

Appeals Court Rules Against ATF's Use of "Vague" and "Amorphous" Factors to Classify Firearms

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In a case argued by Wiley attorneys on behalf of the Firearms Regulatory Accountability Coalition (FRAC), SB Tactical, B&T USA, and Richard Cicero, the Eighth Circuit issued a 2-1 opinion in *FRAC v. Garland* finding that the coalition plaintiffs were "likely to succeed on the merits" of their Administrative Procedure Act (APA) challenge to a rule issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

The case concerns a January 2023 rule that purported to provide guidance to the public for determining whether a braced pistol platform qualified as a "short-barreled rifle" subject to increased regulation under the National Firearms Act (NFA). The rule outlined six factors ATF would use in classifying these platforms. In conjunction with the rule, ATF simultaneously published slideshows depicting various braced pistol platforms the agency deemed short-barreled rifles subject to increased restrictions.

FRAC, SB Tactical, B&T USA, Mr. Cicero, and 25 states immediately sought a preliminary injunction of the rule and the associated slideshows in the District of North Dakota. The district court initially held that the plaintiffs were unlikely to succeed on the merits and denied injunctive relief.

On appeal, the Eighth Circuit disagreed. Writing for the majority, Judge Grasz found the rule's factors were "arbitrary and capricious" on three grounds.

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First, the court found that one of ATF's factors – the amount of rear surface area for shouldering – failed to offer a specific metric or other clear criteria for compliance. This deficiency, the court explained, meant that ATF failed to comply with the APA because it had "articulated no standard whatsoever."

Second, the court rejected ATF's plan to use "marketing" and "community-use" information as indicators of whether a braced pistol should instead be classified as an NFA firearm. The court found these factors "amorphous" because they relied on "vague" terms that "tell[] the reader nothing about how the ATF will evaluate" the factors.

Finally, the court found the agency's "slideshow" – pictures of braced pistols that the agency deemed short-barreled rifles – to be "devoid of any reasoning as to how ATF applied the Final Rule." The court rejected ATF's argument that it would provide the reasoning for its conclusions later. Not mincing words, the court compared that kind of analysis to "shooting the side of a barn, drawing the target around the bullet holes, and then proclaiming, 'bullseye!'"

Judge Shepherd dissented in the case because he saw "no need to *preliminarily* enjoin the enforcement" by the ATF after a Texas-based federal district court vacated the rule in June.

The Eighth Circuit's opinion is an important development. The Eighth Circuit is the first federal appellate court to hold unlawful the factors that ATF promulgated in the rule.^[1] The result will be to make it harder for the agency to apply vague, multifactor tests in firearms regulation and enforcement. For one, the agency's multifactor test purported to codify some factors the agency previously relied upon to classify braced pistols – meaning that the Eighth Circuit's rebuke of those factors implicates the legality of both the current rule and the agency's prior approach to classifying braced guns. And the court's reasoning suggests that, going forward, ATF may not use rulemaking to place gun owners or the gun industry in legal jeopardy by failing to offer clear guidance on what products or activities trigger scrutiny under the NFA.

Wiley attorneys Steve Obermeier, Mike Faucette, Jeremy Broggi, Tom Johnson, Boyd Garriott, and Isaac Wyant represent FRAC, SB Tactical, B&T USA, and Richard Cicero. Additionally, a coalition of 25 states joined the private plaintiffs in challenging the rule.

[1] The Fifth Circuit previously enjoined the rule after finding it was not a logical outgrowth of the agency's notice of proposed rulemaking. *See Mock v. Garland*, 75 F.4th 563 (5th Cir. 2023).