No. 23-852

In the
Supreme Court of the United States

Merrick B. Garland, Attorney General, *et al.*,
Petitioners,

v.

Jennifer VanDerStok, *et al.*,
Respondents.

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

BRIEF OF RESPONDENTS DEFENSE DISTRIBUTED, POLYMER80, INC., NOT AN L.L.C. (DOING BUSINESS AS JSD SUPPLY), AND THE SECOND AMENDMENT FOUNDATION, INC.

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March 8, 2024

Questions Presented

The Gun Control Act of 1968 was "not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. 90-618, Title I, § 101. So Congress defined its keystone term "firearm" to cover an *actual* firearm and its *actual* frame or receiver, but *not* mere parts that might be manufactured into one. 18 U.S.C. §921(a)(3). It thereby covers full-fledged commercial firearms without covering private gunmaking.

A 2022 Bureau of Alcohol, Tobacco, Firearms, and Explosives rule redefines the GCA term "firearm." 87 Fed. Reg. 24,652 (Apr. 26, 2022). ATF's new "firearm" redefinition makes the GCA cover much more than an *actual* firearm and its *actual* frame or receiver. It goes well beyond full-fledged commercial firearms, deep into private gunmaking. The questions presented are:

1. Whether the GCA term "firearm" defined by 18 U.S.C. §921(a)(3) includes "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive" under the new ATF rule, *see* 27 C.F.R. 478.11.

2. Whether the GCA term "firearm" defined by 18 U.S.C. §921(a)(3) includes "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver" under the new ATF rule, *see* 27 C.F.R. 478.12(c).

Corporate Disclosure Statement

No Respondent party to this brief has a parent company or a publicly held company with a ten percent or greater ownership interest in it.

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Statement

The decision below correctly stated the case's background and procedural posture. Pet. App. 3a-12a.

I. Legal Background.

Americans have always had the right to make personal firearms without Presidential permission. The Second Amendment both stems from and protects this right, which has utmost support in the nation's history and tradition. *See* Pet. App. 7a-8a. "In fact, there were no restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries." *Id.* (quoting Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 66 (2023)). There is no historical tradition of regulating, let alone criminalizing, the self-manufacture of firearms.

Relatively recently, Congress used the Commerce Clause to enact a variety of criminal laws concerning commercial "firearm" matters. Pet. App. 5a n.5; *see* 18 U.S.C. ch. 44. Under this regime, it is a crime for many Americans to possess a commercial "firearm," 18 U.S.C. § 922(g), to transport a commercial "firearm," 18 U.S.C. §§ 923(a)(1)(A), 923(a)(3), to manufacture a commercial "firearm" at all, or to do so without a serial number, 18 U.S.C. §§ 923(a)(1)(A), 923(i). *See* Pet. App. 4a-5a. "Should a person commit these or any of the other unlawful acts found in the twenty-six subsections of section 922, section 924 authorizes various penalties, including fines, imprisonment, or both." Pet. App. 5a.

"Firearm" is therefore one of criminal law's most impactful statutory keystones. Pet. App. 4a-5a. In what is now 18 U.S.C. § 921, the Gun Control Act of 1968 supplied this keystone "firearm" definition:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(2). Congress never gave the constituent phrase "frame or receiver" its own definition.

The Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has certain administrative authority over the GCA and issued rules redefining its keystone "firearm" term on several occasions. *See* Pet. App.6a. ATF issued a 1968 rule redefining "firearm" that prevailed until ATF's 2022 rule promulgated the redefinition at issue here. *Id.*

A. The old "firearm" definition.

In 1968, ATF issued a rule redefining the GCA's "firearm" term by redefining the constituent phrase "frame or receiver." *Internal Rev. Serv., Dep't of the Treasury*, 33 Fed. Reg. 18,555 (Dec. 14, 1968) (formerly codified at 27 C.F.R. § 478.11 (2020)). It

defined "frame or receiver" to mean the "part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." *Id.*

Under the 1968 Rule, ATF took the position that parts like so-called "receiver blanks" were *not* GCA "firearms." ATF's position was that "a hunk of metal became a federally regulated 'frame or receiver' only after it was 80% complete." Pet. App. 34a. According to this view, "items such as receiver blanks, 'castings' or 'machined bodies' in which the fire-control cavity area is completely solid and un-machined have *not* reached the 'stage of manufacture' which would result in the classification of a firearm according to the GCA." R.2332 (emphasis added).

B. The new "firearm" definition.

In 2022, ATF promulgated *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24,652 (Apr. 26, 2022). *See* Pet. App. 3a. The Rule overhauls ATF's "firearm" definition with respect to the two contexts at issue here: (1) weapon part kits and (2) incomplete firearm frames and receivers.

27 C.F.R. 478.11 codifies ATF's new definitional position about weapon parts kits. Pet. App. 9a. According to this part of the Rule, the GCA term "firearm" now covers "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." 27 C.F.R. 478.11.

27 C.F.R. 478.12 codifies ATF's new position about incomplete frames and receivers. Pet. App. 9a. According to this part of the Rule, the GCA's "firearm" term *does* cover "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," but does *not* cover an "article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon." 27 C.F.R. 478.12(c).

The Rule's definitional changes carry huge legal consequences. They "place[] substantial limits on the well-known and previously unregulated right to 'the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pet. App. 26a (quoting the GCA, Pub. L. 90-618, Title I, § 101, 82 Stat. 1213, 1213 (Oct. 22, 1968)).

"Take, for example, an individual who buys a weapon parts kit containing several unfinished parts he later intends to build and adapt into a functional firearm for his personal use." Pet. App. 26a. "Section 922 of the GCA, which uses the term 'firearm' to describe many of the 'unlawful acts' contained therein, may place additional burdens on this individual now that ATF has included aggregations of parts in the definition of 'firearm.'" Pet. App. 26a-27a. "Parts contained in the kit, which were previously unregulated, could now fall into the Final Rule's new definitions, such that the individual cannot sell, transport to another state, or, in some instances, possess the parts at all." *Id.* (footnotes omitted). "And

key determinations, like which parts are regulated, what stage of manufacture they must be in, and how many together constitute an actual 'firearm,' are exceedingly unclear under the Final Rule, such that the individual must guess at what he is and is not allowed to do." *Id.*

The Rule's "firearm" definition is unprecedented. It criminalizes for the first time ever wide swaths of traditional gunmaking activities. Pet. App. 26a-27a. "By expanding the types of items that are considered 'firearms,' ATF has cast a wider net than Congress intended: under the Final Rule, the GCA will catch individuals who manufacture or possess not just functional weapons, but even minute weapon parts that might later be manufactured into functional weapons." *Id.* "The Final Rule purports to criminalize such conduct and impose fines, imprisonment, and social stigma on persons who, until the Final Rule's promulgation, were law-abiding citizens." *Id.*

Judge Oldham's concurring opinion below sees the Rule's true danger. "ATF's overarching goal in the Final Rule is to replace a clear, bright-line rule with a vague, indeterminate, multi-factor balancing test." Pet. App. 33a "ATF's rationale: The new uncertainty will act like a Sword of Damocles hanging over the heads of American gun owners." *Id.* Hence this action.

II. Procedural History.

1. Respondents here are intervening plaintiffs below: Defense Distributed, Polymer 80, Inc., Not An LLC, LLC, doing business as JSD Supply ("JSD"), and the Second Amendment Foundation, Inc. ("SAF"). Pet. App. 10a. Before the Rule took effect, each dealt substantially with the kits and/or incomplete frames and receivers at issue—those deemed GCA "firearms" by the Rule but not by the statute itself or ATF's prior interpretation. Pet. App. 75a-77a, 93a-95a.

Defense Distributed, Polymer 80, and JSD are national leaders on the business side of this industry. Pet. App. 75a-77a, 129a. SAF members are their customers and end users. Pet. App. 93a-95a.

Defense Distributed is the first private defense contractor in service of the general public. Dkt. 164-1. Since 2012's Wiki Weapon project, Defense Distributed has defined the state of the art in small scale personal gunsmithing technology. *Id.* It both manufactures and distributes products deemed GCA "firearms" solely by the Rule—not by the statute and not by ATF's prior interpretation. Pet. App. 75a-77a, 93a-95a; Dkt. 143 at 4; Dkt. 164-1; Dkt. 227 at 8.

Polymer 80 is another private business that designs, manufactures, and distributes a variety of firearms and non-firearm products, including both kits and incomplete frames and receivers deemed GCA "firearms" by the Rule but not the statute or prior ATF interpretations. Pet. App. 75a-77a, 93a-95a. Defense Distributed sold some of these items. Dkt. 184 at 7.

JSD is another business subject to the Rule. It too earns most of its revenue through sales of products now subject to the Rule. Dkt. 227 at 8.

SAF is a non-profit membership organization that promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution's right to privately own and possess firearms and the consequences of gun control. Dkt. 143 at 4; Dkt. 164-2. SAF members are subject to the Rule in their efforts to manufacture firearms with products made by firms like Defense Distributed. Dkt. 164-2; Dkt. 227 at 22.

These Respondents and others sue under the APA to challenge ATF's definitional reclassification of both weapon parts kits and incomplete frames and receivers. Pet. App. 10a, 13a. They seek a judgment holding both parts of the Rule unlawful and setting it aside. *Id.*

Judge Oldham's concurring opinion below set the stage correctly. "The "central dispute in this case is how far back ATF can reach to regulate the *A* that can be converted to *B*." Pet. App. 47a. "Everyone agrees ATF can regulate the gun itself, *B*." *Id.* "But how far back in the manufacturing process of the gun *B* can ATF reach to regulate things *A* that can be *theoretically converted* into guns?" *Id.* "ATF concedes that it cannot reach all the way back to 'unformed blocks of metal' or metal in its 'primoradial state.'" *Id.* (quoting the Rule)." *Id.* "So primordial ooze is not A." *Id.* "But anything more refined than that is subject to

the Final Rule's multi-factor balancing tests and eye-of-the-beholder standards." *Id.*

2. The district court resolved the case on summary judgment. Pet. App. 67a-114a. It entered a final judgment in July 2023, granting full relief. Pet. App. 115a-116a.

As to the merits, the district court held that the Rule contradicts the statute in both challenged respects and was therefore issued "in excess of ATF's statutory jurisdiction." Pet. App. 95a-111a. So the judgment deemed the Rule unlawful on that basis. Pet. App. 115a-116a. It denied as moot the case's other claims of unlawfulness. Pet. App. 116a.

As to remedies, the district court held that the Rule's two key illegalities warranted full vacatur. Pet. App. 111a-114a. So the judgment vacated the entire Rule. Pet. App. 116a. It denied as moot the requests for other remedies. *Id.* ATF appealed.

3. The Fifth Circuit held both challenged aspects of the Rule unlawful. It addressed remedies separately.

On the merits, the Fifth Circuit held that the Rule contradicted the GCA as to both (1) ATF's proposed definition of "frame or receiver" including incomplete frames and receivers; and (2) ATF's proposed definition of "firearm" including weapon parts kits. Pet. App. 3a, 30a-32a. It affirmed that aspect of the district court's decision, which remains in force today.

As to remedy, the Fifth Circuit did not decide whether the district court correctly opted for vacatur. Instead, the Fifth Circuit vacated the remedial aspect of the district court's decision and remanded the case for further consideration of the remedy in light of the merits holding. Pet. App. 31a-32a.[1]

The Fifth Circuit decision below was unanimous. Pet. App. 2a-32a. The court's opinion was authored by Judge Engelhardt and joined by Judges Willett and Oldham. Judge Oldham joined the court's opinion in full and authored a concurring opinion supplying additional reasons to deem the Rule unlawful. Pet. App. 33a-66a.

4. During most of those proceedings, Respondents were protected from ATF's enforcement of the Rule's expansive new "firearm" definition by a patchwork of preliminary injunctions, the district court's initial vacatur of the Rule, and personalized injunctions pending appeal. But in light of orders issued by this Court in August 2023 and October 2023, no such protections exist any more. The district court has stayed the case to await the Court's disposition of the instant petition. Dkt. 279.

[1] Though Respondents do not agree with the Fifth Circuit's disposition of the remedy question (the correct judgment would have affirmed the district court's vacatur of the Rule), they do not here seek relief from that aspect of the Fifth Circuit's decision.

Argument

The Fifth Circuit's decision is correct. The Rule is unlawful because ATF's expansive "firearm" definition exceeds the "firearm" definition that Congress set.

First, the Fifth Circuit correctly held that the Rule's new "firearm" definition plainly contradicts the GCA and is thus "in excess of statutory jurisdiction." 5 U.S.C. § 706(2)(C). Pet. App. 13a-31a. Text, context, and history all point to the same conclusion about what the GCA's "firearm" term means. It covers only an *actual* firearm and its *actual* frame or receiver; it does not cover mere parts or kits of parts that might be manufactured into one. 18 U.S.C. §921(a)(3). The Rule's new definition ignores Congress's expressed decision to cover full-fledged commercial weapons without also covering personal gunmaking. "Because Congress has neither authorized the expansion of firearm regulation nor permitted the criminalization of previously lawful conduct, the proposed rule constitutes unlawful agency action, in direct contravention of the legislature's will." Pet. App.3a.

Second, the Fifth Circuit correctly held in the alternative that, even if the Rule's new "firearm" definition does not clearly contradict the GCA, the rule of lenity would apply and resolve any definitional ambiguities in favor of the narrower "firearm" definition. Pet. App. 30a-31a & n.26. It correctly held that, "should the GCA's text be at all unclear, we err on the side of those citizens who now face unforeseen criminal liability under ATF's new definitions." *Id.*

The Fifth Circuit's decision about the merits is also correct for reasons that, though not passed on below, were fully presented and compel the same result here. Even if the GCA does not plainly foreclose the Rule's new "firearm" definition, the canon of constitutional avoidance requires that same conclusion because ATF's view produces serious doubts about the scheme's compliance with the Due Process Clause and Second Amendment. Those two distinct constitutional infirmities are not just suspected. They are manifest.

The petition therefore beckons for denial, at least by all typical measures. There is no error to correct, there is no split to resolve, and important additional case decisions have yet to be made below (the district court's new remedial decisions). But because of the need to halt the Rule's ongoing irreparable harm, the petition should be granted so that this Court can immediately deem the Rule unlawful once and for all.

I. The Court should grant the petition before the Rule succeeds in destroying lawful Second Amendment gunmaking practices that ATF lacks jurisdiction over.

If ATF's current petition is denied, the courts will likely stay on track and put an end to the Rule in due course. But that will only happen after months or years of further litigation. By then it will be too late.

A crisis is at hand. Judge Oldham's concurring opinion below saw it coming. "Private gunmaking is steeped in history and tradition, dating back to long before the Founding." Pet. App. 33a. "Millions of law-

abiding Americans work on gun frames and receivers every year." *Id.* "In those pursuits, law-abiding Americans (and the law-abiding gun companies that serve them) rely on longstanding regulatory certainty to avoid falling afoul of federal gun laws." *Id.* "But if ATF can destroy that certainty, it hopes law-abiding Americans will abandon tradition rather than risk the ruinous felony prosecutions that come with violating the new, nebulous, impossible to-predict Final Rule." *Id.* Now all of those fears are indeed coming to pass.

Because ATF is being allowed to enforce the Rule's new "firearm" definition while this action is pending, Respondents and the rest of the nation are suffering immense irreparable harms. In particular, ATF's enforcement of the Rule's new "firearm" definition is putting industry-leading business Respondents on the brink of economic destruction. *See, e.g.*, Pet. App. 162a, 172a. Soon the Rule will succeed in destroying an entire field of traditionally lawful Second Amendment business activity that ATF has no right to regulate—not to mention the constitutional rights of the law-abiding individuals these businesses serve. For everyone being wrongly governed by this Rule's severe criminal consequences, time is of the essence.

For these reasons, Respondents request that the Court grant the petition and swiftly affirm the Fifth Circuit's decision to hold that the Rule's challenged provisions violate 5 U.S.C. § 706(2)(C).

II. The Rule is unlawful.

A. The statute plainly forecloses the Rule's new "firearm" definition.

The Fifth Circuit's first basis for the decision below deemed the Rule "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), by holding that both challenged aspects of ATF's new "firearm" definition plainly contradict the GCA. That holding is correct for the reasons given by the decision below and more.

1. The Rule does not faithfully administer the GCA. It contradicts the statute in both of the challenged respects, illegally criminalizing by regulation conduct that Congress never criminalized. Ordinary meanings control this textual inquiry, *see, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), and this text's ordinary meanings are evident. This Rule clearly outruns its statute. Pet. App. 15a-28a.

First, in 27 C.F.R. § 478.12(c), the Rule exceeds the statute by defining "frame" and "receiver" to include a "partially complete, disassembled, or nonfunctional frame or receiver." That exceeds the statute because the GCA defines "frame" and "receiver" to mean an *actual* "frame" and "receiver." It does not let "frame" mean a *non-frame* part that may become a frame if and only if additional manufacturing processes alter its constitution; and it does not let "receiver" mean an "unfinished" *non-receiver* part that may become a receiver if and only if additional manufacturing

processes alter its constitution. The Fifth Circuit rightly held this. Pet. App.15a-19a.

Second, in 27 C.F.R. § 478.11, the Rule exceeds the statute by defining the terms "frame" and "receiver" to include a "weapon parts kit." That too exceeds the statute because the GCA still defines "frame" and "receiver" to mean only an *actual* "frame" and "receiver." It does not let "frame" or "receiver" be defined as a kit of non-receiver and non-frame articles that may become a frame or receiver if and only if additional manufacturing processes alter their constitution. The Fifth Circuit rightly held this. Pet. App.19a-28a.

2. ATF's "readily be converted" argument is wrong. Pet. App. 16a-17a. The "readily be converted" clause applies only to what is already a "weapon" in the first place. 18 U.S.C. § 921(a)(3)(A). Part kits are not already "weapons" in the first place. Incomplete frames and receivers and not "weapons" in the first place either. So whether or not these items can be "readily converted" into a weapon is irrelevant to the GCA's carefully defined "firearm" status. The statute does not allow for ATF's attempted bootstrapping. The Fifth Circuit decision below correctly recognized this, Pet. App. 17a, and Judge Oldham rightly took ATF to task on this point as well, Pet. App. 44a-46a.

The decision below also correctly held that the "readily be converted" argument cannot possibly help ATF as to the matter of incomplete frames and receivers. Pet. App. 17a. In this respect, ATF fails to see that the "readily be converted" phrase pertains

only to the part of the statutory definition that supposedly helps ATF cover kits; the pertinent language is totally missing from the statutory phrases pertaining to frames and receivers. They therefore cannot do any work on that question. Pet. App. 17a.

3. The evolution of statutory text forecloses ATF's new position too, as rightly shown below: "ATF has no authority whatsoever to regulate parts that might be incorporated into a 'firearm' … because Congress explicitly removed such authority when it enacted the GCA." Pet. App. 20a. "The GCA's predecessor statute, the Federal Firearms Act ('FFA'), had specific language that authorized regulation of 'any part or parts of 'a firearm.'" *Id.* But "Congress removed this language when it enacted the GCA, replacing 'any part or parts' with just 'the frame or receiver of any such weapon." *Id.* The Rule "ignores this change completely and improperly rewrites and expands the GCA where Congress clearly limited it." *Id.*

4. 18 U.S.C. § 921(a)(4)(C) is a crucial part of the statutory context that ATF's position contradicts. That provision defines the term "destructive device"[2] to mean "any combination of parts either designed or intended for use in converting any device into any destructive device." 18 U.S.C. § 921(a)(4)(C). The decision below therefore rightly recognized that "Congress thus clearly regulated combinations or aggregations of 'parts' in one section of the GCA, yet it did not do so when it defined 'firearm' within the same statute." Pet. App. 21a.

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[2] No one contends that this case involves a "destructive device."

5. Congress knows full well how to use words that do what ATF wishes. It just chose not use them here. When Congress wants to cover just the minimal act of "assembly," it says so expressly; and when Congress wants to cover more involved act like "completion" or "production" or "manufacturing," it says so expressly. *See* 19 U.S.C. § 2703 (regulating "production, manufacture, or assembly").[3] The GCA utilized only the narrower "assembled" language on purpose. It opted not to have the statute cover parts that need to be "produced" or "manufactured" or "completed" into a firearm.

Despite Congress's purposeful use of narrow terms, the Rule sweeps in all of the above indiscriminately. It treats every kit and every incomplete receiver and frame as though "firearm" status is just an "assembly" away. But in the reality Congress spoke to, most kits and incomplete receivers and frames do not become a real firearm without "producing," "manufacturing," and/or "completing." ATF's conflation of Congress's careful terminology is precisely what APA review should thwart. The decision below rightly recognized this. Pet. App. 24a-25a.

"The point is a simple one: If Congress wanted to regulate aggregations of weapon parts with respect to 'firearms,' it could have." Pet. App. 22a. "Congress,

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[3] *See also* 10 U.S.C. § 7543 (regulating "manufacturer, assembler, developer, or other concern"); 19 U.S.C. § 1677j (regulating items that are "completed or assembled"); 19 U.S.C. § 3203 (regulating "production, manufacture, or assembly"); 19 U.S.C. § 3721 (regulating "manufacture, production, or sale").

however, chose not to do so, and ATF may not alter that decision on its own initiative." *Id.* "ATF cannot legislate." *Id.*

6. The government also fails to give all provisions of the statute meaning, creating surplusage. Sections 921(a)(3)(A) and (B) show that every "firearm" must have a "frame or receiver." Yet the Rule plainly regulates as "firearms" items that do not constitute, and kits that do not contain, an actual "frame or receiver." As Judge Oldham below rightly recognized, this means that "a weapon parts kit that does not include a frame or receiver cannot be regulated under § 921(a)(3)." Pet. App. 56a-58a. "Section 921(a)(3) does not contemplate a weapon covered by (A) that does not have a frame or receiver covered by (B)." *Id.* The Rule violates this limit.

B. The rule of lenity makes the statute foreclose the Rule.

The Fifth Circuit's other basis for decision deemed the Rule "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), by holding that, even if ATF's new "firearm" definition does not plainly contradict the GCA, the rule of lenity makes it so. Pet. App. 30a-31a & n.26. That holding is correct for the uncomplicated reasons given below: "we construe ambiguous statutes against imposing criminal liability—precisely what ATF has done here." *Id.* (invoking *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992)).

C. The constitutional avoidance canon makes the statute foreclose the Rule.

The decision below is also correct because, even if the GCA does not clearly foreclose ATF's new "firearm" definition, the canon of constitutional avoidance applies to make it so. Under this rule, the Court should "shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). The Rule's GCA construction gives rise to multiple serious constitutional doubts, all militating against ATF.

1. ATF's position entails serious Due Process Clause problems.

The Fifth Amendment's vagueness doctrine is violated by criminal laws that either deny defendants fair notice of what is punishable or invite arbitrary enforcement by lack of standards. *E.g.*, *Johnson v. United States*, 576 U.S. 591 (2015). On ATF's view of the GCA, this constitutional violation is not just seriously raised but fully evident in three respects.

1. Initially, ATF's new "firearm" definition violates the Due Process Clause's vagueness prohibition by defining "frame" and "receiver" to include a "partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." 27 C.F.R. § 478.12(c). Those amorphous terms—especially "readily," even as defined by 27

C.F.R. § 478.11—present an unconstitutional level of vagueness that denies citizens fair notice of what is punishable.

The Rule does not say, and no reasonable person can reliably infer, the point of evolution at which a piece of metal or plastic crosses the "readily" barrier to become a "frame or receiver." Vacuous metrics like this are invalid. *See Tripoli Rocketry v. ATF*, 437 F.3d 75, 81 (D.C. Cir. 2006.). Objectified, specific measurements would be needed to cure this kind of shortcoming, *see United States v. Lim*, 444 F.3d 910, 916 (7th Cir. 2006), and the Rule has none.

In this respect, Judge Oldham's concurring opinion below correctly analyzes the vagueness problem and rightly concludes that this aspect of the Rule is "fatally vague." Pet. app. 47a-53a. "With its nonexclusive list of eight factors and lack of concrete examples, the Final Rule produces 'more unpredictability and arbitrariness than the Due Process Clause tolerates." Pet. App. 54a (quoting *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018).

2. ATF's new "firearm" definition also violates the Due Process Clause's vagueness prohibition by defining "frame" and "receiver" to sometimes include "a forging, casting, printing, extrusion, unmachined body, or similar article," depending on whether or not it has "reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon (e.g., unformed block of metal, liquid polymer, or other raw material)." 27 C.F.R. § 478.12(c). Here too, inherently amorphous terms

like "clearly identifiable" present an unconstitutional level of vagueness that denies citizens fair notice of what is punishable. Much like the vagueness problem regarding "readily," the Rule does not say, and no reasonable person can reliably infer, what point of evolution defines the "clearly identifiable" threshold.

3. Last but not least, ATF's new "firearm" definition violates the Due Process Clause's vagueness prohibition by providing that, "[w]hen issuing a classification, the Director may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit." 27 C.F.R. § 478.12(c). Those terms violate the vagueness doctrine by inviting arbitrary enforcement. Once more the Rule does not say, and no reasonable person can reliably infer, exactly what set of materials ATF thinks are relevant to this inquiry—let alone how the bureaucrats will construe them to make the critical determination.

Judge Oldham's concurrence correctly emphasizes a key aspect of ATF's failure here. Pet. App. 55a. "As important as the Fifth Amendment's guarantee of fair notice to individuals is the Amendment's prohibition against 'arbitrary enforcement' by government officials." *Id.* "It is thus of no use for ATF to say that it will tell ordinary people what they can do." *Id.* "The law exists to tell *both* the people *and government officials* what they can do," *id.* (emphasis added), and this Rule does neither.

d. Crimes cannot be defined by government imagination. So held *Johnson v. United States*, 576 U.S. 591 (2015), which deemed the law at issue unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real world facts or statutory elements." *Id.* The Rule here is just as bad, in that it ties the definition of all "firearm" based crimes to an administratively imagined notion of what a complete and operable "firearm" really is, based on little more than a bureaucrat's ipse dixit. "It is one thing to apply an imprecise . . . standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* ATF's imagined abstraction of when a "firearm" becomes a "firearm" is no better.[4]

"Each of the uncertainties in the [Rule] may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guesswork." *Id.* (quoting *United States v. Evans*, 333 U.S. 483, 495 (1948)). "Invoking so shapeless a provision to condemn someone to prison . . . does not comport with the Constitution's guarantee of due process." *Id.*

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[4] It is no answer for the government to say that some cases make for easy application of the Rule. The controlling holdings—both *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)—"squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602. Just as in *Johnson* and *Sessions*, the Rule produces "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Sessions*, 138 S. Ct. at 1215.

2. ATF's position entails serious Second Amendment problems.

The Rule's interpretation of the GCA also raises a serious constitutional problem regarding the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). At issue is the individual right to acquire and make Arms, which is part and parcel of the Second Amendment's right to keep and bear Arms. Indeed, America's historical tradition of personal gunmaking is well-established and free from any major federal regulation at all. Because ATF's "firearm" definition would cause the GCA to trample that right, it ought not be adopted.

1. Self-manufactured firearms in America have a long and, until just recently, unregulated history. *See* Joseph G.S. Greenlee, *The American Tradition of Self Made Arms*, 54 St. Mary's L.J. 35, 66 (2023). The unregulated self-manufacture of firearms was common in the American colonies, beginning with gunsmiths who made and repaired militia and hunting weapons and were "extremely important and highly valued in their communities." *Id.* at 9.

Colonists possessed both the express right to import whole firearms *and the parts necessary to make their own firearms*. *Id.* at 9-10 (citing Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3787–88 (Francis Newton Thorpe ed., 1909)). While "[i]n the large gunsmith shops of the cities it is probable that many

minds were given to the making of a gun . . . in the smaller shops which formed the great majority—mere cabins on the outskirts of the wilderness—one man with or without an apprentice did every part of the work." Charles Winthrop Sawyer, Firearms in American History 145 (1910); *see also* James B. Whisker, The Gunsmith's Trade 5 (1992).

During the Revolutionary War, when the British attempted to prevent the Americans from acquiring firearms and ammunition, Americans were forced to manufacture their own firearms and gunpowder to survive. *See Greenlee*, *supra*, at 12–15 (citing M.L. Brown, Firearms in Colonial America: The Impact on History and Technology 1492-1792 127 (1980)). Due to the circumstances of the war, "[n]early every able-bodied male between 16 and 60 . . . [had] to provide his own arms" and some men "built their arms themselves." *Id.* at 25. "When the colonies faced major arms shortages throughout the war, domestic arms manufacturing filled the void." *Id.* at 16. Indeed, the colonies themselves solicited firearm manufacturers, including those engaged in private manufacture and others outside of the firearms industry, to increase domestic production. *Id.* at 18–23.

Thomas Jefferson understood the right very well. Describing the landscape of firearms in early America in 1793, he wrote that "[o]ur citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them." *Letter from Secretary of State Thomas Jefferson to British Ambassador to the United States George Hammond*,

May 15, 1793, *in* 7 The Writings of Thomas Jefferson 325–26 (Paul Ford ed., 1904).

After the Revolutionary War, "gunsmithing was a universal need in early America" and "many early Americans who were professionals in other occupations engaged in gunsmithing as an additional occupation or hobby." Greenlee, *supra*, at 29. This tradition extended to pioneers, mountain men, and explorers whose need to make and repair firearms was a survival necessity. *Id.* at 32.

ATF's supposedly modern notion of firearm "precursor parts" is not modern at all. Although some early riflemakers forged their firearm parts from scratch, "there were gunsmiths who did not forge out their barrel blanks, but purchased them in bulk from some factory like that of Eliphalet Remington." John G.W. Dillin, The Kentucky Rifle 96 (1975). These riflemakers then fitted their barrels "to hand-made stocks with American factory or English locks." *Id.*

This tradition of personal gunmaking—free from any major federal regulation whatsoever—continued into the nineteenth and twentieth centuries, when "[m]any of the most important innovations in firearms technology began not in a federal armory or major firearms manufactory, but in private homes and workshops." Greenlee, *supra*, at 35. Such innovations include "[t]he most popular rifle in America today . . . the AR-15, owned in the tens of millions . . . [whose] roots are in homebuilding." *Id*. at 39.

During all of these foundational time periods, anyone with the requisite skill had an essentially unfettered right to build their own firearms; "[o]ne need not have had a wealthy patron or sponsor, or work for king and nobility, to make guns." Greenlee, *supra*, at 41 (internal citation omitted); Whisker, *supra*, at 6 ("Even those apprentices who had never completed an apprenticeship might enter the trade. No guild, union or government agency attempted to regulate the gun making business….He need not take any examination. He need not present one of his guns to any examining board."); *id.* at 90 ("Gunsmiths considered it to be their right to make guns without regulation or interference.").

Deviations from this historical tradition are decidedly few and modern. No restrictions were placed on the self-manufacture of firearms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries. *See* Greenlee, *supra*, at 40. Rather, "[a]ll such restrictions have been enacted within the last decade." *Id.* At the state level, it was not until 2016 that a small minority of states began to regulate the manufacture of arms for personal use. *Id.* at 42.

2. Hence, there is no American historical tradition of regulating the self-manufacture of firearms—let alone prohibiting it with harsh criminal penalties. Yet that is precisely what ATF's extraordinary reading of the GCA makes it do. Because that construction likely yields a violation of the Second Amendment, *see N.Y. State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111 (2022), it should not be adopted.

Conclusion

The Court should grant the petition for a writ of certiorari and affirm the Fifth Circuit's decision to hold the Rule unlawful.

Respectfully submitted,

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