TESTIMONY OF MATTHEW LAROSIERE

BEFORE THE COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY, HOUSE OF REPRESENTATIVES ON MARCH 23, 2023

"ATF'S ASSAULT ON THE SECOND AMENDMENT: WHEN IS ENOUGH ENOUGH?"

Honorable Members of the Committee:

My name is Matthew Larosiere, and I am honored to testify before you today about some of the actions taken by Bureau of Alcohol, Tobacco, Firearms and Explosives (hereinafter "ATF"), how these actions are inconsistent with the letter and spirit of the law, and about the massive impacts these actions have had on American people.

My testimony covers two main areas: 1) the history of regulation of handguns and short-barreled rifles (hereinafter "SBRs"), and how ATF's current attempt to compel the registration of all brace-equipped firearms is both inconsistent with the spirit of the law, and disastrous for small businesses and individuals; and 2) the impact of the current administration's "zero tolerance" policy, especially as it relates to small business and individuals.

STATEMENT OF QUALIFICATIONS AND INTRODUCTION

I have spent the better part of a decade focusing the majority of my time and attention into studying the history, technology, and law of firearms. I have worked as a legal practitioner in the area of firearms law since being admitted to practice, starting my legal career at the Cato Institute, where I authored dozens of briefs as *amicus curiae* before the United States Supreme Court, as well as various federal circuit and district courts. Since then, I have worked as a partner at Zermay-Larosiere, focusing on representing American individuals and businesses, helping them navigate and stay safe in the tumultuous firearms regulatory environment, and as an adjunct scholar of law and policy at the Second Amendment Foundation, a 501(c)(3) nonprofit corporation dedicated to Second Amendment rights. I have published numerous scholarly articles, as well as articles in the popular press, authored research papers, advised members of the firearms industry, established firearms manufacturers and dealers, and litigated in the arena of the Second Amendment and firearms in general.

As a threshold matter, the threat ATF's overreach poses to the American people is not a theoretical question, and it is not limited to braced pistols. For example, on October 21, 2022, Patrick Tate Adamiak was convicted of dealing

in machineguns.[1] This headline may not cause many to take a second glance. In actuality, though, the "machineguns" Tate was convicted of "dealing in" were actually *boxes of cut-up, inoperable parts that the ATF had previously approved the importation and sale of*. These "parts kits" are routinely sold in open commerce, as ATF's approval of importation meant they were no longer "firearms." That is, of course, until the ATF changes its mind on when a firearm is "destroyed" in an unpromulgated shift, with no notification to consumers or the general public. The only "notice" Tate was afforded before being locked in a cage was the knock of the raid party on his door. At 28 years old, he is presently awaiting sentencing, his family reeling, and his marriage plans indefinitely interrupted.

In another heavily publicized and absurd prosecution, the government is vindictively prosecuting Matthew Raymond Hoover, a political commentator, for allegedly *advertising a drawing of machinegun parts*. The case concerns "auto key cards," which are metal cards into which a drawing is lightly etched. Following four superseding indictments and over forty thousand pages of discovery, Hoover, a cancer-stricken man of modest means with young children, faces trial next month, potentially 60+ years in prison, and several hundreds of thousands of dollars in fines.

These prosecutions, and the underlying policies which contort the law to enable them, serve no public safety purpose. It is my sincere hope and wish that my testimony today can shed light on the depth of the ATF's absurdity it seems many have ignored.

I. THE REGULATION OF SBRS, PISTOLS, AND CONCEALABLE FIREARMS: HOW ATF'S FIXATION WITH BRACED PISTOLS IS GROUNDED IN ACCIDENTAL LAW

As a group, American gun owners have been conditioned to be wary of the Bureau of Alcohol, Tobacco, Firearms and Explosives. That said, the recent tumult surrounding "pistol braces" has us even more anxious than usual. These braces are devices designed to help people operate large handguns based on familiar platforms such as the venerable AKM and AR-15. This whole mess

[1] Navy Sailor Convicted of Violating the NFA in An Absurd Case, Ammoland News, Nov. 6, 2022, https://www.ammoland.com/2022/11/navy-sailor-convicted-of-violating-the-nfa-in-an-absurd-case/#axzz7wYva9EYD.

relates to the administrative agency's attempts to shoehorn these arms into the National Firearms Act, a terrible law wrought with hidden contradictions.

As initially conceived, the NFA sought to ban virtually all "concealable" firearms.[2] Congress, recognizing that it did not have the authority to enact such a ban outright, attempted to achieve the same objective through the NFA's prohibitively expensive taxation and registration scheme.[3]

At first, the definition of an NFA-restricted firearm included any "pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person." Language pertaining to short-barreled rifles was later added, after the concern was raised that one could acquire a rifle and cut it down to acquire the effective equivalent of a pistol. The phrase "any other firearm capable of being concealed on the person" makes the intent of the bill clear: the law targeted all small, concealable firearms, be they pistols, shotguns, rifles, or exotics that defy simple classification.[4]

Statutory minimum lengths for long guns (and their barrels) were a natural and necessary accompaniment to the NFA's attempted handgun regulation. Any restriction upon handguns would be impotent if a small rifle or shotgun were a legal alternative to a pistol. It would be trivially easy to

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[2] The constitutionality of the bill was predicated on the perceived legality of regulating concealable weapons. "Concealed weapon laws, of course, are familiar in the various States; there is a legal theory upon which we prohibit the carrying of weapons—the smaller weapons. Attorney General Cummings: Of course we deal purely with concealable weapons." HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS, House of Representatives, Seventy-Third Congress, Second Session on H.R. 9066 at 19 (April-May, 1934).

[3] The government that passed the NFA was aware that treating firearms already in peoples possession as NFA firearms would be unconstitutional. "Mr. McClintic: I would like to ask just one question. I am very much interested in this subject. What in your opinion would be the constitutionality of a provision added to this bill which would require registration, on the part of those who now own the type or class of weapons that are included in this bill?
Attorney General Cummings: We were afraid of that, sir.
Mr. McClintic: Afraid it would conflict with State laws?
Attorney General Cummings: I am afraid it would be unconstitutional." *Id*. at 13.

[4] So much was the government's concern with concealability that it thought larger machine guns need not be dealt with. "Attorney General Cummings: The same company, if I recall correctly, the Colt Co., manufactures the Browning gun. But the Browning gun is not easily transportable; it is a large, cumbersome weapon that would probably not be used by the criminal class. So that it is not absolutely necessary to bother with it." *Id*. at 14.

circumvent a handgun ban by chopping down or otherwise modifying a long gun to be of a concealable size.

The bill, though, went through a bizarre twisting before becoming law. Representatives from the National Rifle Association and American Legion insisted upon the deletion of references to "pistols and revolvers," and such were removed in slipshod fashion. That is, a bill that had initially sought sweeping restrictions on all small firearms ultimately exempted the most popular and prevalent small firearms in existence. With that exemption, Congress punted on its original objective: A restriction on concealable firearms that exempts handguns is like a ban on alcohol that exempts beer and liquor.

And yet, the restrictions on small shotguns and rifles remained in the enacted language of the NFA. In other words, the current restrictions on small rifles and shotguns—which are at the core of ATF's current assault on braced firearms—were intended to stop people from circumventing a handgun regime that never actually existed.

In that sense, the NFA's minimum size rules (and the ATF's interpretations thereof) are an absurd anachronism. Those restrictions originated in a time when some of Congress thought it could effectively restrict all small, concealable firearms, including handguns, and minimum size rules for rifles and shotguns would have been necessary to close an obvious loophole.

But even in 1934, exempting handguns from the NFA was necessary to secure sufficient support for its passage. And with the demise of the handgun restriction, the minimum size rules now serve about the same function as a cancer-prone vestigial organ: They don't accomplish anything useful, but they sure can get you into trouble.

Moreover, in recent years, the Supreme Court has not only affirmed, but underlined as fundamental the right to own handguns.[5] In other words, the Supreme Court has affirmed the right to own, above all else, the smallest, most concealable firearms of all. These are arms that the overwhelming majority of gun owners depend on to protect their lives, families, and property.

All this, and yet, the ATF aggressively continues to "interpret" and enforce the NFA's arbitrary and capricious restrictions on small firearms. Restrictions, mind you, designed to prevent Americans from owning the

[5] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

functional equivalent of a handgun—the very arm the Supreme Court has recognized lies at the very core of Second Amendment protection. In their intense and perverse crusade against small firearms, the ATF has pursued an extra-constitutional course of action. The agency inconsistently regards small firearms as verboten based on bureaucratic interpretations and determinations that are arbitrary, fluid, idiosyncratic, and unpromulgated.

The ATF, founded in 1972, is stuck in 1934: a time when some of Congress thought that effectively banning pistols for all but the wealthiest of people was a stellar idea. This is neither the legal nor cultural reality of today. On those grounds, all of the NFA's restrictions on "concealable" firearms should be readily recognized as unconstitutional infringements upon the very center of our fundamental right to keep and bear arms.

It bears emphasis that the ATF is presently using that very same law, which was designed to target concealable firearms, to attach felonious consequences to large handguns by adding a brace—which the ATF contends is essentially a stock—thereby making it *larger and less concealable*. The result, very truly, causes one to scratch one's head.

The recent mess relating to "pistol braces" and "large handguns" isn't a simple matter of a bloated administrative agency overstepping its boundaries. It's more than that. The sustained assault on small firearms is a rogue agency's wanton disdain for the rights of the people—and that disdain is fueled by the vestigial remains of a law that should have never been passed. The NFA, in its entirety, is a leprotic mark on the history of our nation. The American people shouldn't be in peril of prison time for the shape or length of the arms we choose to protect our families with.

From a practical perspective, I have dealt with many individuals faced with accused violations of the NFA's size regime. I can certainly intimate that many people accused of possessing an unregistered short-barreled rifle or shotgun had no idea the item put them in criminal jeopardy. Most of the cases I have dealt with were poor and minority Americans who had otherwise lawfully acquired firearms by gift or from friends, only to be faced with insurmountable fines and years in prison for the simple peaceable possession thereof. Never, in my practice, have I seen an individual accused of violating the NFA who had violent or otherwise nefarious intentions. Nearly always, on the other hand, did I see individuals torn from their families, sometimes at risk

of never seeing them again. All because of the size and shape of a firearm they had the audacity to peaceably possess.

Criminal consequences aside, defending NFA violations is a complicated balancing act. Oftentimes, the rule of lenity is an essential component to a competent defense, which requires the practitioner to have an intimate knowledge of the legislative history of American firearms law. Something very different than other areas of criminal defense. In this much, criminal defendants are faced with the untenable choice between mounting tremendous debt by acquiring the aid of a specialist attorney, and rolling the dice with a more affordable lawyer who, upon a simple reading of the law, would be woefully unprepared to competently defend an individual accused of the simple possession of an NFA firearm.

From a business perspective, as firearms technology has advanced, the need for long barrels to achieve useful velocities has fallen largely by the wayside. Firearms like the Romanian-made AKM-based "Draco" pistol are an exceptional choice for home defense, and are relied upon by a great many Americans. The addition of a brace to a "Draco," or similar, yields what is likely the most optimal choice for an all-round defensive firearm. The market clamors for these firearms, and the industry has noticed. As a result, may small dealers have these firearms in stock, and have been put in an awkward position by the ATF's recent about-face: stuck with thousands of dollars of inventory they are afraid to sell in the configuration demanded by the right-willed consumer. These actions destroy value with no countervailing public safety benefit to speak of. To suggest that smaller firearms, when made more controllable and comfortable to use, become more dangerous, is obviously and intensely contrived.

II. ATF'S "ZERO TOLERANCE" INITIATIVE: DEVASTATING SMALL BUSINESSES OVER MINOR ERRORS IN INTENTIONALLY OBTUSE PAPERWORK

Of great concern today, I am sure, is the White House's recent "Executive Order on Reducing Gun Violence and Making Our Communities Safer," which continues along the lines of the present administration's previous "zero tolerance" measures, directing the ATF to very aggressively pursue the revocation of Federal Firearms Licenses (hereinafter "FFLs") where errors and violations are found.

In the brief time following the implementation of the administration's "zero tolerance" policy, I and other practitioners have seen more attempts to revoke FFLs than in our entire careers. To briefly explain the process: occasionally an FFL is audited by the ATF. The audit process, generally speaking, involved an ATF Industry Operations Investigator ("IOI") combing through completed firearms transfer forms (form 4473) searching for errors. Where there is an error or omission on a form, or, for example, a sale of multiple handguns did not coincide with a report of multiple handguns sale (Form 3310.4), it is noted as a "violation."

One of many issues with this process is the amount of time that passes between when the forms are completed and when the IOI examines them. The IOI is free to look as far back as he likes in examining the dealer's forms. I have personally observed on one occasion where the majority of purported violations, which led to a revocation proceeding, were found on forms completed *many years before the investigation*. In that particular instance, the FFL had been audited several times in the intervening years without issue.

In my experience, the average FFL will have several "violations." Mind, these violations can be as simple as a customer who does not select whether they are "Hispanic or Latino" under the "ethnicity" box, but completes "black" or otherwise under the "race" box. Another example of a common violation is an incorrect pick-up date, or the licensee's employee mis-typing the number on an approved background check, or a customer who picks up a firearm that is on layaway or otherwise delayed picking it up a day or two after the cleared background check expired. None of which, it seems to me, are terribly perilous.

In the past, when reviewing these violations, the IOI would simply coach the FFL on ways to improve recordkeeping to avoid errors. Absent serious violations, such as deliberately transferring firearms without performing a background check at all, revocation actions were incredibly rare.

Now, though, all has changed. Small FFLs are confronted with the revocation of their license—and thereby their livelihood—over these minor errors. The ATF begins by noticing the FFL of its intent to revoke their license, giving the FFL fifteen days to request a hearing, where the FFL can be represented by an attorney.

These hearings are especially problematic. The hearing is presided over and "judged" by the ATF's area Director of Industry Operations ("DIO"), where the IOI testifies and a DOJ lawyer presents a case for revocation. It is, in no

uncertain terms, a kangaroo court. Essentially, to prevail, the licensee must convince the DIO that the IOI—essentially the DIO's employee—was wrong. It should not take much spilling of ink to explain how unfair these proceedings are.

Furthermore, at the revocation hearings, the ATF's employees pressure the FFL to admit that its violations were "willful," as is the standard for revocation under the regulations. In every case I have seen, no matter the circumstance, the ATF aggressively treats any and all paperwork errors as "willful," and heavily resists scrivener's errors as anything short of intentional.

The compounding problem here is that smaller, "mom and pop" FFLs often lack the budget to have an attorney represent them at a revocation hearing. These individuals may not be legally sophisticated, and often respond to the ATF's assertion that minor errors were "willful" with a response akin to "yes, I should have done better, I am sorry." The FFL thereby, unwittingly, affixing the noose the government handed to it.

If the FFL is unsuccessful in convincing the DIO that the DIO's own subordinate was wrong, the ATF will pursue revocation. At this point, the FFL's only option is to file an action challenging the determination in federal district court. In an industry like the firearms industry, populated primarily with small firms with less than fifteen employees, where representation at a simple hearing is a major financial hurdle, hiring an attorney to sue for its ability to continue business is, more often than not, insurmountable.

Even if the FFL can afford to challenge the determination in federal court, their business remains shuttered unless it can convince the court, or the ATF, to stay revocation. Thus, even in the case of an FFL with a meritorious defense, it would not be unlikely for the FFL to be forced out of business for many months, or even years, pending litigation.

It appears now that the administration seeks to simultaneously expand the definition of those "engaged in the business" of dealing in firearms, thereby needing an FFL, and aggressively revoke the licenses of anyone who operates as a FFL with anything short of mechanical perfection, and further to prevent anyone who had been a victim of the government's kangaroo court from ever engaging in the business again. I fear, given the makeup of the industry, this will chill participation in the market and—given the present status of the FFL as the gatekeeper for most Americans to acquire firearms at all—make it even harder for Americans in less populated areas to acquire firearms.

III. CONCLUSION

As thoroughly explained *supra*, the present actions of the ATF are, it appears to me, based on a reading of the law that is inconsistent with its spirit, inconsistent with the rights and best interests of the American people, and lack any meaningful countervailing public safety benefit. The perils posed to the American people by the ATF's aggressive interpretations are far from theoretical—they are concrete and evidenced by far too many broken families, shuttered businesses, and shattered lives. While the agency may point to statistics related to "gun crime" in defense of its actions, it is essential to note that the majority of what constitutes a "gun crime," as defined by the laws applicable to today's discussion, are simple, peaceable possession of firearms. It bears repeating: The American people shouldn't be in peril of prison time simply for the shape or length of the arms we choose to protect our families with.

Very truly yours,