United States Court of Appeals

for the

Fifth Circuit

Case No. 23-10319

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

Plaintiffs-Appellants,

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-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS IN NO. 4:23-CV-95
HONORABLE REED CHARLES O'CONNOR, U.S. DISTRICT JUDGE

AMICUS BRIEF OF AMERICAN FIREARMS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

STEPHEN R. KLEIN
BARR & KLEIN PLLC
Counsel for Amicus Curiae
1629 K Street NW, Suite 300
Washington DC 20006
(202) 804-6676

Certificate of Interested Persons

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that—in addition to the persons and entities identified in the party briefs in this case—the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae

American Firearms Association

I hereby certify that I am aware of no persons or entities with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: June 12, 2023

/s/ Stephen Klein
Stephen R. Klein
Counsel of Record for Amicus Curiae

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

Interest of *Amicus Curiae*[1]

The American Firearms Association is a nonprofit organized under section 501(c)(4) of the Internal Revenue Code and supports Second Amendment rights at the national level and in states nationwide. The American Firearms Association therefore opposes the attempt of the Bureau of Alcohol, Tobacco, Firearms and Explosives to tax, register, and punish the bearing of commonly owned firearms that are protected by the Second Amendment.

Introduction and Summary of Argument

The blunderbuss, "a muzzle-loading firearm with a short barrel and flaring muzzle to facilitate loading," has a place in the American Founding. *blunderbuss*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/blunderbuss [https://perma.cc/3BGA-QMQF]. Though its efficacy falls short of many modern firearms, it is a deadly tool that delivers a wide payload of ammunition with a single shot. *See, e.g.*, *The Blunderbuss from Military Heritage Shooting & Review*, YOUTUBE, https://youtu.be/gcSr_UKMZls. But it was never banned, specially taxed or catalogued *en masse* in a nationwide registry in the Founding Era, even though it features "'concealability [that] fosters its use in illicit activity'" and "'heightened capability to cause damage'" because some examples have a shoulder stock and

[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in any part and no person other than *amicus* funded the preparation and submission of this brief.

barrels under 16 inches in length.[2] *See Factoring Criteria for Firearms With Attached "Stabilizing Braces"*, 88 Fed. Reg. 6478, 6548 *available at* https://www.govinfo.gov/content/pkg/FR-2023-01-31/pdf/2023-01001.pdf [https://perma.cc/H36J-6ZRE] (Jan. 31, 2023) (hereinafter the "Final Rule") (quoting *U.S. v. Marzzarella*, 614 F.3d 85, 90–95 (3d Cir. 2010)); *see, e.g.*, THE NORTH AMERICAN, Feb. 2, 1798, at 3, *available at* https://www.newspapers.com/image/593170059 [https://perma.cc/BZQ4-BNW9] (detailing the robbery of a private citizen of several items including a "blunderbu*f*s" and pistols); *Antique Flintlock Blunderbuss with Bayonet*, GUNBROKER, https://www.gunbroker.com/item/991140392 [http://perma.cc/HM4T-NLTG] (last visited June 7, 2023) (auction for 1820s blunderbuss with a 14-inch barrel). Today, the government seeks to register and tax firearms far less unusual and dangerous, and certainly more prolific, than the once commonly owned blunderbuss. 88 Fed. Reg. at 6560 (estimating 3 million stabilizing braces are possessed by 1.4 million Americans), *but see Handguns, Stabilizing Braces, and Related Components*, CONG. RESEARCH SERVICE, Apr. 19, 2021,

[2] *Amicus* acknowledges that the National Firearms Act exempts certain "antique firearm[s]" from the definition of "firearm", that a blunderbuss is more akin to a "shotgun" under the law and does not fire "a fixed cartridge", among other distinctions. *See* 26 U.S.C. § 5845(a), (c), (d). Nevertheless, certain features of a blunderbuss—along with *any* historic firearm—must inform the Second Amendment analysis of gun laws and regulations.

https://crsreports.congress.gov/product/pdf/IF/IF11763#:~:text=April%2019%2C%202021-,Handguns%2C%20Stabilizing%20Braces%2C%20and%20Related%20Components,into%20a%20short%2Dbarreled%20rifle [https://perma.cc/6MVU-RV7U] (acknowledging "unofficial estimates [that] suggest that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands[.]"). But subjecting millions of weapons in common use to registration and taxation, and subjecting millions of innocent gun owners to felony charges and lengthy prison sentences for noncompliance, violates the Second Amendment. The Court should reverse the court below and enjoin the Final Rule.

The Final Rule is unconstitutional for several reasons. At the outset, despite the denials of the government, the Second Amendment plainly applies to the Final Rule. The government may not simply declare that a weapon is dangerous and unusual and bypass its obligation to prove that its regulation is in keeping with the text, history and tradition of the Second Amendment. When Second Amendment analysis is applied to the Final Rule, the rule fails. Millions of pistols cannot be called dangerous and unusual simply because they can be fired from the shoulder. The government offers no history in support, for there is none to be had. Moreover, by placing special taxes on firearms, National Firearms Act itself is constitutionally suspect. Finally, the Final Rule is unconstitutionally vague because it greenlights

arbitrary and discriminatory prosecutions against alleged short-barreled rifles defined not by their actual characteristics, but by literature and information that is likely far beyond a gun owner's knowledge and, for that matter, the government's comprehension. The Court should reverse the court below and enjoin the Final Rule.

Argument

The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") claims that there are no Second Amendment issues with the Final Rule. "Congress only requires the registration of the firearms in the [National Firearms Registration and Transfer Record] and the payment of a making or transfer tax, neither of which prohibits a person's ability to possess these weapons." 88 Fed. Reg. at 6548; *see also* R.E. 24-26 (the lower court's rejection of Plaintiffs-Appellants' Second Amendment arguments for purposes of an injunction). But the Final Rule subjects millions of firearms to registration and tax on the mere basis that they shoot accurately and are concealable, and vaguely threatens to subject millions more firearms to regulation, without any historic basis. *See* 26 U.S.C. § 5845(a), (c). And an owner's failure to register the firearm or pay the tax subjects him to up to a $10,000 fine and up to 10 years of imprisonment. 26 U.S.C. § 5871. An analogous regime would not pass muster in consideration of any other constitutional right and the Final Rule is unconstitutional under the Second Amendment. U.S. CONST. amend. II ("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.").

I. The Second Amendment Applies to the Regulation of Stabilizing Braces and Short-Barreled Rifles Under the Final Rule

Last year, in *New York State Rifle & Pistol Association v. Bruen*, the United States Supreme Court "made the constitutional [Second Amendment] standard endorsed in [*District of Columbia v.*] *Heller* more explicit[.]" 142 S. Ct. 2111, 2134 (2022); *Heller*, 554 U.S. 570 (2008). This was urgently needed because, particularly after the Court recognized in *McDonald v. City of Chicago* that the Second Amendment applies to state and local governments through the Fourteenth Amendment, certain state and local governments set out to infringe upon the right to keep and bear arms to the greatest extent possible. 561 U.S. 742 (2010); *see, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011) (rejecting a Chicago ordinance that "mandate[d] one hour of range training as a prerequisite to lawful gun ownership . . . yet at the same time prohibit[ed] all firing ranges in the city[.]"); *Ezell v. City of Chicago*, 846 F.3d 888, 890 (7th Cir. 2017) (striking portions of an ordinance that left "only 2.2% of the city's total acreage is even theoretically available" for firing ranges); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 57 (2d Cir. 2018), *vacated and remanded sub nom. N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) ("The Rule restricts *only* his ability to remove the handgun licensed by New York City authorities from the City

premises for which it is specifically licensed." (emphasis added)). Even after *Bruen*, certain states have gone even further, instigating a nullification crisis against the Second Amendment. *See, e.g.*, *Antonyuk v. Hochul*, No. 122CV0986GTSCFH, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022) (enjoining portions of New York's "Concealed Carry Improvement Act" that was enacted after *Bruen*); *Barnett v. Raoul*, No. 3:23-CV-00141-SPM, 2023 WL 3160285 (S.D. Ill. Apr. 28, 2023) (enjoining "Protect Illinois Communities Act" that bans "assault weapons" and was also enacted after *Bruen*).[3]

Unfortunately, as demonstrated by the Final Rule, state governments are not alone in this endeavor: the federal government—the executive branch, specifically—has also displayed alarming recalcitrance to the Second Amendment following *Bruen*, exhibiting a naked determination to make it "'a second-class right[.]'" 142 S. Ct. at 2156 (quoting *McDonald*, 561 U.S. at 780). The Second Amendment's explicit standard should end such shenanigans once and for all at both the state and federal level; here, it certainly leaves the Final Rule unconstitutional and unenforceable. Indeed, if the Final Rule is an appropriate application of the law, it calls into question the related portions of the National Firearms Act. *See* 26 U.S.C. § 5845(a), (c) (definition of "firearm" and "rifle," respectively).

[3] At the time of this submission, these cases are pending appeal, respectively.

Bruen clarified that Second Amendment scrutiny is an analysis that tracks the amendment's text, history and tradition:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)). Plainly, "the Second Amendment guarantees a general right to public carry", or the right for "'law-abiding, responsible citizens'" to do so. *Bruen*, 142 S. Ct. at 2135, 2138 n.9 (quoting *Heller*, 554 U.S. at 635). To regulate firearms, the government must not merely assert, but "*affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127 (emphasis added). The court below all but ignored this analysis, shrugging off this high standard and even stating that "the government need *only* demonstrate" tradition and fit. R.E.24 (emphasis added).

At first the court below simply reasoned that the Final Rule is a regulation instead of a ban and suggested that it imposes "traditional registration and licensing requirements commonly associated with firearm ownership." R.E.25 (citations omitted). Rather than subject this regulation to Second Amendment scrutiny (like

New York's *licensing* regime, which was also not a ban of firearms *per se*), the court simply cited to Justice Kavanaugh's concurrence in *Bruen* and footnote 9 of the majority opinion. *Id.* Though the court then reserved ruling on seemingly all Second Amendment claims for summary judgment, it was wrong to delay owing to the "condensed briefing offered in support of [Plaintiffs-Appellants'] motion" because the burden is plainly on *the government* to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation" *before* subjecting millions of existing firearms to a registration and taxation regime. *Bruen*, 142 S. Ct. at 2126.

This is not, for example, a challenge to a law or regulation that existed prior to *Bruen*, which might justify discovery or permit extended briefing for the government to research and compile an historic record (if one even exists). *See, e.g.*, *U.S. v. Rahimi*, 61 F.4th 443, 456–61 (5th Cir. 2023). The government—ATF—spent 601 days considering the Final Rule, and that is only counting the time after it issued the notice of proposed rulemaking. *See* 88 Fed. Reg. 6478; *Factoring Criteria for Firearms With Attached "Stabilizing Braces"*, 86 Fed. Reg. 30826, *available at* https://www.govinfo.gov/content/pkg/FR-2021-06-10/pdf/2021-12176.pdf [https://perma.cc/J3MZ-RDFZ] (Proposed Rulemaking, June 10, 2021). It had 223 days between the Supreme Court's ruling in *Bruen* and its issuance of the Final Rule to research, analyze and share "historical evidence of similar government

regulations" somewhere in 98 pages of the Federal Register before adding potentially millions of firearms to a regime that threatens 10 years of imprisonment for noncompliance. R.E.26; 26 U.S.C. § 5871. Instead, in those seven months after the opinion the government added but one footnote about *Bruen* to its analysis and claimed that "the Department [of Justice] does not believe the case casts doubt on courts' prior conclusions that, based on historical tradition, the Second Amendment does not extend to dangerous and unusual weapons." 88 Fed. Reg. at 6548 (citing *Marzzarella*, 614 F.3d at 94).

That the court below ruled, albeit half-heartedly, that there *is* a more robust Second Amendment analysis to be had requires reversal and injunction while the government determines what it should have determined before issuing the Final Rule. Moreover, analysis of the Final Rule is appropriate at this time and it fails under the Second Amendment.

II. The Final Rule is Unconstitutional Under the Second Amendment

The Plaintiffs-Appellants appropriately and convincingly focus on the Second Amendment's prevention of subjecting millions of commonly owned firearms to regulation and that the Final Rule has no historic basis to do so. Appellants' Br., ECF No. 82 at 27-36; *see Bruen*, 142 S. Ct. at 2143 ("*even if* . . . colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting *the*

public carry of weapons that are unquestionably in common use today." (emphasis added)). In addition to these arguments, the Court should consider the related argument that the Second Amendment does not permit classifying firearms as dangerous and unusual on the mere basis that they are concealable and accurate. Moreover, the Court should heed other constitutional precedent that prohibits taxing the exercise of constitutional rights. The Final Rule should be enjoined.

The National Firearms Act includes "a rifle having a barrel or barrels of less than 16 inches in length" in its purview. 26 U.S.C. § 5845(a). And "[t]he 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[.]" 26 U.S.C. § 5845(c). The Final Rule addresses when a pistol might become a short-barreled rifle under the law. R.E.13-14; *see, e.g.*, 88 Fed. Reg. at 6494 (photo allegedly comparing a pistol with a stabilizing brace to a rifle). More pointedly, the Final Rule aims to distinguish between when a stabilizing brace on a pistol becomes an accessory that shows the weapon is "intended to be fired from the shoulder" and is thus a rifle that might be a short-barreled rifle. 26 U.S.C. § 5845(c); R.E.14-15 (quoting 88 Fed. Reg. at 6480). If such a weapon is a short-barreled rifle, it is classified among "dangerous and

unusual weapons [that] pos[e] a significant danger to the public[.]" 88 Fed. Reg. at 6481.

This is, to put it mildly, balderdash.

ATF contends, among other things, that adding a stock to a pistol makes it "'virtual[ly] inevitabl[e] that such possession will result in violence.'" 88 Fed. Reg. at 6498 (quoting *U.S. v. Jennings*, 195 F.3d 795, 799 (5th Cir. 1999)). Moreover, "[s]hort-barreled rifles specifically are dangerous and unusual due to both their concealability and their heightened ability to cause damage—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; *see also* 88 Fed. Reg. at 6548 (justifying the regulation of short barrel rifles owing to "'concealability'" and then, in a footnote, denying the Second Amendment "extend[s]" to short barrel rifles). The millions of pistols at issue here, capable of becoming short-barreled rifles via the wrong kind of stabilizing brace, do not change in any way as to projectiles when they are re-classified. This leaves the alteration to one that makes the firearm a combination of concealable and more accurate. But these are not terms that may be juxtaposed over dangerous: indeed, concealable and accurate are closer to synonyms for Second Amendment interests. *See generally Bruen*, 142 S.Ct. at 2128. And even if the Court accepts the government's argument

that these weapons are not in common use, they are far from *unusual* when they number in the millions.

The Second Amendment, as an individual right, may call into question not only the Final Rule but the National Firearms Act more broadly, particularly owing to its imposition of taxes. In the context of the First Amendment, the Supreme Court has stricken myriad discriminatory taxes. "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." *Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 592–93 (1983); *see generally* U.S. CONST. amend. I. Following *Heller* and especially after its affirmation in *Bruen*, placing special taxes on firearms—that the government and the court below go out of their way to say are not banned—"is a license tax-a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943). This is likely unconstitutional under the text, history and tradition of the Second Amendment, but is also unconstitutional under a broader prohibition against singling out the exercise of specific individual rights for taxation, drawing persuasive authority from the First Amendment.

The distinctions between the millions of pistols that can so easily become short-barreled rifles and the other categories of regulation in the National Firearms Act are obvious: short-barreled rifles are not machine guns, sawed-off shotguns,

silenced weapons, or hand grenades. *See generally* 26 U.S.C. § 5845. This case is not about *bona fide* dangerous and unusual weapons, and the AFT's rhetorical sleight of hand should not be accepted by the Court. In addition to being in common use, pistols with stabilizing braces—even ones that facilitate firing from the shoulder—cannot be considered dangerous and unusual under Second Amendment analysis. Moreover, the Court should not accept that the dangerous and *unusual* classification may be retroactively applied to *millions* of firearms. The Final Rule is unconstitutional under the Second Amendment and the Court should enjoin its enforcement.

III. The Final Rule is Unconstitutionally Vague as to What Constitutes a Short-Barreled Rifle

The court below analyzed the Final Rule under the Fifth Amendment, or due process, vagueness analysis. R.E.23-24; *see generally* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"). The court tersely concluded that the rule's two-part, seven-factor[4] balancing test to "indicate that the weapon is designed, made, and intended to be fired from the shoulder" is not unconstitutionally vague because it provides some "'standard of conduct'" that "is comprehensible enough to put a person of ordinary

[4] The court stated that ATF will make the determination under the Final Rule through "six criteria", but the six criteria are to be considered only if the stabilizing brace "provides surface area that allows the weapon to be fired from the shoulder[.]" *Cf.* R.E.24 *with* 88 Fed. Reg. at 6480; *see also* 88 Fed. Reg. at 6575.

intelligence on notice that their weapon may be subject to federal firearms laws." R.E.24 (quoting *Vill. of Hoffman Ests. v. Flipside, Inc.*, 455 U.S. 489, 495 n.7 (1982)). The Plaintiffs-Appellants convincingly argue that this is simply not so. Appellants' Br., ECF No. 82 at 44-47. And this situation—a Final Rule affecting more than a million American gun owners—demands a more stringent vagueness analysis under the Second Amendment.

This Court has explicitly stated that "when a vagueness challenge does not involve First Amendment freedoms, we examine the statute only in light of the facts of the case at hand." *U.S. v. Edwards*, 182 F.3d 333, 335 (5th Cir. 1999). The Supreme Court affirmed this approach in *Holder v. Humanitarian Law Project*. 561 U.S. 1, 19 (2010). Yet more stringent vagueness analysis is required for the facts at hand: "perhaps *the most important factor* affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests.*, 455 U.S. at 499 (emphasis added). Infringing upon Second Amendment rights—with registration, taxation, and felony penalties for noncompliance—inhibits the exercise of gun rights. *Bruen*, 142 S. Ct. at 2126. Yet the Final Rule details that commenters (presumably beyond the Plaintiffs-Appellants) raised vagueness concerns, and ATF evaluated them strictly under the Fifth Amendment and without considering the heightened vagueness

scrutiny owing to the exercise of Second Amendment rights. 88 Fed. Reg. at 6550-52.

At the very least, factors five and six of the second part of the analysis under the Final Rule are unconstitutionally vague. Although shoppers nationwide are often subjected to marketing and promotional materials, one does not necessarily read these materials prior to purchasing an item and is even less likely to do so afterward. The president of the American Firearms Association, Chris Dorr, did not do so when he purchased several stabilizing braces years ago. When shopping in a store, firearm accessories such as stabilizing braces are often presented and sold unboxed, even if they were boxed to begin with. If a brace is boxed and features or contains some "manufacturer's . . . marketing and promotional material" or "[i]nformation demonstrating the likely use of the weapon" after the brace is attached, this is not something a customer will necessarily read. R.E.15 (quoting 88 Fed. Reg. at 6480). And that is but one silly assumption behind the Final Rule, for it requires purchasers to be familiar with *any* "marketing and promotional material[]" of the manufacturer and *any* other "[i]nformation demonstrating the likely use of the weapon in the general community." 88 Fed. Reg. at 6575.

To be sure, the fifth factor would be clear enough to for a citizen to understand how a firearm may be regulated with a brace, via marketing materials, if it did not include *indirect* marketing materials. Even excising this word (and the Court cannot)

it is far too unclear for a citizen to avoid the second factor of vagueness analysis, whether the law is prone to "arbitrary and discriminatory enforcement." *Skilling v. U.S.*, 561 U.S. 358, 402 (2010). ATF and Department of Justice prosecutors will never have a fair comprehension of the "direct and indirect marketing and promotional materials" behind stabilizing braces across the board, will inevitably apply this factor arbitrarily and, far worse, enjoy the flexibility to do so discriminatorily. The sixth factor is worse, for it is *completely* without meaning: "information" is vaguer than "the right of honest services" and provides no guidance for a gun owner as to how his stabilizing brace might become an extension of a short-barreled rifle. *Id.* at 416 (Scalia, J., concurring in part). These are but two vagueness problems with the Final Rule, exacerbated by the fact that they are wholly removed from criteria that assess the firearm itself—unless, perhaps, a manufacturer stencils the language "Shoulder Goes Here" on the rear of a brace.

"The First Amendment does not permit laws that force speakers to retain a[n] . . . attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010). Neither does the Second Amendment permit laws that force Americans to retain an attorney, conduct marketing research or seek a declaratory ruling before attaching a stabilizing brace to a firearm to ensure it's not subject to registry, tax, or 10 years in prison. Even an

attorney can only guess as to the which direction the Final Rule's two-part, seven-factor balancing test will tip, particularly as to part two, factors five and six. The Final Rule is unconstitutionally vague and should be enjoined.

Conclusion

Ironically, though the blunderbuss may be safe for the moment under the National Firearms Act and ATF regulations, the Final Rule joins the long list of "blunderbuss approach[es]", "blunderbuss polic[ies]" and "statutory blunderbuss[es]" wrought by the government. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2391 (2021) (Alito, J., concurring); *Johnson v. California*, 543 U.S. 499, 518 (2005) (Stevens, J., dissenting); *U.S. v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 222 (2003). When it comes to firearm regulation, it is these efforts and not firearms that are the problem. The Court should reverse the court below, preliminarily enjoin the enforcement of the Final Rule, and remand for further proceedings.

Dated: June 12, 2023

Respectfully submitted,

/s/ Stephen Klein

Stephen R. Klein
BARR & KLEIN PLLC
1629 K St NW Ste. 300
Washington, DC 20006
Tel/Fax: 202-804-6676
steve@barrklein.com

Counsel for Amicus Curiae

Certificate of Service

Pursuant to Federal Rule of Appellate Procedure 25(d) and Fifth Circuit Rule 25.2.5, I hereby certify that on June 12, 2023, an electronic copy of the foregoing *amici curiae* brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/ Stephen Klein
Stephen R. Klein

Certificate of Compliance

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,980 words excluding those portions exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Fifth Circuit Rule 32.1 because it was prepared using Microsoft Word in 14-point Times New Roman, a proportionally spaced typeface.

Additionally, I certify that (1) any required redactions have been made in compliance with Fifth Circuit Rule 25.2.13 and (2) the document has been scanned with the most recent version of the Vipre Virus Protection, and is free of viruses.

/s/ Stephen Klein
Stephen R. Klein

Dated: June 12, 2023