No. _____

In The
SUPREME COURT OF THE UNITED STATES

THOMAS F. KUZMA
Petitioner,
v

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the definition of a machinegun in 26 U.S.C. § 5845(b) void for vagueness as applied here to a receiver (frame for a firearm) used to make a shop tool designed to test legal automatic bolts?

2. Who interprets an ambiguous section of a federal statute that results in a criminal conviction and penalties, the Bureau of Alcohol, Tobacco, Firearms, and Explosives or the courts?

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REFERENCE TO OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit was filed on August 3, 2020. The citation to this opinion is: 967 F.3d 959 (9th Cir. 2020). See App. 1-20. The district court's September 11, 2020 amended judgment is unreported. See App. 21-25.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on August 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 1:

All legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and a House of Representatives.

Constitution of the United States, Fifth Amendment:

No person shall be held to answer....., nor be deprived of life, liberty, or property, without due process of law...

26 U.S.C. § 5845(b)

(b) **Machinegun**.—The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

INTRODUCTION

This case presents an opportunity for this Court to address a troubling issue that continues to plague lower federal courts – who interprets an ambiguous portion of a criminal statute, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or the courts? In this case it appears to be the ATF, which means that the enforcer of the law is also defining what conduct falls within that law. Justice Gorsuch described the problem in his statement accompanying the denial of certiorari in *Guedes et. al. v Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S.Ct. 789, 780 (2020):

> "The law hasn't changed, only an agency's interpretation of it. And these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations. How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess *again* whether a later and opposing agency interpretation will *also* be held 'reasonable'?" [emphasis in original]

Here the ATF gave Kuzma conflicting interpretations of the statute defining whether a registered receiver[1] was or was not a machinegun under 26 U.S.C. §5845(b). When the receiver was modified to be used as a shop tool designed to test whether a few automatic bolts were safely ejecting cartridges, the ATF applied

[1] The term "receiver" refers to the central part of a firearm that the parts are attached to for the purpose of making it into a weapon. This part is also referred to as a "frame" or "stamping."

varying interpretations to say it was a "machinegun." This included using a historical definition, which is no longer valid, as well as adding a new interpretation to the "designed" portion of the statute. The ATF's actions in this case violated Kuzma's Fifth Amendment right to due process and presents the larger question of the separation of powers mandated by the Constitution.

STATEMENT OF THE CASE

The charges[2] against Kuzma were based on a receiver that was used to make a shop tool designed to test bolts, which was or was not a machinegun depending upon who you asked and when.

The Receiver. The item at the center of this case was a D&D Sales Model A, multi-caliber Uzi-type semi-automatic receiver (firearm frame).[3] D&D Sales and Manufacturing ("D&D") held a Type 07 Federal Firearms License ("FFL"), which permits its holder to manufacture firearms. (App. 195, 213). In 2013, D&D placed Exhibit 12 into use as a shop tool designed for testing semi-automatic parts with a bolt blocking bar ("blocking bar") installed. (App. 196, 229-230). When the ATF seized the shop tool in 2017, the bolt blocking bar and feed ramp ring had been removed, and an automatic barrel attached. (App. 154, 160). These modifications were made for the sole purpose of permitting manual insertion of a sample automatic bolt to test whether the cartridge extractor worked properly. (App. 132, 149, 224-228). There was no evidence that Exhibit 12 had ever been part of a fully automatic weapon, nor that anyone intended it to be. (App. 145-147, 222).

D&D Sales and Thomas Kuzma. D&D Sales and Manufacturing was founded in 1999 by Donald Tatom and Donald Balda. (App. 207, 209). It didn't

[2] Kuzma was tried and convicted of violating 18 U.S.C. § 922(o) [possession of a machinegun] and 26 U.S.C. § 5861(d) [possession of unregistered machinegun] in the United States District Court for the District of Arizona, case No. 4:17-cr-00855. That court had jurisdiction under 18 U.S.C. § 3231.

[3] Designated as Government Exhibit 12 at trial (App. 124).

deal in firearms, but rather was in the business of converting cut-up submachinegun parts into semi-automatic parts and occasionally sold a few automatic parts. (App. 201, 208-209, 213).

Petitioner Thomas Kuzma was designated as the 'responsible person' on D&D's license. (App. 112-113, 121, 134, 198). Kuzma is a disabled, now 77-year old Army veteran, who managed D&D for several years. (App. 112-113, 202). In exchange for managing D&D, Tatom permitted Kuzma to live in a small portion of his Tucson home.[4] (App. 112, 191-193). At the time of the events here, Kuzma ran the business because Tatom was receiving treatment for a blood disorder abroad. (App. 206-207).

D&D employed two independent contractors: 1) Tammy Loeffler who did the administrative work maintaining all the required logbooks, taking care of the customers, and doing the paperwork for orders; and 2) Timothy Sink who did the manufacturing work as well as preparing and packaging the orders for shipment. (App. 141, 187-188, 194, 199, 210-212). The administrative part of D&D's business operated out of a mobile home on Tatom's property. (App. 188-189, 199). The shop and storage area was in the garage area of the residence. (App. 122, 125-126, 200).

Since 1990 Kuzma suffered from military service-related physical and cognitive impairments, including fibromyalgia, spinal and cerebral degeneration,

[4] Kuzma also received social security and disability benefits per the pre-sentence report ¶ 44.

degenerative joint disease, atrial fibrillation, and mild dementia. (App. 203-205). In 2013 as physical work became more difficult for Kuzma, he hired Sink to help him. (App. 211). By the time of the events in question Kuzma was generally bed-ridden, in a tremendous amount of pain, and Sink was doing all the physical work of D&D. (App. 143-143, 210-211).

How this Case Came About. The investigation began when Sink pawned a firearm he put together from parts he had stolen from D&D. (App. 135, 149). This firearm led the ATF to Sink.[5] Sink told the agents he put the firearm together at D&D. The agents offered him payment for information about Kuzma's violations of federal firearms laws. (App. 136-137, 150-151).

Contrary to the agents' suspicions, D&D had a Type 07 Federal Firearms License. Kuzma, the designated person on the license, kept meticulous records of all acquisitions and dispositions. (App. 112-113, 121, 195, 213). In fact, Exhibit 12 was documented in D&D's books as a registered receiver D&D Sales SND000005 cal. 9mm, .22, .45-ACP, 41-AE & 122.[6] (App. 195). The only incriminating information Sink could offer was that Kuzma had a semi-automatic receiver in the shop from which he had removed the blocking bar for the purpose of testing an automatic bolt. (App. 132, 149). Sink explained that Kuzma instructed him to immediately replace the blocking bar, but he failed to do so. (App. 197, 232-234). After learning this information, the ATF told Sink not to do any more welding,

[5] This machinegun was the basis for Counts 5 and 6 against Sink.
[6] These are ammunition sizes.

which would be required to replace the blocking bar, and as a result Sink never replaced the blocking bar. (App. 137, 152).

Kuzma explained that after they tested the automatic bolt, Sink removed the automatic barrel. (App. 235-236, 240). But apparently after Sink met with the ATF and shortly before the search, Sink reinstalled the automatic barrel, added a pistol grip, and put on sights. (App. 232-236, 240). Kuzma didn't approve of these changes and asked Sink to reverse them as soon as he noticed them. Sink never complied. *Id.*

The agents obtained a search warrant for the D&D property where Kuzma lived. (App. 111-112). Before executing the warrant, the agents lured Kuzma from the property and questioned him. (App. 114-116). Kuzma acknowledged there was an item in the garage that would meet ATF's definition of a machinegun. The agents found the item where Kuzma said it would be. (App. 117-118, 123-124, 133). This item became Exhibit 12. (App. 124).

Consistent with what Sink told the officers, Kuzma explained that this was a shop tool they designed and used to check the extractor function of automatic bolts. (App. 139-140, 224-229). The size needed to be right because if the extractor didn't grip the cartridge properly, it would leave a fired cartridge in place, which could cause an out-of-battery detonation or other deadly accident. (App. 225-226, 233). Kuzma acknowledged the item fit ATF's technical definition of a machinegun. (App. 119-120, 126-127). Although he was aware of this, based on a lengthy correspondence with the ATF about this subject, Kuzma believed D&D

had an exemption that permitted it to possess these receivers, so long as it advised its customers that a blocking bar must be installed when D&D sold a receiver. (App. 214-216, 220-223).

ATF Firearms Enforcement Officer Swift explained that the ATF distinguishes between an Uzi-type automatic receiver (machinegun) and semi-automatic receiver (not) by the absence or presence of a bolt blocking bar. (App. 128, 130). He classified Exhibit 12 as an automatic receiver (and thus a machinegun) on sight because of certain "design features" and it failed to have a blocking bar. (App. 153-154). To make a formal classification, Swift modified the receiver. He took it to the ATF's lab, removed its .45 caliber barrel, installed a 9 mm barrel, an Uzi machinegun bolt assembly, and a machinegun top cover. Then he test fired it. (App. 160-161).

Swift conceded Exhibit 12 wasn't capable of firing when it was found. (App. 155, 167). But due to the lack of a bolt blocking bar, he concluded it was the receiver of a weapon "designed" to shoot automatically. (App. 165, 168, 171, 175, 180). He concluded Exhibit 12 met the statutory definition of a machinegun. *Id.*

ATF's Interpretation. In a series of published letter rulings, the ATF has determined that a firearm is "designed" to shoot automatically, and thus a machinegun, if it "possesses design features which facilitate full automatic fire by simple modification or elimination of existing components." A.T.F. Rule 82-2

(1982); A.T.F. Rule 82-8 (1982); A.T.F. Rule 83-5 (1983).[7] Citing these letter rulings, the ATF's Firearms Technology Branch initially classified D&D Sales Model A receiver (from which Exhibit 12 was constructed), first as a machinegun, then as not a machinegun. (App. 28-30, 49-50). According to its final letter, the receiver, although a "firearm," was not a machinegun because it "does not possess the design features of an Uzi-type machinegun receiver that facilitates automatic fire by simple modification of existing parts." (App. 28-29). The letter then listed various circumstances under which ATF would consider it a machinegun. As relevant here, the letter explained, "[t]his stamping, if assembled into a complete UZI receiver by installation of a back plate, a barrel trunnion, and other receiver components, must have a bolt blocking bar installed. If not, it will be considered a machinegun receiver." (App. 29).[8]

Swift testified that according to the ATF the D&D Sales Model A receiver was not a machinegun before the blocking bar was installed, but became a

[7] ATF letter rulings contain the agency's then-current interpretation of the law. Bureau of Alcohol, Tobacco, Firearms and Explosives, *National Firearms Act Handbook,* §§ 1.4.2, 7.2.4.1 (2009) (*NFA Handbook*), available at https://www.atf.gov/firearms/national-firearms-act-handbook. These letter rulings are not promulgated in compliance with the Administrative Procedures Act, and are subject to correction and revision at the ATF's discretion. Thus they do not have the force and effect of law. *Id.* at § 1.4.2.

[8] The letter also stated, in bold print, **"We strongly recommend that you advise your customers that a bolt blocking bar must be installed to prevent the possession of an unregistered machinegun."** (App 29). Based on this bold print, Kuzma believed, and he argued at trial, that D&D Sales had an exemption that permitted it to possess the item, and that only end-use customers were required to install the bolt blocking bar. (App. 217-221).

machinegun if a blocking bar was installed and then removed. (App. 183-184). Even if other parts were put on the receiver that would prevent automatic bolts from being installed, such as a semi-automatic feed ramp, this would not prevent the receiver from being classified as a machinegun if the receiver didn't have a blocking bar. (App. 172, 185-186). According to the ATF, a blocking bar has to be installed. (App. 155, 165, 169, 171, 177). Yet, the blocking bar made no difference at all as to whether a receiver could function as part of a machinegun as Kuzma demonstrated by showing that an Uzi-style firearm could fire automatically even with the blocking bar in place. (App. 237-239).

REASONS FOR GRANTING THE WRIT

Kuzma's case highlights the due process problems engendered by the combination of an ambiguous statute and the ATF's arbitrary and sometimes conflicting interpretations of that statute. The statute at issue here -- the definition of machinegun -- was used to prosecute Kuzma for violating 18 U.S.C. § 922(o) [possession of a machinegun] and 26 U.S.C. § 5861(d) [possession of unregistered machinegun]. The jury convicted Kuzma of violating these laws based on ATF's subjective interpretation of the machinegun statute, which resulted in the loss of his liberty and livelihood. His case demonstrates both the vagueness of the "designed" portion of the machinegun definition, and the arbitrary manner in which it is interpreted and enforced.

THE STATUTORY DEFINITION OF A MACHINEGUN

Congress first started regulating machineguns in 1934 with the passage of the National Firearms Act of 1934 ("NFA"), codified as amended at 26 U.S.C. §§ 5801-72. The NFA defined a machinegun as "any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger." NFA § 1(b).

The term "receiver" didn't appear until the Gun Control Act of 1968 ("GCA"), which among other things amended and expanded the NFA definition of a machinegun to encompass "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual

reloading, by a single function of the trigger," as well as "the frame or *receiver* of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or control of a person." GCA § 201, (amending 26 U.S.C. § 5845) [emphasis added].

The definition of a machinegun was finally amended to its present form in 1986 with the passage of the Firearms Owners' Protection Act ("FOPA"), (amending 18 U.S.C. §§ 921-29). FOPA left in place the prior definitions of a "machinegun" that include "the frame or receiver of any such weapon" and added new language specifying that the term machinegun would also include "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." FOPA § 109 (amending 26 U.S.C. § 5845(b)).

ENFORCEMENT DELEGATED TO ATF

Congress delegated the authority to promulgate rules and regulations necessary to enforce the provisions of the NFA and GCA to the Attorney General. See 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a). In turn, the Attorney General delegated his authority to administer the statutes to the Director of the ATF, 28 C.F.R. § 0.130(a).

To fulfill its administrative duties under the NFA and GCA, the ATF has published a number of regulations in the Code of Federal Regulations, including

definitions of certain statutory terms, including "machinegun." See 27 C.F.R. § 447.11. The ATF also "publishes rulings in its periodic bulletins and posts them on the ATF website." *NFA Handbook* (2009), § 1.4.2. As stated in the *NFA Handbook*, these rulings "contain ATF's interpretation of the law and regulations as they pertain to a particular fact situation" and they "do not have the force and effect of law but may be cited as precedent with respect to substantially similar fact situations." *Id.*

The ATF permits gun makers to seek classification letters from ATF prior to manufacturing a gun. *NFA Handbook* § 7.2.4. ATF classification letters "may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws." *NFA Handbook* § 7.2.4.1." But ATF adds the caveat that the classifications "are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *Id.*

The portion of 26 U.S.C. § 5845(b) that is at issue here is whether Exhibit 12 -- the D&D Sales, Model A, semi-automatic receiver modified into a shop tool designed to test whether automatic bolts were safely ejecting cartridges -- falls within the definition of the receiver of "any weapon *designed* to shoot...automatically more than one shot, without manual reloading, by a single function of the trigger" contained in 26 U.S.C. § 5845(b) (emphasis added). And, whether ATF's interpretation of the "designed" portion of the machinegun definition to include this receiver runs afoul of the void-for-vagueness doctrine.

VOID-FOR-VAGUENESS AS APPLIED DOCTRINE

"To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *United States v Skilling*, 561 U.S. 358, 402-403 (2010) (quoting *Kolender v Lawson*, 461 U.S. 352, 357 (1983)).

The danger presented by vague laws is that it transfers "legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions." *Sessions v Dimaya*, 138 S.Ct. 1204, 1228 (2018). See *Grayned v City of Rockford*, 408 U.S. 104, 108-109 (1972). And by leaving the job of interpreting vague laws to the police and prosecutors there are attendant dangers of arbitrary and discriminatory application of those laws. See *Grayned*, 408 U.S. at 108. "[T]he more important aspect of the vagueness doctrine 'is not the actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting S*mith v Goguen*, 415 U.S. 566, 574 (1974)); see also *Dimaya*, 138 S.Ct. at 1228 (Gorsuch, J., concurring). "Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers." *Dimaya*, 138 S.Ct. at 1227 (J. Gorsuch, concurring). Kuzma's case shows that the "designed" portion of the

machinegun definition statute is unconstitutionally void-for-vagueness as applied here.

"DESIGNED" PORTION OF THE MACHINEGUN STATUTE IS AMBIGUOUS

The portion of the "machinegun" definition that includes receivers for weapons "designed" to shoot automatically is not sufficiently definite that ordinary people can understand what items are included. The first sentence of the machinegun definition describes three categories of weapons: 1) weapons that shoot automatically; 2) weapons *designed* to shoot automatically; and 3) weapons that can be readily restored to shoot automatically. A separate sentence includes the receivers of those weapons. See 26 U.S.C. § 5845(b).

Logically, the "designed" category must be different from weapons that shoot or are readily restored to shoot automatically.[9] Unfortunately, it is unclear just what that category of weapons would include. Nor is it apparent how an ordinary citizen would discern if a receiver was, or was not, intended for a weapon "designed" to shoot automatically. The receiver itself is the same whether it is ultimately built into a semi-automatic Uzi or a fully automatic Uzi. (App. 208, 212, 214, 221, 228-229). Yet, only fully automatic Uzis are prohibited, not semi-automatic ones.

[9] "The Court will avoid a reading of a statute which renders some words altogether redundant." *Gustafson v Alloyd Co, Inc*. 513 U.S. 561, 574 (1995).

In light of the vagueness of 26 U.S.C. § 5845(b), the ATF recommends firearms manufacturers seek ATF classification of the items "to avoid an unintended classification and violations of the law." *NFA Handbook*, 7.2.4 (2009). In other words, the ATF advises manufacturers to ask the ATF whether the ATF thinks an item is a machinegun so they (the manufacturers) can avoid breaking the law. These classification letters don't refine the statutory definition, instead they operate as ad hoc classification decisions. This process results in administrative classifications becoming the means of arbitrary enforcement. Kuzma's case demonstrates how the ATF's ad hoc administrative classifications lead to arbitrary enforcement.

ATF Engaged in Arbitrary Enforcement

It is uncontested that Exhibit 12, as found in D&D's shop, is not an operational machinegun. The only issue at trial was whether it was a "machinegun" as defined by 26 U.S.C. § 5845(b) under the "designed" as a machinegun receiver portion of that statute. Exhibit 12 was a shop tool designed to test semi-automatic bolts that was modified to test automatic bolts, which by themselves are not illegal. It was never part of an operational machinegun, nor was it ever designed or intended to be part of a machinegun.

This case was preceded by a long correspondence history between D&D Sales and the ATF over the classification of the D&D Model A receiver; the receiver used to construct Exhibit 12. (App. 26-90). Dating back to 2004, D&D

Sales asked ATF for a classification letter regarding the bare receiver and whether it would be classified as a machinegun. (App. 54-68, 71-73). D&D was concerned about the parts classification based on an ATF interpretation that classified a shoestring as a machinegun under the parts used to convert a firearm into a machinegun section. See App. 76-79. After significant correspondence, the ATF issued a classification letter saying that the D&D Sales Model A receiver, by itself without any additional parts, was a machinegun because it lacked the blocking bar. (App. 49-51, 81-83, 85-90). Shortly after receiving that letter, D&D Sales sent a letter to ATF disagreeing with the classification of the receiver as a machinegun, and pointing out that the receivers in question, some 30,000 of them, were sold at an auction supervised by ATF. (App. 40-47). This letter further pointed out that the ATF's focus on the blocking bar didn't matter because all semi-automatic firearms were easily converted to automatic weapons by a few simple modifications and in fact it was easier to modify a semi-automatic firearm to fire automatically, than it was to build a machinegun in the first place. (App. 43-45).

Eventually on September 23, 2005 the ATF issued a supplemental classification letter that stated the Model A receiver wasn't a machinegun:

> "Our original classification of this item as a *machinegun* was not accurate. After further review we have determined the following:
>
> - This item, as examined, does not possess the design features of an UZI-type machinegun receiver that facilitate automatic fire by simple modification of existing parts.
> - In addition, Exhibit 1 is not readily restorable to shoot automatically because it did not previously

shoot automatically and does not in its present condition.

- Further, if a receiver stamping of this type is possessed with a complete set of UZI machinegun parts, it is a combination of parts from which a machinegun can be assembled and therefore, a machinegun.
- Finally, as indicated, the UZI receiver stamping submitted and evaluated is a firearm. This stamping, if assembled into a complete UZI receiver by the installation of a back plate, barrel trunnion, and other receiver components, must have a bolt blocking bar installed. If not, it will be considered a machinegun receiver.

We strongly recommend that you advise your customers that a bolt blocking bar must be installed to prevent the possession on an unregistered machinegun." (Appx. 28-29) [italics and bold in original].

The ATF didn't explain why it changed its previous opinion that the bare receiver with no parts was a machinegun to that the same receiver wasn't a machinegun. Nor did it explain why if it was now not a machinegun without the blocking bar that the installation of a blocking bar prevented it from being a machinegun receiver. The ATF also didn't explain why the installation of a "backplate, barrel trunnion, and other receiver components" would transform it into a machinegun requiring the installation of a blocking bar. This letter is inconsistent with the ATF's stated interpretation that a receiver without any parts attached must have a blocking bar to prevent it from being considered a machinegun under 26 U.S.C. § 5845(b). (App. 28-29, 49-50). Kuzma interpreted the September 23, 2005 letter as allowing him to possess the receiver without a

blocking bar as a shop tool based on the ATF changing the classification of the D&D Sales Model A receiver without any explanation why it did so.

At trial the ATF witnesses only muddied the waters on what constituted a receiver for a weapon "designed to shoot automatically" under 26 U.S.C. § 5845(b).[10] The Government proffered several conflicting theories to support its interpretation that Exhibit 12 was a machinegun under the "designed" category. One of those was that Exhibit 12 had a back plate and barrel trunnion. (App. 165-166, 170). But those parts didn't matter to ATF when they initially classified the Model A receiver as a machinegun without it having either a back plate or barrel trunnion on it. See App. 49-51, 81-83. And, ATF expert Swift never mentioned in his report that these parts contributed to his conclusion that Exhibit 12 was a machinegun. See App. 91-97. Instead he testified that the open channel for the receiver was a machinegun, even without any parts attached, simply because it was a receiver without a blocking bar. (App. 162-163, 171).

The trial testimony related to the significance of the absence or presence of a bolt blocking bar illustrated the vagueness of the 'designed' category of machinegun receivers. The Government's expert, ATF Officer Swift said that without any parts attached to Exhibit 145 (the same frame as Exhibit 12) it was a semi-automatic receiver, not a machinegun, because it was "designed for inclusion

[10] Only the "designed" category is at issue here. Exhibit 12 did not shoot at all, much less automatically. (App. 145-146, 155, 167). Exhibit 12 was not "readily restorable to shoot automatically, because it was a semi-automatic receiver to begin with. (App. 125, 127, 132, 146-147).

of a semi-automatic blocking bar." (App. 157-159). But he also said that if a person installed the blocking bar and removed it, it was a machinegun. (App. 159). And, that it was still a machinegun even if you welded the blocking bar back into the receiver. (App. 183). In his opinion, the only lawful option was to destroy the receiver. *Id.*

Based on the ATF's classification letters for D&D Sales Model A and the ATF witnesses at trial, the receiver without a blocking bar either was or was not a machinegun, depending upon whom and when one asked. If it was not a machinegun without a blocking bar, installing a blocking bar and then removing it rendered it a machinegun. Even reinstalling the blocking bar would not return it to its prior lawful state as a semi-automatic receiver. Obviously the ATF's position on the blocking bar is inconsistent.

The ATF requirement of a blocking bar is not statutory, but rather is historical dating back to the origins of regulations prohibiting machineguns because it would prevent the insertion of an automatic bolt. (App. 148, 173, 177).[11] In fact, Swift said it was the ATF who determined that the blocking bar was the single part that could prevent an Uzi-type receiver from being considered a machinegun. (App. 169, 177-178). The problem with using that historical definition is that there are now automatic bolts that could be inserted even though there is a blocking bar installed. (App. 174-177). Despite the fact that ATF is

[11] The blocking bar is not even in the Code of Federal Regulations. (App. 179).

aware of these automatic bolts, which can be used even if there is a blocking bar on the receiver, the ATF has continued to require the blocking bar based on the idea that the blocking bar would not allow the installation of automatic bolts. (App. 148, 174-177).

The ATF also continues to focus on the presence or absence of a blocking bar as its definition of a machinegun even though there were other components that could prevent an Uzi-type receiver from being used as part of a weapon that fired automatically. (App. 172). For example, a semi-automatic feed ramp, like a blocking bar, would prevent the receiver from accepting automatic bolts. (App. 185-186). Even though that is true, Swift testified that part wouldn't prevent the receiver from being considered a machinegun. *Id.* Why? For no reason other than the blocking bar is required by the ATF. (App. 155, 168, 180, 186).

Here the purported distinction between a "designed to be" automatic receiver and a "designed to be" semi-automatic receiver was so vague that it was subject to ad hoc and inconsistent determinations by the ATF, which resulted in arbitrary enforcement. The record here brings into stark relief the unconstitutional vagueness of the "designed" receiver category in the machinegun definition.

The fact that the receiver here had the blocking bar removed at the time it was found doesn't preclude a finding that the "designed" portion of the machinegun definition is vague. This Court recently clarified that due process vagueness challenges may be raised even by a defendant whose conduct is clearly covered by the statute. *Dimaya*, 138 S.Ct. at 1214 n. 3; *Johnson v United States,*

576 U.S. 591, 602-603 (2015). In *Johnson*, this Court explained, "although statements in some of our opinions could be read to suggest" that statutes are not vague if there is some conduct that would clearly qualify, "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S. at 602-603 (emphasis in the original).

This point was reinforced in *Dimaya*, where this Court held the residual clause of 18 U.S.C. § 16(b) unconstitutionally vague based on a challenge involving residential burglary. It reached this conclusion even though courts had unanimously concluded residential burglary was a crime of violence under the residual clause, and even though this Court itself had described residential burglary as the "classic example" of a crime of violence under the residual clause. See *Dimaya*, 138 S.Ct. at 1214 n. 3; *Id.* at 1250-51 (Thomas, J., dissenting). Since the "designed" portion of the machinegun definition is unconstitutionally vague and invites arbitrary interpretation and enforcement, it is void—even if Exhibit 12 could be determined to fit within that definition because that determination would itself be arbitrary given the vagueness of the definition.

SEPARATION OF POWERS -- RULE OF LENITY

The second aspect of the void-for-vagueness doctrine is separation of powers. The Constitution gives Congress the exclusive right to legislate – to create laws. U.S. Const. art. I, § 1. When a law passed by Congress is ambiguous, it is up

to the courts to define what that law means, especially criminal statutes. *Abramski v United States*, 134 S.Ct. 2259, 2274 (2014). While 26 U.S.C. § 5845(b) (definition of a machinegun) is in the tax statutes, it is incorporated by reference and used for criminal statutes, e.g. U.S.C. § 922(o) and 26 U.S.C. § 5861(d). Since the ATF classification letters and interpretations of what is a machinegun are the government's readings of a criminal statute, they aren't entitled to any deference. *United States v Apel,* 571 U.S. 359, 369 (2014) (citing *Crandon v United States*, 494 U.S. 153, 177 (1990) (Scalia, J., concurring in the judgment)). This is true even though Congress delegated the enforcement of the NFA and GCA to the Attorney General, who in turn delegated that responsibility to the ATF because a criminal statute is "not administered by any agency, but by the courts." *Crandon*, 494 U.S. at 177; cf. *Gutierrez-Brizuela v Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016)(Gorsuch, J., concurring) (summarizing principle that due process and equal protection demand criminal law be clear and clearly given by judges, not prosecutorial agencies). The danger is that a prosecutorial agency will interpret criminal statutes broadly, often times more broadly than Congress intended.

Agency interpretative rulings are likely to be expansive because "[a]ny responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent." *Crandon*, 494 U.S. at 177-178. This makes sense in the administrative context. But deferring to an agency interpretation in criminal cases would lead

courts to construe ambiguous criminal statutes expansively (rather than narrowly), and against (rather than in favor of) the defendant. *Id.* at 178.

If it is unclear whether the "designed" definition refers to the manufacturer's design, or whether Congress intended something akin to the ATF's more expansive interpretation, the rule of lenity would require any ambiguity to be resolved in Kuzma's favor. *United States v Santos*, 553 U.S. 507, 514 (2008). "Under a long line of [Supreme Court] decisions, the tie must go to the defendant." *Id.* Any ambiguity must be construed in favor of the defendant:

> This venerable rule not only vindicates the fundamental principle that no citizen shall be held accountable for a violation if a statute whose commands are uncertain, or subjected to punishment not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal laws in Congress's stead. *Id.*

Since the ATF's interpretation expands the statutory definition beyond recognition, the rule of lenity requires it be rejected. Exhibit 12 was not the receiver of a weapon "designed" to shoot automatically. It was a shop tool designed to test the size and safe functioning of automatic bolts that had never been part of a fully automatic weapon until the ATF brought it to its lab and added numerous additional parts required to test-fire it.

When interpreting statutes involving the "design" of manufactured items, the courts regularly look to the purpose of the item as conceived by its manufacturer. See *Village of Hoffman Estates v Flipside*, 455 U.S. 489, 501 (1982) ("A business person of ordinary intelligence would understand that this term refers to the design

of the manufacturer"). Applying the same meaning of "designed" here, a weapon "designed to shoot automatically" means a weapon designed by the designer or manufacturer to shoot automatically. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Dabit*, 547 U.S. 71, 86 (2006). Properly defined, Exhibit 12 is not a machinegun.

The uncontroverted evidence proved Kuzma designed Exhibit 12 to be a shop tool, not a weapon. Kuzma asked Sink to remove the blocking bar to permit them to manually slide an automatic bolt inside to ensure the extractor gripped the cartridge properly and would not cause an out-of-battery detonation or other deadly accident. Kuzma—the item's designer and manufacturer—did not design Exhibit 12 to shoot automatically. He didn't even design it to shoot. He designed it to test whether a cartridge extractor was properly configured and was safe to sell. Since Exhibit 12 was not part of a weapon designed to shoot automatically, it was not the frame or receiver of such a weapon.

The government's theory of prosecution and the testimony of the ATF witnesses was based on the ATF's more expansive interpretation of the "designed" portion of the machinegun definition, which turned on the so-called "design features" of the firearm, not on what the designer intended. ATF has purported to interpret the "designed" definition to "include[] those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by a simple modification or elimination of existing

components."[12] And as described above, the correspondence history regarding the D&D Sales Model A receiver shows how that broad interpretation permits the ATF to engage in case-by-case, inconsistent determinations whether an Uzi-type receiver is a machinegun or not.

Kuzma's case illustrates the ATF's inconsistent determinations. Here the ATF classified the D&D Sales Model A receiver used to make a shop tool designed to test bolts, as not a machinegun even though it didn't have a blocking bar installed. But, according to the ATF it became a machinegun after a blocking bar was installed to test semi-automatic bolts, then removed to test automatic bolts. The fact that Kuzma ordered the blocking bar to be re-installed so that they could go back to using the shop tool for testing semi-automatic bolts didn't matter to the ATF. The ATF would still classify the receiver as a machinegun.

The ATF's contradictory classifications of Uzi-type receivers comes from the vagueness of the "designed" portion of the machinegun definition. Allowing the ATF to decide what is criminal conduct on an ad hoc basis violates both due process and the separation of powers when it comes to possession of a machinegun under the "designed" portion of 26 U.S.C. § 5845(b).

[12] A.T.F. Rule 82-2 (1982); A.T.F. Rule 82-8 (1982); A.T.F. Rule 83-5 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

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