitted).

Nor does this Court address a vagueness claim in a vacuum: A court must "consider whether a statute is vague as applied to the particular facts at issue," because a plaintiff "cannot complain of the vagueness of the law as applied to the conduct of others." *Humanitarian Law Project*, 561 U.S. at 18-19 (quotation omitted). Plaintiffs have not identified any specific braced firearm for which it is unclear how the statute and Rule might apply. And to the extent a plaintiff remains uncertain about how ATF will classify any particular braced firearm, he may "request a classification

determination from ATF for additional clarity." 88 Fed. Reg. at 6552. That ability to receive additional clarity "by resort to an administrative process" ameliorates any harm from claimed vagueness. *Hoffman Estates*, 455 U.S. at 498.

b. In response, plaintiffs develop a scattershot of arguments, but none persuades.

At the outset, plaintiffs urge that the Rule is impermissibly vague because the Rule develops a multifactor inquiry and does not provide quantitative metrics or sufficient guidance for those factors. *See* Britto Br. 38-39; SAF Br. 31-32. That is incorrect.

As an initial matter, the Rule provides substantially more guidance on how ATF will approach the individual factors than plaintiffs suggest. *See* 88 Fed. Reg. at 6509-43 (exhaustively describing each factor). For example, plaintiffs protest (at Britto Br. 38-39; SAF Br. 32) that the Rule does not identify which rifles are comparable to a particular braced firearm when evaluating whether that braced firearm has a weight, length, and length of pull "consistent with" similar rifles. But the Rule explains that for a weapon "marketed as a pistol that is a variant of a rifle," ATF will compare the braced firearm "against the original rifle design." 88 Fed. Reg. at 6518. And for a braced firearm that is not a rifle variant, ATF will compare against similar pistol variants designed to be fired from the shoulder (*e.g.*, a braced firearm made from a Glock-type pistol may be compared against "a Glock-type pistol with a shoulder stock"). *Id.*

Similarly, although plaintiffs complain (at Britto Br. 39; SAF Br. 32) that the Rule does not elaborate on what types of materials constitute relevant "indirect marketing materials," the Rule in fact explains that "[i]ndirect marketing materials" generally refers to relevant marketing materials beyond those of the firearm manufacturer. In particular, the term covers "statements from accessories manufacturers for the accessories that a firearms manufacturer attaches or incorporates into its firearm." 88 Fed. Reg. at 6544. Thus, as an example, the Rule explains that when evaluating "an AR-type firearm with an SBA3 'stabilizing brace' device," relevant evidence would include both the "the firearm manufacturer's or maker's" marketing and promotional materials relating to the completed braced firearm and also the marketing materials of SB Tactical, the manufacturer of the SBA3 device. *Id.*

In any event, there is no constitutional prohibition on the use of a qualitative, multifactor test. An agency is free to apply "multifaceted considerations" without offending constitutional notice principles so long as it provides "comprehensible and actionable guidance about the standards" it will employ. *Northstar Wireless, LLC v. FCC*, 38 F.4th 190, 218-19 (D.C. Cir. 2022); *see also, e.g.*, *Texas v. EPA*, 983 F.3d 826, 839-40 (5th Cir. 2020) (upholding an agency's use of a "multi-factor balancing test"). The Rule—which goes into substantial detail regarding each category of evidence it deems relevant to the statutory inquiry—meets that standard.

The Rule's choice to eschew quantitative metrics in favor of qualitative standards is particularly appropriate in this context, where the Rule is interpreting a statutory requirement that is itself a qualitative standard: whether a firearm is "designed," "made," and "intended to be fired from the shoulder," 26 U.S.C. § 5845(c). Indeed, as explained, intent-based standards are common in the law and are routinely assessed through a holistic, totality-of-the-evidence approach rather than through precise, quantitative metrics. *See supra* p. 31. And plaintiffs do not offer any support for the proposition that such a common holistic approach to intent raises constitutional vagueness problems.

Nor do plaintiffs advance their case by arguing (at Britto Br. 39) that ATF did not identify any particular braced firearms that are not designed and intended to be fired from the shoulder. For one, ATF's choice to give, or not give, specific examples of weapons that fall on one side of the qualitative line cannot render an otherwise comprehensible test impermissibly vague. And, regardless, the Rule specifically describes braced weapon designs that would not be rifles. For example, a braced weapon might not have "a surface area that allows shouldering"—as with "an elastic strap that wraps around the shooter's wrist." 88 Fed. Reg. at 6529-30. Or it might have "a feature intended specifically to prevent shooting the firearm from the shoulder," such as "a permanently attached protrusion" that would prevent comfortable shouldering. *Id.* at 6530. That ATF could point to no specific product on the market meeting these descriptions does not undermine the usefulness of the

guidance that ATF was able to give on this score—and, indeed, to the extent that such true braces have not found a substantial customer base, that only underscores the correctness of ATF's conclusion that braced firearms are primarily used as rifles.

Plaintiffs' attempted reliance (at SAF Br. 33-35) on *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 584 U.S. 148 (2018), is similarly unavailing. According to plaintiffs, those decisions make clear the vagueness problem with the Rule because the Rule attempts to apply a standard to "an administratively imagined notion" of a rifle and not "to real-world facts or statutory elements." SAF Br. 33 (quotation omitted).

But plaintiffs' argument on this score again underlines their misunderstanding of the Rule. The Rule provides a framework reflecting ATF's understanding of how the statutory standard should be applied to determine whether any particular braced firearm is designed, made, and intended to be fired from the shoulder. The Rule does not go on to apply that framework to specific braced firearm designs and, thus, does not engage in the process of actually weighing the relevant evidence or coming to an ultimate conclusion about whether particular firearms are "rifles"; instead, application of the framework is left for ATF to do in future, case-by-case determinations focused on specific firearms. Much less does the Rule classify or otherwise address some "administratively imagined notion" of a rifle. Indeed, plaintiffs' protestations on this account only underscore that plaintiffs cannot permissibly raise—and this Court

cannot properly assess—plaintiffs' vagueness challenge in a vacuum, rather than as applied to specific weapons.

3. Finally, the *Britto* plaintiffs briefly argue (at 40-42) that, if the Rule does not conflict with the NFA, then the statute violates nondelegation principles. That argument has no merit.

Since the Founding era, the Supreme Court has held that "Congress may certainly delegate to others[] powers which the legislature may rightfully exercise itself." *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825) (Marshall, C.J.). Delegations are constitutional so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (second alteration in original) (quotation omitted). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 372-73 (quotation omitted). These standards "are not demanding." *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 442 (5th Cir. 2020) (quotation omitted). Even though Congress has delegated authority from "the beginning of the government," *id.* (quotation omitted), the Supreme Court "has found only two delegations to be unconstitutional," *id.* at 446. One "provided literally no guidance for the exercise of discretion," and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. American Trucking*

Ass'ns, 531 U.S. 457, 474 (2001) (first citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); and then citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

In the almost 90 years since those decisions issued, the Supreme Court has consistently upheld "Congress' ability to delegate power under broad standards," *Mistretta*, 488 U.S. at 373, and "ha[s] almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law," *American Trucking*, 531 U.S. at 474-75 (quotation omitted). *See also Mistretta*, 488 U.S. at 374-77 (direction to promulgate the then-binding Sentencing Guidelines); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (direction to fix "fair and equitable" commodities prices (quotation omitted)); *National Broad. Co. v. United States*, 319 U.S. 190, 224-26 (1943) (direction to regulate broadcast licensing as "public interest, convenience or necessity" requires (quotation omitted)).

Against the backdrop of these principles, it is plain that the NFA provides more than sufficient standards to guide agency decisionmaking, both generally and with respect to the definition of "rifle" at issue in this case. As a general matter, the NFA sets forth a clear federal policy: enforcing specific controls for narrow classes of particularly dangerous weapons to curtail their criminal misuse. *See generally* 26 U.S.C. §§ 5811-5812, 5821-5822, 5841, 5845(a). And the statute authorizes the Attorney General to issue "all needful rules and regulations for the enforcement" of those controls. *Id.* § 7805(a). In the context of the NFA's narrow but comprehensive

regulatory scheme, that delegation of general rulemaking is more than sufficiently bounded to satisfy the requirements of nondelegation.

Moreover, the authority exercised in this specific case—to define the statutory term "rifle"—is even more closely bounded, as Congress has defined "rifle" to include, as relevant here, "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder," 26 U.S.C. § 5845(c). The agency is required to stay within the bounds of that definition even as it employs rulemaking to expound upon the proper application of the statutory term. It is thus unsurprising that plaintiffs do not cite—and the government is not aware of—any case throughout the NFA's 90-year history holding that the statute violates principles of nondelegation.

II. The Equitable Factors Do Not Support Preliminary Relief

Even assuming that any of the plaintiffs is likely to succeed on the merits, no plaintiff cannot demonstrate that the equitable factors support entry of preliminary relief. None of the individual, commercial, or organizational plaintiffs have substantiated any irreparable harm, and any harm is substantially outweighed by the benefits of the Rule.

A. No Plaintiff Has Demonstrated Irreparable Harm

As the government explained with respect to *Mock*, *Texas*, *Texas Gun Rights*, and *Britto*, *see* Opening Br. 32-40, none of the plaintiffs has demonstrated that it would suffer any irreparable harm from the Rule in the absence of preliminary relief. And the district court in *Second Amendment Foundation* correctly rejected those plaintiffs'

claims of irreparable harm. In contending otherwise, plaintiffs generally do no more than repeat the erroneous reasoning of the district courts that entered injunctions, failing to address the government's explanation of how the district courts' decisions to credit their theories of irreparable harm rested on incorrect legal determinations.

1. At the outset, the government has explained (at Opening Br. 33) that no plaintiff can demonstrate injury stemming from *the Rule* because the NFA itself requires that short-barreled rifles be taxed and registered, and no plaintiff has demonstrated that the Rule has affected the legal status of any particular weapon that they possess or manufacture. Without such a demonstration, preliminary relief is inappropriate because any injunction against the Rule "would be ineffectual." *United States v. Parish of St. Bernard*, 756 F.2d 1116, 1123 (5th Cir. 1985). Most of the plaintiffs entirely ignore this fundamental problem with the district courts' reasoning, and no plaintiff even attempts to identify a specific firearm whose classification he believes the Rule has altered. Indeed, the only response to this point comes from the *Britto* plaintiffs, who state that the Rule is a "legislative rule," Britto Br. 56 (quotation omitted), and thus alters legal rights. But that is a non-sequitur. If the braced firearms that plaintiffs own, sell, or manufacture are properly classified as short-barreled rifles directly under the statute, then plaintiffs cannot demonstrate any irreparable harm from application of the Rule's approach to arrive at the same conclusion—and that is true regardless of whether the Rule is "legislative."

2. In any event, none of the specific claimed irreparable harms by any group of plaintiffs suffices to support a preliminary injunction.

a. *Individual Plaintiffs*: In attempting to demonstrate irreparable harm, the individual plaintiffs primarily repeat the district courts' errors in advancing theories of harm based on compliance costs (Texas Br. 32; Britto Br. 55-56; SAF Br. 47-48, 55; Mock Br. 28-30), the risk of criminal prosecution for noncompliance with the NFA (Texas Br. 32; Mock Br. 29), and the deprivation of constitutional rights (Texas Br. 31; Britto Br. 20-21, 54-55; SAF Br. 48-49; Mock Br. 31-33). The government has already explained why each of these theories of harm fails, and plaintiffs do nothing to rehabilitate the district courts' errors in accepting them.

First, the individual plaintiffs urge that the Rule will cause them irreparable harm in the form of compliance costs because they will surrender or destroy braces that they already own if the Rule takes effect and the resulting economic injury would not be recoverable in a damages suit. Texas Br. 32; Britto Br. 55-56; SAF Br. 47-48, 55; Mock Br. 28-30. But the government has already explained the error in that analysis, *see* Opening Br. 34-35: The Rule does not require any plaintiff to surrender or destroy any brace that they already own. Instead, the Rule permitted plaintiffs to register—tax-free—any braced firearm subject to the NFA if they did so by May 31, 2023. And if plaintiffs did not take advantage of that compliance option, any resulting harm from their choice is "self-inflicted" and not "irreparable." *Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021) (per curiam) (quotation omitted). Plaintiffs have no

response to this basic point and make no attempt to explain how any costs from their choice to surrender or destroy braces is not, in fact, self-inflicted. Instead, they simply cite precedent from this Court suggesting that unrecoverable compliance costs may count as irreparable harm. But ATF does not dispute the general principle that such costs may, in appropriate circumstance, suffice to demonstrate irreparable harm, and that precedent has no bearing where, as here, any potential costs are entirely self-inflicted.

Moreover, to the extent that plaintiffs intend to additionally suggest that compliance with the Rule through registration of their braced short-barreled rifles would also inflict irreparable compliance costs, that suggestion is similarly misplaced. As explained, *see* Opening Br. 35, to constitute irreparable harm, costs must be "more than de minimis," *Restaurant Law Ctr. v. Department of Labor*, 66 F.4th 593, 600 (5th Cir. 2023) (quotation omitted), and no plaintiff has submitted any evidence to demonstrate that the cost of registering his braced firearms clears that hurdle. Indeed, as the *Second Amendment Foundation* district court explained in rejecting similar arguments, "the registration form" simply "seeks basic information such as whether a registrant is a fugitive or intends to use the brace-equipped firearm to commit a felony"; it is thus "unconvincing" for plaintiffs to claim that the process of registering generates any serious "compliance cost." ROA.23-11157.1187-88.

Some plaintiffs also urge that the NFA's tax constitutes irreparable harm. *See, e.g.*, Mock Br. 29-30. As the government has explained, *see* Opening Br. 36, that is

incorrect; unlike other potential compliance costs for which the government has not waived sovereign immunity, any individual who pays the NFA's tax in error may sue for a refund. *See* 26 U.S.C. § 7422. And a cost that may be recovered in a refund suit is, by definition, not irreparable.

Second, some plaintiffs (at Texas Br. 32; Mock Br. 29) briefly repeat the *Mock* district court's suggestion that they can demonstrate irreparable harm because they may face criminal prosecution if they do not comply with the statute. But as the government demonstrated, *see* Opening Br. 36, that contention falls flat. Each individual plaintiff may continue to possess and acquire braced short-barreled rifles with no threat of criminal prosecution so long as he complies with the NFA. Plaintiffs cannot manufacture irreparable harm in the form of threatened criminal prosecution simply by refusing to comply with those minimal requirements; any such harm is self-inflicted by the choice to violate the statute. No plaintiff responds to that fundamental point or explains how any such threat of prosecution could be anything other than self-inflicted harm.

Finally, the individual plaintiffs contend (at Texas Br. 31; Britto Br. 20-21, 54-55; SAF Br. 48-49; Mock Br. 31-33) that they have demonstrated irreparable harm through the loss of their Second Amendment rights. But in making that argument, most plaintiffs do no more than cite a litany of cases for the general proposition that the loss of constitutional freedoms constitutes irreparable harm. The government does not take issue with that general proposition; however, as explained, *see* Opening

Br. 37-38, the mere "invocation" of a constitutional right does not relieve a plaintiff of his obligation to establish "an imminent, non-speculative irreparable injury," *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016).

Plaintiffs' attempt to leverage their Second Amendment claims into the requisite irreparable constitutional injury fails at each step. First, as explained, *see supra* pp. 47-58, plaintiffs' Second Amendment claims are unlikely to succeed on the merits, undermining any claim to irreparable constitutional injury. Second, the Second Amendment right is a right to keep and bear arms "for the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630. And as explained, *see* Opening Br. 37-38, nothing about the Rule inflicts an imminent, irreparable injury to that fundamental right, both because the NFA and Rule leave most firearms unaffected and because each plaintiff may continue to keep and bear braced short-barreled rifles for self-defense if they comply with the NFA.

At most, some plaintiffs (at SAF Br. 55; Britto Br. 55) attempt to demonstrate the requisite imminent injury by stating that they cannot use heavy pistols safely and effectively without a stabilizing brace. But even those statements fail to meet plaintiffs' burden. For one, plaintiffs nowhere explain how heavy pistols are necessary to their right to armed self-defense (or, for that matter, how they envision using a stabilizing brace—which often requires the user to pry apart the two halves of the brace, wedge his forearm into the narrow opening created, and then fasten straps around the user's forearm—in the sort of fast-moving, confrontational environment

in which armed self-defense might become necessary). Regardless, as the *Second Amendment Foundation* district court explained, the "Rule does not impose a ban on brace-equipped firearm[s]" and so plaintiffs may continue to acquire and use them to the extent that they are necessary to plaintiffs' self-defense so long as they either comply with the NFA or use a stabilizing brace not covered by the NFA. ROA.23-11157.1190-91. Regardless, plaintiffs' statements to this effect could do no more than establish irreparable injury for the specific individuals alleging a self-defense need for braced pistols and thus would not support any broader relief.

b. *Commercial plaintiffs*: The two commercial plaintiffs—Maxim Defense and Rainier Arms, both retailers in firearms and stabilizing braces—have not demonstrated irreparable harm either. In the main, plaintiffs attempt to meet their burden by showing that the Rule will cause them "substantial financial injury," Mock Br. 24-27 (quotation omitted), that is "unrecoverable," SAF Br. 50-54 (quotation omitted). But as the government explained in its opening brief, any revenue losses in this context are neither caused by the Rule nor redressable by an injunction.

As an initial matter, as the district court explained, Rainier, one of the *Second Amendment Foundation* plaintiffs, failed to provide any detailed evidentiary support for its assertion that the Rule is causing it to lose substantial revenue. ROA.23-11157.1184-85. To support that claim, Rainier filed a declaration stating that it had lost "substantial profits" and a later declaration saying that the lost revenue exceeded "tens of thousands of dollars per month." ROA.23-1157.1184 (quotation omitted).

But, as the district court observed, nothing in the record "provide[d] other contextual facts such as when this loss began, how the figure is calculated, or whether the figure represents total or product-specific lost revenue." ROA.23-1157.1184. And when the district court "tried to ascertain" additional details during the evidentiary hearing, plaintiffs' counsel "had no further information to share." ROA.23-1157.1184. Without additional contextual information and support for Rainier's bare assertions, the district court reasonably refused "to take [Rainier's] word" that it was suffering "substantial" losses. ROA.23-1157.1184 (quotation omitted). And in response to the district court's decision, Rainier does nothing more than reassert (at SAF Br. 48, 50-54) its previous figures, without explaining how the district court abused its discretion in requiring additional context and support.

Regardless, neither Rainier nor Maxim has demonstrated that its assertions of lost revenue are traceable to the Rule. As explained, *see* Opening Br. 38-40, any such losses are mediated through Rainier's and Maxim's customers' independent decision to purchase or not purchase particular products, and nothing about the Rule controls those decisions.

In response, plaintiffs (at SAF Br. 53-54; Mock Br. 27-28) contend that their customers' decisions are traceable to the Rule because the Rule has a "determinative or coercive effect" on customers, *Bennett v. Spear*, 520 U.S. 154, 169 (1997), or at least a predictable effect on customers' behavior, *see Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). But plaintiffs do not substantiate those assertions. For one,

nothing about the Rule has any "determinative" effect on customers, who remain legally free to purchase or not purchase braced firearms as they see fit. Moreover, to the extent plaintiffs' customers do not wish to purchase braced firearms that are subject to the NFA, plaintiffs may choose to manufacture and sell braced firearm designs that are not classified as short-barreled rifles; any harm from plaintiffs' choice not to sell such products is self-inflicted and not irreparable. *See* Opening Br. 39-40.

Plaintiffs also have not shown that relief—much less preliminary relief—against the Rule would redress their harm by inducing their customers to resume buying braced firearms outside the strictures of the NFA. Now reminded that ATF considers at least some such firearms to constitute short-barreled rifles, potential customers who previously misunderstood ATF's understanding of the statute may be unwilling to participate in potential violations of the NFA, with or without a preliminary injunction in place. *Cf. United States v. Texas*, 599 U.S. 670, 691 (2023) (Gorsuch, J., concurring in the judgment) (concluding that plaintiffs' injuries were not likely to be redressed because federal officials would "possess the same underlying prosecutorial discretion" regardless). And the risk that preliminary relief may eventually dissolve on further review or on final judgment—potentially leaving customers who have bought braced firearms not in compliance with the NFA illegally in possession of unregistered short-barreled rifles—may make customers especially unwilling to continue flouting the statute based solely on the temporary protection afforded by a preliminary injunction.

Indeed, the *Second Amendment Foundation* district court observed that it had provided Rainier with "an administrative stay and preliminary injunction" for nearly five of the first nine months after the Rule took effect; nevertheless, Rainier Arms asserted that it had experienced "lost profits during part of the administratively imposed relief." ROA.23-11157.1186. That assertion, the court explained, "suggests" that a new "preliminary injunction would not prevent the threatened financial harm," because, in fact, the last preliminary injunction did not prevent the asserted financial harm. ROA.23-11157.1186. In any event, plaintiffs have done no work to establish that their customers would—notwithstanding this context—react to a preliminary injunction against the Rule by resuming purchases of braced firearms at their previous rates.

c. *Organizational plaintiffs*: No plaintiff appears to contest that the organizational plaintiffs' harm is tied to their individual and commercial members. Because no individual or commercial plaintiff has substantiated irreparable harm, no organization has either.

d. *State of Texas*: Finally, the State of Texas briefly claims (at Texas Br. 32-33) that it will suffer irreparable harm from the Rule. But the *Texas* district court correctly concluded that the State of Texas has likely not even demonstrated sufficient cognizable harm to support Article III standing—much less to support a preliminary injunction—and declined to enter relief running to the State. *See* ROA.23-40685.1038-44. Texas has not cross-appealed the district court's decision not to enter a

preliminary injunction providing relief to the State, and this Court thus "lack[s] jurisdiction to expand the scope of the remedy ordered." *Justice for All v. Faulkner*, 410 F.3d 760, 772 (5th Cir. 2005). As a result, it is irrelevant whether Texas could establish irreparable harm.

Although this Court has no jurisdiction to consider Texas' request for relief, and so should not consider Texas' arguments, the government responds to address the errors in Texas' contentions. First, the State claims (at Texas Br. 32-33) that the Rule "negatively affects the operation of Texas law" because Texas law criminalizes the possession, manufacture, and sale of "a short-barrel firearm" unless that firearm is either registered with ATF or "not subject to that registration requirement," Tex. Penal Code Ann. § 46.05(a)(1)(C) (West). Thus, Texas appears to be suggesting, the Rule affects the implementation of Texas law—and inflicts some "sovereign injury"—by erroneously resulting in the criminalization of unregistered braced firearms in Texas. But that suggestion is unavailing. For one, if the Texas government believes that braced firearms are not short-barreled rifles subject to the NFA's requirements, they can interpret or enforce the Texas statute to exclude those firearms. And regardless, to the extent Texas believes its own State law is unavoidably tethered to ATF's interpretation of federal law, that tethering results from Texas' own sovereign choice. It can hardly turn around and claim sovereign injury when ATF then interprets federal law in a way that the State does not like.

The State's assertion that the Rule somehow undermines its "quasi-sovereign interest in the health and well-being" of its citizens, Texas Br. 33 (quotation omitted), fares no better. As the Supreme Court has made clear, a State may not sue the federal government "to protect her citizens from the operation of federal statutes." *Massachusetts v. EPA*, 549 U.S. 497, 520 n. 17 (2007) (quotation omitted). That is because "the United States, not [a] State, represents [its] citizens as *parens patriae* in their relations to the federal government." *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 446 (1945). Thus, a "State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

B. The Balance of the Equities and the Public Interest Weigh Against Preliminary Relief

1. To the extent that plaintiffs can demonstrate any irreparable harm, that harm is outweighed by the public interests in regulatory clarity and public safety. As explained, *see* Opening Br. 40-41, the Rule promotes regulatory clarity by articulating the framework ATF will employ to assess whether a firearm is designed, made, and intended to be shoulder-fired and by adopting uniform criteria to that end. *See MediNatura, Inc. v. FDA*, 998 F.3d 931, 945 (D.C. Cir. 2021). And the Rule promotes public safety by ensuring the continued effective implementation of the NFA's scheme, which Congress has long determined to be necessary to prevent the criminal misuse of particularly dangerous firearms.

In response, most plaintiffs do not engage with ATF's explanation of these important public benefits weighing against preliminary relief. And those plaintiffs that do briefly attempt to undermine the Rule's public benefits are not persuasive. First, some plaintiffs protest that ATF has not "explain[ed] how the rule is remedying" confusion. Britto Br. 58. But as the government has explained, the Rule improves upon the often-inconsistent guidance and case-by-case classification that preceded it. *See* 88 Fed. Reg. at 6494, 6501-02. The Rule adopts transparent and consistent criteria to assess the statutory intent-based inquiry, which both makes it more likely that similar firearms will be classified similarly and also gives greater guidance to the regulated public. *See id.*

Second, some plaintiffs argue that there are no genuine public safety concerns because the Rule only points to two incidents of criminal misuse of braced firearms. Texas Br. 33. As an initial matter, that attempt to second-guess Congress' public-safety determination is unavailing, because it is Congress—not plaintiffs and not this Court—that is in the best position to determine the necessary controls to enhance public safety. And as the Supreme Court has explained, the NFA reflects Congress' determination that regulated weapons have a "quasi-suspect character," *Staples*, 511 U.S. at 611-12, and can "be used readily and efficiently by criminals," H.R. Rep. No. 83-1337, at A395. But regardless, plaintiffs dramatically undercount the criminal use of braced weapons. Although criminals have exploited braced firearms to commit at

least two *mass shootings*, ATF has come across far more during the course of its criminal investigations and tracing. *See* 88 Fed. Reg. at 6499.

2. Rather than genuinely attempt to show that their minimal asserted harms outweigh the significant public interest in continued implementation of the Rule, plaintiffs primarily repeat the same error as the district courts, contending that plaintiffs' likelihood of success on the merits necessarily implies victory on the balance of the equities because there is categorically "no public interest in the perpetuation of unlawful agency action." *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021); *see* Texas Br. 33-34; Britto Br. 57-58; SAF Br. 59; *Mock* Br. 36.[8]

Plaintiffs' position finds some support in the recent caselaw of this Court. *See, e.g.*, Texas Br. 33-34 (citing cases). As explained, however, *see* Opening Br. 41-42, plaintiffs' position is flatly inconsistent with governing Supreme Court precedent. And if plaintiffs were correct, the merits inquiry and equitable inquiry in this context would collapse into one; any plaintiff who could demonstrate a likelihood of success on the

[8] Some plaintiffs similarly suggest that a conclusion on the merits "carries with it a determination" that all of the equitable factors have been satisfied. Texas Br. 31 (quoting *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 783-84 (5th Cir. 1990). The statement plaintiffs quote was, however, restricted to "the facts of [that] case," *Trans World Airlines*, 897 F.2d at 783, and does not reflect generally applicable law. To the contrary, the Supreme Court has made clear that a plaintiff must demonstrate both a likelihood of success on the merits and also each of the equitable factors. *See, e.g.*, *Winter*, 555 U.S. at 24-26.

merits could thereby negate any countervailing equities by simply repeating the mantra that there is no public interest in unlawful action.

Not only does that position disregard the inherently tentative nature of a merits determination at the preliminary injunction stage, it has also been emphatically rejected by the Supreme Court. As *Winter*—a suit against the government—explained, the preliminary injunction framework requires distinct merits and equities showings—and, in all cases, courts are required to "balance the competing claims of injury" and "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." 555 U.S. at 24 (quotation omitted). And indeed, in *Winter* itself, the Supreme Court declined to "address the lower courts' holding that plaintiffs" had "established a likelihood of success on the merits." *Id.* at 23-24. Nonetheless, the Court ultimately reversed the lower courts' entry of a preliminary injunction, concluding "that the balance of equities and consideration of the overall public interest" weighed in favor of the government—notwithstanding the Court's acceptance of the lower courts' conclusion that the agency action in question was likely unlawful. *Id.* at 26. Similarly, the Supreme Court "has consistently rejected invitations" in the copyright context "to replace traditional equitable considerations with a rule that an injunction automatically follows a determination" that a defendant acted illegally. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006). And that is true even at final judgment, when a court's conclusion regarding a defendant's illegal action is final rather than—as at the preliminary relief stage—only tentative. *Id.*

At most, a determination that the Rule is likely unlawful may undermine the sovereign harm the government would otherwise experience from its inability to enforce the Rule. *Cf. Maryland v. King*, 567 U.S. 1301, 1302-03 (2012) (Roberts, C.J., in chambers). But Supreme Court precedent does not permit this Court to erase the tangible harms experienced by the regulated community and by victims of gun violence when the government's attempt to ensure consistent and complete implementation of the NFA is thwarted. Those interests must be weighed against plaintiffs' alleged harms. And when that balance is properly conducted, it is clear that plaintiffs have failed to demonstrate entitlement to preliminary relief.

III. At a Minimum, This Court Should Reverse the District Courts' Overbroad Relief

As explained in the government's opening brief (at 43-52), at a minimum, this Court should narrow the preliminary relief granted below. That extraordinary relief finds no basis in precedent and goes well beyond that granted pending appeal in *Mock*.

A. The *Britto* Court Erred in Staying the Rule

As explained, *see* Opening Br. 44-48, it was improper for the *Britto* district court to stay the Rule in its entirety and universally where a more tailored injunction would have fully protected the interests of the three named plaintiffs. A court may stay agency action only "to the extent necessary to prevent irreparable injury," 5 U.S.C. § 705, and fundamental constitutional and equitable principles likewise make clear that relief generally must be limited to remedying a plaintiff's injuries. And prudential

concerns further underscore that such universal relief is improper, not least because it is asymmetric and short-circuits percolation. The district court in *Britto* needlessly issued universal relief, and that order should be reversed.

In response, plaintiffs nowhere address the textual and contextual limitations on relief provided by the APA and fundamental principles of equity and Article III. Nor do they dispute that the asserted injuries of the three individual plaintiffs in *Britto* could have been fully remedied by a tailored preliminary injunction. These concessions alone are sufficient to demonstrate the error in the *Britto* court's relief.

Nevertheless, some plaintiffs argue (at Britto Br. 58-61; Mock Br. 42-46; Texas Br. 34-35) that the APA authorizes courts to enter universal stays of agency action. But those arguments are irrelevant. The government recognizes that this Court has construed the APA to permit such relief in certain circumstances and does not here contest that point. The relevant question is whether the *Britto* court reasonably exercised that power in this case, not whether the power exists at all.

And turning to that relevant question, plaintiffs offer (at Britto Br. 61-63; Mock Br. 46-49) only a scattershot of hypothetical bases on which the *Britto* court might have reasonably entered universal relief. The district court itself did not articulate any of these bases or suggest that they underlay the court's exercise of equitable discretion. Nor could any of them solve the fundamental problem that the relief entered went much further than necessary to remedy the specific plaintiffs' injuries. Those alone are sufficient reasons to reject plaintiffs' attempted post hoc justifications

for the district court's decision. But each suggested basis is also unavailing on its own terms.

First, plaintiffs argue (at Britto Br. 62-63) that the district court's stay was properly aimed at addressing the procedural notice violation found by the court. But that it is a non-sequitur. As explained, *see supra* pp. 16-19, a logical outgrowth claim reflects a party's argument that it did not have an adequate opportunity to comment on a final rule given changes made to the proposed rule. But nothing about that violation—or about any resulting harm that plaintiffs experience from the Rule—requires universal relief. To the contrary, a tailored preliminary injunction to prevent enforcement of the assertedly deficient Rule against the plaintiff who is challenging it and demonstrates prejudice more than suffices to directly redress the violation.

Second, plaintiffs assert that the district court appropriately issued a universal stay rather than a targeted injunction because this Court has described stays as "less drastic" remedies than injunctions. Britto Br. 61-62 (quotation omitted). But although stays are "less drastic" than similarly scoped injunctions in some respects—they do not affirmatively order the agency to do, or not, do anything and are not enforceable through contempt—that principle has no application here, where the district court entered a universal stay of the Rule rather than an injunction tailored to three specific individuals. It is, of course, a much more drastic intrusion on the agency to wipe out its Rule, issued through notice-and-comment, than it would be to enjoin the agency from applying the Rule to three specific, named individuals.

Equally unpersuasive is plaintiffs' claim (at Mock Br. 46-48) that universal relief is important because the Rule operates nationwide—and, in particular, because (in plaintiffs' telling) commercial retailer plaintiffs may not receive full relief unless all participants in the nationwide braced firearm market receive relief. But those arguments are irrelevant. As explained, the only plaintiffs in *Britto* are three individuals, and there is no dispute that those three plaintiffs could receive full relief from a tailored injunction. The *Britto* court could not enter universal relief to protect commercial entities that are not plaintiffs in that case; a district court's equitable power is limited to protecting the rights of plaintiffs. It has no authority to enter overbroad relief with the goal of protecting other individuals who are not before it. And that is particularly true in the preliminary context, where relief is aimed only at preserving the parties' rights during the pendency of litigation. *Cf. University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (explaining that the purpose of preliminary relief is to preserve positions for trial).

Finally, plaintiffs briefly contend that a universal stay is more "workable" and administrable than more limited relief and that universal relief serves the important value of consistent application of the statute. Britto Br. 61 (quotation omitted); Mock Br. 47, 49. But they fail to persuade. For one, as explained, the plaintiffs in *Britto* are three individuals, and it is manifestly more "workable" for the agency to avoid enforcing the Rule against three named individuals than it is for the agency to cease implementing the Rule altogether. Moreover, the Rule itself provides—for the first

time—an articulated overarching framework to guide ATF's determinations of whether particular braced firearms are designed, made, and intended to be fired from the shoulder. Thus, the stay of the Rule does not reinstate some previous consistent approach; instead, it returns the agency to the pre-Rule case-by-case approach that led to inconsistency and significant confusion. It therefore promotes workability and consistency for the agency to at least be able to apply the Rule when evaluating firearms related to the wide universe of individuals who are not plaintiffs in *Britto*—or, indeed, to the universe of individuals who have not received preliminary relief in any of these suits—even if it cannot apply the Rule to plaintiffs who have received relief.

B. Relief to Unidentified Members of the Plaintiff Organizations

As the government previously explained, *see* Opening Br. 48-52, this Court should also reverse the *Mock*, *Texas Gun Rights*, and *Texas* district courts' extension of relief to unidentified members of plaintiff organizations (and should decline to extend relief to the members of the plaintiff organization in *Second Amendment Foundation*). The extension of relief to such members suffers from two fundamental problems. First, because no organization has shown that its claimed members control the organization or that it is authorized to proceed on behalf of its members, as required by this Court's precedent, no plaintiff organization has demonstrated that it may properly assert the claims of all of its hundreds of thousands—or millions—of members. *See* Opening Br. 49-51; *see also Friends of the Earth, Inc. v. Chevron Chem. Co.*,

129 F.3d 826, 829 (5th Cir. 1997). Second, even if the organizations had authority to bring their members' individual claims, allowing the organizations to seek relief on behalf of individuals who are not parties and have not agreed to be bound by the judgment violates longstanding equitable principles regarding the bidirectional nature of any judgment. *See* Opening Br. 51-52. Plaintiffs have no persuasive response to either point.

At the outset, plaintiffs rest on their contention (at Texas Br. 35-36; Britto Br. 64; Mock Br. 40-41) that the organizations have satisfied Article III's requirements for associational standing, which requires that they identify only a single member with standing. But that response avoids the relevant question. The government has not disputed that the organizational plaintiffs have standing to seek relief on behalf of their identified members; the relevant question is whether those organizations also have standing to seek relief on behalf of hundreds of thousands or more other unidentified members, especially when "members" appears to include anyone who has donated to the organization. As the government explained, *see* Opening Br. 49-51, this Court's precedents require that plaintiff organizations demonstrate that they have some authority to represent each members' interests and bind them to any judgment. Beyond bare assertions that their members tend to support their involvement in litigation, *see, e.g.*, Texas Br. 36, plaintiffs do not even attempt to demonstrate the sort of structure or membership control that would give rise to such authority.

Next, plaintiffs attempt to resist (at Texas Br. 36-37; Mock Br. 40) this Court's clear requirement that they demonstrate authority to assert their members' claims. Plaintiffs primarily contend that the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023), alters the landscape and excuses them from any requirement to demonstrate authority to proceed on behalf of unidentified members.

But plaintiffs overread *Students for Fair Admission*. That case was brought by a plaintiff association that alleged that it had 47 members and was proceeding, in one of the consolidated cases, on behalf of "four members in particular" who "filed declarations" stating their support for the lawsuit. *Students for Fair Admissions*, 143 S. Ct. at 2158. As the Court explained, where "an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates." *Id.*

That statement in no way permits an organization to proceed on behalf of potentially millions of unnamed "members" (or, really, donors). Here, as explained, the government does not dispute that the plaintiff organizations have standing to litigate on behalf of, and seek relief that runs to, identified members. The plaintiff organizations, however, are purporting to litigate on behalf of hundreds of thousands or more unidentified "members" who do not control the organization or this litigation and many of whom may not even know about the litigation or that they will be bound by an adverse judgment. Nothing in the Supreme Court's decision in

Students for Fair Admission—or the other cases cited by plaintiffs involving the same organization—undermines this Court's commonsense rule that an organizational plaintiff may not assert claims held by unidentified members, without additional evidence establishing that those members in fact direct or control the organization.

Nor do plaintiffs advance their case by suggesting (at Texas Br. 35) that requiring their members to identify themselves would violate the principles of associational freedom articulated in *NAACP v. Alabama*, 357 U.S. 449 (1958). That case concerned compelled disclosure of an organization's members in a suit brought by the State. *Id.* at 451-52. It has no bearing here. The government is not seeking to compel the plaintiff organizations to do anything; it is the plaintiff organizations that filed suit and sought to obtain relief for their members. And, of course, parties seeking relief in court usually must identify themselves; "this court does not usually allow parties to proceed anonymously based on generalized concerns." *June Med. Servs., LLC v. Phillips*, 22 F.4th 512, 520 n.5 (5th Cir. 2022). In abiding by any judgment, the government must know to whom relief runs.

Finally, plaintiffs do not even attempt to respond to the equitable concerns the government raised with respect to their seeking relief on behalf of unidentified members. *See* Opening Br. 51-52. Plaintiffs do not contest that, under their theory of associational litigation, they are entitled to assert claims on behalf of individual members who have no knowledge of the litigation. Tellingly, the plaintiff organizations do not commit to a position on whether those members would be

bound by a loss in these cases. But, in either event, such an outcome is untenable. If the plaintiff organizations assert the power to bind members to adverse judgments, such an assertion would create serious due process problems with respect to members who have not delegated authority to litigate on their behalf. By contrast, if the plaintiff organizations do not believe their members would be bound by an adverse judgment, then each individual member's claims may be litigated many times over by different associations with overlapping memberships. Not only would such an outcome result in the improper duplication of individual claims and the evisceration of Federal Rule of Civil Procedure 23's class-action requirements, *see* Opening Br. 46, 51-52, but the government would be forced to prevail in every such case, pinning the "hope of implementing any new policy" on "the long odds of a straight sweep" across the cases. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring in the grant of a stay). In light of these serious equitable concerns, the district courts erred in granting relief that runs to all of the unidentified members of the plaintiff organizations.

CONCLUSION

For the foregoing reasons, the orders of the district courts in *Mock*, No. 23-11199; *Britto*, No. 23-11203; *Texas Gun Rights*, No. 23-11204; and *Texas*, No. 23-40685; should be reversed and the order of the district court in *Second Amendment Foundation*, No. 23-11157, should be affirmed.

Respectfully submitted,

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April 2024

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished on all parties through that system.

s/ Sean R. Janda
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of this Court's order of April 15, 2024, because it contains 23,246 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Sean R. Janda
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