

ADMINISTRATIVE RELOADS UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA): HOW THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES CAN CURE APA DEFECTS IN ITS STABILIZING BRACE RULE

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* J.D. Candidate, American University Washington College of Law (2027); B.A., International Relations, Colgate University (2024). I would like to thank my family and friends for their love, patience, and encouragement while I worked on this piece. Writing about an issue as difficult and deeply felt as gun violence reminded me how much we can learn by listening to and challenging one another. While the law can be technical and filled with specific rules and regulations, its purpose is ultimately to help people and protect communities—and we should never lose sight of that. I also want to thank my peers on the *Administrative Law Review*, whose thoughtful feedback shows the value and power of peer review. Even when the issues before us feel urgent, the laws and processes meant to guide change still matter; without them, even well-intentioned efforts can fail and leave us without the order and accountability needed to create lasting progress. I dedicate this piece to everyone who has lost someone they love to senseless gun violence.

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INTRODUCTION¹

In 2012, Alex Bosco invented the pistol brace stabilizing accessory, designed to help disabled veterans and shooters with physical limitations better control ArmaLite Rifle (AR)-style pistols.² Bosco was the co-founder of SB Tactical, a manufacturing company that produced parts and accessories for a variety of personal defense weapons pistol platforms.³ The device straps around the user's forearm and attaches to the rear of the weapon, allowing those with limited mobility to operate firearms with one hand.⁴ In 2012, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) concluded that attaching a stabilizing “brace” to a firearm did not convert the weapon to be fired from the shoulder.⁵ As a result, ATF determined that such a modification would not alter the classification of a pistol or other firearm, and would not be subject to National Firearms Act (NFA) controls.⁶

Since then, the number and variety of “stabilizing braces,” “‘brace’ devices, and pistols equipped with ‘braces’ has grown significantly.”⁷ Starting in 2014,

1. Content Advisory: This Comment references and briefly describes real incidents of firearm violence, including mass-casualty shootings, solely to provide factual and legal context for administrative law analysis. No graphic detail is included, but readers are advised that the subject matter involves loss of life and gun-related harm.

2. See *What Are Pistol Braces? Complete Guide to Current Laws and Regulations*, RECOVER TACTICAL (Apr. 25, 2025), <https://recovertactical.com/what-are-pistol-braces/> [<https://perma.cc/XR95-LWAX>] [hereinafter *What Are Pistol Braces?*]; *Difference Between AR-15 Rifle and AR-15 Pistol*, PRIME ARMOR (Jan. 19, 2022), <https://primearmor.us/difference-between-ar-15-rifle-and-ar-15-pistol/> [<https://perma.cc/3UL8-GKBA>] (noting that AR stands for ArmaLite, and an AR-style pistol has a typical barrel length of nine and a half inches compared to a rifle which has a longer barrel).

3. *ATF's Assault on the Second Amendment: When Is Enough Enough?: Hearing Before the H. Comm. on Oversight & Accountability & Subcomm. on Crime & Fed. Gov't Surveillance of the H. Comm. on the Judiciary*, 118th Cong. (2023) (biography of Alex Bosco).

4. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. 6,478, 6,487–88 (Jan. 31, 2023) (to be codified at 27 C.F.R. pts. 478–79).

5. See Letter from John R. Spencer, ATF, Chief of Firearms Tech. Branch, ATF #2013-0172 (Nov. 26, 2012) [hereinafter Letter from ATF].

6. See *id.*

7. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,479.

ATF observed that both individuals with limited mobility and general firearm users were utilizing “braces” to fire weapons from the shoulder.⁸ ATF also noted that newer brace designs incorporated features commonly found on shoulder stocks.⁹ Prior ATF classifications focused on whether the manufacturer’s claim that the device could be used on the forearm for single-handed firing was accurate.¹⁰ Many of those classifications failed to account for key design and usage considerations.¹¹ The wide variety of “brace” devices resulted in numerous firearms equipped with “stabilizing braces” that exhibit objective design characteristics consistent with weapons designed, manufactured, and intended to be fired from the shoulder.¹² Stabilizing braces can be pressed against the shoulder, adding a point of stabilization that increases accuracy and makes the firearm easier to fire.¹³ ATF found that “individuals who attach a ‘stabilizing brace’ to a firearm could find themselves making an NFA firearm without abiding by the registration and taxation requirements of the NFA.”¹⁴ An NFA firearm falls within one of six categories of defined firearms that are deemed as dangerous and therefore require a structured regulatory process consisting of registration, a tax, and other background information.¹⁵

Congress enacted the National Firearms Act in 1934 in response to rising gun violence and imposed strict controls on short-barreled rifles and other weapons deemed particularly dangerous.¹⁶ Decades later, technological

8. *Id.*

9. *See id.* A stock is the rear portion of the gun that rests against the shooter’s shoulder and provides stability when aiming and firing.

10. *See id.*

11. *See id.* (stating the particular classifications did not consider whether (1) the particular firearm equipped with a given brace was designed or modified, according to its objective design features, to be fired from the shoulder; or (2) how the firearm with that brace was actually being used in the broader community).

12. *See* GUN TALK MEDIA, *Brace or No Brace: Springfield’s SAINT AR Pistol*, at 00:37–00:48 (YouTube, June 16, 2018), www.youtube.com/watch?v=vPAmDoC0vUE [<https://perma.cc/4D2Z-QDZB>]; PERSONALDEFENSENET, *Shouldering an AR Pistol with a SIG Brace*, at 01:51–02:01 (YouTube, June 21, 2017), <https://www.youtube.com/watch?v=DvoZxDLaSM> [<https://perma.cc/J85C-7DW6>].

13. Tom McHale, *Rifle vs. Pistol Shootings: Six Fun Facts*, NRABLOG (June 8, 2016), <https://www.nrablog.com/articles/2016/6/rifle-vs-pistol-shooting-six-fun-facts> [<https://perma.cc/7B6Z-QVT8>].

14. *See* Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,479.

15. *See* 26 U.S.C. §§ 5812(a), 5822 (stating requirements to make a “firearm” subject to the National Firearms Act (NFA)).

16. *See* 26 U.S.C. § 5841(a), (d); *National Firearms Act*, ATF, (Feb. 4, 2026), <https://www.atf.gov/rules-and-regulations/laws-alcohol-tobacco-firearms-and-explosives/national-firearm-act> [<https://perma.cc/FY3U-K6J6>] [hereinafter *National Firearms Act*].

developments in firearms accessories, most notably stabilizing braces, introduced new questions about how those longstanding statutory categories should apply.¹⁷ Over time, these braces proliferated far beyond their intended audience because users would be allowed to shoulder a pistol like a rifle.¹⁸ This presented a new loophole to regulators by blurring critical legal distinctions within the NFA.¹⁹ The Biden Administration argued that clearer and more comprehensive rules were needed to stop gun owners from evading the NFA's restrictions on short-barreled rifles by modifying pistols for shoulder firing.²⁰ Since the invention of the stabilizing brace, an estimated 3–7 million stabilizing braces were manufactured and sold between the years 2013 to 2020.²¹ These braces make handguns more powerful and easy to conceal.²² Buyers of such pistols realized they could own what was akin to a more maneuverable, easily concealable tactical rifle while bypassing the added effort and expense that came with owning a weapon covered by the NFA.²³

Several key incidents have prompted public concern and ATF's scrutiny of stabilizing braces. In August 2019, a man shot and killed nine people and wounded twenty-seven others in only thirty-two seconds in Dayton, Ohio, using a stabilizing brace and firing from the shoulder.²⁴ The gunman used an AR-type pistol outfitted with a brace and a double-drum magazine

17. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,479.

18. See *id.*

19. See *id.*

20. Andrew Willinger, *An Update on Legal Challenges to the Pistol Brace Rule*, DUKE CTR. FOR FIREARMS L. (Apr. 25, 2025), <https://firearmslaw.duke.edu/2025/04/an-update-on-legal-challenges-to-the-pistol-brace-rule> [<https://perma.cc/9EBY-V49N>].

21. ATF OFF. OF REGUL. AFFS., ATF, RIN 1140-AA55, FACTORING CRITERIA FOR FIREARMS WITH ATTACHED STABILIZING BRACES 16 (2021).

22. Lindsay Whitehurst, *Justice Department Finalizes Tighter Regulations on Gun Stabilizing Braces*, PBS NEWSHOUR (Jan. 13, 2023, at 20:32 ET), <https://www.pbs.org/newshour/politics/justice-department-finalizes-tighter-regulations-on-gun-stabilizing-braces> [<https://perma.cc/4BJ6-2SYJ>] (quoting former Attorney General Merrick Garland, “[p]istol-stabilizing braces transform a handgun into a weapon with a similarly dangerous combination of being powerful and easy to conceal”).

23. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,479; 26 U.S.C. §§ 5801(a), 5802 (explaining that the expense includes a \$200 tax and registration of firearm).

24. See Brief of Amici Curiae Brady Center to Prevent Gun Violence et al. in Support of Defendants at 6, *Watterson v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 23-11157 (5th Cir. Jan. 29, 2024) [hereinafter *Gun Violence Brief*].

capable of holding 100 rounds of ammunition.²⁵ In March 2021, a man killed ten people at a grocery store in Boulder, Colorado, also using a stabilizing pistol brace.²⁶ This gunman was armed with an AR-566 pistol that was purchased six days before the attack and came with a stabilizing brace already installed.²⁷

Against this backdrop of recurring mass shootings and heightened public concern over firearm violence, the federal government's regulatory role has increasingly come into focus. ATF is a component of the Department of Justice (DOJ).²⁸ Its modern firearm regulatory role emerged from the National Firearms Act of 1934, enacted under Congress's taxing power, which imposed registration and taxes on certain especially dangerous weapons.²⁹ Congress later expanded ATF's mandate through the Gun Control Act (GCA) of 1968 and the Firearm Owners' Protection Act of 1986 (FOPA), both grounded in the Commerce Clause.³⁰ Today, ATF has dual responsibilities: federal criminal investigations and regulatory oversight of firearms, explosives, alcohol, and tobacco.³¹ ATF administers the NFA and the GCA, giving the agency the authority to classify firearms.³² These classifications have concrete legal consequences for manufacturers and millions of consumers.³³

On June 10, 2021, ATF published a new proposed rule in the *Federal Register* entitled "Factoring Criteria for Firearms with Attached 'Stabilizing

25. Bill Chappell, *The Pistol That Looks Like a Rifle: The Dayton Shooter's Gun*, NPR (Aug. 8, 2019, at 16:39 ET), <https://www.npr.org/2019/08/08/748665339/the-pistol-that-looks-like-a-rifle-the-dayton-shooters-gun> [<https://perma.cc/MS33-PKDD>].

26. Gun Violence Brief, *supra* note 24, at 25.

27. Brian Freskos & Alain Stephens, *Facing GOP Pressure, the ATF Canceled Review of Devices Now Implicated in Two Mass Shootings*, TRACE (Mar. 30, 2021), <https://www.the.trace.org/2021/03/ar-pistol-stablizing-brace-atf-gun-boulder-dayton/> [<https://perma.cc/Y73E-LYCC>].

28. *Organization, Mission and Functions Manual: Bureau of Alcohol, Tobacco, Firearms and Explosives*, U.S. DEP'T OF JUST. ATF, <https://www.justice.gov/doj/organization-mission-and-functions-manual-bureau-alcohol-tobacco-firearms-and-explosives> [<https://perma.cc/JH5A-BUPX>] (last visited Apr. 30, 2026).

29. 26 U.S.C. §§ 5801–02; National Firearms Act, ch. 757, 48 Stat. 1,236, 1,237–38 (1934).

30. See 18 U.S.C. § 922; see also Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968); Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

31. *About Bureau of Alcohol, Tobacco, Firearms & Explosives*, ATF (Mar. 12, 2026), <https://www.atf.gov> [<https://perma.cc/4T3A-5UDV>].

32. See *id.*

33. See, e.g., 26 U.S.C. §§ 5801–02 (imposing taxes and federal registration requirements on firearms manufactures and importers based on statutory firearm classifications).

Braces” (Proposed Rule).³⁴ The specifics of the rule, along with how it was adopted, will be discussed in more detail in Part I.B.³⁵ Generally, the rule aimed to clarify that firearm manufacturers, dealers, and individuals may not circumvent these critical public safety requirements by attaching accessories to pistols that effectively convert them into short-barreled rifles.³⁶ The Proposed Rule received a great deal of pushback from gun-rights groups such as the National Rifle Association (NRA), who pointed out that these stabilizing braces were originally designed for disabled veterans.³⁷ When finalized, the rule reversed more than a decade of ATF classification letters and informal guidance treating stabilizing braces as lawful, non-NFA accessories.³⁸ Gun control groups argued the rule was necessary and in accordance with the NFA by making clear that pistols equipped with certain modern forms of stabilizing braces are short-barreled rifles that are dangerous and serve no legitimate self-defense purpose.³⁹

Part I of this Comment establishes the statutory and constitutional framework for ATF by outlining its authority to regulate firearms under the NFA and GCA, and addressing how such regulation remains consistent with Second Amendment doctrine.⁴⁰ Part II examines the administrative law defects in the 2023 “Factoring Criteria for Firearms with Attached ‘Stabilizing Braces’” rule (Final Rule), finding it fails to satisfy the logical outgrowth test and related procedural deficiencies under the Administrative Procedure Act (APA).⁴¹ Part III analyzes judicial review of the rule by the Fifth and Eighth Circuits, explaining how the Fifth Circuit invalidated the rule for procedural notice failures, while the Eighth Circuit concluded that aspects of the rule were arbitrary and capricious due to ATF’s failure to engage in reasoned decisionmaking.⁴² Finally, Part IV offers recommendations for how ATF can re-promulgate a lawful and durable brace rule by issuing a supplemental notice of proposed rulemaking, articulating objective classification criteria, and addressing reliance interests to withstand future APA challenges.⁴³

34. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826 (proposed June 10, 2021) (to be codified at 27 C.F.R. §§ 478–79).

35. See *infra* Part I.B.

36. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,487–88.

37. *NRA File Comments Opposing ATF’s “Stabilizing Brace” Proposed Rule*, NRA INST. FOR LEGIS. ACTION (Sep. 8, 2021), <https://www.nraila.org/articles/20210908/nra-files-comments-opposing-atfs-stabilizing-brace-proposed-rule> [<https://perma.cc/EF26-X7LH>].

38. See *id.*

39. Gun Violence Brief, *supra* note 24, at 19–22.

40. See *infra* Part I.

41. See *infra* Part II.

42. See *infra* Part III.

43. See *infra* Part IV.

I. DEFINING ATF'S AUTHORITY TO REGULATE FIREARMS

A. *Overcoming Second Amendment Doctrine and Establishing ATF's Regulatory Authority Under NFA and GCA*

Before evaluating the Final Stabilizing Brace Rule, it is important to understand ATF's authority to regulate firearms and why those regulations do not violate the Second Amendment. Congress passed the NFA to more stringently regulate the possession and use of certain firearms that were commonly used by criminals during Prohibition.⁴⁴ In the 1930s, Attorney General Homer Cummings described that the United States was facing “a very serious national emergency” with gun violence and crime plaguing the country.⁴⁵ Congress enacted the NFA to “regulat[e] weapons useful for criminal purposes.”⁴⁶ Firearms falling under the NFA must be registered in the National Firearms Registration and Transfer Record by a person entitled to possess the firearm, require approval by the Attorney General before their transfer or manufacturing, and are subject to transfer and manufacturing taxes.⁴⁷ Also, any person engaged in the business of importing, manufacturing, or dealing NFA firearms must register with the Attorney General and pay an occupational tax.⁴⁸ Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General.⁴⁹ DOJ and ATF issue regulations to carry out the provisions of the GCA and NFA.⁵⁰

Today the NFA regulates six categories of statutorily defined firearms.⁵¹ The relevant category for this Comment is the short-barreled rifle, which is

44. *National Firearms Act*, *supra* note 16.

45. *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways and Means*, 73d Cong. 4 (1934) (statement of Homer S. Cummings, Att’y Gen. of the U.S.); Joseph Connor, *How 1930s American Gang Violence Paved the Way for Gun Control*, HISTORYNET (Aug. 23, 2021), <https://www.historynet.com/how-1930s-american-gang-violence-paved-the-way-for-gun-control/> [https://perma.cc/7A9W-K23C] (indicating Cummings estimated that over 500,000 criminals were “armed to the teeth,” yet the federal government imposed no firearms restrictions in the 1930s, even as figures like Clyde Barrow and Bonnie Parker crossed state lines with dangerous firearms).

46. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 516 (1992); *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding the Second Amendment guarantees the right to possess a firearm only if that possession is related to the preservation of a well-regulated militia and the NFA’s restriction on possessing a sawed-off shot gun did not violate the Second Amendment).

47. 26 U.S.C. §§ 5811–12, 5821–22, 5841.

48. 26 U.S.C. §§ 5801, 5802.

49. 26 U.S.C. § 7801(a)(2); 28 U.S.C. § 599A(b)(1), (c)(1); 28 C.F.R. § 0.130(a)(1)–(2) (2024).

50. 27 C.F.R. §§ 478, 479 (2025).

51. 26 U.S.C. § 5845(a).

defined as “a rifle having a barrel or barrels of less than 16 inches in length” or “a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length.”⁵² Although the NFA does not define a “pistol,” it does define a “rifle,” as:

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.⁵³

So, a weapon is a “rifle” that is either an ordinary rifle (which is not regulated by the NFA as a firearm), or a short-barreled rifle (which is regulated), only if it is “designed,” “made,” and “intended to be fired from the shoulder.”⁵⁴ A weapon not meeting the criteria is not a “firearm” under the NFA.⁵⁵ The text states that a pistol is not a NFA-regulated firearm but does not define “pistol” or explain how to distinguish a pistol from a short-barreled rifle.⁵⁶

Compliance with the provisions of the NFA involves a more structured regulatory process than compliance with the laws applicable to standard non-NFA firearms.⁵⁷ Federal law requires one to file an ATF application form, pay the applicable tax of \$200, submit photographic identification and fingerprints, notify local authorities, and wait potentially months for approval.⁵⁸ After approval, ATF adds each applicant’s address, personal information, and NFA item’s serial number to the National Firearms Registration and Transfer Record.⁵⁹ Once on the registry, owners of NFA items must adhere to certain requirements and restrictions.⁶⁰ A violation of any NFA provision is a federal felony punishable by up to ten years’ imprisonment and a fine of up to \$250,000 for an individual, or by a fine of up to \$500,000 for an

52. § 5845(a), (e); 18 U.S.C. § 921(a)(8).

53. 26 U.S.C. § 5845(c) (emphasis added).

54. *Id.*

55. *See* § 5845(a), (c).

56. *See* § 5845(e).

57. Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 DICK. L. REV. 273, 289 (2022).

58. §§ 5812(a), 5822 (stating the requirements to transfer or make a “firearm” subject to the NFA).

59. *ATF National Firearms Act Handbook*, ATF § 3.1 (Apr. 2009).

60. 18 U.S.C. § 922 (a)(4); 27 C.F.R. § 478.28(a)–(b) (2025) (stating that when an owner of a NFA item changes their permanent address, ATF requires notification). When an owner brings their NFA item across state lines, they must have available documentation proving its registration. 26 U.S.C. § 5841(e); 27 C.F.R. § 479.101(e).

organization.⁶¹ ATF has seen an upwards trend in NFA applications over the years, with approximately 900,000 NFA application filings in 2020.⁶² The GCA is much broader than the NFA.⁶³ The GCA's definition of a firearm includes "any weapon . . . designed . . . to expel a projectile by the action of an explosive."⁶⁴ The GCA also establishes requirements for federal firearms licensees who wish to sell a short-barreled rifle.⁶⁵

Having established ATF's authority to regulate certain firearms, this Comment turns to whether the Final Stabilizing Brace Rule could survive Second Amendment scrutiny. In *District of Columbia v. Heller*,⁶⁶ the Supreme Court ruled the Second Amendment protects arms in "common use" and those "typically possessed by law-abiding citizens for lawful purposes."⁶⁷ The Court made it clear that the constitutional right to possess a handgun is not unlimited and that there are certain types of especially powerful weapons that might be subject to regulation.⁶⁸ The Court expressly noted the Second Amendment does not extend to "dangerous and unusual weapons" not typically possessed by law-abiding citizens, such as short-barreled shotguns.⁶⁹

In *New York State Rifle & Pistol Association, Inc. v. Bruen*,⁷⁰ the Court held that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects the conduct, and the government must demonstrate that its regulation is consistent with the "Nation's historical tradition of firearm regulation."⁷¹ Writing for the majority, Justice Thomas's rationale centered on a textual and historical analysis of the Second Amendment.⁷² The Court concluded, while history showed that some regulations

61. 26 U.S.C. § 5871; 18 U.S.C. §§ 3559(a), 3571(b)(3).

62. *Firearms Commerce in the United States: Annual Statistical Update*, ATF 13 (2021), <https://www.atf.gov/resource-center/docs/report/2021-firearms-commerce-report/download> [http://perma.cc/6VA7-HADD].

63. 27 C.F.R. §§ 478, 479 (2025).

64. 18 U.S.C. § 921(a)(3).

65. § 922(a)(4), (b)(4).

66. 554 U.S. 570 (2008).

67. *Id.* at 625–27.

68. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 55 n.6 (2017) (citing *Heller*, 554 U.S. at 623, 625, 627) (stating that "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever and for whatever purpose") [hereinafter *Gun Law History in the U.S.*].

69. *Heller*, 554 U.S. at 625–27.

70. 142 S. Ct. 2111 (2022).

71. *Id.* at 2126.

72. *See id.* at 2138 ("Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the

on public carry were permissible, there was no historical tradition justifying a broad prohibition on public carry by law-abiding citizens or requiring them to demonstrate a special need for self-defense.⁷³ In practice, the *Bruen* test asks whether the regulated conduct involves arms within the Second Amendment's plain text.⁷⁴ If it does, the burden then shifts to the government to show the regulation is consistent with "this Nation's historical tradition of firearm regulation," which could include analogous regulations from the Founding or Reconstruction eras.⁷⁵ The Court also said "a modern-day regulation" need not be "a dead ringer for historical precursors" for it to be "analogous enough to pass constitutional muster."⁷⁶

Even if possession of a braced pistol falls within the Second Amendment's plain text as keeping of "arms," the government may still regulate such weapons consistent with the nation's historical tradition of regulating unusually dangerous weapons.⁷⁷ There is a strong historical analogue for regulating unusually dangerous weapons or accessories.⁷⁸ From the Founding Era onward, state and federal legislatures have exercised authority to restrict weapons perceived as posing heightened risks to public safety, particularly those that are especially dangerous, easily concealable, or closely associated with criminal misuse.⁷⁹ This principle persisted through the Reconstruction Era and into the early twentieth century when legislatures increasingly addressed technical developments that blurred

intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.").

73. *See id.*

74. *See id.* at 2126.

75. *Id.*

76. *Id.* at 2133.

77. *See* U.S. CONST. amend. II; *Bruen*, 142 S. Ct. at 2185 (Breyer, J., dissenting) ("The tradition of regulations restricting public carriage of firearms, inherited from England and adopted by the Colonies, continued into the founding era.").

78. *Bruen*, 142 S. Ct. at 2185 (Breyer, J., dissenting).

79. *See* *State v. Buzzard*, 4 Ark. 18, 21 (1842) (upholding the statute regulating the carrying of weapons, warning that an entirely unregulated right to keep and bear arms could predictably "produce in the community disorder and anarchy."); *see also* Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1719 (2012) (stating that a robust model of weapons regulations with widespread acceptance began in the Founding Era, such as prohibitions on concealed carry); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. L. REV. 1, 39 (2012) (explaining how historical evidence does not show the Second Amendment's core right to armed self-defense superseded community-safety concerns reflected in several state statutes, such as Massachusetts in 1837).

traditional weapon classifications.⁸⁰ Congress enacted the NFA in 1934 placing restrictions on fully automatic weapons, and at least ten states (plus the District of Columbia) enacted laws restricting semi-automatic weapons.⁸¹ The idea that weapons whose lethality, combined with concealability, pose heightened public danger and may be subject to regulation, can be traced back to the Nation's beginnings.⁸² It is also important to note, that under *Bruen* a modern regulation need not be an exact "historical twin" of a past regulation so long as it is sufficiently analogous to a well-established historical analogue.⁸³ Although the courts have so far not addressed this issue in the litigation over the rule, the Final Stabilizing Brace Rule should not violate the Second Amendment because it validly protects public safety and further implements Congress's almost century-long statutory directive.⁸⁴

B. Past Regulatory Action and the Stabilizing Brace Rule

In 2012, the inventor of the stabilizing brace submitted the first stabilizing-brace device to ATF, inquiring whether the addition of their prototype brace device to a heavy pistol, such as an AR-15-type pistol, would change the pistol's classification under federal firearms laws.⁸⁵ The applicant stated that they designed the brace to help people with disabilities fire heavy pistols more safely and comfortably.⁸⁶ In response to the inquiry, ATF reviewed the submitted stabilizing brace and determined the sample "permits the shooter to hold the firearm with the nontrigger hand" and was not "designed or intended" to fire a weapon from the shoulder.⁸⁷ ATF concluded that, when attached to a firearm, the brace did not convert the weapon into one designed to be fired from the shoulder, nor did it change the firearm's

80. Robert J. Spitzer, *Gun Law History*, 51 *FORDHAM URB. L.J.* 57, 64 (2023) (explaining there have been many state-level and nationwide attempts to regulate automatic and semi-automatic firearms beginning in the early twentieth century).

81. See *Gun Law History in the U.S.*, *supra* note 68, at 68–71; Firearms Regul. Accountability Coal. (FRAC) v. Garland, 112 F.4th 507, 511 (8th Cir. 2024).

82. *Gun Law History in the U.S.*, *supra* note 68, at 63–65. As early as 1686, New Jersey enacted a law against wearing and concealing weapons, followed by North Carolina and Virginia passing similar laws in the late 1700s, and 38 other states joining the list in the 1800s. *Id.*

83. *Bruen*, 142 S. Ct. at 2189 (Breyer, J., dissenting).

84. See *Gun Violence Brief*, *supra* note 24, at 17–20, 23–25; *Gun Law History in the U.S.*, *supra* note 68, at 58 (noting that early American governments focused heavily on firearms possession, storage, and regulation out of a broader commitment to public safety, "even as it intruded into citizens' private gun ownership and habits").

85. See *What Are Pistol Braces?*, *supra* note 2.

86. See *id.*

87. 18 U.S.C. § 921(a)(30)(C)(iii); Letter from ATF, *supra* note 5.

classification as a pistol or other type of weapon.⁸⁸ Therefore, such a firearm would not be subject to regulation under the NFA.⁸⁹

Since the brace was approved by ATF, there has been an increase in stabilizing braces being used and marketed as shoulder stocks, which users press against their shoulder to provide more stability and accuracy.⁹⁰ Although the brace was not designed for shoulder firing, its rigid rear surface allows users to press it against the shoulder, adding a point of stabilization that makes the firearm easier to aim and fire.⁹¹ To evaluate ATF's role in regulating the brace, it is important to understand the critical distinction between a pistol and a rifle, which is the number of points of contact between the weapon and the shooter's body.⁹² Firing a pistol generally involves one or two hands, with the firearm held in front of the shooter's body, and the hands are typically the only points of contact between the shooter and the pistol.⁹³ In contrast, firing a rifle usually involves four points of contact: both hands, the cheek, and most importantly, the shoulder, which stabilizes the firearm.⁹⁴ Although the stabilizing brace was originally designed to strap to the shooter's forearm, many users instead press the device against the shoulder when firing.⁹⁵ Shoulder contact adds a critical point of stabilization, making the weapon far more aimable by allowing the shooter to control recoil and maintain accuracy in a manner functionally indistinguishable from a traditional rifle stock.⁹⁶ As a result, braces have increasingly been used and perceived by users not as forearm supports, but as shoulder stocks in all but name.⁹⁷

Part of the rationale for the Stabilizing Brace Rule rests on the fact that a device designed and intended so that a shooter can fire an AR-15-type or

88. Letter from ATF, *supra* note 5.

89. *See id.*

90. *See* Gun Violence Brief, *supra* note 24, at 7, 11, 14.

91. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. 6,478, 6,579–98 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79) (explaining that stabilizing braces were originally marketed to assist shooters in controlling pistols and providing stability, and the brace makes it easier to shoot more bullets faster).

92. *See* McHale, *supra* note 13.

93. *See* Frank Melloni, *Why (& How) You Should Learn to Shoot One Handed*, NRA FAM. (Aug. 4, 2022), <https://www.nrafamily.org/content/why-how-you-should-learn-to-shoot-one-handed/> [<https://perma.cc/JM26-7UT9>].

94. *4 Points of Contact: How to Hold an AR-15*, NRA WOMEN (Aug. 9, 2022), <https://www.nrawomen.com/content/4-points-of-contact-how-to-hold-an-ar-15> [<https://perma.cc/HF2R-K5E5>].

95. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. at 6,479.

96. *See* SB TACTICAL, *Pistol Stabilizing Brace Shooting Techniques*, (YouTube, July 29, 2016), <https://www.youtube.com/watch?v=FoTHRWCz64> [<https://perma.cc/8Y33-VJKP>].

97. *See id.* (discussing different ways to mount the gun to make it more stable).

other pistol with those additional points of contact, in particular contact with the shoulder, turns the firearm into a rifle.⁹⁸ The rule explained that “a majority of these firearms . . . are configured as rifles and have a barrel or barrels of less than 16 inches in length,” which puts them “under the purview of the NFA.”⁹⁹ Beginning in 2014, ATF “began to see ‘braces’ being used to fire weapons from the shoulder and new ‘brace’ designs that included characteristics common to shoulder stocks.”¹⁰⁰ “How-to” guides and videos from gun enthusiasts, professionals, and social media influencers began appearing on the Internet, where people reviewed and discussed new stabilizing braces and displayed the widespread use of certain stabilizing braces as shoulder stocks.¹⁰¹

But the Stabilizing Brace Rule also explained that the increased use of stabilizing braces as shoulder stocks is not just because of the habits of particular purchasers, but because these specific braces are marketed for this use.¹⁰² A video for SB Tactical, whose co-founder invented the pistol brace and stated the device was intended to assist disabled shooters, demonstrates various “techniques” for using the “brace,” and shows how the pistol is used as a rifle.¹⁰³ Sellers of certain stabilizing braces identified their braces as “stocks” on their websites.¹⁰⁴

However, ATF’s guidance defining braces and the legality of their use has been unclear.¹⁰⁵ In March 2014, ATF stated although it classifies weapons

98. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,479.

99. See *id.*; 26 U.S.C. § 5845(a) (calling for regulation of rifles with barrels less than 16 inches).

100. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,479.

101. *Id.* at 6,503 n.90 (citing SB TACTICAL, *Pistol Stabilizing Brace Shooting Techniques*, (YouTube, July 29, 2016), <https://www.youtube.com/watch?v=FoTHRWCz64> [<https://perma.cc/RYP3-349N>]); see ATF’s *Assault on the Second Amendment: When Is Enough Enough?: Hearing Before the Subcomm. on Econ. Growth, Energy Pol’y & Regul. Affs. of the H. Comm. on Oversight & Accountability and the Subcomm. on Crime & Fed. Gov’t Surveillance of the H. Comm. on the Judiciary*, 118th Cong. (2023), <https://oversight.house.gov/hearing/%EF%BF%BCatfs-assault-on-the-second-amendment-when-is-enough-enough/> [<https://perma.cc/KCD4-P74G>] [hereinafter *ATF’s Assault on the Second Amendment*]; *supra* note 12.

102. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,494.

103. *Id.* at 6,503–05.

104. Gun Violence Brief, *supra* note 24, at 14–17; SB 47 *Stabilizing Brace*, CENTURY INT’L ARMS, INC., <https://web.archive.org/web/20130906231317/http://centuryarms.biz/proddeptail.asp?prod=OT1648> [<https://perma.cc/CJR5-9UMA>] (last visited Sep. 6, 2013); *Stocks*, CLYDE ARMORY, <https://web.archive.org/web/20230201194553/https://clydearmory.com/gun-parts/ar-15-parts/stocks/> [<https://perma.cc/4RZU-K9GZ>] (last visited Feb. 1, 2023).

105. See *Mock v. Garland*, 75 F.4th 563, 571 (5th Cir. 2023).

“based on their physical design characteristics . . . [and] usage/functionality . . . does influence the intended design, it is not the sole criterion for determining the [weapon’s classification].”¹⁰⁶ ATF specifically stated it does not “classify weapons based on how an individual uses a weapon.”¹⁰⁷ Under this logic, an individual’s improper firing of a braced pistol from the shoulder did not transform the pistol into a short-barreled rifle.¹⁰⁸ Later in October 2014, ATF reversed course, asserting that a weapon’s classification could be altered based on its subjective use rather than its design characteristics.¹⁰⁹ By December 2014, ATF still approved brace stabilizers for use, as long as the device was “used as originally designed and not used as a shoulder stock.”¹¹⁰ In 2015, after receiving requests for clarification, ATF issued an open letter explaining that anyone intending to use a handgun stabilizing brace as a shoulder stock on a pistol, with a rifled barrel shorter than sixteen inches or a smooth bore barrel shorter than eighteen inches, was required to file an ATF Form 1 and pay the applicable tax.¹¹¹ This kind of gun configuration would place the firearm under the NFA.¹¹² In 2017, ATF clarified that occasional or incidental shouldering of a pistol equipped with a stabilizing brace did not constitute a redesign under the NFA and therefore did not reclassify the weapon.¹¹³ By 2019, the agency continued to maintain in criminal cases that firearms with pistol braces were not considered rifles for NFA purposes.¹¹⁴ ATF asserted that manufacturers were making stabilizing braces so consumers would bypass regulation and obtain short-barreled rifles, which makes classification more unclear.¹¹⁵

On June 10, 2021, ATF issued a Notice of Proposed Rulemaking (NPRM) on stabilizing braces, proposing amendments to the definition of “rifle” to clarify

106. Letter from Earl Griffith, Chief, Firearms Tech., ATF, to Sgt. Bradley, Greenwood Police Dep’t, No. 2012-301737 (Mar. 5, 2014), https://soldiersystems.net/blog1/wp-content/uploads/2014/04/ATF-FTB_SB15.pdf [<https://perma.cc/FK5T-XWKX>].

107. *Id.*

108. *See id.*

109. *Mock*, 75 F.4th at 571 (quoting “Letter from ATF #2014-302492” (Oct. 28, 2014)).

110. *See id.*

111. Max M. Kingery, *Open Letter on the Redesign of “Stabilizing Braces,”* ATF (Jan. 16, 2015), https://downloads.regulations.gov/ATF-2021-0002-131836/attachment_7.pdf [<https://perma.cc/KTN7-QX73>].

112. *See id.*

113. *Mock*, 75 F.4th at 572 (quoting “Letter from ATF #9000:GM, 5000” (Mar. 27, 2017)).

114. *See id.* (“ATF letters do correctly state they consider a firearm with a pistol brace to not be a rifle under the NFA for purposes of the NFA.”).

115. *See* Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. 6,478, 6,497, 6,503 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79).

when a firearm equipped with a stabilizing brace qualifies as a rifle.¹¹⁶ These characteristics would be evaluated using the criteria set forth in “ATF Worksheet 4999: Factoring Criteria for Rifled Barrel Weapons with Accessories Commonly Referred to as Stabilizing Braces.”¹¹⁷ The NPRM noted that while ATF typically does not classify standalone, unregulated components or accessories under the GCA or NFA, certain additions to a firearm may alter its legal classification.¹¹⁸ This can occur when (1) the common use of a component or accessory provides insight into whether the manufacturer’s stated design intent aligns with its actual intent, and (2) the design or function of the attached component causes the firearm to meet a specific statutory definition.¹¹⁹

The proposed worksheet was in response to criticism that ATF had not clearly articulated its method for applying classification criteria.¹²⁰ The worksheet was intended to help manufacturers and individuals determine whether such weapons would be classified as short-barreled rifles under the NFA.¹²¹ The worksheet assigned point values to specific criteria to determine whether a stabilizing brace was suitable for shouldering and whether the firearm was designed and intended to be fired from the shoulder.¹²² Specifically, the worksheet scored features from zero to four points, signaling a spectrum from minor to decisive indicators of shoulder-fired intent, and separated the analysis into “Accessory Characteristics” and “Configuration of Weapon.”¹²³ A firearm reaching four or more points in either section would be deemed a rifle, and if paired with a barrel under sixteen inches, it would be deemed a NFA-regulated short-barreled rifle.¹²⁴ The NPRM clarified that the proposed criteria did not apply to “pistol grip shotguns,” because those firearms are designed to be fired with two hands, lack a shoulder stock, and are not intended for one-handed use.¹²⁵ Accordingly, although stabilizing braces were originally designed to facilitate single-handed firing, in practice, their addition enables shoulder firing, making such firearms with barrels under eighteen inches subject to NFA regulation as short-barreled shotguns.¹²⁶

116. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826 (proposed June 10, 2021) (to be codified at 27 C.F.R. §§ 478–79).

117. *Id.* at 30,851.

118. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. at 6,495.

119. *Id.*

120. *See id.* at 6,495.

121. *See id.* at 6,495–96.

122. *Id.*

123. *Id.* at 6,496.

124. *Id.*

125. *Id.*

126. *Id.*

After a comment period, in which the agency received hundreds of thousands of (mostly negative) comments, ATF published the Final Rule.¹²⁷ The Final Rule abandoned the points-based framework outlined in the Proposed Rule and instead adopted a six-factor balancing test that evaluated factors ranging from the firearm's weight when equipped with a stabilizing brace to marketing, promotional materials, indicating the intended use of the weapon and any information on how the attachment is likely to be used by the general community.¹²⁸ The Final Rule went into effect on January 31, 2023, but ATF allowed a grace period of four months, giving owners of weapons that were then considered short-barreled rifles multiple opportunities and options for compliance, including registration under the NFA, so they could avoid any criminal penalties.¹²⁹

In its Final Rule, ATF stated that this rule conveys to the public the objective design features and other factors that indicate “a weapon is in fact a firearm or short-barreled rifle under the [NFA and GCA.]”¹³⁰ ATF claimed that the revised definition in its Final Rule is consistent with the statutory provision that firearms with an attached “stabilizing brace” can possess objective design features that make them “rifles.”¹³¹ If a firearm equipped with a stabilizing brace satisfies the definition of a rifle under the factors outlined in the Final Rule, it may also qualify as a short-barreled rifle depending on the barrel length, thereby subjecting it to additional requirements under the NFA and GCA.¹³² ATF revised the definition of “rifle” to include weapons with a rifled barrel equipped with an accessory, a stabilizing brace designed to aid one-handed firing but that, based on objective design features, also enables shoulder firing.¹³³ ATF also stated that short-barreled rifles are “dangerous and unusual due to both their concealability and their heightened ability to cause damage.”¹³⁴ Conversely, a firearm fitted with a brace was not considered a rifle under the relevant statutes if it is not designed,

127. *Id.* at 6,478.

128. *See id.* at 6,512, 6,480; *ATF's Assault on the Second Amendment*, *supra* note 101 (noting that the congressional record of a House Judiciary and Oversight joint subcommittee hearing, held on March 23, 2023, contained a compilation of such videos); *Mock v. Garland*, 75 F.4th 563, 567 (5th Cir. 2023).

129. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. 6,478, 6,478, 6,553 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79).

130. *Id.* at 6,478.

131. *Id.* at 6,480.

132. *See id.*

133. *Id.*

134. *Id.* at 6,499 (noting that since 2015, about sixty-three firearms with stabilizing braces have been identified in criminal investigations, and there are 105 firearms cases or investigations involving braced weapons).

made, or intended to be fired from the shoulder.¹³⁵ The Final Rule did not ban stabilizing braces or prohibit firearms equipped with them regardless of their classification.¹³⁶ The rule treated guns with the accessory like short-barreled rifles, which is a weapon that has been heavily regulated since the 1930s.¹³⁷ Proponents of the rule argued that this ATF action was reasonable and consistent with Congress's intent in the NFA because shoulder stabilization makes pistols far more aimable, transforming them into weapons capable of accurate and deadly fire at distances far beyond ordinary handgun use.¹³⁸

II. FRAMING THE ADMINISTRATIVE LAW DEFICIENCIES

A. *Logical Outgrowth Doctrine*

To assess the validity of ATF's Final Stabilizing Brace Rule, the Fifth Circuit applied the logical outgrowth doctrine in *Mock v. Garland*,¹³⁹ which requires that a final rule be a reasonable extension of the agency's proposed rule so that interested parties have fair notice and an opportunity to comment.¹⁴⁰ Under the APA, whenever an agency decides to formulate, amend, or repeal a rule, it must first publish a NPRM setting forth "either the terms or substance of the proposed rule or a description of the subjects and issues involved."¹⁴¹ Once an agency researches the issues and determines whether a new rule is necessary, it often issues a NPRM.¹⁴² After the public comment period closes, the agency reviews all the comments and conducts an analysis.¹⁴³ There may be instances where an agency will offer a second round of notice-and-comment, especially in situations where it appears that the final rule may differ substantially from the proposal.¹⁴⁴ A rule is considered a logical outgrowth of a proposed rule when those affected could have reasonably foreseen the potential change and as a result, could have submitted comments addressing it during the notice-and-comment

135. *See id.* at 6,480 ("[A] majority of the existing firearms equipped with a 'stabilizing brace' are likely to be classified as 'rifles' because they are configured for shoulder fire based on the factors described in this rule.").

136. *See id.*

137. *See* Whitehurst, *supra* note 22.

138. *See* Gun Violence Brief, *supra* note 24, at 5, 17–19, 24–25.

139. 75 F.4th 563 (5th Cir. 2023).

140. *Id.* at 578, 585–86 (citing *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1107 (4th Cir. 1985)).

141. Administrative Procedure Act, 5 U.S.C. §§ 553(b)(3), 551(5).

142. *See generally* Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING (Am. Bar Ass'n, 6th ed. 2018) (describing the general rulemaking procedure in American politics).

143. *See id.*

144. *See id.*

period.¹⁴⁵ The logical outgrowth doctrine inquiry hinges on whether regulated parties should have anticipated the final rule based on the notice provided.¹⁴⁶ An agency “must describe the range of [regulatory] alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on,” and notice-and-comment rulemaking will fail to produce “better-informed agency decisionmaking.”¹⁴⁷ If the final rule departs so substantially from the agency’s proposed rule that the public lacked adequate notice of the issues under consideration, a court may invalidate the rule on the basis of insufficient notice.¹⁴⁸ In *Chocolate Manufacturers Ass’n v. Block*,¹⁴⁹ the Fourth Circuit held that the USDA’s notice was inadequate because the proposed rule did not propose a change in the previous regulation that explicitly allowed flavored milk and did not indicate that its elimination was under consideration.¹⁵⁰ The court held that the final rule’s elimination of flavored milk was not a “logical outgrowth” of the proposed rule, given the history of flavored milk in USDA programs and the specificity of the preamble.¹⁵¹ The preamble to the proposed rule discussed the sugar content of cereals and fruit juices but did not mention flavored milk.¹⁵² The court reasoned that the USDA’s notice was insufficient because it failed to alert the Chocolate Manufacturers Association to the possibility of removing chocolate milk.¹⁵³ The final rule’s removal of flavored milk was not a “logical outgrowth” of the proposed rule because it materially altered the issues involved without adequate notice.¹⁵⁴ The rule was remanded to USDA with instruction to allow another round of comments.¹⁵⁵

In *Small Refiner Lead Phase-Down Task Force v. EPA*,¹⁵⁶ a trade group representing small refiners challenged an EPA rule setting lead-content limits for leaded gasoline and redefining which refineries qualified as “small.”¹⁵⁷ The August 1982 EPA proposal defined “small refinery” using production limits measured over the most recent calendar quarter, while the October 1982 final rule added

145. *Tex. Ass’n of Mfrs. v. U.S. Consumer Prod. Safety Comm’n*, 989 F.3d 368, 381–82 (5th Cir. 2021).

146. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546–50 (D.C. Cir. 1983).

147. *Id.* at 549.

148. Lubbers, *supra* note 142.

149. 755 F.2d 1098 (4th Cir. 1985).

150. *Id.* at 1102.

151. *Id.* at 1107.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 705 F.2d 506 (D.C. Cir. 1983).

157. *Id.* at 511.

a “past production” requirement and other eligibility restrictions.¹⁵⁸ The DC Circuit held that EPA provided adequate notice of the past production requirement, but failed to provide adequate notice of other aspects of the final rule, including a “past ownership” requirement and a stricter interim lead standard.¹⁵⁹ The court reasoned that small refineries could reasonably foresee the past production requirement because the proposal signaled EPA’s concern with closing loopholes in the definition of small refiners.¹⁶⁰ By contrast, the court held that EPA failed to provide fair notice of a separate “past ownership” requirement and of a stricter interim lead-content standard, neither of which was reasonably foreseeable from the proposal.¹⁶¹ The court rejected EPA’s reliance on general statements reserving the right to make changes.¹⁶²

The Fifth Circuit ruled in *Mock* that the Final Rule bore almost no resemblance in manner or kind to the proposed rule, and therefore, the Final Rule failed the logical outgrowth test and violated the APA.¹⁶³ The Fifth Circuit’s analysis in *Mock* closely tracks the logical outgrowth principles articulated in *Chocolate Manufacturers* and *Small Refiner*.¹⁶⁴ As in *Chocolate Manufacturers*, where the USDA’s proposal affirmatively signaled that flavored milk would remain permissible, ATF’s proposed Stabilizing Brace Rule repeatedly emphasized implementing an objective worksheet designed to clarify classification outcomes and provide regulated parties with predictable guidance.¹⁶⁵ The Final Rule’s abandonment of that worksheet in favor of an open-ended, multi-factor balancing test altered the regulatory approach.¹⁶⁶

158. *Id.* at 548, 552.

159. *Id.* at 547–49.

160. *See id.* at 547–48.

161. *Id.* at 542–44, 548–49.

162. *See id.* at 549–50; *see also* Debra T. Landis, Annotation, *What Constitutes Adequate Notice of Federal Agency Rule as Against Objection That Rule Adopted Differed in Substance from That Published as Proposed in Notice*, 96 A.L.R. Fed. 411 Art. III (1990) (collecting cases addressing changes between proposed and final rules when they exceed adequate notice).

163. *Mock v. Garland*, 75 F.4th 563, 585–86 (5th Cir. 2023); 5 U.S.C. § 553(c) (stating that “the agency shall give interested persons an opportunity to participate in the rule making” and “shall incorporate in the rules adopted a concise general statement of their basis and purpose”).

164. *Mock*, 75 F.4th at 583–84, 586; *see Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1105–07 (4th Cir. 1985); *Small Refiner*, 705 F.2d at 547.

165. *See Chocolate Mfrs.*, 755 F.2d at 1107; *Mock*, 75 F.4th at 583–84; Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826, 30,828 (proposed June 10, 2021) (to be codified at 27 C.F.R. pt. 478–79).

166. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. 6478, 6480 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79); *see Mock*, 75 F.4th at 574, 583–84.

The deficiencies that the Fifth Circuit identified also parallel those issues in *Small Refiner*.¹⁶⁷ In *Mock*, the court emphasized that ATF's Final Rule replaced a system of objective criteria with a subjective balancing framework that lacked metrics, examples, or clear thresholds, leaving manufacturers and owners unable to determine whether a firearm configuration was lawful.¹⁶⁸ As in *Small Refiner*, where EPA adopted requirements that were not reasonably foreseeable from the proposal, ATF's shift from an objective worksheet to a subjective balancing test lacking standards restructured the regulatory framework in a manner that deprived regulated parties of meaningful notice.¹⁶⁹ The regulated parties were unable to meaningfully comment on the feasibility, scope, and consequences of the final approach.¹⁷⁰

B. Reliance Interests and Arbitrary and Capricious Analysis

The Eighth Circuit's analysis of the Final Stabilizing Brace Rule in *Firearms Regulatory Accountability Coalition (FRAC) v. Garland*¹⁷¹ reflects the arbitrary and capricious principles under the APA, in which agencies are required to provide a reasoned explanation for changes in policy, especially when departing from established precedent to avoid being struck down.¹⁷² An agency may not simply disregard rules that are still in existence nor depart from a prior policy without stating their intent to do so.¹⁷³ The agency must show there are good justifications for the new policy; however, the agency is not required to prove to the court that the rationale for the new policy is superior to that of the previous one.¹⁷⁴ The agency must at minimum demonstrate that it recognizes it is revising its prior stance and provide a reasoned explanation showing valid grounds for adopting the new policy.¹⁷⁵ Additionally, longstanding policies can create substantial reliance interests that must be considered and weighed as part of the decisionmaking process.¹⁷⁶

In *FCC v. Fox Television Stations, Inc.*,¹⁷⁷ the Supreme Court addressed whether the FCC's change in policy was arbitrary and capricious under the

167. See *Small Refiner*, 705 F.2d at 547–48.

168. See *Mock*, 75 F.4th at 585.

169. See *Small Refiner*, 705 F.2d at 549; *Mock*, 75 F.4th at 583–85.

170. See *Mock*, 75 F.4th at 585–86.

171. 112 F.4th 507 (8th Cir. 2024).

172. See *id.* at 519; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

173. *Fox*, 556 U.S. at 515.

174. *Id.*

175. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citing *Fox*, 556 U.S. at 515).

176. *Id.* at 221–22 (citing *Fox*, 556 U.S. at 515–16).

177. 556 U.S. 502 (2009).

APA. The case concerned the FCC's shift from a longstanding policy that generally permitted a single "fleeting" use of an expletive on broadcast television, to a new policy that did not distinguish between isolated and repeated uses of offensive words.¹⁷⁸ The Court held that the FCC's new enforcement policy was neither arbitrary nor capricious because the Commission acknowledged that its recent actions were changing old rules.¹⁷⁹ Also, the agency had a fully rational basis for expanding the scope of its enforcement activity and stepping away from its old policy.¹⁸⁰ The agency's reasons for expanding the scope of its enforcement activity were rational because there was no solid basis for the prior distinction between literal and nonliteral uses of offensive words.¹⁸¹ The Court held there is a meaningful difference between invalidating agency action under the APA for failing to present empirical data that is reasonably available, and demanding evidence that cannot be easily obtained.¹⁸² The agency's choice to retain some discretion does not make its regulation of deliberate, shocking uses of offensive language arbitrary or capricious, particularly during certain programming that is more likely to draw the attention of children.¹⁸³

In *Encino Motorcars, LLC v. Navarro*,¹⁸⁴ the Supreme Court analyzed whether a 2011 Department of Labor regulation, which interpreted the Fair Labor Standards Act exemption for certain automobile dealership employees, was arbitrary and capricious.¹⁸⁵ The Court held that the Department of Labor's regulation was arbitrary and capricious because it lacked the required reasoned explanation, given the Department's change in position and the significant reliance interests by those affected.¹⁸⁶

178. *Id.*

179. *See id.* at 517 (explaining how the Commission explicitly disavowed the past rules as "no longer good law").

180. *See id.* at 518 (holding that the agency reasonably concluded the prior distinction between literal and nonliteral uses of offensive language was illogical, unsustainable, and "at odds with the Commission's overall enforcement policy").

181. *Id.* at 517–18.

182. *See id.* at 519 (distinguishing the reasonable availability of empirical data concerning the costs and benefits of mandatory passive automobile restraints in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45–56 (1983)).

183. *Id.* at 521.

184. 579 U.S. 211 (2016).

185. *See id.* at 214.

186. *See id.* at 222–23 (explaining that a summary discussion would be sufficient in other circumstances, but in this instance, there were decades of industry reliance on the Department's prior policy, and so "the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy").

The Eighth Circuit's analysis of the Final Stabilizing Brace Rule in *FRAC*¹⁸⁷ reflects the arbitrary and capricious principles articulated in *Fox* and *Encino Motorcars*.¹⁸⁸ As *Fox* makes clear, although an agency may change policy, it must acknowledge that change and offer a reasoned explanation for abandoning prior regulatory distinctions.¹⁸⁹ In *FRAC*, the Eighth Circuit concluded that ATF failed to meet the standard when it replaced years of classification guidance with a multi-factor test that relied on marketing and community use without explaining why those earlier approaches were no longer adequate.¹⁹⁰ The court emphasized that an agency's retention of broad discretion does not excuse its obligation to articulate detailed standards and explain how its new policy flows from its statutory mandate.¹⁹¹

The Eighth Circuit's reasoning aligns closely with *Encino Motorcars*, which stressed that agencies must seriously consider the reliance interests when changing longstanding regulatory positions.¹⁹² In *FRAC*, the court found that ATF inadequately addressed the substantial reliance interests of manufacturers and firearm owners who structured their conduct around prior classification letters and guidance treating stabilizing braces as lawful accessories.¹⁹³ The court faulted the agency for not weighing the costs of disruption or explaining why those interests were outweighed by the benefits of the new rule.¹⁹⁴ Under *Encino Motorcars*'s framework, the Final Stabilizing Brace Rule was arbitrary and capricious not because the ATF lacked authority to regulate but because it failed to engage in reasoned decisionmaking that is required when an agency reverses course in a way that impacts settled expectations.¹⁹⁵

There are instances where agencies have been able to cure the arbitrary and capricious deficiencies when making rules. The FCC's 2003 Triennial Review Order (TRO) attempted to redefine incumbent local exchange carriers' unbundling obligations under Section 251 of the Telecommunications Act of 1996 by setting nationwide impairment findings.¹⁹⁶ The D.C. Circuit held that the key provisions of the TRO were arbitrary and unlawful because regulated parties could not predict their obligations from the rule's text due to a lack of uniform

187. *Firearms Regul. Accountability Coal. (FRAC) v. Garland*, 112 F.4th 507, 519 (8th Cir. 2024).

188. *See Fox*, 556 U.S. at 513–15; *Encino Motorcars*, 579 U.S. at 211.

189. *Fox*, 556 U.S. at 515.

190. *See FRAC*, 112 F.4th at 523–24.

191. *Id.* at 519.

192. *See Encino Motorcars*, 579 U.S. at 221–22.

193. *See FRAC*, 112 F.4th at 520–21.

194. *Id.*

195. *See id.* at 525–26; *Encino Motorcars*, 579 U.S. at 222–23.

196. *See U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554, 561–63 (D.C. Cir. 2004) (describing the Triennial Review Order's impairment and delegation framework).

impairment criteria.¹⁹⁷ To cure those defects, the FCC did not rely on enforcement guidance but instead issued the Triennial Review Remand Order (TRRO) through renewed APA notice-and-comment rulemaking, expressly acknowledging its change in position, providing clearer federal standards and requirements, and inviting more public input on the remanded issues.¹⁹⁸ As shown by the Ninth Circuit's decision in *Fones4All Corp. v. FCC*,¹⁹⁹ courts have treated the TRRO as an enforceable, operative rule following remand, demonstrating that an agency can preserve its regulatory goal while fixing a vague rule by replacing subjective, discretionary balancing with specific, self-applying criteria developed in the rulemaking record.²⁰⁰ The court explained that the TRRO "was subject to full notice and comment."²⁰¹ The TRRO was upheld in *Covad Communications Co. v. FCC*,²⁰² where the D.C. Circuit found that the Commission "reasonably concluded" Competitive Local Exchange Carriers (CLECS) were no longer "impaired" without unbundled access to [mass market local switching]."²⁰³ Accordingly, the TRRO suggests that when a rule is found deficient, an agency can cure those defects by undertaking new notice-and-comment rulemaking that replaces vague standards with clearer and predictable standards, which underscores the shortcomings of ATF's approach in the Stabilizing Brace Rule.²⁰⁴

III. JUDICIAL REVIEW

A. *Fifth and Eighth Circuit Court Analysis*

Two Circuit Courts have issued decisions invalidating the Final Stabilizing Brace Rule. In *Mock*, as discussed above, the Fifth Circuit reviewed ATF's Final Rule, which defined firearms with stabilizing braces as short-

197. See *id.* at 570 (explaining that "the Commission cannot proceed by [having] very broad national categories where there is evidence that markets vary decisively . . . without exploring the possibility of more nuanced alternatives and reasonably rejecting them"). The court suggested that the Commission could have "successfully identif[ied] criteria based . . . on an [incumbent local exchange carrier's] track record for speed and volume in a market." See *id.*

198. See Triennial Review Remand Order, 20 FCC Rcd. (Feb. 4, 2005) (codifying the replacement adopted on remand), https://docs.fcc.gov/public/attachments/FCC-20-22A1_Rcd.pdf [<https://perma.cc/TTQ4-43E8>].

199. 550 F.3d 811 (9th Cir. 2008).

200. See *id.* at 820–21.

201. See *id.* at 821.

202. 450 F.3d 528 (D.C. Cir. 2006).

203. *Id.* at 547.

204. See *id.* at 549–50.

barreled rifles under the NFA and GCA.²⁰⁵ The Final Rule replaced the Proposed Rule's objective Worksheet 4999 with a subjective six-factor test.²⁰⁶ ATF explained in its Final Rule that "[a]ll of the objective design features and factors listed in the rule that indicate the weapon is designed, made, and intended to be fired from the shoulder are derived from the NPRM and proposed Worksheet 4999."²⁰⁷ In analyzing the Final Rule, the court examined the text and history of the NFA and the GCA, and also laid out in detail the worksheet point system regarding the proposed rule.²⁰⁸ The court held that the Rule failed the logical outgrowth test, because the shift from Worksheet 4999 to a subjective six-factor test was unforeseeable and prejudiced the plaintiffs.²⁰⁹ The Fifth Circuit reversed the denial of a preliminary injunction and remanded for further proceedings.²¹⁰

A NPRM must clearly define the issues for consideration so that interested parties can reasonably foresee the agency's eventual decision based on the original notice.²¹¹ In regards to ATF's rule, the Fifth Circuit concluded that the Final Rule bore little resemblance to the NPRM and provided an analysis of their differences.²¹² According to the court, while the Worksheet permitted individuals to evaluate their own firearms and provided an objective framework to contest ATF's conclusions, the Final Rule instead granted ATF full discretion to apply a subjective balancing test, assessing six vague factors without a clear or measurable standard.²¹³ Moreover, the court concluded that "[n]othing in the Proposed Rule put the public on notice that the Worksheet," which was the main aspect of the Proposed Rule, "would be replaced with a six-factor test based on almost entirely subjective criteria."²¹⁴ Nor was the public put on notice that ATF planned to revise its criteria dramatically.²¹⁵ The new standard was "so expansive" that it was expected to bring

205. See *Mock v. Garland*, 75 F.4th 563, 566–67 (5th Cir. 2023).

206. See *Factoring Criteria for Firearms with Attached "Stabilizing Braces,"* 88 Fed. Reg. 6478, 6480, 6513 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79).

207. *Id.* at 6480.

208. *Mock*, 75 F.4th at 573–74.

209. *Id.* at 578, 586.

210. *Id.* at 588.

211. See *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021) (citing *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019)).

212. See *Mock*, 75 F.4th at 583–84 ("[M]erely informing the public, in a generic sense, of the broad subjects and issues the Final Rule would address is insufficient.").

213. *Id.* at 584.

214. *Id.* at 583.

215. *Id.*

approximately 99% of stabilizing braces on the market under heightened regulation and to increase the Rule's economic impact by more than \$100 million.²¹⁶

ATF argued that the factors in the Final Rule were derived from the NPRM and Proposed Worksheet; however the court held that "[a]gency notice must describe the range of alternatives being considered with reasonable specificity."²¹⁷ The court observed that the Final Rule could extend to certain AR-style pistols lacking an obvious brace attachment, creating uncertainty as to whether owners had adequate notice that possession without registration could trigger liability.²¹⁸ ATF sought to justify its changes in the Final Rule as responsive to the comments and by acknowledging that Worksheet 4999 was ambiguous and prone to subjective application.²¹⁹ The agency argued that this was why it adopted a six-factor test focused on objective design features to determine whether a firearm was intended be fired from the shoulder.²²⁰ The test evaluated the weight and length of the firearm while it is equipped to the stabilizing brace affixed to it, the length of pull, the presence and configuration of shoulderable surface area, sight or scope design and usability when shouldered, and adjustability features consistent with rifle design.²²¹ But, the court was not persuaded.²²² It asserted that the six-factor test did not provide meaningful clarity about what established an impermissible stabilizing brace under the Rule, citing ATF's own assertions that the objective criteria "are not themselves determinative" and that the adjudications are made "on a case-by-case basis."²²³ The court also determined that ATF provided no explanatory reasoning in its contemporaneous classifications under the Final Rule and failed to include even one example of a brace-equipped handgun that would remain lawful under the new standard.²²⁴ The Final Rule also introduced new, unrelated criteria including third party marketing, community usage trends, and other actors' conduct,

216. *Id.* at 583–84 (noting that when commentators were given the Proposed Rule there were many comments displaying "general dissatisfaction" with the use of the worksheet; however, ATF did not "give notice that it was considering getting rid of the Worksheet for a vaguer test").

217. *See id.* at 584 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

218. *Id.* at 585.

219. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. 6478, 6513 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79).

220. *See id.*

221. *Id.*

222. *See Mock*, 75 F.4th at 585.

223. *Id.* (quoting Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. at 6495, 6518).

224. *Id.*

that were absent from the Proposed Rule.²²⁵ The court held that these changes were neither logically consistent or a foreseeable outgrowth of the original notice.²²⁶

The Eighth Circuit also analyzed and struck down ATF's rule on substantive grounds in *FRAC*.²²⁷ The court examined whether ATF's Final Rule reclassifying pistols with stabilizing braces as short-barreled rifles was arbitrary and capricious under the APA.²²⁸ The court reasoned that agencies must rest their decisions on clear, well-reasoned standards and cannot base their reasoning on considerations outside Congress's intent or overlook key elements of the issue.²²⁹ The Final Rule began by requiring an evaluation of any "weapon that is equipped with an accessory, component, or other rearward attachment ([such as] a 'stabilizing brace')" to determine whether it offers a surface area that enables the weapon to be fired from the shoulder.²³⁰ The plaintiffs argued this first step was arbitrary and capricious because ATF declined to define clear, objective criteria, and the court agreed with that assessment.²³¹ The opinion outlined how guesswork like this "fails to create an identifiable metric that members of the public can use to assess whether their weapon falls within the Final Rule's definition of a 'rifle.'"²³² In *Tripoli Rocketry Ass'n v. ATF*,²³³ for example, the D.C. Circuit held that although ATF was not required to adopt a mathematical definition of "deflagration," its failure to explain how it determined whether a material met that standard rendered the classification arbitrary and capricious.²³⁴ Like the agency action in *Tripoli Rocketry Ass'n*, ATF's failure to articulate clear, administrable criteria in the Final Rule left regulated parties without a meaningful standard, rendering the rule arbitrary and capricious.²³⁵

225. *Id.* at 585–86.

226. *Id.* at 586.

227. *See* Firearms Regul. Accountability Coal. (FRAC) v. Garland, 112 F.4th 507, 511 (8th Cir. 2024).

228. *See id.* at 519–24.

229. *Id.* at 519.

230. *Id.* at 520 (quoting Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. 6478, 6575 (Jan. 31, 2023)).

231. *See id.* (explaining that the ATF did not specify the minimum surface area necessary for firing).

232. *Id.* at 520, 524 (stating that "the marketing and community-use factors are arbitrary and capricious because they are internally inconsistent" and do not provide an "intelligible explanation" that shows "reasoned decisionmaking").

233. 437 F.3d 75 (D.C. Cir. 2006).

234. *See id.* at 81.

235. *FRAC*, 112 F.4th at 520, 524.

B. *Distinguishing ATF's Stabilizing Brace Rule from Garland v. Cargill*

Recent Supreme Court decisions reviewing ATF firearms regulation provide important context for evaluating the Stabilizing Brace Rule. In particular, the stabilizing brace litigation cases are more similar to the recent ghost gun case in *Bondi v. VanDerStok*²³⁶ than to the challenges to ATF's bump stock ban that were successful in *Garland v. Cargill*.²³⁷ *Cargill* addressed a relatively straightforward issue concerning how bump stocks operate and whether they fall within the statutory definition of a "machine[]gun," which is defined with some precision.²³⁸ In contrast, *VanDerStok* involved less specific statutory language and required the exercise of judgment to determine what qualifies as a "firearm" under the GCA and when an item is considered "readily [] convert[ible]" into one.²³⁹ The pistol brace rule litigation has differed from *Cargill* because *Cargill* interpreted a precisely-defined statutory term, and based on a mechanical analysis of how bump stocks operate, finding them to be outside the statute.²⁴⁰ In contrast, courts reviewing the brace rule have not so far questioned ATF's statutory authority to regulate short barreled rifles, instead they have found ATF's rulemaking to be defective.²⁴¹ Those courts focused on how ATF exercised that authority, faulting the agency for changing its regulatory approach in ways that left regulated parties unable to determine in advance whether a given firearm configuration remained lawful.²⁴² Unlike in *Cargill*, which turned on whether a device fit neatly inside a clearly defined statutory term, the Final Stabilizing Brace Rule was invalidated by the Fifth Circuit on APA fair-notice failures, including the lack of logical outgrowth from the proposal, and by the Eighth Circuit because ATF replaced an objective worksheet with a subjective, standardless balancing test, while providing no metrics or examples of what remained lawful.²⁴³ Those arguments were not at issue in *Cargill*, in which the Court compared what it considered clear statutory language with how bump stocks mechanically operate.²⁴⁴ The Court did not review whether ATF changed its policy in a vague or unpredictable way, and it was not analyzing whether the public

236. 145 S. Ct. 857 (2025).

237. *Garland v. Cargill*, 144 S. Ct. 1613 (2024).

238. See Willinger, *supra* note 20.

239. See *id.*

240. See *Cargill*, 144 S. Ct. at 1618.

241. See *Firearms Regul. Accountability Coal. (FRAC) v. Garland*, 112 F.4th 507, 511 (8th Cir. 2024) (explaining the purpose of the NFA and the delegation to ATF to regulate firearms).

242. See *id.* at 524.

243. See *Mock v. Garland*, 75 F.4th 563, 585 (5th Cir. 2023); *FRAC*, 112 F.4th at 520.

244. See *Cargill*, 144 S. Ct. at 1619.

had fair notice of what remained legal.²⁴⁵ The Court also never asked whether some bump stocks might still be lawful accessories because under ATF's bump stock rule, such firearms were either a machinegun or not based on the statutory definition.²⁴⁶

The stabilizing brace litigation resembles *VanDerStok*, where the Court evaluated the agency's line drawing and judgment under open-ended statutory language, rather than a formal definitional inquiry under the statute.²⁴⁷ In *VanDerStok*, the Court addressed whether partially completed frames and receivers qualified as "firearm[s]" under the GCA, a statute that requires judgment about when an object is "readily convertible" into a regulated weapon.²⁴⁸ The Court's analysis did not focus on mechanical operation of the statute, but instead on the agency's interpretation of statutory standards.²⁴⁹ The same issues govern challenges to the Final Stabilizing Brace Rule. Like the rule in *VanDerStok*, the brace rule does not turn on statutory definition, but on a multi-factor inquiry into how a firearm is configured, marketed, and used.²⁵⁰ Courts reviewing the brace rule have examined whether ATF articulated intelligible standards and exercised its discretion in a reasoned manner, rather than asking whether a brace mechanically transforms a pistol into a rifle.²⁵¹ This focus on agency judgment and regulatory coherence places the stabilizing brace litigation within the analytical framework of *VanDerStok*, not *Cargill*.²⁵²

IV. RECOMMENDATIONS FOR A REVISED RULE THAT WITHSTANDS APA REVIEW

A. Anchoring the Revised Rule in Objective Metrics and Examples

ATF should issue a Supplemental NPRM that provides objective, measurable criteria such as firearm length, weight, and rear-surface design along with concrete examples of covered braces.²⁵³ This transparency would align

245. *See id.* at 1618–19.

246. *See id.*

247. *See* Bondi v. VanDerStok, 145 S. Ct. 857, 863 (2025).

248. *See id.* at 869.

249. *See id.*

250. *See* Firearms Regul. Accountability Coal. (FRAC) v. Garland, 112 F.4th 507, 524 (8th Cir. 2024).

251. *See id.*

252. *VanDerStok*, 145 S. Ct. at 874–75.

253. *See* Mock v. Garland, 75 F.4th 563, 584–85 (5th Cir. 2023) (explaining that the Final Rule was not a logical outgrowth where ATF swapped the worksheet framework for a materially different multi-factor standard).

with *Mock*, ensuring that parties can foresee the agency's final approach.²⁵⁴ Under the logical outgrowth doctrine, if the final rule is found to be the logical outgrowth of the proposed rule, the court will find that there is adequate notice, otherwise it will strike the rule down as violating the APA's notice requirement.²⁵⁵ To withstand APA scrutiny, ATF should ensure the revised Final Stabilizing Brace Rule clearly stems from the proposed rule.²⁵⁶ To meet the *FRAC* standards, there needs to be a clear analysis of the metrics (e.g., what amount of surface area or what length triggers the NFA status).²⁵⁷ ATF must explicitly explain why and how each criterion furthers the statutory goals.²⁵⁸ For example, if a brace effectively allows a shooter to fire from the shoulder it directly implicates the NFA's aim to regulate easily concealable rifles.²⁵⁹ Showing that ATF meaningfully weighed the costs and benefits of regulation, and that the regulation is cost-effective, will help the rule withstand APA challenges.²⁶⁰

B. Accounting for Reliance Interests in Regulatory Reversal with Temporal Specificity

Courts require agencies to account for reliance interests when reversing a longstanding policy.²⁶¹ Millions relied on ATF's prior stance that attaching stabilizing braces did not convert pistols into rifles.²⁶² There are several risks of ignoring such reliance interests, and to avoid being found arbitrary and capricious, ATF should quantify the scope of affected firearms, disclose compliance burdens, and adopt mitigation measures such as phased deadlines and more expansive fee waivers.²⁶³ The agency could also make an exception for disabled shooters who use the braces as intended for accessibility

254. *See id.*

255. *See* Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (2002).

256. *See id.* at 214–15.

257. *See* Firearms Regul. Accountability Coal. (FRAC) v. Garland, 112 F.4th 507, 511 (8th Cir. 2024).

258. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 45–46 (1983) (reasoned decisionmaking requirement under arbitrary and capricious review); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (agency must acknowledge change and give a reasoned explanation).

259. *See* 26 U.S.C. § 5845(c) (defining a rifle as “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder”).

260. *See id.*

261. *See* Fox, 556 U.S. at 515; Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016).

262. *See* Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 88 Fed. Reg. 6478, 6507 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79).

263. *See* Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1817 (2024).

purposes.²⁶⁴ To avoid creating a broad loophole, such an exception could be limited upon showing documentation of a disability. Addressing reliance interests supports more reasoned decisionmaking and better withstands APA challenges.²⁶⁵ The rule's preamble should specifically address the financial, logistical, and legal burdens of suddenly reclassifying millions of firearms.²⁶⁶ The rule could stagger compliance dates or utilize an improved electronic registration process, ensuring that both the agency and the public can meet any new requirements efficiently.

C. Modeling a Revised Rule on Agencies that Cured Arbitrary Standards

A path for ATF to repair the vacated Final Stabilizing Brace Rule is to follow the approach used by the FCC in addressing the remanded rule in 2005, when the D.C. Circuit vacated agency standards for relying on non-uniform impairment criteria that parties could not apply or predict in *United States Telecommunications Ass'n v. FCC*.²⁶⁷ After the D.C. Circuit vacated portions of the FCC's Triennial Review Order, the Commission cured those defects by issuing the Triennial Review Remand Order through renewed notice-and-comment rulemaking that replaced discretionary balancing with clear, administrable criteria.²⁶⁸ ATF should similarly now issue a supplemental NPRM that states it is revising prior policy and defines quantifiable design benchmarks for braces. Regulatory reversals under the APA depend on clear, objective, codified criteria rather than discretionary, case-by-case guidance or unexplained balancing tests.²⁶⁹ ATF should now issue a supplemental NPRM that expressly acknowledges its policy change, defines measurable design thresholds (e.g., setting a minimum length of pull range, weight, length and specifications of what is being measured) and include specific examples of what constitutes a lawful brace versus a NFA-regulated

264. See *Outdoor Activities and Amenities in Maryland*, MD. DEP'T OF NAT. RES., https://dnr.maryland.gov/publiclands/Pages/accessibleactivities.aspx?activity=accessible_hunting [<https://perma.cc/DLL6-F4FT>] (last visited Apr. 20, 2026) (noting that "[h]unters with mobility impairments may obtain a special permit so they may hunt from a vehicle" which is generally illegal).

265. See Landyn Wm. Rookard, *Misplaced Reliance: Recalibrating the Role of Reliance Interests in Judicial Review of Agency Policy Changes*, 92 UMKC L. REV. 355, 370 (2023).

266. See Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. at 6507.

267. See *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 585 (D.C. Cir. 2004).

268. See Triennial Review Remand Order, 20 FCC Rcd. 2533, 2535–36 (Mar. 3, 2020), https://docs.fcc.gov/public/attachments/FCC-20-22A1_Rcd.pdf [<https://perma.cc/B4M U-48XV>] (codifying the replacement adopted on remand).

269. See *Mock v. Garland*, 75 F.4th 563, 585–86 (5th Cir. 2023).

brace configuration.²⁷⁰ This could be included within an appendix that lists various classifications and examples of approved handguns.²⁷¹ The agency should also provide an analysis of reliance interests and mitigation measures on the rulemaking record to demonstrate reasoned decisionmaking when departing from a prior stance.²⁷² The agency can also include a safe-harbor provision, stating that firearms remaining below those specific thresholds, and marketed solely for one-handed firing or disability assistance, are not NFA regulated rifles.²⁷³ Several agencies have implemented safe-harbor provisions, such as the Securities and Exchange Commission, which provides a safe harbor for selective disclosures if they are corrected in a specified timeframe.²⁷⁴ The APA does not require ATF to abandon regulation, but it does require ATF to regulate with clarity, acknowledgment of reversal, and objective standards the public can reasonably apply.²⁷⁵ By issuing a supplemental NPRM that outlines measurable design thresholds, safe harbors, and specific brace classification examples, ATF can cure both the procedural and arbitrary and capricious defects that were identified by the courts.²⁷⁶ Grounding the rule in empirical realities, including the mass-casualty shootings carried out with stabilizing brace-equipped pistols, underscores the agency's rationale for acting and the public safety stakes at issue, while reinforcing the need for a clear, lawful rule that provides fair notice and withstands APA review.

270. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

271. See *Fones4All Corp. v. FCC*, 550 F.3d 811, 813 (9th Cir. 2008) (treating the FCC's Triennial Review Remand Order, adopted through renewed notice-and-comment rulemaking, as an enforceable rule following remand); Triennial Review Remand Order, 20 FCC Rcd. 2533, 2535–36 (Mar. 3, 2020) (codifying the replacement adopted on remand), https://docs.fcc.gov/public/attachments/FCC-20-22A1_Rcd.pdf [<https://perma.cc/B4MU-48XV>].

272. See *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 543 (D.C. Cir. 2006) (concluding that the Commission reasonably explained its revised standards and determined competitive carriers were no longer impaired without access to mass market local switching).

273. See *Factoring Criteria for Firearms with Attached "Stabilizing Braces"*, 88 Fed. Reg. 6478, 6481 (Jan. 31, 2023) (to be codified at 27 C.F.R. §§ 478–79). Although the Final Rule allowed affected individuals 120 days to comply with the Rule before penalties would apply, a true Administrative Procedure Act safe harbor should instead expressly define the criteria exempting a firearm owner from the Rule's coverage rather than leaving that determination to ATF discretion. See *id.*

274. See 17 C.F.R. § 243.101 (2020).

275. See *Fox*, 556 U.S. at 515.

276. *Fones4All*, 550 F.3d at 820–21.

CONCLUSION

Gun violence remains a profound public health crisis in the United States, with nearly 47,000 firearm-related deaths in 2023.²⁷⁷ The frequency, lethality, and societal impact of mass shootings have contributed to widespread fear and demand for policy response and devices like stabilizing braces were used in several mass shootings.²⁷⁸ The Final Stabilizing Brace Rule represented a significant effort by ATF to address a regulatory gap that allows potentially dangerous configurations of firearms to evade heightened oversight.

However, the current political landscape under President Donald Trump has shifted substantially away from this type of regulatory intervention. Following the Fifth Circuit's decision in *Mock*, the Department of Justice dismissed its appeal, leaving the rule vacated and unenforced.²⁷⁹ The specific recommendations outlined in this paper including clearer, objective metrics for brace classification may fall on deaf ears in the current Administration.

Nonetheless, the legal and policy analysis here offers a blueprint for more defensible and effective regulation under the APA. It is the author's hope that future administrations will be more amenable to following these recommendations and advancing firearm regulations that are both legally sustainable and responsive to the goal of reducing gun violence. By grounding future rulemaking in clear, objective standards, agencies can better satisfy the APA's requirements while avoiding the procedural defects that undermined the Stabilizing Brace Rule.

277. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Mar. 5, 2025), <https://www.pewresearch.org/short-reads/2025/03/05/what-the-data-says-about-gun-deaths-in-the-us/> [https://perma.cc/5TB4-4C4R].

278. Jennifer Mascia, *Are Handguns or Rifles Used More Often in Mass Shootings?*, TRACE (July 18, 2023), <https://www.thetrace.org/2023/07/mass-shooting-type-of-gun-used-data/> [https://perma.cc/296G-DE3X].

279. Benjamin Owen, *DOJ Drops Appeal in Pistol Brace Ban Case*, RELOAD (July 22, 2025, at 16:57 ET), <https://thereload.com/doj-drops-appeal-in-pistol-brace-ban-case/> [https://perma.cc/36VU-89HG].