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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAMES FAHR, et al.,

Plaintiffs,

v.

CITY OF SAN DIEGO,
CALIFORNIA, et al.,

Defendants.

Case No.: 21-CV-1676-BAS-BGS _____

**PLAINTIFFS’ SUPPLEMENTAL
BRIEF REGARDING THE IMPACT
OF 87 FED. REG. 24652 ET SEQ.
(APR. 26, 2022) ON SAN DIEGO CITY
MUNICIPAL CODE SECTION 53.18.**

Judge: Hon. Cynthia Bashant
Date: No date set
Courtroom: 4B
Trial: Not Set

In the context of Defendants’ pending motion under F.R.C.P. Rule 12(b)(6) to dismiss Plaintiffs’ Second Amendment and Takings claims, this Court has requested supplemental briefing concerning the effect on the Second Amendment claim of the final rule issued by the Department of Justice (“DOJ”) and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) to modify the definition of “firearm” for

1 purposes of the federal regulations governing serialization requirements. Supp. Brief
2 (“SB”) Order at 3 (citing 86 Fed. Reg. 27720 et seq.) (hereafter “Final Rule”).

3 The focal point of the Court’s question for supplemental briefing are the
4 stated exceptions to the ban under San Diego Municipal Code Section 53.18
5 (“Section 53.18”), generally rendering it unlawful for any person within the City of
6 San Diego to “possess,” “purchase,” “transport,” “receive,” “sell,” “transfer,” or
7 “offer to transfer an unfinished frame or receiver.” The Court observes that Section
8 53.18 does not apply to an “unfinished frame or receiver” that is either (1) “imprinted
9 with a serial number issued to that unfinished frame or unfinished receiver by a
10 Federal Firearms Importer or Federal Firearms Manufacturer” or (2) “engraved or
11 permanently affixed with a serial number provided by the California Department of
12 Justice for that unfinished frame or unfinished receiver.” SB Order at 1-2. The Court
13 further observes that, once effective, the Final Rule will modify “the definition of
14 ‘firearm’ and . . . provide a more comprehensive definition of ‘frame or receiver,’”
15 thereafter requiring serialization of “each frame or receiver” as so defined. *Id.* at 2.

16 As modified, the Final Rule will include within the definition of “firearm” the
17 “frame” or “receiver” of any weapon “that will, is designed to, or may readily be
18 converted to expel a projectile,” as well as “a weapon parts kit that is designed to or
19 may readily be assembled, completed, converted, or restored to expel a projectile by
20 the action of an explosive.” Final Rule at 24654, 24661. And it will include within
21 the definition of “frame or receiver” those “frames or receivers that are partially
22 complete, disassembled, or inoperable, or a frame or receiver that has reached a stage
23 in manufacture where it may readily be completed, assembled, converted, or restored
24 to a functional state.” *Id.* at 24663. Based on these prospective changes, the Court
25 infers that “Plaintiffs presumably now, or will soon, have access to unfinished
26 frames and receivers that fit squarely within one of the exceptions to Section 53.18,”
27 undermining their allegation that the City precludes them from engaging in lawful
28 self-manufacturing with “unfinished” frames or receivers. SB Order at 2-3.

1 This prospective change does not undermine Plaintiffs’ allegation and
2 certainly could not support a dismissal of Plaintiffs’ Second Amendment claim
3 under the lenient standards that the Court must apply in ruling on Defendants’
4 motion to dismiss under Rule 12(b)(6). This is clear for four essential reasons.

5 *First*, it is simply premature to render any judgments based on the effect of
6 the Final Rule when it doesn’t become effective for another three months from now.

7 *Second*, and more to the point, it’s a matter of speculation as to whether, the
8 extent to which, or when Plaintiffs or anyone else in San Diego City *will* “have
9 access to unfinished frames and receivers that fit squarely within one of the
10 exceptions to Section 53.18.” As the Final Rule makes clear, “these determinations
11 must necessarily be made on a case-by-case basis,” Final Rule at 24692, and the
12 ATF employs a multi-faceted test consisting of subjective and objective factors
13 ultimately designed to decide, in the judgment of the agency, whether classifying the
14 specific component as a “frame or receiver” is consistent with the legislative intent
15 of Congress and the ATF’s prior “firearm” classifications. 86 FR 27728.¹ Similarly,
16 whether a “partially complete, disassembled, or inoperable” frame or receiver
17

18 _____
19 ¹ Here are the factors that ATF considers in making this determination:

20 (a) Which component the manufacturer intended to be the frame or
21 receiver; (b) which component the firearms industry commonly considers
22 to be the frame or receiver with respect to the same or similar firearms;
23 (c) how the component fits within the overall design of the firearm when
24 assembled; (d) the design and function of the fire control components to
25 be housed or integrated; (e) whether the component may permanently,
26 conspicuously, and legibly be identified with a serial number and other
27 markings in a manner not susceptible of being readily obliterated, altered,
28 or removed; (f) whether classifying the particular component is consistent
with the legislative intent of the Act and this part; and (g) whether
classifying the component as the frame or receiver is consistent with the
Director’s prior classifications. No single factor is controlling.

86 FR 27728. Both the Notice of Public Rulemaking (“NPRM”) and the Final Rule
have incorporated ATF’s determination test. NPRM at 27721; Final Rule at 24655,
24662 (“The NPRM also proposed to codify in the regulations the factors ATF
considers when classifying the frame or receiver of a firearm.”).

1 constitutes a “firearm” for serialization purposes is largely a discretionary
2 determination of the ATF based on the above-referenced test and “any available
3 instructions, guides, templates, jigs, equipment, tools, or marketing materials” about
4 the nature of the part(s) that the Director “may” choose to “consider.” 86 FR 27729.

5 Necessarily then, it cannot be said with any certainty—especially not by
6 laypeople or courts lacking the technical expertise in the industry—whether any
7 particular materials, parts, or components that a San Diego City resident may have
8 or seek to obtain in the future individually or collectively constitute an “unfinished
9 frame or receiver” *within the revised definition of a “firearm”* under the Final Rule.
10 Unless and until those objects are presented to the ATF for a technical determination,
11 average law-abiding citizens like Plaintiffs—who seek to exercise the rights to build
12 their own firearms but clearly cannot themselves purport to answer questions like
13 whether classifying a particular component or components as a “firearm” would be
14 consistent with Congress’s intent and ATF’s prior classifications—cannot act with
15 any confidence or certainty that the items they may possess or seek to acquire for
16 such purposes “fit squarely within one of the exceptions to Section 53.18.”

17 Indeed, the Final Rule itself recognizes the real-world complications law-
18 abiding citizens face. Not only does it accommodate them by continuing to preserve
19 people’s right to engage in homebuilding for personal use without the need for *any*
20 markings at all, Final Rule at 24653, 24706, but the rule emphasizes that ATF’s
21 voluntary determination process—which has mostly just served the manufacturing
22 industry to date—permits anyone to seek and obtain a determination “on whether an
23 item is a ‘firearm’” so as to clarify the legal status of the item, *id.* at 24666.

24 ***Third***, under the Final Rule, for anything that *is* ultimately classified as a
25 “frame or receiver” subject to serialization as a “firearm,” it must be “readily
26 completed, assembled, restored, or otherwise ‘converted’ to function as a frame or
27 receiver” or capable of being so “readily” altered. Final Rule at 24653; *see id.* at
28 24654, 24661, 24663 (applying this requirement to “frames or receivers” generally,

1 “weapon parts kits,” and “partially completed” frames or receivers). As the Final
2 Rule itself says, “the final rule makes clear that articles that have not yet reached a
3 stage of manufacture where they are clearly identifiable as an unfinished component
4 of a frame or receiver (e.g., unformed blocks of metal, liquid polymers, or other raw
5 materials) are *not* frames or receivers.” *Id.* at 24653 (italics added).

6 The Final Rule sets out a specific, multi-faceted definition of “readily,” which
7 focuses on the “time, ease, expertise, equipment, availability, expense, scope, and
8 feasibility” of converting the items or items into a functional frame or receiver, Final
9 Rule 24663, and which “[e]xpressly excludes from the definition of ‘frame or
10 receiver’ unformed blocks of metal, liquid polymers, and other raw materials,” *id.* at
11 24700. This “readily” requirement is “necessary to determine when a weapon,
12 including a weapon parts kit, a partially complete or damaged frame or receiver, or
13 an aggregation of weapon parts becomes a ‘firearm[.]’” *Id.* at 24663. It reflects
14 “when the critical stage of manufacture has occurred in which an unfinished
15 component part of a weapon becomes a ‘frame or receiver’ under 18 U.S.C.
16 921(a)(3)(B).” *Id.* at 24699. Thus, for example, the “readily” requirement is essential
17 to any proper finding that a weapons parts kit is sufficiently complete so as to fall
18 within the definition of a “firearm” that is subject to the serialization requirement,
19 because “[a]n essential part missing from the kit that cannot efficiently, quickly, and
20 easily be obtained would mean that the weapon cannot readily be completed,
21 assembled, restored, or otherwise ‘converted’ to a functional state.” *Id.* at 24685.

22 Section 53.18’s prohibitions against “unfinished” frames or receivers are not
23 limited by any such “readily” requirement. They apply to any “piece of any material
24 that does not constitute the completed frame [or receiver] of a firearm, but that has
25 been shaped or formed in any way for the purpose of becoming the frame [or
26 receiver] of a firearm, and which may be made into a functional frame [or receiver]
27 of a firearm through milling, drilling, or other means.” §53.18(b)(11)-(12). Many
28 things “may be made” into a frame or receiver by being “shaped or formed” in *some*

1 way “for the purpose of becoming” such an object, including all sorts of “raw
2 materials” whose purchase, possession, or receipt do not fairly reflect that a person
3 has reached “the critical stage of manufacture” under the Final Rule. Thus, countless
4 items *not* subject to the federal serialization requirement will inevitably remain
5 prohibited as “unfinished” frames or receivers in San Diego City, leaving people like
6 Plaintiffs under a continuing threat of prosecution in seeking to build their own guns.

7 ***Fourth***, to the extent any doubt *might* exist on this issue, the existence of a
8 question cannot support a dismissal pursuant to Rule 12(b)(6), under which the Court
9 “accepts as true the allegations in the complaint, construes the pleading in the light
10 most favorable to the party opposing the motion, and resolves all doubts in the
11 pleader’s favor.” *Motaghedi v. Pompeo*, 436 F.Supp.3d 1345, 1354 (E.D. Cal. 2020).
12 Plaintiffs’ complaint undoubtedly survives any such question about the potential
13 effects of the Final Rule. Rather, this case is ripe for the discovery process.
14 Investigating and gathering evidence on when and what firearm precursor parts meet
15 these new definitions is the only way of knowing and thus being able to properly
16 resolve whether plaintiffs *will* “have access to unfinished frames and receivers that
17 fit squarely within one of the exceptions to Section 53.18”—now or later. *See United*
18 *Public Workers of America*, 330 U.S. 75, 90, n. 22 (1947) (federal courts are “not to
19 decide” any “abstract, hypothetical or contingent questions,” “any constitutional
20 question in advance of the necessity for its decision,” or “any constitutional question
21 except with reference to the particular facts to which it is to be applied”).

22 Incidentally, the Final Rule has no bearing on Plaintiffs’ distinct Takings
23 claim concerning the property of which they have already been required to
24 dispossess themselves, for all the reasons already stated in their briefing to date.

25 So, nothing has changed in the final calculation: this motion must be denied.

26 Dated: May 16, 2022

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28 /s/ Raymond M. DiGuiseppe

/s/ John W. Dillon

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