Before the Office of the Attorney General
Department of Justice
Washington, D.C.

In the Matter of	)	
	)	
Factoring Criteria for Firearms With	)	Docket No. ATF 2021R-08
Attached "Stabilizing Braces"	)	AG Order No. 5070-2021
	)	

COMMENTS OF FLORIDA LEGAL FOUNDATION, INC.

The Agency's proposed rule violates 26 U.S.C. § 5845(c) and the most fundamental constitutional principal of the separation of powers.

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Comment: **The Agency's proposed rule violates 26 U.S.C. § 5845(c) and the most fundamental constitutional principal of the separation of powers.**

Bureau of Alcohol, Tobacco, Firearms, and Explosives – Docket Number: ATF 2021R-08

Re: BATFE Proposed Rulemaking: Factoring Criteria for Firearms with Attached "Stabilizing Braces"

INTRODUCTION

Florida Legal Foundation, Inc. is a 501(c)(3) non-profit, non-partisan organization founded in 1992, reorganized in 2020, that exists to participate in matters of interest to the people of the State of Florida. Its areas of interest include the preservation and promotion of economic liberty and specifically, the right of all persons to own, use, and possess their private property.

ANALYSIS

The Agency's proposed rule represents a usurpation of legislative authority, in that the Agency is attempting to change the meaning of the law to impose criminal sanctions upon millions of Americans. The difference lies between the definition of a "handgun" and a "rifle." Pursuant to 18 U.S.C. § 921(a)(29), a handgun is defined as follows:

> (A) a firearm which has a short stock and is **designed** to be held and fired by the use of a single hand; and
>
> (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.

(Emphasis added). Conversely, a rifle is defined by 26 U.S.C. § 5845(c) as:

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

(Emphasis added).

First, it is important to note that *Chevron* deference does not apply to Agency definitions involving a criminal statute. *U.S. v. Apel*, 571 U.S. 359, 369 (2014) (citing *Crandon v. U.S.*, 494 U.S. 152, 177 (1990)

(Scalia, J., concurring in the judgment)) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Gun Owners of Am., Inc., v. Garland*, 992 F.3d 446, 454-68 (6th Cir. 2021) (holding in the context of 26 U.S.C. § 5845(b), a criminal statute, BATFE was not entitled to *Chevron* deference). Therefore, separation of powers demands that the above statutes be interpreted as they are written. *Gun Owners of America*, 992 F.3d at 468 (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 531 (2019)). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). It must also be noted that the Rule of Lenity requires that in construing a criminal statute, any ambiguity must be resolved "in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

The National Firearms Act was first enacted in 1934 and amended through the Gun Control Act in 1968. *Gun Owners of America*, 992 F.3d at 481 n.7. According to Black's Law Dictionary, third edition, the word "designed" means, "[c]ontrived or taken to be employed for a particular purpose[;] [or] [f]it, adapted, prepared, suitable, appropriate." *Black's Law Dictionary* 566 (3rd ed. 1933). Likewise, the fourth edition of Black's Law Dictionary defines "designed" as "[c]ontrived or taken to be employed for a particular purpose[;] [f]it, adapted, prepared, suitable, appropriate[;] [i]ntended, adapted, or designated. *Black's Law Dictionary* 533-34 (4th ed. 1968).

In 2012, the owner of SB Tactical, Alex Bosco, designed the first stabilizing brace in an effort to help wounded combat veterans use and control a firearm. SB Tactical, "Our History," https://www.sb-tactical.com/about/company/ (last visited Aug. 29, 2021). After testing his concept, Bosco sought approval from ATF, who responded to his inquiries as follows:

> [T]he submitted brace, when attached to a firearm, does not convert that weapon to be fired from the shoulder and **would not alter the classification of a pistol or other firearm**. While a firearm so equipped would still be regulated by the Gun Control Act … such a firearm would not be subject to NFA controls.

Id. (emphasis added). Then in 2014, ATF further stated in explaining how it determines weapons classifications that:

> [F]or the following reasons, we have determined that firing a pistol from the shoulder would not cause the pistol to be reclassified as an SBR: **FTB classifies weapons based on their physical design characteristics**. While usage/functionality of the weapon does influence the intended design, it is not the sole criterion for determining the classification of a weapon. **Generally speaking, we do not classify weapons based on how an individual uses a weapon**.

Id. (emphasis added). From its onset, the Agency concedes the focus of defining "design" is on the physical design characteristics, and pistol braces when attached to a firearm would not change its design from a "pistol" into a "rifle."

The Agency admits that pistol braces as originally designed are attached to a handgun to make contact with a person's arm and facilitate stable, one-handed firing. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30827 (June 10, 2021). Thus, a braced firearm falls within the ambit of a "handgun" pursuant to 18 U.S.C. § 921(a)(29). A braced firearm is employed simply for the purpose of providing a stable one-handed shooting platform. Nothing in the applicable law discusses whether the weapon as "designed" is "impractical," yet the Agency proposes to supplant the design of a manufacturer with its own subjective views on supposed "practicality." *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30829 (June 10, 2021); *cf.* 18 U.S.C. § 921(a)(29). The Agency has no power or authority to alter the language of 18 U.S.C. § 921(a)(29) to include language on whether a design is "practical;" that power rests solely with the legislature. *See* Art. I, § 1 U.S. Const. While some individuals may misuse the brace on a firearm for a purpose other than its original design, this does not and cannot constitute a change in the actual "design" or physical characteristics of a braced firearm.

In reality, the Agency's supposed "objective" criteria involve matters that are highly subjective. For example, the Agency proposes consideration of a weapon's weight and length as part of doling out points toward criminal liability, because longer and heavier weapons are ostensibly "impractical." *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30829-30 (June 10, 2021). This "objective" standard ignores the fundamental truth that each and every person is physically distinct with differing physical limitations. A five-foot, two-inch, 120-pound female will experience recoil, weight, and

length of pull on a braced firearm much differently than a six-foot, two-inch, 200-pound male. A person with short arms and a low center of gravity will experience recoil, weight, and length of pull differently than a person with a higher center of gravity and arms that are three or four feet long. Using the physical differences between any persons to establish an "objective criterion" is logically inconsistent.

Additionally, the Agency now appears determined to circumvent its own prior sound logic (adhering to 18 U.S.C. § 921(a)(29)) and proposes to include weapon and accessory characteristics distinct from a brace, to determine whether a brace is "designed" to be fired from the shoulder, making the weapon a "rifle." *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30830-31 (June 10, 2021). Many, if not all, of the factors proposed to be considered by the Agency would be deemed irrelevant, but for the attachment of a brace to a firearm. *Id.* Therefore, the focus is and should be on the design of the brace.

A prime example of the logical inconsistency in the criteria the Agency now proposes is "the presence of rifle-type back-up/flip-up sights," which would earn an otherwise law-abiding citizen 1 point toward criminal liability. *Id.* at 30831. Plenty of handguns, including more traditional hand guns or more modern "AR style" handguns without a brace attached, possess some form of "back-up iron sights." In fact, many handguns commonly carried by military, law enforcement, or civilians not only have the ability to equip some form of "reflex" or "red dot" sight, but also retain the original handgun sights as a "back-up."[1] Back-up sights or flip-up sights have no direct or exclusive correlation to a firearm with an attached brace, yet the Agency proposes to determine the "design" of a braced firearm based upon irrelevant accessories.

It is further noteworthy that 26 U.S.C. § 5845(c) has an intent element. However, the Agency's factoring criteria would create a crime without considering the intent of the manufacturer or end-user. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30829-31 (June 10, 2021). In

[1] It appears that the Agency's proposed rule aims to discourage the safe use of firearms by awarding points toward criminal penalties for attaching parts to increase accuracy. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30831 (June 10, 2021). It strains credulity for the Agency to in one breath imply that braced handguns are actually rifles because they, as designed, are "inaccurate" and then, in the next breath, define a braced handgun as a rifle because it has accessories that make it more accurate. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30829 (June 10, 2021); *cf.* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30831 (June 10, 2021).

fact, it appears that the Agency intends to use its factoring criteria on "design" to supplant any "intent" that the manufacturer or end-user might have. *Id.* It is well settled that "[t]he existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," and strict liability laws that forgo a criminal intent element are disfavored. *See Dennis v. U.S.*, 341 U.S. 494, 500 (1951). Furthermore, it is not within the Agency's power to create a strict liability law, especially where the underlying Federal Code expressly requires the opposite. *See* Art. I, § 1 U.S. Const. ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

CONCLUSION

Simply stated, the Agency is attempting to redefine the word "designed" as contemplated in both 18 U.S.C. § 921(a)(29) and 26 U.S.C. § 5845(c) with a point system comprised of a list of irrelevant factors. A firearm with a brace is designed, based upon the design of the brace, to aid in one-handed fire. Under the law, this is unambiguously a handgun, and the Agency is powerless to redefine what constitutes a handgun. However, even if an ambiguity is found to exist, the rule of lenity must be applied to construing the statute, especially considering the **millions** of Americans that would become criminals at the whim of some small group of unelected bureaucrats.

Respectfully submitted by Counsel for Florida Legal Foundation, Inc.:

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