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Ilya Shapiro,<sup>1</sup> Josh Blackman,<sup>2</sup> E. Gregory Wallace,<sup>3</sup> Randal J. Meyer<sup>4</sup>

*In the Matter of*

## Implementation of the NICS Improvement Amendments Act of 2007

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<sup>1</sup> Ilya Shapiro is a senior fellow in the Cato Institute's Center for Constitutional Studies.

<sup>2</sup> Josh Blackman is an associate professor of law at the South Texas College of Law who specializes in constitutional law, and an adjunct scholar at the Cato Institute.

<sup>3</sup> E. Gregory Wallace is an associate professor of law at Campbell University School of Law who specializes in constitutional law and social security disability law.

<sup>4</sup> Randal John Meyer is a legal associate in the Cato Institute's Center for Constitutional Studies.

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## Introduction

We've been here before: to advance a broader social agenda, the government targets the “mentally defective,” and deprives them of constitutional rights based on vague standards, with only a veneer of due process and an insufficient review process.<sup>5</sup> Stripped to its core, this proposed rulemaking demonstrates a reckless disregard for the right to keep and bear arms, the guarantees of due process, and the Constitution's protection of discrete and insular minorities, simply because the president's gun-control agenda has stalled in Congress. Unable to legislate new restrictions on what kind of arms can be sold, the government has embarked on a long-term effort of adding an untold number of Americans to lists—based on the unfounded conjecture that they pose a “danger” to others—and deprive them of a fundamental constitutional right. The very people who most need a “designated payee”—who are far more likely to be victims of a violent crimes, rather than the aggressor—should not be sacrificed at the alter of this administrative activism.

The Social Security Administration's (SSA) proposed regulation purports to comply with unpublished 2013 guidance from the Department of Justice (DOJ) and the NICS Improvements Act of 2007 (NIAA).<sup>6</sup> The SSA's NPRM advances a process for depriving “a mental defective”<sup>7</sup> of his or her constitutional right to bear arms in self-defense. The proposed regulation for transferring the records of those who seek a representative payee under Social Security disability benefits programs to the National Instant Criminal Background Check System (NICS) falls far short of constitutional muster. The proposed rule is arbitrary, capricious, plainly erroneous, and is inconsistent with the regulatory and statutory scheme; fails the standard for procedural due process established in *Mathews v. Eldridge*<sup>8</sup>; is void for vagueness, facially and as-applied, and is irrational; imposes unconstitutional conditions on the sacrifice of Second Amendment rights to obtain Social Security benefits; goes beyond the scope of Congress's delegation to the DOJ (not SSA) in the NIAA on a matter of “economic and political significance”; infringes the constitutional rights of Social Security beneficiaries without passing heightened scrutiny.

In addition to the constitutional deficiencies, the proposed rule cannot be reconciled with the requirements of Listing 12.05C; will disrupt the agency's ability to process claims and deliver services to the public; and will stigmatize mental illness and discourage the disabled from applying for benefits. Moreover, extending the proposed rule to those who are found disabled at step five is inconsistent with 18 U.S.C. § 922(d)(4).

Simply put, SSA lacks the authority to regulate firearms under the auspices of helping disabled persons. This unconstitutional and *ultra vires* rule should be abandoned. It cannot be cured by further rounds of rulemaking.

### **I. The Proposed Rule Is Arbitrary, Capricious, Plainly Erroneous, and Inconsistent with the Regulatory and Statutory Scheme**

The SSA describes its proposed rulemaking as an intricately connected set of Russian-nesting dolls. First, the Gun Control Act of 1968 prohibits the “mental defective” from

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<sup>5</sup> See *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>6</sup> NICS Improvements Act of 2007, Pub. L. 110-180, 121 Stat. 2559, 2561, at tit. I, § 101 (Jan. 8, 2008) (codified at 18 U.S.C. § 922).

<sup>7</sup> E.g., NPRM at 4, 6, 7, 22, 29, 31.

<sup>8</sup> 424 U.S. 319 (1976).

purchasing guns.<sup>9</sup> Second, the NICS Improvement Amendments Act of 2007 (NIAA) requires all federal agencies to provide the attorney general with records of any individuals they know are “mental defective,” so they can be added to the NICS.<sup>10</sup> Third, a 2014 regulation promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives defines “mental defective” as one who “lacks the mental capacity to contract or manage his own affairs.” Fourth, a 2013 unpublished DOJ “guidance” document interprets the term “lack the mental capacity to contract or manage his own affairs” to include “agency designations of representative or alternate payees for program beneficiaries.” Fifth, the Social Security Administration has the authority to determine if an applicant’s impairment warrants the receipt of benefits through a representative payee. Sixth, according to this logic-chain, once SAA determines that an individual should receive a representative payee, they are obligated to turn over those records to the Attorney General for inclusion in the NICS. On closer scrutiny however, this *matroyshka* collapses.

It is important to stress that we have no quarrel here with the Gun Control Act or the NIAA. Instead, our target is the missing link between actual law, and the proposed rule. And the link is *literally* missing. The proposed rule only vaguely approximates the statutory and regulatory standards for the federal mental health prohibitor. Under 18 U.S.C. § 922(d)(4) and (g)(4), any person who has been “adjudicated as a mental defective” is prohibited from purchasing, possessing, shipping, transporting, or receiving a firearm. The ATF regulation, 27 C.F.R. 478.11, specifies that this category includes any person who a lawful authority has determined “lacks the mental capacity to contract or manage his or her own affairs.” Only those persons who meet these criteria should be reported to the NICS.

The NPRM triggers reporting to the NICS based on the finding that a claimant who has been found disabled under one of the listed mental impairments, 20 C.F.R. Part 404, Subpart P, Appendix 1, §§ 12.00 et seq., requires a representative payee. Under 42 U.S.C. § 405(j)(1), however, payments to a representative payee are (1) *discretionary* when the agency “determines that the interest of any individual under this chapter would be served thereby . . . *regardless of the legal competency or incompetency of the individual*” and (2) *required* when the agency determines that “such a payment would serve the interest of the individual because the individual also has an alcoholism or drug addiction condition (as determined by the Commissioner) and the individual is incapable of managing such benefits.” Since the proposed rule triggers reporting to the NICS in cases of mental disability other than alcoholism or drug addition, the discretionary standard applies. That standard explicitly disclaims any necessary relationship between appointment of a representative payee and a beneficiary’s mental incompetency.<sup>11</sup>

To solve this problem, the “guidance” fabricates a link between the the ATF regulation, and the rulemaking. In January 2013—as part of his post-Sandy Hook executive actions—President Obama directed the Justice Department to “issue guidance to agencies regarding the identification and sharing of relevant Federal records and their submission to the NICS.”<sup>12</sup> Three

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<sup>9</sup> 18 U.S.C. 922(g)(4).

<sup>10</sup> 121 Stat. 2559, 2561, at tit. I, § 101(a)(4).

<sup>11</sup> 20 C.F.R. § 404.2010 affirms that “[w]e will pay benefits to a representative payee . . . when it appears to us that this method of payment will be in the interest of the beneficiary.” The regulation specifies that a representative payee will be appointed for a beneficiary who is “[l]egally incompetent or mentally incapable of managing benefits payments” or “[p]hysically incapable of managing or directing the management of his or her benefit payments.”

<sup>12</sup> Barak Obama, “Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System: Memorandum for the Heads of Executive Departments and Agencies,” Jan.

years later, this Justice Department “guidance” documents celebrates its regulatory cotillion through footnote 10 of the Notice of Proposed Rulemaking. For the very first time, the public learned that in March 2013, DOJ distributed a document titled “Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS.” The “guidance” specifically states that a person who “lack[s] the mental capacity to contract or manage his own affairs” includes someone who received an “agency designations of representative or alternate payees for program beneficiaries.” The “guidance” conveniently defines the broader category of being unable to manage affairs, at the narrow, precise level of specificity of SSA’s authority: Designating a representative payee. Without this “guidance,” the NPRM would lack statutory authority. The “guidance” purports to create a connection where there is none. But this administrative sleight of hand will not save the NPRM, because SSA receives no deference in interpreting statutes and regulations that are entrusted to another agency to implement.

This “guidance,” which by all accounts has been in effect for over three years, has never gone through the notice-and-comment process. For the constitutional reasons we discuss in Parts II-VI, *infra*, had this “guidance” gone through the rulemaking process, we would have submitted a comment, challenging DOJ’s determination that agencies must report any documents that involve “agency designations of representative or alternate payees for program beneficiaries.” But it never did. Now, SSA is trying to bootstrap deference for a rulemaking process on top of an informal “guidance” document that never went through the notice-and-comment.

It is certainly true that under *Auer v. Robbins*, agencies interpreting their own regulations are entitled to deference—even if the “guidance” document is not produced until the course of litigation.<sup>13</sup> But here, SSA is not interpreting its own regulations; it isn’t even interpreting another agency’s regulations. The basis of the entire NPRM is DOJ’s 2013 unpublished “guidance.” SSA cannot claim any deference by interpreting another agency’s informal guidance document or regulations. There is no indication that Congress intended SSA to have *any* role in deciding who would be “mentally defective” for purposes of a gun-control law. The rulemaking is “procedurally defective” *ab initio*, for it lacks any “reasoned explanation” for how SSA has the authority, expertise, or qualifications to interpret the DOJ regulation, and make determinations that raise serious Second Amendment and due process concerns.<sup>14</sup>

This rulemaking is nothing more than a “rope-a-dope.” Commenters and litigants will launch a myriad of constitutional challenges against a deficient rule and SSA will deflect, arguing that the correct target is the Justice Department (which is not a party to this rulemaking). But in truth, the government has it backwards: it’s “dope-a-rope.” SSA is entitled to no deference in its interpretation of BAFTE’s 2014 regulation, informed by the DOJ “guidance.” If this rule is finalized, a reviewing court—and there will be a reviewing court, with undersigned as intervenors—will have to interpret the proposed rule *de novo* based on the text of the Gun Control Act of 1968 and the NIAA. Absolutely nothing in those statutes gives SSA the authority to do what it proposes here: there is no statutory authority to provide such information that deprives the disabled of their civil rights. If it did, this rulemaking would have been nugatory. SSA cannot graft its regulatory reach onto a federal gun-control law under the auspices of an unpublished DOJ “guidance” document.

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16, 2013, <https://www.whitehouse.gov/the-press-office/2013/01/16/presidential-memorandum-improving-availability-relevant-executive-branch>.

<sup>13</sup> 519 U.S. 452 (1997).

<sup>14</sup> *Encino Motor Cars, LLC v. Navarro*, No. 15-415, 2016 WL 3369424, at \*6-7 (U.S., June 20, 2016).

Further, the proposed rules represent a stark departure from longstanding understanding of “mental defective” under the Gun Control Act of 1968, and the NIAA, without any “reasoned explanation.” As the Supreme Court recently observed:

When an agency changes its existing position, it “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). But the agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.” *Ibid.*; see also *Smiley v. Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations*, supra, at 515–516. It follows that an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Brand X*, [545 U.S. 967, 981 (2005)]. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp.*, [533 U.S. 218, 227 (2001)].<sup>15</sup>

For decades, Americans have come to rely on the representative-payee standard as a means to ensure those with mental health concerns have adequate assistance with their financial affairs. It is a radical departure to now force these individuals to sacrifice their constitutional rights, because the outgoing administration has determined—without any scientific basis—that they cannot be trusted to defend themselves because they cannot balance a checkbook. There is no “reasoned explanation” why the prior policy, which had substantial reliance interests, must be disregarded.

The proposed rules are arbitrary, capricious, plainly erroneous, and inconsistent with the regulatory and statutory scheme.

## II. The Proposed Rule Violates Procedural Due Process

“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”<sup>16</sup> The SSA’s proposed procedure for depriving Social Security disability recipients of their constitutional right to arms for self-defense<sup>17</sup> falls far short of satisfying procedural due process and leaves far too much room for “mistaken or unjustified deprivation” of constitutional rights.

Procedural due process claims are evaluated under the rubric established in *Mathews v. Eldridge*. The *Eldridge* inquiry requires review of “three distinct factors,” which are: “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used . . . and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the

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<sup>15</sup> *Id.* at \*7.

<sup>16</sup> *Carey v. Phipps*, 435 U.S. 247, 259 (1978).

<sup>17</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

additional or substitute procedural requirement would entail.”<sup>18</sup> Moreover, “[a]n essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’ We have described ‘the root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.”<sup>19</sup>

As to the first *Eldridge* factor, the “private interest” is an individual’s Second Amendment right to bear and keep arms.<sup>20</sup> Substantive constitutional rights are the highest order of private interest, so this factor cuts against the due-process sufficiency of the proposed rule.

As to the second *Eldridge* factor—the risk of erroneous deprivation—the proposed rule also falls short of constitutional requirements. The proposed process is as follows: (1) an SSA official is charged with determining whether a person requires a representative payee, which simultaneously determines whether the individual is “a mental defective” and to be deprived of the constitutional right to bear arms; (2) after this determination is made, an individual may apply for relief under NIAA wherein the burden shifts to the applicant to prove that he or she is not a risk to society or his or herself and must provide written evidence to prove a satisfactory “reputation”; (3) after the final determination is made, the applicant must then appeal to a district court.<sup>21</sup> Constitutional rights cannot be deprived in this manner without a fair adjudication before a neutral, Article III judge.

There is something particularly unsavory about having a bureaucrat make the initial determination that a substantive constitutional right may be abridged because an individual is “a mental defective.” Indeed, the process here smacks of the same vague and unscientific pronouncements which—through stigmatization of the mentally ill—lead to the mass sterilization of tens of thousands of Americans. In *Buck v. Bell*, the Supreme Court held that the constitutional right to procreate could be abridged permanently because “the Commonwealth [of Virginia] is supporting in various institutions many defective persons who, if now discharged, would become a menace, but, if incapable of procreating, might be discharged with safety and become self-supporting with benefit to themselves and to society, and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c.”<sup>22</sup>

While *Buck* is still good law in a purely technical sense, the case is universally reviled in the legal profession for its gross insensitivity to the rights of a “discrete and insular minority,” those determined by the state to be mentally ill.<sup>23</sup> Still even considering *Buck* as good law, the provision allowing for the removal of a constitutional right in that case required a hearing and appeals process *before* the deprivation of a constitutional right.<sup>24</sup> This is the rare case where both elements of *Carolene Products*’ fourth footnote are satisfied: “discrete and insular minorities” are being denied “a specific prohibition of the Constitution, such as those of the first ten

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<sup>18</sup> *Mathews*, 424 U.S. at 335.

<sup>19</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (U.S. 1985) (citing and quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>20</sup> See generally U.S. Const. amend. II; *Heller*, 554 U.S. 570.

<sup>21</sup> NPRM at 12 (“our determination regarding an individual’s claim for benefits, specifically our determination regarding the appointment of a representative payee, which we make in accordance with the authority granted to the Commissioner under the Act, constitutes a determination by a ‘lawful authority . . . that makes a person subject to the Federal mental health prohibitor’”), 23-24 (NIAA Review process).

<sup>22</sup> *Buck v. Bell*, 274 U.S. 200, 206-07 (1927) (Holmes, J.).

<sup>23</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>24</sup> *Buck*, 274 U.S. at 206.

amendments.”<sup>25</sup> This warrants super strict scrutiny. The SSA’s proposed process falls stunningly short of even the unsatisfactory protection of rights afforded to Carrie Buck.

If the proposed rule had been in effect in 1927, a state-employed genealogist could simply look at Buck’s family tree, observe there were “three generations of imbeciles,” and proceed to deprive her of constitutional right without a full hearing “appropriate to the nature” of the specific matter.<sup>26</sup> Realizing this parallel should be the end of the matter, and this proposed rule should be tossed to the ash-heap of constitutional errors. Nobody should be deprived of a constitutional right without the opportunity for a hearing before a neutral Article III judge whose expertise germane to that topic and taking into account the actual risks posed by an individual to others.<sup>27</sup> That the SSA’s proposed process falls short of the individualized procedure afforded to the mentally ill in *Buck* speaks volumes.

Furthermore, the process afforded compounds the issues of poor definitions and a lack of a hearing with insufficient evidentiary standards:

First, we consider legal evidence; legal evidence is required only where there is an allegation that the beneficiary is legally incompetent. Second, we consider medical evidence; whenever possible, we will obtain medical evidence that indicates the beneficiary cannot manage or direct someone else to manage his or her benefits. Third, we consider lay evidence; in the absence of legal evidence, we will obtain lay evidence in all cases. If legal evidence establishes that the beneficiary is incompetent to manage or direct someone else to manage his or her benefits, the beneficiary must receive benefits through a representative payee, and no other development is necessary. Otherwise, we will make a capability determination based on lay and medical evidence.<sup>28</sup>

This standard is frankly stunning. An SSA civil servant—who has no discernible training in domestic or national security affairs—can determine whether a person is incompetent, and sacrifice his or her substantive Second Amendment rights. This prefect will consider medical evidence “whenever possible,” and yet “will obtain lay evidence in all cases” when “mak[ing] a capability determination.” *Id.* The testimony of a lay person is not an adequate substitute for expert medical evidence. Expert evidence as to whether an individual is truly mentally incompetent or a danger to themselves and others is required before substantive constitutional rights are abridged as a matter of due process.<sup>29</sup>

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<sup>25</sup> *Carolene Products*, 304 U.S. at 152 n. 4.

<sup>26</sup> *Id.* at 207; *Loudermill*, 470 U.S. at 542 (1985) (quoting *Mullane*, 339 U.S. at 313).

<sup>27</sup> See generally *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 446-47 (1915) (“[When a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds,” a hearing is a due process right). Clearly a single individual facing the deprivation of a substantive constitution right is a “relatively small” number of persons who are “exceptionally affected,” and “upon individual grounds.” *Id.*

<sup>28</sup> NPRM at 20-21 (emphasis added).

<sup>29</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 344-345 (1976) (requiring medical testimony for the deprivation of statutory SSA benefits which, *a fortiori*, applies to constitution deprivations) (“By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon ‘routine, standard, and unbiased medical reports by physician specialists,’ *Richardson v. Perales*, 402 U.S., at 404, concerning a subject whom they have personally examined. In *Richardson* the Court recognized the ‘reliability and probative worth of written medical reports,’ emphasizing that while there may be ‘professional disagreement with the medical conclusions’ the ‘specter of questionable credibility and veracity is not present.’ *Id.*, at 405, 407.”).

Additionally, after this determination is made, the evidentiary issues compound again in the appeals process. Post-deprivation, the burden shifts to the applicant to prove that he or she is not a risk. The applicant must provide written evidence to prove their “reputation” for non-violence. After the final determination is made, the applicant must then appeal to a district court.

There is no definition of the applicable evidentiary standard—preponderance, clear and convincing, or beyond a reasonable doubt in the NPRM. The proposed rule uses the unscientific and unspecific term “reputation” to describe the kind of evidence that the individual must provide to prove that he or she is not a danger to themselves or others, and fails to provide even an example of what sort of evidence might be acceptable.<sup>30</sup> It is unconscionable to shift the burden to the defendant to prove that his or her “reputation” warrants a protection of a civil right.

Moreover, it is at this stage that *medical evidence is first mandatorily considered*—“[t]o make these required findings, we propose to require the individual who requests relief to provide us with certain evidence, including evidence from his or her primary mental health provider regarding his or her current mental health status and mental health status for the past 5 years”—when that evidence should have been mandatorily considered by the applicable SSA bureaucrat pre-deprivation.<sup>31</sup> The description of medical evidence is the *only* specification in the NPRM about what may be produced to prove a person’s “reputation”—whatever that means. Further, in light of the backlogs and understaffing within the agency,<sup>32</sup> it isn’t even clear if it would be able to practically provide sufficient procedural protections. Thus, the proposed rule fails the second *Eldridge* factor, in that the proposed deprivation process leaves a wide berth for error.

Turing to the final *Eldridge* factor, the government interest and cost to agencies, here the proposed rules stands on shaky ground. We do not dispute that the government has a public-safety interest in keeping guns out of the hands of those who have been properly adjudicated as a danger to themselves or others. But this agency, whose institutional competency focuses on assisting those with disabilities, has no role to play in this compelling state interest. Further, the administrative cost of considering medial evidence pre-deprivation, or defining applicable standards of evidence is minimal-at-best. Hearings are similarly inexpensive when weighed against the effect of that protections against erroneous deprivation and its importance in administrative law, discussed *supra*. While the government has an interest here in public safety, the minimal costs and risks associated with providing basic due process before a neutral arbitrator, with the proper competencies to adjudge questions of domestic security, cause this factor to cut against the government as well.

It is no answer to claim that DOJ is ultimately responsible for adding names to the NICS, so SSA bears no responsibility for any resulting constitutional deprivations. Through the proposed rules, SSA is taking specific actions to label a disabled person “mental defective,” a stigmatizing imprimatur that will directly result in the loss of civil rights. It also creates a burdensome, lengthy appeals process, which a disabled person must personally bear the cost of. It is SSA, not DOJ, that creates this constitutionally suspect regime.

Accordingly, the proposed rule does not even come close to passing constitutional due process muster under *Mathews v. Eldridge*.

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<sup>30</sup> NPRM at 22-25.

<sup>31</sup> NPRM at 23.

<sup>32</sup> Office of Inspector General, SSA, A-07-13-13073, Evaluation Report: The Social Security Administration’s Progress in Reducing the Initial Disability Claims Backlog at “Summary” (2014) (backlog will “not be reduced to 525,000 claims.”), *available at* [https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-13-13073\\_0.pdf](https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-13-13073_0.pdf).

### III. The Proposed Rule Is Void for Vagueness and Defies Rationality

The proposed regulation is void for vagueness on its face and as applied to individual SSA benefit recipients. The term “a mental defective” is so capacious that it sweeps far too many people with various mental health conditions that in no way impact the right to keep and bear arms. It defies rationality. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”<sup>33</sup> Moreover, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”<sup>34</sup> “Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights,” such as those protected by the Second Amendment.<sup>35</sup>

The Gun Control Act is a criminal statute, bearing penalties of up to 10 years of imprisonment and \$250,000 in fines.<sup>36</sup> Specificity in drafting regulations that may trigger such penalties is thus all the more critical.<sup>37</sup> Yet, as discussed in Part II, *supra*, all that is required for deprivation of the right to bear arms under the proposed rule is for an SSA official to determine a person to be “a mental defective”—without even necessarily the benefit of medical evidence.

The term “mental defective” is grossly overbroad, under-defined, and suffers from concerns of over-inclusiveness.<sup>38</sup> Moreover the additional “specifying” criteria proposed in the rule—“a person [is a mental defective when], as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: is a danger to himself or others; or lacks the mental capacity to contract or manage his own affairs”<sup>39</sup>—is equally vague and unscientific. The proposed rule leaves a prefect free to determine, on the basis of lay evidence, whether someone meets some unspecified criteria that is not necessarily related to her propensity to harm herself or others or her responsibility with firearms. There is no indication whatsoever that SSA officials have even the slightest bit of expertise regarding what sorts of behavior pose a danger to others, or have any qualifications to assess questions of domestic or national security. That is hardly a clear standard that is capable of preventing ad hoc, subjective enforcement or “arbitrary and discriminatory applications.”<sup>40</sup>

Not all mental illnesses are created equal—or, in the words of the SSA, not all “mental defective[s]” are as “defective” as the next. It is incredibly telling that the NPRM does not *once* cite to the most recent edition Diagnostic and Statistical Manual of Mental Disorders (DSM-V) in an attempt to parse what “mental illnesses” carry with them a risk of actual incompetence such that a person is “a mental defective” for the purposes of NICS listing. They couldn’t because the agency lacks any qualifications to make such judgment calls. Even on appeal, this is not a judicially manageable standard that courts can use to review the denial of rights. The regulation

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<sup>33</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

<sup>34</sup> *Id.*

<sup>35</sup> *Hoffman Estates v. The Flipside*, 455 U.S. 489, 499 (1982).

<sup>36</sup> 18 U.S.C. §§ 922(d)(4), (g)(4) (2016).

<sup>37</sup> *See Hoffman Estates*, 455 U.S. at 498-99 (“The Court has also expressed greater tolerance of enactments with civil, rather than criminal, penalties because the consequences of imprecision are qualitatively less severe.”); *see also Reno v. ACLU*, 521 U.S. 833, 845, 872, 882 (1997) (vagueness challenge) (“[T]he risk of criminal sanctions ‘hovers over each . . . like the proverbial sword of Damocles. . .’”).

<sup>38</sup> NPRM at 22.

<sup>39</sup> NPRM at 29.

<sup>40</sup> *Grayned*, 408 U.S. at 109.

is so vague that it brings practically any iteration of mental disease under the sweep of “mental defect[,]” and thus is irrationally vague.<sup>41</sup>

The proposed rule states that reporting to the NICS will be triggered only when a representative payee is appointed because the mentally-disabled beneficiary is “incapable of managing benefits payments as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease.” 20 C.F.R. § 421.110(b)(5) (proposed).

Neither the SSA, the agency’s current regulations, nor the proposed rule define what it means to be “mentally incapable of managing benefits payments,” except to limit the inquiry to the capability to manage benefit payments. The ATF regulation, 27 C.F.R. 478.11, however, specifies that a “mental defective” is any person who a lawful authority has determined “lacks the mental capacity to contract or manage his or her own affairs.” Critically, managing one’s disability benefit payments is only *a subset* of managing one’s affairs. The two standards don’t say the same thing in different ways; they say different things. A person can manage his or her own affairs, even if help is needed with respect to the limited subcategory of disability payments.

The agency concedes on page 13 of the proposed rule that there is not a “perfect fit” between these regulatory definitions, but it asserts *without explanation* there is a “reasonable and appropriate fit.” Since operation of the proposed rule will result in an absolute ban on possession and purchase of firearms—a constitutionally-protected right—as well as potential criminal liability, a standard that is “reasonably close” but not identical will not suffice. The fit has to be narrowly tailored. The NPRM is “about as narrowly tailored as a burlap bag.”<sup>42</sup>

Significantly, the agency *will make no finding* that the beneficiary either is a “mental defective” or “lacks the mental capacity to contract or manage his or her own affairs.” The agency’s *only findings* will be that the beneficiary is disabled under the Mental Disorder Listings and must have a representative payee because he or she is incapable of managing benefits. These findings fall short of the statutory or regulatory standards for the federal mental health prohibition

Accordingly, due process requires that the SSA at least specify criteria that provides more clarity to enforcing bureaucrats than whether the person is “a mental defective.”

#### **IV. The Proposed Rule Imposes Unconstitutional Conditions on the Receipt of Social Security Benefits**

The proposed rule unconstitutionally conditions the receipt of Social Security disability benefits on the sacrifice of Second Amendment rights. “[T]he power of the state . . . is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights.”<sup>43</sup> Indeed, “[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.”<sup>44</sup> Moreover,

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<sup>41</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (applying rational basis-plus review to discrimination against the mentally ill).

<sup>42</sup> *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1685 (2015) (Alito, J., dissenting).

<sup>43</sup> *Frost & Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583, 593-94 (1926).

<sup>44</sup> *Id.* at 594.

For at least a quarter-century, this Court has made clear that, even though a person has no ‘right’ to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons . . . It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest . . . . Such interference with constitutional rights is impermissible.<sup>45</sup>

The Supreme Court has “applied this general principle to . . . welfare payments.”<sup>46</sup> The “condition” here could not be more clear: in order to gain or maintain a representative payee by administrative determination, needy disabled persons must submit to being placed on the NICS list and foregoing their Second Amendment rights.<sup>47</sup> That plainly conditions the receipt of valuable statutory benefits on the sacrifice of civil rights. The government is not allowed to foist that Catch-22 onto mentally disabled persons. “This constitutional challenge cannot be answered by the argument that public assistance benefits are a ‘privilege,’ and not a ‘right.’”<sup>48</sup> When the government seeks to provide services to the disabled through the SSA, it cannot require those seeking the privilege of services to sacrifice rights. Otherwise, it would allow the government to “produce a result which [it] could not command directly.”<sup>49</sup>

Accordingly, the proposed regulation fails constitutional muster insofar as it conditions the receipt of a representative payee upon the submission to NICS registry.

## V. The Proposed Rule Touches Upon a Question of “Economic and Political Significance” and is *Ultra Vires*

Congress does not quietly give agencies the power to radically alter constitutional rights. “In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>50</sup> Like the administrative question posed in *King v. Burwell*, this too is “one of those cases.”<sup>51</sup> The proposed rule abridges constitutional rights for a large number of people without express congressional authority. Gun ownership is a substantive constitutional right and cannot lightly be infringed upon.<sup>52</sup> Thus, whether every person who can be termed to be “a mental defective”—which is to have any mental illness of any degree without reference to medical evidence on the dangerousness of the person—can be deprived of a

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<sup>45</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

<sup>46</sup> *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); *Graham v. Richardson*, 403 U.S. 365, 374 (1971)). While the Court has enacted more restrictive tests in other “unconstitutional conditions” contexts, see *Dolan v. City of Tigard*, 512 U.S. 687 (1994) (conditions on property development); *Nollan v. Carolina Coastal Comm’n*, 483 U.S. 825 (1987) (same), it has not applied those tests to “welfare cases.” *Graham*, 403 U.S. at 366 (Blackmun, J.).

<sup>47</sup> U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the right to keep and bear arms in self-defense is a fundamental constitutional right).

<sup>48</sup> *Shapiro*, 394 U.S. at 627 n.6.

<sup>49</sup> *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); see also “*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*”, Black’s Law Dictionary (9th ed.) (“when anything is prohibited directly, it is also prohibited indirectly”); 2 Co. Inst. 48; Co. Litt. 223(b).

<sup>50</sup> *King v. Burwell*, 135 S.Ct. 2480, 2488-89 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

<sup>51</sup> *Id.* at 2489.

<sup>52</sup> See generally U.S. Const. amend. II; *Heller*, 554 U.S. 570.

constitutional right is a question of “deep ‘economic and political significance.’”<sup>53</sup> Therefore, it can fairly be said that “had Congress wished to assign that question to . . . [the SSA], it surely would have done so expressly.”<sup>54</sup>

Moreover, “it is especially unlikely that Congress would have delegated this decision” to SSA, “which has no expertise in crafting” gun policy “of this sort.”<sup>55</sup> Courts post-*King* are commanded to examine whether agencies are actually expert in the areas of regulation in which they are claiming implicit delegation. Determining whether a mentally ill person satisfies the criteria for obtaining the benefit of a representative payee is perfectly within SSA’s expertise. But determining who among its recipients is capable of responsible firearm ownership and which pose a real danger to society is far, far afield of the SSA’s area of expertise and mission. The SSA’s job is to administer social insurance benefits and the trust fund, not to determine gun safety regulations. This administration is not staffed with the medical and gun policy experts necessary to make such determinations on a regular basis. “This is not a case” for the SSA.<sup>56</sup>

Indeed, the proposed rule is *ultra vires*. The NIAA’s statutory framework does not clearly authorize this exercise of executive power by an agency. Section 101 of the NIAA requires that agencies provide relevant records to the attorney general, but determining which of those records are covered by the NIAA’s mandatory reporting provisions is not delegated to the SSA or any other executive agency.<sup>57</sup> Nor does the Social Security Act task the SSA with gun policy.<sup>58</sup> Moreover, as discussed *supra*, it is highly unlikely that Congress made this delegation implicitly to SSA or *any* executive agency. Were an agency expressly tasked with the authority to make a rule that SSA representative-payee records were relevant and must be disclosed, there would be no *ultra vires* concern. (As discussed in Part I, *supra*, the unpublished DOJ “guidance” does not count). But that is not the case here, and the SSA is far afield from its mandate.

In sum, the proposed rule is both *ultra vires* and presents a question of “economic and political significance” which Congress would have expressly tasked SSA to answer if Congress wanted SSA to answer it.

## **VI. The Proposed Rule Ignores That a Person Who Requests a Representative Payee from SSA Still Receives *Heller* Protection**

The proposed rule treats the entire category of the mentally ill as *per se* deprived of their Second Amendment rights under *District of Columbia v. Heller*.<sup>59</sup>

The *Heller* Court held that “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”<sup>60</sup> This right is not a “second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause,” but a

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<sup>53</sup> *King*, 135 S.Ct. at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2443 (2014) (quoting *Brown & Williamson*, 529 U. S., at 160)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> NICS Improvements Act of 2007, Pub. L. 110-180, 121 Stat. 2559, 2561, at tit. I, § 101 (Jan. 8, 2008) (codified at 18 U.S.C. § 922).

<sup>58</sup> See generally 42 U.S.C. ch. 7.

<sup>59</sup> 554 U.S. 570 (2008) (clarifying the substantive constitutional right to bear arms); see also U.S. Const. amend II; *McDonald v. Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment against the states).

<sup>60</sup> *Heller*, 554 U.S. at 595.

robust part of the Bill of Rights.<sup>61</sup> Impositions on the constitutional right to keep and bear arms are subject to heightened scrutiny.<sup>62</sup> That right has since been incorporated against the states.<sup>63</sup>

Similar to the regulation in *Heller*, the proposed rule here seeks to enacting a “prohibition on an entire class” of people from obtaining arms to exercise their “inherent right of self-defense.”<sup>64</sup> Accordingly it must pass at least intermediate scrutiny. Intermediate scrutiny requires that the proposed rule infringing on a constitutional right serve an “important state interest” and be “substantially related” to serving that interest.<sup>65</sup> A “complete prohibition” of gun use by the entire class, however, fails intermediate scrutiny and *a fortiori*, strict scrutiny.<sup>66</sup> Reg says reasonably related, suggesting some sort of rational basis scrutiny.

For sure, there is an important state interest in ensuring that weapons are kept out of the hands of those who would use them to harm themselves or others. However, the proposed rule is not “substantially related” to serving that interest.

By the SSA’s own admission:

We recognize that there is no perfect fit between: (1) our adjudication regarding a claimant’s entitlement to benefits and determination of whether to designate a representative payee; and (2) the regulatory definition of an individual who is subject to the Federal mental health prohibitor. Considering the relevant regulatory factors, discussed above, however, we believe that there is a *reasonable and appropriate fit* between the criteria we use to decide whether some of our beneficiaries are disabled and require a representative payee and the Federal mental health prohibitor.<sup>67</sup>

It is difficult to claim that the proposed rule is substantially related when there is an admitted and substantial mismatch between the SSA’s determination that a person needs a representative payee and the legal standard for meeting the federal mental health prohibitor. The SSA includes autistic persons and those who suffer from anxiety disorders within those that would be subject to NICS reporting. While the SSA might be right that its rule could pass rational basis review as “reasonable and appropriate,” that does not mean it would pass muster under heightened scrutiny. This issue is compounded by the fact that SSA “would not provide underlying diagnoses, treatment records, or other identifiable health information, nor does the NICS maintain that information,” so those maintaining the NICS list could not exclude erroneous SSA reports based on their expertise.<sup>68</sup>

The *Heller* Court explained that the case does not “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.” The Supreme Court did not lay out an exhaustive definition of mentally ill or describe to what laws specifically it was referring—nor did it purport to intend to do so.<sup>69</sup> From its context—paired with possession by felons—“mentally ill” in this context is most naturally read to indicate a person who has been

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<sup>61</sup> *McDonald*, 561 U.S. at 780.

<sup>62</sup> *Heller*, 554 U.S. at 628-29 & n.27.

<sup>63</sup> *See generally McDonald*, 561 U.S. at 742.

<sup>64</sup> *See Heller*, 554 U.S. at 628.

<sup>65</sup> *See generally, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

<sup>66</sup> *Id.* at 629.

<sup>67</sup> NPRM at 13.

<sup>68</sup> NPRM at 9.

<sup>69</sup> *Heller*, 554 U.S. at 626.

adjudicated as harmful to himself, or to others.<sup>70</sup> The government should not attempt to graft its capacious and vague definition of “mentally defective” onto *Heller’s* dicta. Doubtless, the Court did not mean to sweep every hypochondriac, arachnophobiac (spiders), coulrophobiac (clowns), or lepidopterophobiac (butterflies) under the federal mental health prohibitor. For example, an agoraphobic person may have a fear of crowded Social Security offices, and request a representative-payee. The person may have complete control over her affairs, and have no impairment of her ability of self-defense. But due to specific conditions, she benefits from having a person appointed to handle disability payments. There is no reason to bar this person from owning a firearm.

A person’s fear of butterflies or crowded places clearly has no bearing on her ability to use firearms. Thus, the *Heller* “mental illness” language—despite its unfortunate brevity—cannot reasonably be construed to cast a blanket exception for Second Amendment protections when discussing the mentally ill. The language should be construed so that those whose mental illness makes them a danger to themselves or others may be deprived of Second Amendment rights if afforded due process. Accordingly, the proposed rule runs afoul of the heightened scrutiny demanded by *Heller* for impositions on Second Amendment constitutional rights.

Further, strong empirical evidence exists to question the rationality behind prohibiting those with mental illness who have not demonstrated they pose a harm to themselves, or others from bearing arms. First, the NPRM makes no effort to connect a person with a mental disorder—especially something as trivial as an inability to manage one’s own finances—and propensity for violence. The Surgeon General concluded that “the overall contribution of mental disorders to the total level of violence in society is exceptionally small.”<sup>71</sup> A 2009 study in *Arch Gen Psychiatry* found that “[s]evere mental illness alone was not statistically related to future violence,” and “if a person has severe mental illness without substance abuse and history of violence, he or she has the same chances of being violent during the next 3 years as any other person in the general population.”<sup>72</sup> A study from the Netherlands demonstrated that the proportion of violent crime directly attributed to mental illness is less than 0.2%.<sup>73</sup>

Second, mental health professionals have been unable to identify specific conditions that serve as risk factors for violence.<sup>74</sup> The 2009 study in *Arch Gen Psychiatry* concluded, “that people with any type of severe mental illness were not at increased risk of committing serious/severe violent acts such as use of deadly weapons.” This conclusion, the study noted, was “at odds with public fears such as those reported in a national survey in which 75% of the sample viewed people with mental illness as dangerous and 60% believed people with schizophrenia were likely to commit violent acts.” The Supreme Court has singled this sort of irrational animus

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<sup>70</sup> Josh Blackman, *The Constitutionality of Social Cost*, 34 Harv. J.L. & Pub. Pol’y 1 (2011).

<sup>71</sup> U.S. Dep’t of Health and Human Servs., *Mental Health: A Report of the Surgeon General 7* (1999), available at <https://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf>.

<sup>72</sup> Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 *Arch. Gen. Psychiatry* 152, 157 (2009), available at <http://archpsyc.jamanetwork.com/article.aspx?articleid=210191>.

<sup>73</sup> See generally David J. Vinkers et al., *Proportion of Crimes Attributable to Mental Disorders in the Netherlands Population*, 11 *World Psychiatry* 134 (June 2012), available at <http://onlinelibrary.wiley.com/doi/10.1016/j.wpsyc.2012.05.012/full>.

<sup>74</sup> Elbogen & Johnson, *supra* at note 72.

against the disabled as grounds for heightened scrutiny.<sup>75</sup> Age, gender, and socioeconomic status are much stronger predictors of violence than mental health.<sup>76</sup>

Third, individuals with severe mental illness are victims of violent crimes at a rate nearly 12 times higher than the general population.<sup>77</sup> This strengthens the need for their inalienable right of self defense, not weakens it. Both *Heller*, the Gun Control Act of 1968, and the NIAA are best read to prohibit the sale of guns to the mentally ill who pose a threat to others. To avoid these constitutional doubts, SSA should not interpret the law in a manner that expands the class of individuals added to the NICS without any showing that they pose a risk to others—based only on their inability to manage financial affairs. This cannot be the basis to deny a substantive constitutional right.

## **VII. The proposed Rule Cannot Be Reconciled with the Requirements of Listing 12.05C, the Most Commonly Used Listing for Intellectual Disability**

The proposed rule on pages 13 and 14 sets out four factors, including the agency’s determination that the claimant meets or medically equals the requirements of one of the Mental Disorders Listing of Impairments (Listings), 20 C.F.R. Part 404, Subpart P, Appendix 1, §§ 12.00 et seq., to ensure that “our determination is the ‘result of’ his or her mental impairment, and not because of another factor, such as the individual’s age or physical impairment” (page 14). Listing 12.05C, which is the most commonly used listing for intellectual disability, specifies that a claimant is considered disabled due to intellectual disability when he or she has “[a] valid verbal, performance, or full scale I.Q. of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05C.

Disability under Listing 12.05C does not depend on the existence of significantly subaverage general intellectual functioning (60-70 IQ) *alone*; rather, the listing is met only when there is subaverage intelligence *and* another physical or other mental impairment significantly limiting the claimant’s ability to work. A claimant who is found to be disabled under Listing 12.05C is not disabled based on the mental impairment alone, but on the mental impairment *in combination* with a physical or another non-listing level mental impairment.

Put differently, neither subaverage intelligence measured by a valid IQ of 60-70 (what used to be called “mild mental retardation”) nor the additional physical or mental impairment *by themselves* meet the criteria for a mental disorder listing.

A finding of disability under Listing 12.05C thus is inconsistent with the proposed rule’s assurance that reporting to the NICS will be triggered only when the claimant’s disability is due only and exclusively to mental impairment of listing-level severity, and not because of a physical

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<sup>75</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (“the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.”).

<sup>76</sup> *Id.* (“Predictors of serious/severe violence included a subset of these risk factors, including younger age, being male, having less than a high school education, history of violence, juvenile detention, perception of hidden threats from others, and being divorced or separated in the past year. This model had an AUC of 0.87 and was statistically significant, accounting for a quarter of the variance in serious/severe violent behavior.”).

<sup>77</sup> Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness*, 62 Arch. Gen. Psychiatry 911, 914 (2005), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1389236>; Heather Stuart, *Violence and Mental Illness: An Overview*, 2 J. World Psychiatry 121, 123 (2003) (“It is far more likely that people with a serious mental illness will be the victim of violence,” rather than its perpetrator.).

impairment. That inconsistency is two-fold: (1) the claimant’s mental impairment—subaverage intelligence measured by a valid IQ of 60-70—is not itself of listing-level severity; and (2) the claimant meets the mental disorder listing only because his or her sub-listing-level mental impairment is combined with a significant physical impairment, or with another sub-listing-level mental impairment.

These inconsistencies belie the proposed rule’s claim to report to the NICS only those disabled by mental impairments of listing-level severity and not due to physical impairments.

#### **VIII. Extending the Proposed Rule to Those Who are Found Disabled at Step Five and Receive a Representative Payee Is Inconsistent with 18 U.S.C. § 922(d)(4) and (g)(4)**

The proposed rule invites comments as to whether the agency also should report to the NICS those who have been appointed a representative payee after being found disabled at step five of the sequential evaluation process.

This would be a dangerous and unconstitutional expansion of the proposed rule because at step five the finding of disability is not based solely on the severity of a mental impairment; it also includes consideration of a person’s age, education, work history, and other vocational factors, and it often includes consideration of physical impairments as well. For example, a claimant could be found disabled at step five if he is 50 years old and is limited to unskilled sedentary work due to chronic back pain and depression, even though the depression by itself is not severe enough to be disabling.

Because of the wide range of factors considered in determining disability at step five, the risk of erroneous deprivation is much greater even than at step three. Once disability is determined at step five, inquiry into whether the claimant is “incapable of managing benefits payments as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease,” 20 C.F.R. § 421.110(b)(5) (proposed), will become much more complex and imprecise, the factfinder must isolate the claimant’s mental impairment from physical impairments and other factors to accurately assess its severity and effects.

A claimant whose disability is based on his or her age, education, and vocational factors, and includes consideration of physical and mental impairments that may not, by themselves, be disabling, has not been “adjudicated as a mental defective” in the ordinary and usual sense of that term in 18 U.S.C. § 922(d)(4) and (g)(4).

#### **IX. The Proposed Rule Will Disrupt the Agency’s Ability to Process Claims and Deliver Services to the Public**

The agency’s adjudicative process is designed to determine disability, not whether a beneficiary meets a federal firearms prohibitor. What heretofore has been ancillary to the disability determination process—whether a representative payee is required—will become a legally separate and complex determination of huge consequence. Under the proposed rule, the representative payee determination will determine a beneficiary’s constitutional rights and put the beneficiary at risk for criminal liability. The additional procedures required to ensure due process will disrupt the agency’s ability to process claims and deliver services to the public.

The proposed rule requires the disability and payee determinations to be legally separate. Indeed, a “capability” inquiry entirely separate from the disability determination process must be commenced to adjudicate whether the affected beneficiary is capable of managing his or her own benefits as a result of marked subnormal intelligence, or mental illness, incompetency, condition

or disease. Notice of rights denied, criminal penalties, and the relief process must be given both orally and in writing before the inquiry can proceed. Legal, medical, and lay evidence must be obtained, analyzed, and tested. Doctors, therapists, and medical professionals, as well as lay witnesses who give unfavorable opinions will be subject to cross examination.<sup>78</sup> The capability determination will take on a life of its own, with the very real potential for becoming every bit as prolonged and complicated as the disability determination process. It also could take on an adversarial character far beyond current agency adjudication, as witnesses with strong views on gun control may hijack what are designed to be rehabilitative proceedings.

And that's just prior to the representative determination. The proposed rule adds an entirely new layer of administrative process for requesting relief from the federal mental health prohibitor in §§ 421.150 to 421.165. Administrative adjudicators, who heretofore have devoted themselves to the disability determination process, now will be required to determine whether the beneficiary will not be likely to act in a manner dangerous to public safety and that the granting of relief will not be contrary to the public interest. Or, scarce agency resources will be required to hire and train numerous additional adjudicators who do nothing but consider relief requests.

Agency adjudicators will consider the applicant's criminal history, reputation, current mental health status and five years of mental health records, whether the applicant has ever been a danger to himself or herself or to others, whether the applicant will pose a danger if allowed to purchase and possess a firearm or ammunition, statements from clergy, law enforcement officials, employers, friends, and family members.<sup>79</sup>

This entire process is far outside the agency's mandate and expertise, and can only disrupt the agency's disability-determination process and require diversion of scarce resources to nondisability issues.

#### **X. The Proposed Rule Stigmatizes Mental Illness and Will Discourage Those Who Are Disabled Due to Mental Impairment from Seeking Treatment or Applying for Disability Benefits for Fear of Losing Their Civil Rights**

The proposed rule creates a distinct risk that a program designed to help the disabled actually will stigmatize mental illness and discourage people from seeking treatment or benefits. While notice requirements under the proposed rule are triggered only after a finding of disability under the Mental Disorders Listing of Impairments, *see* 20 C.F.R. § 421.140 (proposed rule), the claimant's representative likely will inform the claimant of the reporting requirements in advance—or the claimant will have learned of them from friends, online, or in the media.

The proposed rule creates a strong disincentive for disabled firearm owners (or potential firearm owners) to seek treatment or benefits that could help fund further mental health treatment. It could also force potential beneficiaries to self-incriminate, by providing information about their firearm disability. The very people who need benefits and continuing treatment may

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<sup>78</sup> Courts are divided on whether the right to subpoena and cross-examine witnesses in agency disability hearings is absolute under procedural due process or qualified under the agency's regulations, dependent upon a claimant's request and subject to the ALJ's denial, which is reviewed for abuse of discretion. *See, e.g., Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008). Because of the potential for deprivation of civil rights and imposition of criminal liability, courts will have little difficulty recognizing an absolute right to subpoena and cross-examine witnesses in capability hearings.

<sup>79</sup> An applicant is afforded only 30 days to collect this evidence after the request for relief is submitted or show cause for an extension of that period. This short time period obviously raises due process concerns.

be dissuaded from talking to their doctor or applying for disability out of a fear of losing their civil rights.

## Conclusion

Let's be frank about what this proposed rule represents. The president has been stymied by his inability to advance his gun-control agenda in Congress, so he has directed federal agencies to identify any conceivable basis that can be used to disarm undesirables—"suspected" terrorists, veterans with PTSD, Social Security recipients, and others.<sup>80</sup> The government's *modus operandi* is to add people to lists so they are disqualified from purchasing arms. Once these lists are created, their ranks will swell, spreading this unconstitutional scourge to countless classes of Americans, who have done nothing wrong, and pose no harm to anyone. This NPRM would create a dangerous precedent that would bolster other ill-conceived measures, such as "No Fly, No Buy" lists and any other due-process-lacking list the administrative state can concoct to deprive people of civil rights, before a neutral judge assesses the situation.

This proposed rule is particularly shameless, because it targets the disabled—a group far more likely to be a victim of violent crimes than the aggressor—and puts them in the intractable position of choosing between their constitutional rights and statutorily-protected benefits. There is not a scintilla of evidence anywhere in the NPRM to support the baseless assertion that individuals who are appointed a representative payee suffer such an ailment that justifies the sacrifice of their constitutional rights. Further, only through a regulatory rope-a-dope can SSA fabricate the authority they need to engage in this rulemaking. Exacerbating these constitutional tragedies, is that the NPRM foists upon an agency that is perpetually overstaffed and underfunded the delicate task of balancing security and liberty.

Abandon this foolish rule. Don't sacrifice the rights of the disabled to serve an unrealized legislative agenda.

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<sup>80</sup> Josh Blackman, Obama's Long Game on Guns, *National Review Online*, Jan. 6, 2016, <http://www.nationalreview.com/article/429303/obamas-guns-executive-action-opens-door-state-action>.