IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NATHANIEL GETZ, EXECUTOR OF THE ESTATE OF SUZANNE FOUNTAIN *Plaintiff*, v. STURM, RUGER & COMPANY, INC., *Defendant.*	Civil Action No. 3:23-cv-01338-RNC **January 19, 2024**

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION TO REMAND

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INTRODUCTION

Defendant Sturm, Ruger & Company's ("Ruger's") opposition ("Opp.") to Plaintiff's Motion to Remand focuses heavily on the Final Rule issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in January 2023 and the ongoing legal challenges to it. *See Factoring Criteria for Firearms With Attached "Stabilizing Braces."* No. ATF 2021R-08F, 88 Fed. Reg. 6478, 2023 WL 1102552 (Jan. 31, 2023) (the "Final Rule"). But Plaintiff's claims do not turn on the Final Rule, and resolution of his claims will have no bearing on the legal challenges to it, which concern unrelated issues of administrative law. This is a red herring. The National Firearms Act ("NFA") and the Gun Control Act ("GCA"), and not the ATF's Final Rule, provide the legal standard governing the disputed federal issue here: whether the SBA3 brace-equipped Ruger AR-556 Pistol wielded by the shooter who killed Suzanne Fountain was a short-barreled rifle ("SBR"). This presents questions of fact—including most critically whether the weapon was "designed," "made," and "intended to be fired from the shoulder." 26 U.S.C. § 5845 (c); 18 U.S.C. § 921(a)(7), (8). The parties' disagreement concerns whether the Ruger AR-556 Pistol, configured with an SBA3 stabilizing brace, was *in fact* an SBR. Accordingly, under *Grable* and its progeny, Ruger simply cannot show that the federal issues here are "nearly 'pure issue[s] of law'"; instead, because they are primarily issues of fact, to be decided by a jury according to the documentary, testamentary, and expert evidence to be developed during discovery and presented at trial, removal was improper and this case should be remanded.

BACKGROUND ON ATF FINAL RULE

To facilitate its administration of the NFA's registration and other requirements, and to help manufacturers "avoid an unintended classification and violations of the law," ATF provides manufacturers with the opportunity to voluntarily submit their products for classification. 27 C.F.R. § 479.102(c); ATF E-Publication 5320.8, *National Firearms Act Handbook* at § 7.2.4 (Rev.

2009), *available at* https://www.atf.gov/firearms/national-firearms-act-handbook. Pursuant to this process, the ATF first evaluated an AR-style pistol configured with a stabilizing brace in 2012 and determined that it did not constitute a weapon designed, made, and intended to be fired from the shoulder. Final Rule at 6482–83; Am. Compl. ¶¶ 59–60 (ECF No. 1-3). Subsequently, however, gun industry actors, including defendant Ruger and SB Tactical, moved toward brace-equipped pistols that increasingly looked and functioned like SBRs with traditional shoulder stocks. Final Rule at 6479; Am. Compl. ¶¶ 61–62. The ATF ultimately recognized that "these 'braces' were being used with firearms extensively to create SBRs without following NFA requirements." Final Rule at 6494; *see also Firearms Regul. Accountability Coal., Inc. v. Garland*, No. 23-cv-024, 2023 WL 5942365, at *2 (D.N.D. Sept. 12, 2023), *appeal docketed* No. 23-3230 (8th Cir. Oct. 6, 2023).

The Final Rule thus makes clear that the ATF interprets the statutory definition of a SBR to cover a "pistol" equipped with a stabilizing brace that meets certain additional criteria. Final Rule at 6480. Specifically, to determine whether a firearm equipped with such a brace is "designed or redesigned, made or remade, and intended to be fired from the shoulder," the ATF will focus on whether the brace "provides surface area that allows the weapon to be fired from the shoulder" as well as: (1) the weapon's weight or length; (2) the weapon's "length of pull"; (3) "[w]hether the weapon is equipped with sights or a scope with eye relief that require the weapon to be fired from the shoulder in order to be used as designed; (4) "[w]hether the surface area that allows the weapon to be fired from the shoulder is created by a buffer tube, receiver extension, or any other accessory . . ."; (5) "[t]he manufacturer's direct and indirect marketing and promotional materials indicating the intended use of the weapon"; and (6) "[i]nformation demonstrating the likely use of the weapon in the general community." Final Rule at 6480.

Contrary to Ruger's suggestion (Opp. at 3–4), the Final Rule does not rewrite the law, but

instead clarifies the ATF's interpretation of the already-extant scope of the NFA and GCA. *Firearms Regul. Accountability Coal.*, 2023 WL 5942365, at *7 ("The Court finds that the Final Rule does not 'rewrite' the definition of rifle, but rather provides guidance for enforcers to determine when a particular weapon with a stabilizing brace falls under the purview of the" NFA.); Final Rule at 6479–80. Notably, the ATF does not classify firearms as a group, and the Final Rule does not include a blanket classification. *Contra* Opp. at 11. Instead, the ATF classifies weapons on a firearm-by-firearm basis because "attempting to make more general classifications may result in the erroneous application of the relevant statutes." Final Rule at 6507.[1]

Ruger focuses on a decision by a divided panel of the Fifth Circuit in *Mock v. Garland*, 75 F.4th 563 (5th Cir. 2023), which determined that the challengers to the Final Rule were likely to succeed on the merits of their Administrative Procedure Act ("APA") claim because the Final Rule was not a "logical outgrowth" of the initially Proposed Rule and thus ATF did not satisfy the APA's notice and comment requirements. *Mock*, 75 F.4th at 578, 586. Following *Mock*, several courts in the Fifth Circuit have considered motions for preliminary injunction regarding the Final Rule, with mixed outcomes. *See, e.g.*, *Second Amend. Found. v. ATF*, No. 21-CV-0016, 2023 WL 7490149 (N.D. Tex. Nov. 13, 2023) (denying preliminary injunction); *Britto v. ATF,* No. 23-CV-019, 2023 WL 7418291 (N.D. Tex. Nov. 8, 2023) (granting preliminary injunction).[2] Outside the Fifth Circuit, the two district courts to consider similar motions for preliminary injunction have both denied them. *Firearms Regul. Accountability Coal.*, 2023 WL 5942365, at *6, *11 ("This Court is aware of the reversal rendered in *Mock* and understands its significance, but is not bound

[1] The ATF anticipates, however, that it is likely to classify the majority of brace-equipped pistols as rifles under its current interpretation of the NFA and GCA. Final Rule at 6480.

[2] *See also Tex. v. ATF*, No. 23-cv-00013, 2023 WL 7116844 (S.D. Tex. Oct. 27, 2023) (granting preliminary injunction); *Tex. Gun Rts., Inc. v. ATF*, No. 23-cv-00578, 2023 WL 8352316 (N.D. Tex. Oct. 4, 2023) (same); *Mock v. Garland*, No. 23-cv-00095, 2023 WL 6457920 (N.D. Tex. Oct. 2, 2023) (same). The pending appeals from these five decisions have been consolidated by the Fifth Circuit under docket number 23-11157.

nor persuaded by the 2-1 holding of the Fifth Circuit Court of Appeals."); *Miller v. Garland,* No. 23-cv-195, 2023 WL 3692841, at *7, *12 (E.D. Va. May 26, 2023), *appeal docketed* No. 23-1604 (4th Cir. June 6, 2023*)* ("[T]he Final Rule is merely interpretative as it provides the public with guidance as to ATF's interpretation of definitions in the NFA and the GCA. . . . [T]he Final Rule does not impose any new legal obligations and merely attempts to clarify when a weapon is a short-barreled rifle.").

As further explained below, the resolution of Plaintiff's claims will not encroach on the issues being litigated in these cases. Plaintiff's claims do not implicate the ATF's authority to issue the Final Rule, its procedural history, or the other administrative law issues that are the central focus of the legal challenges to it. Simply put, a jury's consideration of the disputed factual issues in this case will have no bearing on the federal courts' consideration of the ATF's Final Rule.

ARGUMENT[3]

I. Ruger Fails to Demonstrate *Grable* Substantiality.

In response to Plaintiff's argument that Ruger cannot satisfy the "substantiality" requirement under *Grable*, Ruger offers five responses. None is persuasive.

First, Ruger misses the mark widely when it argues that the case before this Court is analogous to *Grable.* Opp. at 10. *Grable* involved a state law quiet title claim that turned on the interpretation of a federal law—specifically, whether a requirement that the IRS provide written notice before seizing property could be satisfied by service by certified mail or instead required personal service. 568 U.S. 251, 311 (2013). Thus, "the meaning of the federal statute [wa]s actually in dispute" and "appear[ed] to be the only legal or factual issue contested in the case." *Id*.

[3] As explained in Point II, below, Plaintiff no longer contests the timeliness of Ruger's removal. Accordingly, Plaintiff focuses in this Reply on its central argument that removal was improper because Ruger cannot satisfy the *Grable* factors.

at 315. As the Supreme Court later explained in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700–01 (2006), "*Grable* presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous tax sale cases.'" (citation omitted).

Here, in stark contrast, and as explained in Plaintiff's moving brief, the central disputed federal question of whether the AR-556 is an SBR raises pure or nearly pure questions of fact. As Plaintiff argued in its opening brief, the factfinder in this case will be required to determine whether the weapon at issue met the enumerated statutory elements—that is, whether Ruger's AR-556 Pistols equipped with SBA3 braces: (i) have rifled bores; (ii) have a barrel length of less than 16 inches; and were (iii) "designed," (iv) "made," and (v) "intended" by Ruger "to be fired from the shoulder." 26 U.S.C. § 5845(a)(3)–(4), (c); 18 U.S.C. § 921(a)(7)–(8); Am. Compl. ¶¶ 44–46. These five inquiries are all factual, not legal, questions, and all are to be decided by a trier of fact.

Stated differently, in *Grable*, whether service by certified mail was sufficient was an issue of law *to be decided by the Court*, with broad implications for how a federal agency conducted itself going forward; here, in stark contrast, whether the (discontinued) AR-556 is an SBR raises the above-recited *issues of fact to be decided by a jury,* and those "fact-bound and situation-specific" findings will not govern numerous future cases. *Empire Healthchoice*, 547 U.S. at 701. In short, *Grable,* explained by *Empire Healthchoice*, strongly supports remand.

Second, apparently recognizing that *Grable* and *Empire Healthchoice* stand as clear barriers to federal court jurisdiction given the fact-intensive issues at the heart of this case, Ruger attempts to manufacture a different "substantial" legal question: "whether ATF's Final Rule and its analytical framework for determining whether pistols with stabilizing braces are SBRs . . . is legally binding." (Opp. at 11). But that *legal* question—which to be sure is before numerous other federal courts, and raises complex questions of federal administrative law—is no part of Plaintiff's

claim here. Plaintiff does not refer to the Final Rule in his complaint; Plaintiff has not and will not ask the presiding court to opine as to whether it violates the federal Administrative Procedures Act or is otherwise invalid as alleged in the challenges to the Final Rule; and the presiding court need not address, much less resolve, those questions to decide the issues in this case. Instead, the NFA (and GCA) and *the statutory requirements that define an SBR* are what are "binding" and are what the jury here will be considering and deciding about.

Ruger is also wrong that "there is no clear framework for assessing the factual determinations" or "legal standard for assessing [the weapon's] design." Opp. at 12. The important point is that there is a clear framework for deciding if the weapon here falls within the NFA: i.e., the five statutory factors outlined above. Model federal criminal jury instructions for the crime of illegal possession of an NFA firearm show the way—instructing courts to list all of the "characteristics *in the appropriate statutory definition* of the particular firearm or firearms which are the subject of the prosecution . . . found at 26 U.S.C. § 5845" or to "*insert applicable provision(s) of section 5845*, e.g., a shotgun having a barrel of less than 18 inches in length."[4] *See also United States v. Elmowsky*, No. 22-562, 2023 WL 3513582 (2d Cir. May 18, 2023) (affirming conviction where jury was instructed on the statutory elements of NFA violation, including whether the weapon was made, designed, and intended to be fired from the shoulder, and without any more specific criteria);[5] *United States v. Reindeau*, 947 F.2d 32, 35, 36–37 (2d Cir. 1991) (describing testimony of the government's expert regarding whether a destructive device was

[4] Committee on Federal Criminal Jury Instructions of the Seventh Circuit, The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, at 1054–55 (2023 ed.), available at https://www.ca7.uscourts.gov/pattern-jury-instructions/pattern-jury.htm; Sand et al., 2 Modern Federal Jury Instructions-Criminal P 35.16 (Instruction 35-98) (emphasis added).

[5] The relevant portion of the district court's charge to the jury, which included the NFA's definitional standard, is available at pages A-609-14 of the appellate appendix. Appendix Vol. 3, ECF No. 45, *United States v. Elmowsky*, No. 22-562 (2d Cir. Jul. 22, 2022).

"designed . . . for use as a weapon" and vacating NFA conviction due to curtailment of the cross-examination of that expert). So too here: the presiding court will be in a position to instruct the jury on the central factual questions around the AR-556's design, using the legal/analytical *statutory framework* provided by section 5845 of the NFA, irrespective of the Finale Rule's fate.

To be sure, Plaintiff's allegations include some facts that track the criteria provided by the Final Rule as relevant to assessing whether a firearm qualifies as a brace-equipped SBR. *See* Am. Compl. ¶¶ 72, 75, 83–86; Final Rule at 6480. But this in no way means that Plaintiff is arguing the Final Rule is controlling here; instead, Plaintiff's fact allegations and the Final Rule's criteria are consistent because they each "align[] with the statutory definition regarding whether a weapon is 'designed, redesigned, made or remade and intended to be fire from the shoulder.'" *Miller*, 2023 WL 3692841 at *9. More importantly, and regardless of the fate of the Final Rule, Plaintiff expects that the presiding court will instruct the jury to assess whether the AR-556 was "designed," "made," and "intended" to be fired from the shoulder by considering all of the evidence presented, including expert testimony, and the parties' arguments.

Nor has Ruger established substantiality by demonstrating that Plaintiff's tort claims will "necessarily have far-reaching implications for other firearms manufacturers, distributors, retailers, other federal firearms licensees, and owners of pistols with stabilizing braces." Opp. at 5, 12–13. First, this case deals with one discontinued firearm configuration: the AR-556 Pistol. A verdict that this particular configuration is a SBR self-evidently would not control whether the many *different* firearms equipped with arm braces qualify as SBRs, especially since the evidence of their design features and the intentions of other manufacturers will be manufacturer-specific and model-specific. As to the hundreds of thousands of AR-556 Pistols currently in circulation, as Plaintiff explained in its opening brief, "nothing a fact-finder determines in this case would bind

or otherwise interfere with any federal enforcement of existing federal law." Mem. in Support of Mot. to Remand ("Mot.") at 14. As to owners of AR-556s, even if a jury decides in Plaintiff's favor here, as a matter of law any such verdict would of course not be binding or controlling as to parties not before this court (including individual owners of AR-556s or the United States government). Ruger's assertion that if Plaintiff succeeds on his claims here "millions" of "lawful gun owners could be deemed criminals" (Opp. at 13 n. 7) is no more than hyperbolic rhetoric detached from any legal reality—especially considering the higher burden of proof in criminal cases as well as the scienter requirement. *See* Seventh Circuit and Sand Model Federal Jury instructions, *supra*.[6]

Third, contrary to Ruger's argument, the fact that the question of what constitutes an SBR may be part of a complex federal firearms regulatory scheme does not support federal jurisdiction here. On this point, Ruger mostly repeats its arguments about the supposed importance of pending "challenges to ATF's new Final Rule" and the "multiple federal lawsuits pending." Opp. at 14–15, 16. But as explained above, the outcome of this case is not dependent on the outcome of those administrative law challenges. Ruger also cites *NASDAQ OMX Grp., Inc. v. UBS Securities, LLC*, 770 F.3d 1010 (2d Cir. 2014), which is distinguishable. There, while conducting "one of the largest [IPOs] in history," NASDAQ allegedly violated the "singular duty" to operate fair and orderly markets pursuant to the federal Exchange Act. *Id.* at 1013, 1021. In finding substantiality, the court noted the "quasi-governmental" nature of the NASDAQ's exchange powers and emphasized the SEC's statement, made in the context of disciplinary proceedings against NASDAQ, that securities exchanges play a foundational role in the stability of the U.S. capital markets. *Id.* 1023–28. Here,

[6] It is important to note that the ATF's Final Rule provides multiple NFA compliance options to owners of brace-equipped SBRs. Final Rule at 6570. For instance, the Final Rule provided a grace period for NFA-mandated registration (*id.*), which suggests that at least some owners of AR-556 Pistols have already complied with the NFA. And, for owners who do not wish to register their weapons, options such as permanently removing the brace from their firearm are available. *Id*. Thus, there is no meaningful connection between resolution of the disputed fact issue here and criminal prosecution of thousands or millions of firearm owners.

Ruger does not play a similar foundational role to the national interest or the federal system and this case will not broadly impact the federal regime for enforcement of the NFA.[7]

Finally, as to Ruger's fourth and fifth arguments on substantiality, the absence of a private right of action under the NFA or GCA weighs strongly *against* federal jurisdiction, as Ruger concedes and Plaintiff argued in its opening brief (Mot. at 17–18), and Ruger's reliance on the *Arm and Ally* and *Fleet Farms* decisions is misplaced, as Plaintiff also explained (*id.* at 20–22).

In the end, none of Ruger's arguments changes the reality that this case will largely turn on the factual questions of whether its AR-556 firearm was designed, made, and intended to be fired from the shoulder and, if it was, whether Ruger's NFA (and GCA) violations proximately caused Plaintiff's injuries.[8] The federal issue is therefore not "substantial" within the meaning of *Grable* and its progeny, and this case should be remanded to state court. As the Supreme Court explained in *Empire Healthchoice,* in words equally applicable here, "*Grable* emphasized that it takes more than a federal element 'to open the 'arising under' door . . . [and] [t]his case cannot be squeezed into the slim category *Grable* exemplifies." 547 U.S. at 701.

II. Plaintiff No Longer Contests the Timeliness of Removal, But Ruger Mischaracterizes the State Court's Rejection of Its Objection to the Amended Complaint.

With regard to Plaintiff's timeliness argument: the same disputed federal issue is present in both the Initial and Amended Complaints. Mot. at 2–4, 6–7. Nevertheless, Plaintiff

[7] For the same reason, Ruger's citations (Opp. at 15) to *Tantaros v. Fox News Network, LLC*, 12 F.4th 135 (2d Cir. 2021), and *New York ex rel. Jacobson v. Wells Fargo National Bank, N.A.*, 824 F.3d 308 (2d Cir. 2016) do not advance its cause. In *Tantaros*, the disputed federal issue was a "purely legal one concerning the preemptive effect of a federal statute." 12 F.4th at 146. In *Jacobson*, the court found *Grable* substantiality because the disputed federal issue was the interpretation of federal tax provisions, the resolution of which would "minimiz[e] uncertainty" for "[m]any major financial institutions" engaged in a "a trillion-dollar national market." 824 F.3d at 317–18.

[8] Ruger also suggests in passing that *Grable* substantiality is present here because the federal firearms law implicate the Second Amendment right. Opp. at 20. This argument carries no weight, as the Second Amendment does not protect "weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Dist. of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

acknowledges the merit of Ruger's argument that the Initial Complaint was susceptible to an interpretation in which the federal issue was not sufficiently necessary to bring it within the "special and small" set of cases removable pursuant to the *Grable* doctrine. *Gunn v. Minton*, 568 U.S. 251, 258 (2013).[9] As such, Plaintiff no longer contests the timeliness of the removal, and the Court need not reach this issue or Plaintiff's law of the case argument. But Plaintiff continues to maintain that the Initial Complaint put Ruger on notice that his claims related to Ruger's violation of the NFA and GCA and reserves the right to argue at the appropriate time that the law of the case doctrine precludes Ruger from re-litigating the issue of whether the allegations in Plaintiff's Amended Complaint relate back to the allegations in his Amended Complaint.[10]

CONCLUSION

For the reasons stated above and in Plaintiff's opening brief, Plaintiff respectfully requests that this Court grant the Motion to Remand.

[9] Ruger's related argument that Plaintiff's allegations about its "evasion" of federal law in the Initial Complaint were in fact allegations of Ruger's "compliance" with federal law is without merit. *See* Opp. at 6. The Initial Complaint, and the July 7, 2023, Revised Complaint, clearly alleged that Ruger designed the AR-556 Pistol so that it "evade[d] federal classification as a rifle" while still functioning as a rifle. Initial Compl. ¶¶ 10–15, Ex. A to Notice of Removal (ECF No. 1-2); Revised Compl. ¶¶ 9–14, Ex. 1 to Mot. (ECF No. 21-2). In its Answer to the Revised Complaint, Ruger denied those allegations, which belies its framing of them here. Answer ¶¶ 9–14, Ex. 5, attached hereto.

[10] The state court overruled Ruger's objection to the Amended Complaint, in an order that Ruger now attempts to decouple from Connecticut's relation back doctrine. Ex. 4 to Mot. (ECF 21-5); Opp. at 7–8. Ruger's objection rested on the sole ground that the Amended Complaint raised new causes of action that do not relate back and are thus time-barred. *See* Ex. 2 to Mot. (ECF 21-3), Ruger Obj. to Am. Compl. at 6–12. While Connecticut courts grant amendment requests liberally, *see, e.g., Jacob v. Dometic Origo AB*, 916 A.2d 872, 875 (2007), "[i]f the statute of limitations has expired and an amended pleading does not relate back to the earlier pleading, then the trial court has no discretion to allow an amendment." *Briere v. Greater Hartford Orthopedic Group, P.C.*, 157 A.3d 70, 76 n.8 (Conn. 2017). Consistent with Connecticut's relation back doctrine, Plaintiff demonstrated that his Amended Complaint asserts the same cause of action—that is, the same "transaction or occurrence" or "single group of facts which is claimed to have brought about an unlawful injury to the plaintiff"—while "amplify[ing] [and] expand[ing] what has already been alleged in support of [that] cause of action." *Briere*, 157 A.3d at 77; Ex. 3 to Mot. (ECF. 21-4) at 5–9. The state court overruled Ruger's objection, thereby necessarily deciding that the Amended Complaint relates back to the Initial Complaint. Mot. at 9–10; Ex. 4.

January 19, 2024

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CERTIFICATION

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