August 19, 2021

Hon. Merrick Garland, Attorney General
c/o Office of Regulatory Affairs, Enforcement Programs and
Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Ave. NE, Mail Stop 6N-518
Washington DC 20226

VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov

RE: Comments on Behalf of America First Legal Foundation on the Bureau of Alcohol, Tobacco, Firearms, and Explosives' 2021R-05, "Definition of "Frame or Receiver" and Identification of Firearms," 86 Fed. Reg. 27720 (May 21, 2021), Notice of Proposed Rulemaking

Dear Attorney General Garland:

America First Legal Foundation ("AFL") is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and encourage the diffusion of knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. These include the right to possess and carry firearms recognized by and "codified" in the Second Amendment.[1] AFL's mission also includes ensuring that the Executive Branch complies with Article II, Section 3 of the Constitution and faithfully executes the laws enacted by Congress.[2]

We submit these comments on the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") May 21, 2021, Notice of Proposed Rulemaking titled: "Definition of 'Frame or Receiver' and Identification of Firearms." 86 Fed. Reg. 27720 (May 21, 2021), Docket No. ATF 2021R-05 ("NPRM").

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[1] *D.C. v. Heller*, 554 U.S. 570, 592 (2008).

[2] Here, the agency's power to act and how it may act are authoritatively prescribed by the Supreme Court's Second Amendment jurisprudence, *see, e.g., id.* at 576-577, and by the text of the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., which must be construed in accordance with its ordinary public meaning at the time of enactment. *Util. Air Regul. Grp. v. E.P.A.,* 573 U.S. 302, 325 (2014); *see also Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538-539 (2019).

To advance the Biden Administration's radical effort to deny Americans the right to carry firearms for self-defense—a right widely understood to have pre-dated the Constitution itself—ATF has proposed overreaching its authority. Settled and controlling authorities hold that ATF may not lawfully rewrite statutory text, substitute specious history for reasoned decision making, ignore longstanding reliance interests, and fail to discharge its duty to provide our citizens with robust fair notice of what is permissible and what is prohibited.[3] Yet, as demonstrated below, ATF proposes doing all these things. Accordingly, the NPRM should be withdrawn.

I. Summary

The Gun Control Act of 1968 ("GCA") provides in relevant part:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.[4]

To expand ATF's power and restrict Second Amendment rights, the NPRM proposes to rewrite the GCA by designating multiple parts of a single firearm as the "frame or receiver" to classify unfinished receivers as firearms subject to federal regulation. This will allow ATF to separately regulate pistol slides and critical parts of the ubiquitous AR-15 rifle as "firearms."

There is absolutely no statutory warrant for this power grab. To begin, Congress passed the GCA to amend, and pare back, the Federal Firearms Act of 1938 ("FFA"). The FFA and its implementing regulations defined a "firearm" to include "any part or parts of such weapon."[5] The GCA replaced the phrase "any part or parts" with the

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[3]Administrative agencies may not rewrite statutory text. *Util. Air Regul. Grp.*, 573 U.S. at 325; *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297, 307 (2013); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94 (1952) (Frankfurter, J., concurring) ("No authority that has since been given to the President can by any fair process of statutory construction be deemed to withdraw the restriction or change the will of Congress"). Administrative agencies must engage in reasoned decision making, meaning an examination of all relevant data and issues, and then articulating a satisfactory explanation for any action, including a rational connection between the facts found and the choice made, while accounting for reasonable reliance interests. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569-70 (2019); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020); *Encino Motorcars, LLC v. Navarro*,136 S. Ct. 2117, 2126 (2016). Especially with respect to the regulation of rights codified in the Constitution, such as Second Amendment rights, regulations must give robust and clear fair notice of the conduct that is forbidden or required. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted); *see also Sessions v. Dimaya*, 138 S. Ct 1204, 1212, 1223-33 (2019) (Gorsuch, J., concurring in part); *U.S. v. Hariss*, 347 U.S. 612, 617 (1954).

[4] 18 U.S.C. § 921(a)(3).

[5] Public Law 75-785, 52 Stat. 1250 (1938); 26 CFR 177.10 (repealed).

more specific reference to "frame or receiver." Ironically, ATF acknowledges this history in the NPRM before going on to propose rewriting the GCA by administrative fiat.[6] ATF asserts the GCA and its implementing regulations were created years before "split" or "multi-piece receiver firearms, such as the AR-15 semiautomatic rifle…became popular."[7] It reasons the GCA does not adequately provide for their regulation. And then, it claims power to rewrite Congressional text.[8]

But ATF's premise and arguments are demonstrably false. First, multiple split or multi-piece receiver firearm designs predate the GCA.[9] Many of the GCA's sponsors were combat veterans who used split receiver firearms during their time in the service. As the NPRM acknowledges, Congress enacted the GCA to reduce regulatory burdens.[10] Accordingly, the correct analysis is that Congress was clearly familiar with the designs at the time of the GCA's enactment, it could have regulated these firearms differently, but chose *not to do so*.

Second, the GCA defines a "firearm" for federal regulatory purposes as "the frame or receiver"—that is, in the singular. The NPRM redefines the statutory language so that one firearm may be regulated as multiple weapons because it has or could have multiple frames. But ATF lacks the power to define the term "the frame or receiver" in a way that is inconsistent with the ordinary public meaning of the terms at the time of enactment and the context and meaning of the statute itself.[11] Because the Proposed Rule lacks statutory predicate and authority, its promulgation will violate the Constitutional separation of powers.[12]

Third, the NPRM's standard for defining a "frame or receiver" is impermissibly vague. Specifically, it redefines "frame or receiver" so that the term includes partially complete receivers but fails to clearly identify at what stage of manufacture an article

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[6] 86 Fed. Reg. at 27720.
[7] *Id.* at 27721.
[8] *Id.*
[9] Glen Zediker, The AR-15: A Brief History, National Rifle Association (Oct. 16, 2019), https://www.ssusa.org/articles/2019/10/16/the-ar-15-a-brief-history/ (last visited Aug. 10, 2021) (stating that the AR-15 was sold to civilians starting in 1964).
[10] 86 Fed. Reg. at 27720.
[11] *Bostock,* 140 S. Ct. at 1738; *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).
[12] *Util. Air Regul. Grp.,* 573 U.S. at 325-26. ATF's proposed action "would deal a severe blow to the Constitution's separation of powers." As the Court held in striking down analogous agency action:

> Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. U.S. Const., Art. II, § 3; *see Medellín v. Texas*, 552 U.S. 491, 526-27, 128 S. Ct. 1346, 170 L.Ed.2d 190 (2008). The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute").

Id. at 327.

becomes regulated.[13] The NPRM lists factors for identifying a qualifying receiver but suggests there may be other relevant unlisted factors.[14] Consequently, a reasonable person cannot be expected to know what ATF claims to regulate and what it does not. Therefore, the NPRM fails to provide fair notice.[15]

II. The NPRM's Justification is Based on a False Premise and Mischaracterizes Statutory History

The NPRM claims Congress was unfamiliar with what ATF now calls "split receiver designs" when it passed the GCA.[16] ATF says that it was not until "[y]ears after" the original GCA "definitions were published" that "split/multi-piece receiver firearms . . . became popular."[17] As examples, ATF lists "the AR-15 semiautomatic rifle (upper receiver and lower receiver), Glock semiautomatic pistols (upper slide assembly and lower grip module), and Sig Sauer P320 (M17/18 as adopted by the U.S. military) (upper slide assembly, chassis, and lower grip module)."[18] But as the NPRM itself acknowledges, it is simply not true that multi-piece receiver firearms were uncommon in 1968 when Congress passed the GCA. For example it states, "[A]t the time the current definitions were adopted there were numerous models of firearms that did not contain a part that fully met the regulatory definition of 'frame or receiver,' such as the Colt 1911, FN-FAL, and the AR-15/M-16."[19] In other words, at the time the definitions were adopted, some of the most familiar guns in the world had multi-piece receivers.

Not only were multi-piece receiver weapons common in 1968, but many of the GCA's sponsors in the U.S. Senate had personal experience with them. Many Senators who sponsored the Act used split receiver designs in their own military service, including the Colt M1911 pistol that was issued to and used by officers in World War I, World War II, the Korean War, and the Vietnam War. Two thirds of the sponsors of the GCA

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[13] 86 Fed. Reg. at 27730.

[14] *Id*. at 27727 ("With respect to the fire control components housed by the frame or receiver, the definition would include, at a minimum, any housing or holding structure for a hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. However, the definition is not limited to those particular fire control components. There may be future changes in firearms technology or terminology resulting in housings or holding structures for new or different components that initiate, complete, or continue the firing sequence of weapons that expel a projectile by the action of an explosive").

[15] *See Dimaya,* 138 S. Ct at 1223-33 (2019) (Gorsuch, J., concurring in part); *Fox Television Stations, Inc.,* 567 U.S. at 253.

[16] 86 Fed. Reg. at 27721.

[17] *Id*.

[18] *Id*.

[19] *Id*. ATF argues that these were not popular in the civilian world, which is untrue as to the Colt M1911, which became widely popular among civilians after the Army adopted it in 1913.

in the Senate were U.S. military veterans; officers carried the M1911.[20] Enlisted men would also have been familiar with and/or used the weapon. One sponsor, Senator Daniel Brewster, was a Colonel in the U.S. Marine Corps Reserves on the day he voted for the bill, in an era during which the Marine Corps was actively using the M16, another weapon ATF now calls a split receiver design.[21]

It is simply irrational and implausible to argue that these men were unfamiliar with the design of weapons that they were issued and used.[22] It is also irrational and implausible to suggest Congress had no idea firearms used in the military would also be sold on the civilian market. In fact, a civilian model of the M1911 pistol was offered for sale as early as 1912.[23] Moreover, regardless of the "commonality" or "popularity" at the time, the fundamental fact is that these types of weapons existed, and Congress was familiar with them. Through the CGA, Congress decided to regulate firearms in a specific way, and a perceived increase in the popularity of a given product does not now authorize ATF to rewrite the statute.[24]

Even if ATF had the legal authority to rewrite statutory text to "update" Congressional enactments, which it does not, the facts here completely undermine the NPRM's given reason for regulatory action. On this basis alone, the NPRM must be withdrawn. Such fractured and contrived history can never be a competent basis for the reasoned decision making required by the Administrative Procedure Act.[25]

III. The "Split Receiver Design" Contrivance Offends Statutory Text

The NPRM's "split receiver designs" contrivance offends and conflicts with the statutory text. 18 U.S.C. § 921(a)(3)(B) defines "firearm" as "*the frame or receiver* of any such weapon." The statute uses the word "or" to link two nouns: "frame" and "receiver." The nouns are singular. If Congress had intended to define "firearm" as multiple frames or receivers, it had options. It might have written "the frame *and* receiver of any such weapon" or "the *frames* and *receivers* of any such weapon" or even "the *frames or receivers* of any such weapon." Congress did not do any of these things, of course. By intentionally using the term "frame or receiver" Congress specified the singular of one or the other.

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[20] 90 S. 3633; *see generally*, The National Rifle Association, The U.S. M1911 & The Medal of Honor, American Rifleman (Dec. 17, 2010), https://www.americanrifleman.org/content/the-u-s-m1911-the-medal-of-honor (last visited July 13, 2021).

[21] *See* The Daniel Brewster Papers, located at the University of Maryland.

[22] 86 Fed. Reg. 27720-21.

[23] See LEROY THOMPSON, THE COLT 1911 PISTOL 18 (2011).

[24] *Util. Air Regul. Grp.*, 573 U.S. at 325-26.

[25] *Dep't of Com.*, 139 S. Ct. at 2575-76 ("The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.").

ATF explicitly justifies its regulatory power expansion based on alleged deficiencies in statutory text. "ATF proposes to replace the respective regulatory definitions of 'firearm frame or receiver" and 'frame or receiver' in 27 CFR 478.11 and 479.11 because they too narrowly limit the definition of receiver with respect to most current firearms and have led to erroneous district court decisions."[26] But when "an agency claims to discover in a long-extant statute an unheralded power to regulate" the Supreme Court will "typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[27] For five decades, under administrations from both parties, ATF has read the statute as it is written to regulate a singular frame or receiver. Now, because of the Biden Administration's desire to gut the Second Amendment, ATF has decided to redraft congressional text by bureaucratic fiat—granting itself sweeping power in the process.

The constitutional grant of authority to execute the laws "does not include a power to revise clear statutory terms that turn out not to work in practice."[28] Thus, even if the clear text of the statute had made it entirely unworkable, a claim far more serious than the one ATF makes, it would be beyond the ATF's power to revise. Furthermore, as the NPRM acknowledges, Congress designed the GCA to *deregulate* while ensuring that each firearm purchased was still tracked.[29] The GCA accomplishes this by tracking the major component of each weapon—the frame or receiver. Yet, in the service of the Biden Administration's policy to undermine American's Second Amendment rights, ATF uses the "split frame receiver" contrivance to bypass Congress and rewrite the GCA.

IV. Constitutional Fair Notice Is Lacking

As Justice Scalia wrote in *Heller*, the Second Amendment "codified a *pre-existing* right" to "possess and carry weapons," which the Court explained was an individual right predating the Constitution itself.[30] To lawfully exercise its narrow regulatory authority over this right, ATF must provide citizens with robust and specific fair notice of what is permitted and what is prohibited. The NPRM, however, fails to do this in critical respects.

ATF seeks to redefine "firearm" so that "[t]he term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive."[31] The regulations, however, are far

[26] 86 Fed. Reg. at 27727.
[27] *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (internal quotes and citations omitted).
[28] *Id.* at 328.g
[29] 86 Fed. Reg. at 27720.
[30] *Heller*, 554 U.S. at 592.
[31] 86 Fed. Reg. 27741.

from clear about the meaning of the term "readily." The NPRM defines it as "a process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process."[32] ATF then lists eight non-exhaustive, non-determinative factors to determine if a frame qualifies as "readily" completed.[33] Specifically:

> Factors relevant in making this determination, *with no single one controlling, include* the following: (a) Time, *i.e.*, how long it takes to finish the process; (b) Ease, *i.e.*, how difficult it is to do so; (c) Expertise, *i.e.*, what knowledge and skills are required; (d) Equipment, *i.e.*, what tools are required; (e) Availability, *i.e.*, whether additional parts are required, and how easily they can be obtained; (f) Expense, *i.e.*, how much it costs; (g) Scope, *i.e.*, the extent to which the subject of the process must be changed to finish it; and (h) Feasibility, *i.e.*, whether the process would damage or destroy the subject of the process, or cause it to malfunction. (Emphasis added).[34]

Here, ATF apparently reserves the right to consider factors not listed in determining whether an item is a frame or receiver, saying that the listed factors "include" the listed ones, and that no single listed factor controls. Indeed, the listed factors do not even include guidance on which direction each weighs. For example, ATF does not say whether a high price indicates that something is, or is not, a frame or receiver. Consequently, citizens are left to wonder, if there are two identical items with different prices, which is more likely to be a receiver. Is it the more expensive one or the cheaper one? ATF does not say. They merely state that price is relevant, in some unspecified way.

ATF also says:

> The new definition more broadly describes a "frame or receiver" as one that provides housing or a structure designed to hold or integrate any fire control component. Unlike the prior definitions of "frame or receiver" that were rigidly tied to three specific fire control components (i.e., those necessary for the firearm to initiate or complete the firing sequence), the new regulatory definition is intended to be general enough to encompass changes in technology and parts terminology…the definition is not limited [because there] may be future changes in firearms technology or terminology…[35]

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[32] *Id.* at 27747.
[33] *Id.* at 27730.
[34] *Id.*
[35] *Id.* at 27727.

There is no Constitutional warrant for this sort of regulation.[36] The NPRM redefines "frame or receiver" to include partially complete receivers while failing to clearly identify at what stage of manufacture an article becomes regulated.[37] It lists factors for identifying a qualifying receiver but provides no guidance with respect to weight and then suggests there may be other relevant unlisted factors as well.[38] Consequently, a reasonable person cannot be expected to know what ATF claims to regulate and what it does not.

Because Congress cannot delegate powers it does not have, and because agencies derive their power from congressional grants, agency regulations, as well as acts of Congress, must provide fair notice.[39] Yet the Proposed Rule leaves American citizens guessing how, in any given case, the government might criminalize a given firearm. This is not a trivial or technical matter. The Proposed Rule will introduce high levels of confusion and uncertainty, especially because ATF apparently aims to free itself from the need to provide the public with the benefit of notice and comment rulemaking in the future.

This is not a trivial or technical matter for ATF to resolve. This cuts to the heart of the NPRM. The proposed regulation defines a firearm for purposes of a regulatory regime with significant criminal penalties.[40] Vagueness in this setting will deprive individuals of fair notice as to prohibited conduct and violate their due process rights. It is fundamental to American notions of justice that citizens must be able to understand the laws before they can be held criminally liable for violations. Here, ATF seeks to define a firearm based on an unknown number of factors, some secret, and prosecute citizens for violating laws that rely on this definition later.

ATF risibly claims its opaque Proposed Rule adds clarity.[41] It does not. In fact, a fair reading of the NPRM suggests ATF views vagueness as a *feature*, not a bug, in its politically driven effort to regulate around and undermine the Second Amendment.

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[36] *Winters v. New York*, 333 U.S. 507, 509-10 (1948); *see also Hariss*, 347 U.S. at 617. *See also Dimaya* 138 S.Ct. at 1212; *Fox Television Stations, Inc.*, 567 U.S. at 253; *Skilling v. United States*, 561 U.S. 358, 403 (2010); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) *Connally v. General Const. Co*., 269 U.S. 385, 391 (1926); *Collins v. Commonwealth of Kentucky*, 234 U.S. 634, 638 (1914).

[37] 86 Fed. Reg. at 27730.

[38] *Id*. at 27727 ("With respect to the fire control components housed by the frame or receiver, the definition would include, at a minimum, any housing or holding structure for a hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. However, the definition is not limited to those particular fire control components. There may be future changes in firearms technology or terminology resulting in housings or holding structures for new or different components that initiate, complete, or continue the firing sequence of weapons that expel a projectile by the action of an explosive.").

[39] *Fox Television Stations, Inc.*, 567 U.S. at 253; *see also Dimaya*, 138 S. Ct. at 1212; *Connally*, 269 U.S. at 391; *Papachristou,* 405 U.S. at 162.

[40] *See* 18 U.S.C. § 924.

[41] 86 Fed. Reg. at 27720.

V. Conclusion

With this NPRM, ATF attempts to rewrite history to justify a rulemaking that fundamentally alters the existing statutory framework. The changes ATF seeks to make would require Congress, and Congress alone, to enact a new law, but even then, it is likely such a law would violate the Second Amendment. That is because the rule ATF seeks to implement would impose rules so vague no average citizen could understand them. And ATF aims to apply these vague rules to burden and limit every American's fundamental rights.

Instead, ATF should level with the public and base any Proposed Rule on the truth and not on fabricated history invented to advance a politically driven agenda avoid Constitutional limitations on government. It should respect the role of Congress and the Constitution, not rewrite laws. It should write rules that are consistent with the ordinary public meaning of the controlling statutes. When it regulates, it should promulgate clear rules with discernable standards and provide Constitutional fair notice. ATF has not done any of these things. Accordingly, the Proposed Rule should be withdrawn.