No. 23A82

In The Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Applicants,

v.

JENNIFER VANDERSTOK, ET AL.,

Respondents.

On Application for a Stay of the Judgment Entered by the United States District Court for the Northern District of Texas

RESPONDENTS VANDERSTOK, ANDREN, TACTICAL MACHINING, FIREARMS POLICY COALITION, INC., AND POLYMER80, INC.'S RESPONSE IN OPPOSITION TO STAY

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CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, no Respondent party to this brief has a parent company or a publicly held company with a 10 percent or greater ownership interest in it.

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INTRODUCTION

The district court correctly held that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has exceeded its authority by seeking to depart from over fifty years of regulatory practice and extend the definitions of "firearm" and "frame or receiver" in federal law beyond any reasonable understanding of those terms. The district court also correctly held that vacatur is a proper remedy when a federal agency has been found to exceed its statutory authority, as courts have consistently held since the enactment of the Administrative Procedure Act in 1946. The Fifth Circuit rejected the Government's plea to stay the district court's vacatur order with respect to the specific regulatory definitions at issue, and this Court should do the same.

The Gun Control Act of 1968 reflects a fundamental policy choice by Congress to regulate the commercial market for firearms while leaving the law-abiding citizens of this Country free to exercise their right to make firearms for their own use without overbearing federal regulation. To that end, the Act includes a precise definition of what it takes for an item to be a "firearm" whose commercial production and sale must comply with the Act's regulatory regime. As relevant here, the Act defines a "firearm" to mean "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" and "the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3). Consistent with Congress's decision not to interfere with the making of firearms by private citizens,

commercial production and sale of other items that may be used by private citizens to make firearms for their own use is outside the scope of the Act.

ATF, however, apparently believes that it has now become too easy for private citizens to make their own firearms. But rather than seeking to convince Congress that changing circumstances counsel in favor of revisiting the policy choice Congress made in 1968, ATF has decided to take matters into its own hands. To that end, in August 2022, ATF expanded the regulatory definition of "firearm" in two key respects.

ATF first decreed that items that *are not* frames or receivers nevertheless *are* frames and receivers for purposes of federal law, so long as those items "may readily be . . . converted to function as a frame or receiver." *See* 27 C.F.R. § 478.12(c). While this definition is questionable on its face, it is wholly untenable in context. That is because the Gun Control Act of 1968 expressly defines a firearm to include "any weapon" that "may readily be converted to expel a projectile by the action of an explosive" as well as the "frame or receiver of any such weapon," while conspicuously excluding any language about items that can be converted to frames or receivers. *See* 18 U.S.C. § 921(a)(3).

ATF's second change was to expand the definition of a firearm to include firearm parts other than a frame or receiver. ATF decreed that the term firearm now 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." 27 C.F.R. § 478.11. This expansion makes a difference only when the kit in question does not include a frame or receiver—if it did, the frame or receiver

already would be a firearm under the Gun Control Act. But it is the frame or receiver of a firearm that Congress chose to treat as equivalent to a firearm, not a collection of other parts.

The district court was correct to hold that in expanding the definition of "firearm" in these ways ATF exceeded its statutory authority. Indeed, by seeking to bring within its purview items that facilitate the making of firearms by private citizens for their own use, ATF has sought to fundamentally alter the policy choices made by Congress in 1968. Those policy choices are for Congress, not ATF, to make.

Because the district court properly found that ATF exceeded its statutory authority, the district court was warranted in vacating the offending provisions of ATF's regulation. The APA expressly instructs courts to "hold unlawful and set aside agency action" that, like ATF's rule here, is "in excess of statutory . . . authority." 5 U.S.C. § 706(2). This language has long been understood to "affirmatively provide[ ] for vacation of agency action," *Cream Wipt Food Products Co. v. Federal Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951), which is unsurprising given that at the time the APA was enacted in 1946 Black's Law Dictionary defined "set aside" to mean "to cancel, annul or revoke," *Set aside*, BLACK'S LAW DICTIONARY (3d ed. 1933). The Court should not grant a stay on the basis of the Government's challenge to this longstanding interpretation of the APA, which is decades older than even the substantive understanding of the Gun Control Act that ATF is seeking to upend.

The Government not only has failed to show that it is likely to succeed if the merits of this dispute were to reach this Court but also has failed to show that equity

favors a stay. The district court's judgment maintained the status quo with respect to the definition of firearms as it was understood from 1968 to 2022. And even since 2022 the law has for the most part been enjoined with respect to Respondents. What is more, the Government's alleged "epidemic" of privately made firearms traced by the police appears to be largely an artifact of police departments changing their tracing practices in response to ATF pressure. "In particular, the substantial increase in [privately made firearm] trace submissions since 2020 is in part attributable to education, outreach, and training that ATF has provided to [law enforcement agencies] and the importance of submitting them for tracing." *National Firearms Commerce and Trafficking Assessment Vol. II: Part III*, at 5 (Jan. 11, 2023), https://bit.ly/3q9q7e0 ("NFCT Report"). Even with these changed tracing practices, in 2021 suspected privately made firearms accounted for less than 5% of trace requests nationwide. NFCT Report at 1, 5–6. What is more, much of the activity captured by these traces may be independently illegal. The trace figures capture "suspected" privately made firearms. *See* NFCT Report at 5 & n.3. It is likely that at least some are in fact commercial firearms with their serial numbers removed, and removing serial numbers from a firearm already is illegal. *See* 18 U.S.C. § 922(k). The trace figures likely also include firearms that are made privately not for the maker's own use but for commercial sale outside of the federal regulatory system. This too is a federal crime. *See* 18 U.S.C. § 922(a)(1). In short, nothing in the Government's submission demonstrates that firearms made by individuals for their own personal use are fueling an increase in crime.

The Government has failed to demonstrate that emergency relief is needed, particularly when that relief seeks to keep in place a regulatory regime that exceeds the bounds of congressional authorization and seeks to make it harder for the law-abiding citizens of this Nation to make their own firearms, a practice that has persisted "since the earliest colonial days." *See* Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 36 (2023).

For these reasons, this Court should deny the Government's motion for a stay. If the Court is inclined to grant the Government's motion to any extent, in light of the harm faced by Respondents if ATF's rule is enforced against them, and the lack of any demonstrated harm caused by the preliminary injunction that was issued in this case and that protected Respondents for almost a full year, the Court should limit any stay to applications of the vacatur order that exceed the scope of the preliminary injunction. Finally, if the Court were to disagree altogether and issue a full stay, Respondents support the Government's request to treat the stay application as a petition for certiorari and to grant certiorari before judgment.

STATEMENT

I. Background

Congress enacted the National Firearms Act in 1934 "[t]o provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof." National Firearms Act of 1934, Ch. 757, 48 Stat. 1236, 1236 (June 26, 1934). The National Firearms Act "imposed a tax

on the making and transfer of firearms defined by the Act, as well as a special (occupational) tax on persons and entities engaged in the business of importing, manufacturing, and dealing in [National Firearms Act] firearms." *National Firearms Act*, ATF, https://bit.ly/3Y2kzP9 (last visited August 1, 2023). "Firearms subject to the 1934 Act included [short barreled] shotguns and rifles . . . , certain firearms described as 'any other weapons,' machine guns, and firearm mufflers and silencers." *Id.* Four years later, Congress enacted the Federal Firearms Act, which defined "firearm" more broadly to include "any weapon . . . designed to expel a projectile or projectiles by the action of an explosive . . . or any part or parts of such weapon." Federal Firearms Act of 1938, ch. 850, Pub. L. 75-785, 52 Stat. 1250, 1250 (June 30, 1938) (repealed 1968).

Thirty years later, Congress enacted the Gun Control Act of 1968, which amended the NFA and established a four-part definition of what constitutes a "firearm." *See* 18 U.S.C. § 921, *et seq.* As defined in the Gun Control Act, and as it has stood since 1968,

> [t]he 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)(3). This definition superseded the Federal Firearms Act definition, in which "any part or parts of such a weapon [were] included." S. Rep. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2200. Experience had taught that "it [was] impractical to have controls over each small part of a firearm. Thus, the revised

definition substitute[d] only the major parts of the firearm; that is, frame or receiver for the words 'any part or parts.' " *Id.*

As the Government indicates, Congress delegated to the Attorney General the authority to "prescribe 'such rules and regulations as are necessary to carry out' the Act." Application for a Stay of the J. Entered by The U.S. Dist. Ct. for the N. Dist. Tex., at 8 (July 2023) ("Pet.") (quoting 18 U.S.C. § 926(a)). The Government elides, however, that this is no freewheeling delegation. Rather, as amended in 1986, the Act delegates to the Attorney General the authority to "prescribe *only* such rules and regulations as are necessary to carry out" the Act. 18 U.S.C. § 926(a) (emphasis added). The 1986 amendments to the Act were intended to

> reaffirm the intent of Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . . for lawful purposes.'

An Act to Amend Chapter 44 (Relating to Firearms) of Title 18, United States Code, and for Other Purposes, §1(b)(2), 100 Stat. 449 (1986).

The Attorney General has delegated to ATF the power "to administer, enforce, and exercise the functions and powers of the Attorney General" under the Gun Control Act. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 897 (6th Cir. 2021). ATF established a definition for "frame or receiver" as "[t]hat 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." Internal Rev. Serv., Dep't of the Treasury, 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968) (to be codified at 26 C.F.R. pt. 178).

The definition promulgated in 1968 prevailed until 2022. In August 2022, however, ATF changed this definition and expanded it 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 . . . receiver." 27 C.F.R. § 478.12(c) (the "Rule"). The new definition excludes "a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet 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.)" *Id.* And the new rule allows ATF to consider extrinsic factors when determining if an object is a frame or receiver, including "any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with [or otherwise made available to the purchaser or recipient of] the item or kit." *Id.* Finally, the new rule functionally redefined "firearm" under the Gun Control Act to "include 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.

II. Proceedings Below

The original plaintiffs in this case are two individuals (Jennifer VanDerStok and Michael Andren), one producer and retailer (Tactical Machining, LLC), and one membership organization (Firearms Policy Coalition). App.11a–12a. After this action was instituted, several producers and retailers intervened (BlackHawk

Manufacturing Group, Inc., Defense Distributed, Not an LLC d/b/a JSD Supply, and Polymer80, Inc.) as did another membership organization (Second Amendment Foundation). App.12a–13a.

The individual plaintiffs are Texas residents who own items implicated by the Rule that they have manufactured and/or intend to manufacture into firearms for personal, lawful use, and they wish to purchase additional products directly online to help facilitate the making of their own firearms. App.11a. Under the challenged rule, all such purchases would have to be channeled through a federal firearms licensee, incurring fees and other expenditures, as well as adding time to the process. App.11a.

Tactical Machining produces and sells items that are subject to regulation under the Rule. App.12a. The sale of newly regulated items constitutes more than 90% of Tactical Machining's business. App.12a. Polymer80 designs, manufactures, and distributes firearms and non-firearm products, and ATF has taken the position that some of its products are covered by the Rule. App.13a. Firearms Policy Coalition is a non-profit membership organization dedicated to promoting and defending the constitutionally protected rights of American citizens through public education and legislative and legal advocacy. App.12a. In addition to itself owning items that are subject to regulation under the Rule, FPC has hundreds of thousands of members nationwide, including the individual Plaintiffs in this lawsuit. App.12a. FPC brings this suit on behalf of itself and its members. *Id.*

Plaintiffs filed this suit in August 2022, before the Rule took effect, and sought preliminary injunctive relief, which the district court granted. App.12a & n.14; *see*

also VanDerStok v. Garland, 625 F. Supp. 3d 570 (N.D. Tex. 2022). That preliminary relief remained in effect until the district court granted Plaintiffs' motion for summary judgment and held that the Rule exceeded ATF's rulemaking authority in the way it defined "frame or receiver" and "firearm" and vacated the Rule. App.42a–43a.

The Government petitioned the district court for a stay pending appeal. The district court denied that motion on July 18, 2023, but granted a 7-day administrative stay to permit the Government to seek emergency relief from the Fifth Circuit. App.5a. The Fifth Circuit denied the stay in part and granted it in part. The Fifth Circuit denied the stay as to the vacatur of the "frame or receiver" and "firearm" definitions because it concluded that Plaintiffs were likely to succeed on appeal in showing that those definitions were promulgated in excess of agency authority. App.3a. The Fifth Circuit granted the stay with respect to the vacatur of other aspects of the Rule. *Id*. The Fifth Circuit expedited the appeal and will hear argument on September 7, 2023. App.4a; *VanDerStok v. Garland*, No. 23-10718, Doc. 63 (5th Cir. July 25, 2023).

ARGUMENT

To justify its petition for a stay of a lower court decision, the Government "must demonstrate (1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (cleaned up). "Because this matter

is pending before the Court of Appeals, and because the Court of Appeals denied [the Government's] motion for a stay, [the Government] has an especially heavy burden." *See Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). The Government has failed to carry its burden.

I. The District Court Correctly Held That ATF Exceeded Its Authority By Expanding The Definitions Of "Frame Or Receiver" And "Firearm" Beyond Statutory Bounds.

In redefining "frame or receiver" and "firearm" under federal law, ATF exceeded its authority under the Gun Control Act and regulated items that are not firearms and which Congress never envisioned it regulating. There is no fair prospect that this Court will reverse the district court's decision vacating the Rule.

A. The Items Newly Regulated By The Rule Are Not Frames Or Receivers.

The Gun Control Act, in relevant part, defines "firearm" to include "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[, or,] the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3). While the statute considers "any weapon" that could "readily be converted to expel a projectile by the action of an explosive" to be a firearm, it conspicuously does not include language defining as firearms items that are not yet but could be converted to become "the *frame or receiver* of any such weapon." *Id.* (emphasis added). If an item potentially could be made into a frame or receiver but is not a frame or receiver that is insufficient under the Act's plain text to make it a "firearm." But the Rule considers it sufficient anyway. The district court found that, by greatly expanding the universe of items that could be considered a

"frame or receiver," the Rule conflicted with the controlling "plain and unambiguous meaning of the statutory language." App.31a–32a (quoting *NPR Invs., L.L.C. ex rel. Roach v. United States*, 740 F.3d 998, 1007 (5th Cir. 2014)). As it put it, "that which *may become* or *may be converted to* a functional receiver is not itself a receiver," and though Congress *could have* included such items within the definition of firearm under the Act, it did not. App.32a (emphasis in original).

That Congress included certain non-functional firearms in its definition of the term adds strength to the district court's reading. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002)); *see also Allison Engine Co., Inc. v. U.S. ex rel. Saunders*, 553 U.S. 662, 671 (2008). That presumption should be even stronger here where the district court was not comparing different sections of the same statute, but two clauses of the same sentence. Where Congress wanted to include items that could be converted to meet its definition of firearms, it did so explicitly. Its decision not to incorporate such language with regard to frames and receivers should be the end of the discussion.

In response, the Government argues that the ordinary usage of frame or receiver includes items that have been prepared to be frames or receivers but for which the manufacturing process is not yet complete. Pet. at 22. It analogizes to a bicycle and suggests that "a bicycle is still a bicycle even if [it] lacks pedals, a chain,

or some other component needed to render it complete [to] allow it to function" or if it is shipped "with a seat tube that the user must cut to length before installing." Pet. at 22. But this analogy obscures, rather than clarifies the issue.

The key question in this case is: what is a "firearm?" Congress has defined it to be, for these purposes, one of only three things: (1) any weapon that fires a projectile by means of an explosive (the ordinary usage of the term), (2) any weapon that could readily be converted to do so (an expansion of the ordinary usage to cover issues related to disassembled or disabled firearms), or (3) a "frame or receiver." In ordinary parlance, of course, a frame or receiver would not be understood to be a firearm. An individual who is not versed in the statutory definition is hardly likely to look at a Sig Sauer P320 fire control unit (below left) or an AR-15 lower receiver (below right), both considered by ATF to be the "frame or receiver" component of their respective firearms, and call them "firearms."

Instead, when used to mean "frame or receiver," "firearm" is a term of art, not intended to be understood in its ordinary sense, and appeals to the ordinary understanding of the term are unhelpful when the statutory definition must control.

See Burgess v. United States, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words in the usual case.") (internal quotation marks and ellipses omitted). Contrary to the Government's argument, the district court's statutory analysis did not read into the statute a requirement that a "frame or receiver" be " 'complete,' 'operable,' or 'functional.' " Pet. 22. Rather, it merely refused to import, into a technical definition prescribed by Congress, a phrase that Congress had specifically omitted to include.

To return to the Government's faulty analogy, assume a federal statute had for years regulated every pedal, seat, brake line, and chain of a bicycle, and Congress, determining that such a system was too complicated, passed a new law that treated as a bicycle either (1) a vehicle that is a bicycle or could readily be fashioned into one *or* (2) specifically the part known as a bicycle *frame*. It may be fair to say that a bicycle whose seat post is removed for shipping alongside the rest of the bicycle is still a bicycle. But it would *not* be fair to say an unmachined bicycle frame—which requires additional manufacturing before the pedals, wheels, and seat can even be attached to it—meets the definition of a "frame" that is considered to *be* a bicycle under federal law. More importantly, the government's reach to analogy here is indicative of its desire to avoid contending with the text, structure, and history of the Gun Control Act and to treat this question of interpretation outside of the relevant context, because that context dooms its argument.

In any event, it makes no sense to posit that an item that with manufacturing could *become* a frame or receiver in fact *is* a frame or receiver. Indeed, if an item must

be "converted" into a frame or receiver it would be counterintuitive to call that item a frame or receiver *before* the conversion.

The Government's claim that its new definition of "frame or receiver" is "consistent with ATF's longstanding interpretation and implementation of the Act" is historical revisionism. Pet. at 25. In support of this claim, the Government cites a handful of letters—three from the 1970s and 1980s and one sent just months before ATF began the process of promulgating the rule at issue here. In fact, until now ATF has consistently taken the position that these newly regulated items fall outside the scope of the Gun Control Act. *See Are "80%" or "unfinished receivers illegal?*, ATF, https://bit.ly/3OEDgFt (last visited Aug. 1, 2023). Indeed, just months before the Rule was proposed ATF took that position in litigation:

> the 'designed to' and 'readily be converted' language are only present in the first clause of the statutory definition [of firearm]. Therefore, an unfinished frame or receiver does not meet the statutory definition of a 'firearm' simply because it is 'designed to' or 'can readily be converted into' a frame or receiver. Instead, a device is a firearm either: (1) because it is a frame or receiver or; (2) it is a device that is designed to or can readily be converted into a device that 'expel[s] a projectile by the action of an explosive.'

Fed. Defs.' Mem. of Law in Support of Mot. for Summ. J., Doc. 98 at 5, *Syracuse v. ATF*, No. 1:20-cv-06885 (S.D.N.Y. Jan. 29, 2021). The classification letters cited by the Government—which focused on the question of whether a frame or receiver had been sufficiently machined to meet the former definition—are consistent with the ATF's "several decades" of "focus[ing] on the degree of machining a device has undergone (and hence its degree of completeness)," *id.* at 7, but utterly inconsistent

with ATF's new policy of asking whether an item is intended to or could become a frame or receiver.

Finally, the Government falls back on the argument that, statutory text aside, interpreting "frame or receiver" this way "frustrate[s] one of the Act's principal goals: ensuring that firearms transfers are adequately vetted and recorded so that weapons do not fall into the hands of prohibited persons." Pet. at 27. But "vague notions of a statute's basic purpose are . . . inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) (quotation marks omitted); *see also Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."). Like other agencies, ATF is a creature of statute. And that means that,

> no matter how important, conspicuous, and controversial the issue . . . [its] power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). Here, Congress determined that "frame[s] or receiver[s]" should be regulated as firearms, and ATF has no authority to expand that phrase to include items that are neither frames nor receivers, but merely could be manufactured into them.

B. A Parts Kit Is Not A "Firearm."

The district court also correctly held that the Rule exceeded ATF's statutory authority when it added, to the statutory definition of "firearm," "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. A principal problem with this addition is that, if it has any meaning at all, it operates to regulate firearm parts *other than a frame or receiver*, when the Gun Control Act specifically limited ATF's purview to that *one* part of the weapon. *See* App.36a–37a (detailing history of Gun Control Act removing authority to regulate "any part or parts" of a firearm in favor of authority to regulate frames and receivers). As the district court explained, "[t]he statutory context repeatedly confirms that Congress intentionally chose not to regulate 'weapon' parts generally." App.36a–37a (collecting examples). "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." App.37a (quoting *SEC v. Hallam*, 42 F.4th 316, 337 (5th Cir. 2022)). The Government's position, which would permit ATF to regulate all manner of parts that are not frames or receivers, is incompatible with this rule of interpretation.

The Government argues that this definition follows logically from the Gun Control Act's statement that a "firearm" includes "any weapon . . . which . . . may readily be converted to expel a projectile by the action of an explosive." Pet. at 19. But the Government's reading cannot be correct. If a parts kit really does comprise all the parts necessary to create a functional firearm, then it contains a frame or receiver

and, as such, already is treated as a "firearm" according to the text of the Act and by ATF. Such a narrow reading would render the inclusion of parts kits superfluous. But that construction is not warranted. The "weapons parts kits" definition is ATF's attempt at an end-run around the (previously discussed) requirement that a frame or receiver must be a finished frame or receiver to be regulated—it targets, for example, so-called "Buy Build Shoot" kits that include firearm parts alongside an item that, with manufacturing, can be made into a frame. *See* Zusha Elinson, *Ghost-Gun Company Raided by Federal Agents*, WALL ST. J. (Dec. 11, 2020), https://on.wsj.com/44T1q4O.

The Government's attempt to analogize parts kits to an IKEA bookshelf fails for this same reason: an IKEA bookshelf is shipped with all the completed parts necessary to construct a bookshelf, whereas a parts kit requires additional manufacturing on the key component to become a firearm. A better analogy would be to a "taco kit" sold as a bundle by a grocery store that includes taco shells, seasoning packets, salsa, and other toppings, along with a slab of raw beef. No one would call the taco kit a taco. In addition to "assembly," turning it into one would require cutting or grinding and cooking the meat—and until that was done, it would be nonsensical to treat it as food and the equivalent of a taco.

For this same reason, the Government is wrong to suggest there is anything "illogical" about the district court's conclusion that "disassembled" weapons are firearms but never-before-assembled part kits necessarily missing a frame or receiver are not. Pet. at 20. A disassembled firearm—which at one time was a functioning

firearm—has all the components (including a finished frame or receiver) necessary to be quickly rendered a firearm. To continue the analogy, it is like leftovers from taco night that have been stored in separate containers in the refrigerator but that could be quickly turned back into tacos for lunch the next day. Treating a disassembled weapon as a firearm creates no conflict with the Act's insistence that only firearms with completed frames should be regulated. Extending that same analysis to a "Buy Build Shoot" kit, on the other hand, does create a conflict with the plain text of the statute and the district court was right not to countenance it.

C. The District Court's Interpretation Is Supported By The Doctrine Of Constitutional Avoidance And The Rule of Lenity.

The district court's interpretation of the statute is the best interpretation of the statute's terms in context. To the extent there could be any uncertainty, the doctrine of constitutional avoidance and the rule of lenity further bolster the district court's interpretation. The district court's interpretation avoids at least two significant constitutional problems raised by the Rule. And "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The district court's interpretation also properly resolves ambiguity, to the extent it exists, against the Government.

First, the Gun Control Act, as applied through the Rule, creates a substantial question under the Second Amendment to the United States Constitution. The Second Amendment, which protects "the right of the people to keep and bear Arms,"

U.S. CONST. amend. II, also protects, by necessary implication, the right to *acquire* arms, *see Luis v. United States*, 578 U.S. 5, 26–27 (2016) (Thomas, J., concurring); *see also Rigby v. Jennings*, 630 F. Supp. 3d 602, 615 (D. Del. 2022). One way of acquiring arms is by making them; indeed, self-manufacture of firearms is an historically common way to acquire them. *Supra* Greenlee, 54 ST. MARY'S L.J. at 45–70. And although certain restrictions on Second Amendment protected activity are acceptable if they can be shown to be "consistent with this Nation's historical tradition of firearm regulation," *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), there is no historical tradition of regulating privately made firearms, *supra* Greenlee, 54 ST. MARY'S L.J. at 78 ("All such restrictions [on the manufacture of arms for personal use] have been enacted within the last decade."). Instead, Congress has focused (as in the Gun Control Act) on regulating the *commercial* sale of firearms. The Rule breaks with this history and raises serious Second Amendment concerns that the district court's interpretation of the Act avoids.

Second, the district court's interpretation mitigates vagueness concerns with the Gun Control Act. The Act is a criminal statute, and "[t]he prohibition on vagueness in criminal statutes . . . is an essential of due process, required by both ordinary notions of fair play and the settled rules of law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (quotations omitted). The Rule threatens to render the Act unconstitutionally vague by making it unclear when an item that with some work could become a frame or receiver crosses the line to become a "frame or receiver" or when a "weapons parts kit" is sufficiently complete to be a "firearm." For example,

under the Rule an item may be regulated as a frame or receiver when it is in a state such that it "may readily be completed" to function as a frame or receiver. 27 C.F.R. § 478.12(c). "Readily" is, in turn, determined by reference to eight factors, which are not weighted, and include things like an evaluation of "parts availability" and "feasibility" of completing the manufacturing process. 27 C.F.R. § 479.11. The face of the regulation fails to provide clear guidance to law-abiding citizens about which items are or are not firearms under the Act.

The inclusion of "weapon parts kit[s]" within the definition of "firearm" creates similar problems. Such items are regulated when they are "designed to or may readily be completed" to become a firearm, 27 C.F.R. § 478.11, and in determining whether an item fits this definition, ATF may consider "any associated templates, jigs, molds, equipment, or tools that are made available by the seller" as well as "any instructions, guides, or marketing materials." 27 C.F.R. § 479.102. In other words, whether an item or parts kit is a "firearm" and therefore regulated under the Gun Control Act depends in part on the "marketing materials" and "tools" with which it is packaged and the same parts, sold in different contexts, may be regulated in some but not regulated in others. Such a regulation, with criminal consequences, essentially creates a trap for the unwary.

Third, while the district court's interpretation of the statute is straightforwardly the best interpretation, even if that were not the case the statute would be at best ambiguous. Because the Gun Control Act is a criminal statute, the

rule of lenity counsels that any such ambiguity must be resolved against the Government. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992).

II. Vacatur Was The Appropriate Remedy.

The district court was correct, having found that ATF's definitions of "frame or receiver" and "firearm" conflicted with the Act, to vacate the Rule under the APA.[1] The Government argues that the district court's chosen remedy was overbroad and the court should have, instead, limited the remedy to an injunction against enforcement of the challenged rule against Plaintiffs. To support this argument, it points both the text and structure of the APA and to Article III limitations on the type of remedies courts can grant to victorious litigants. Neither argument should be accepted.

A. The APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). " 'Set aside' usually means 'vacate.'" *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006). Indeed, Black's Law Dictionary defined the phrase as "to cancel, annul or revoke" when the APA was enacted. *Set aside*, BLACK'S LAW DICTIONARY (3d ed. 1933).

[1] The district court invalidated the entirety of the Rule. App.44a. The Fifth Circuit stayed the vacatur of the provisions of the Rule that are not discussed in this brief. App.3a. Without conceding that the Fifth Circuit was correct to temporarily limit the scope of the relief afforded by the district court's judgment, for purposes of this brief (because the Government must show that the unstayed relief afforded following the Fifth Circuit's decision is overbroad), Plaintiffs discuss vacatur in the context of the "frame or receiver" and "firearm" definitions only.

Consistent with this meaning, "set aside" in the APA has long been interpreted to "affirmatively provide[] for vacation of agency action." *Cream Wipt Food Prods.*, 187 F.2d at 790. Indeed, the lower courts have held that vacatur is "the default remedy to correct defective agency action." *Nat'l Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 501 (D.C. Cir. 2019) (emphasis added). Debate in the lower courts has centered on whether remand is ever appropriate under the APA, or whether vacatur is *compelled*. *See, e.g.*, *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("[W]hen we hold that the conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted."); *Checkosky v. SEC*, 23 F.3d 452, 492 (D.C. Cir. 1994) (Randolph, J., dissenting) ("Pursuant to the Administrative Procedure Act, courts are instructed *always* to 'hold unlawful and set aside agency action, findings and conclusions found to be arbitrary or capricious.") (quoting *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1497 (D.C. Cir. 1988)) (cleaned up).

This is a sensible form of relief in APA cases, where the question is ordinarily whether an agency has acted in accordance with congressional authorization and used the appropriate procedures in promulgating a rule or issuing a decision. In such a case, where an agency has promulgated what amounts to an illegal policy, principles of fairness to the regulated community, national uniformity, and judicial efficiency all weigh in favor of exercising the authority that Congress has granted to reviewing courts to vacate rules in total. *See* Spencer E. Amdur & David Hausman*, Nationwide*

Injunctions and Nationwide Harm, 131 HARV. L. REV. F. 49, 54 (2017) ("We would have a very different system without these remedies. No one would be protected from an illegal policy without bringing their own challenge. The number of lawsuits over some policies might have to increase dramatically.")

Nevertheless, the Government argues that "set aside" has been misinterpreted essentially since the APA was passed and that it is better to read the phrase to mean "disregard." Pet. at 31. It suggests that Section 706 of the APA does not prescribe any sort of remedy, that Section 703 *does*, and that Section 703 does not provide for vacatur. *Id.* at 32. But Section 703 does not even purport to specify the remedies available to litigants suing agencies. Instead, it is a venue provision that clarifies that a person who has a claim against an agency that is not governed by a special statutory provision calling for judicial review—"including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus"—may file an action against the agency "in a court of competent jurisdiction." 5 U.S.C. § 703. Even if this provision *could* be read as providing for certain remedies in agency litigation, that the list begins with "including" clearly indicates it is not intended to be an exclusive enumeration of *all available* remedies. *See, e.g.*, *United States v. S. Half of Lot 7 and Lot 8, Block 14, Kountze's 3rd Addition to City of Omaha*, 910 F.2d 488, 489 (8th Cir. 1990). It does not matter that, in enumerating this nonexclusive list of actions, Section 703 "points *outside* the Administrative Procedure Act (APA) for the available remedies." Pet. at 32. There would be no question that a form of relief authorized by the APA *itself* is available against an agency in an APA challenge. It therefore would

be much more important to clarify that traditional forms of relief *are also* still available when necessary. *See* Ronald Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 101, 113 (forthcoming 2023), *available at* https://tinyurl.com/m9vb6tzk (discussing legislative history of APA).

Even if the Government were right, that courts have been misinterpreting Section 706 for almost three-quarters of a century, the fact is that such a massive misinterpretation, which played a role in hundreds of high-profile cases and dictated the fate of several signature presidential policies, *cannot* have been missed by Congress. And while this Court has never affirmatively stated that the prevailing interpretation of Section 706(2) in the lower courts is correct, it has tacitly blessed it time and again. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2605–06 (2022) (discussing vacatur of clean power plan). Indeed, the Chief Justice, at oral argument in *United States v. Texas*, noted that this argument amounts to a request for "overturning [a] whole established practice under the APA." Tr. of Oral Argument at 35:24–25, *United States v. Texas*, No. 22-58 (Nov. 29, 2022), https://bit.ly/4793FCB; *accord id.* at 116:3–6 ("What the Court is reviewing and looking for are these kinds of errors by the agency, and we're told that when they exist, you set aside . . . the agency action."). In such a case, ordinary principles of judicial restraint weigh heavily against adopting the Government's new reading, since "unlike in a constitutional case, critics of [the prevailing interpretation] can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). That Congress has not corrected the record strongly

suggests the courts have correctly understood the APA all along and, even if not, they should not abruptly change course now.

B. The district court's vacatur of the Rule also does not conflict with Article III's "case or controversy" requirement. The Government argues that Article III limits available relief to only what is necessary to address the injury incurred by the plaintiffs before the court and that prescribing broad relief that impacts non-parties runs afoul of this limitation. Pet. at 28–29. But this Court has recently sanctioned the award of similarly broader relief. In *Trump v. International Refugee Assistance Project*, 582 U.S. 571 (2017) (per curiam), the Court stayed, in part, a nationwide injunction, but left it in place for those non-parties who were "similarly situated" to the Plaintiffs. *Id.* at 582. In fact, contrary to the Government's argument, "[a]s long as a plaintiff has standing to challenge a policy, Article III is no barrier to enjoining it in full" even with regard to parties not before the court but merely similarly situated to them. *Supra* Amdur & Hausman, 131 HARV. L. REV. F. at 54 n.35; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting); *id.* at 890 n.2 (maj. op.). Indeed, this Court has acknowledged that, unlike the injury-in-fact prong of the standing inquiry, the scope of redress available from a court is subject to adjustment by Congress without raising Article III concerns. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). That is because a remedial order vacating a regulation binds parties before the Court. When a regulation is vacated in an APA action, the party directly affected is the agency that enforces the statute, and that agency (or one of its officials) will be a party to the action.

The Government also raises practical arguments against vacatur as a remedy, suggesting that vacatur "strains our separation of powers" by setting judges in the position of a legislature, encourages forum shopping, and operates asymmetrically against the government, which must prevail in every case to prevent its rule from being vacated nationwide. Pet. at 29. Further, the Government complains that the remedy requires emergency litigation because the stakes are so high for the Government. *Id.*

These policy concerns, of course, cannot displace the congressional judgment enacted in the APA to prescribe vacatur as a valid remedy when agencies exceed their lawful authority. Congress created a cause of action for private litigants under the APA, Congress made the judgment that on balance vacatur should be allowed, and Congress remains free to revisit that judgment at any time.

The Government's policy arguments also are overstated and fail to account for the full range of relevant considerations. Taking these in turn, vacatur respects the separation of powers by following the Congressional directive to "set aside" actions that exceed agency authority. To be understood as consistent with the separation of powers, of course, rulemaking must be viewed not as legislation but rather as execution of legislation. And just as Congress defines the scope of agency authority to execute congressionally enacted policies, Congress likewise has defined the scope of judicial authority to ensure that administrative agencies do not exceed their lawful authority. There can be no question that in ordering vacatur courts act *judicially*; they are neither legislating nor executing the law, but rather interpreting the law

and applying a lawful remedy. And the remedy of vacatur promotes the separation of powers by creating a tool to check attempts by administrative agencies to exceed their lawful authority. Indeed, the Government's separation-of-powers argument is counterintuitive, to say the least. For the type of challenge at issue in this case, the question of remedy arises only after it has been found that the agency in question itself has exceeded its lawful authority and therefore effectively attempted to legislate policy not enacted by Congress. It would be strange to say that to respect the separation of powers an unlawful agency regulation must remain on the books.

As for the Government's complaint that vacatur operates "asymmetrically" and that it must win multiple suits across the country if it is to avoid a judgment vacating the Rule, this is merely a reversal of the ordinary " 'non-acquiescence' doctrine, under which the government may normally relitigate issues in multiple circuits." *Nat'l Mining Ass'n v. U.S. Army Corps. of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). That is "no more than an inevitable consequence of . . . the APA's command that rules 'found to be . . . in excess of statutory jurisdiction' shall be not only 'h[e]ld unlawful' but 'set aside.' " *Id.* at 1410 (quoting 5 U.S.C. § 706(2)). The federal government does not have the *right* to be able to litigate the same policy to different results in multiple fora; and while it ordinarily enjoys that *privilege*, Congress has the power to remove it. As in other areas of the law, this issue involves balancing several considerations. On the one side, to be sure, are the Government's arguments about percolation and gradual development of the law. But there are powerful practical arguments that cut the other way. The ATF rule at issue in this case, for example, concerns a nationwide

market in items that can be used by private citizens to make firearms. The Government's approach could lead to a patchwork of different regulatory regimes in force across the country. And the patchwork would not even necessarily track geography, given that parties from anywhere in the Nation generally can bring an APA claim in their home districts *or* in the District of Columbia. *See* 5 U.S.C. § 703; 28 U.S.C. § 1391(e). Regulations also typically come with attendant burdens and compliance costs on the regulated community that can be exacerbated by the fits and starts that can result from the multi-year percolation that could occur absent vacatur as a remedy. Percolation is not "the paramount concern in all cases," *Supra* Amdur & Hausman, 131 HARV. L. REV. F. at 54 n.36, and Congress evidently determined that the burdens of percolation outweigh the benefits when executive branch agencies exceed their authority. *See also* Tr. of Oral Argument at 18:19-24, *Dep't of Educ. v. Brown*, No. 22-535, (Feb. 28, 2023), https://bit.ly/3QoBJob ("Would … we be in a world if you were right about universal vacatur in which every single borrower in the country would have to bring a lawsuit in order to vindicate a right that the Court would say these two people have?") (Jackson, J.).

III. The Equities Weigh Against A Stay.

To obtain a stay of the district court's judgment pending appeal or certiorari, the government must also show that it would likely suffer irreparable harm absent the stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). In "close cases," "the Court will balance the equities and weigh

the relative harms to the applicant and to the respondent," 558 U.S. at 190, and consider "the public interest," *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J. concurring in grant of applications for stays). The Government has failed to demonstrate that these factors weigh in its favor here.

The Government first argues that it will be irreparably injured absent a stay of the district court's judgment pending appeal because (1) "ghost guns" are "a grave threat to public safety," Pet. at 34–36, and (2) vacatur of the Rule's challenged provisions would result in "confusion among law enforcement, regulated parties, and the general public" that "would require ATF to expend substantial additional resources to re-educate its officers and the public," *id.* at 36. But the government fails to demonstrate irreparable harm on either of these bases.

As an initial matter, the Court should not accept the government's self-serving characterization of the supposed "soaring use of ghost guns in violent crimes" and its statistics concerning the alleged increase in "ghost guns . . . recovered by law enforcement each year" since 2017. Pet. at 36; *see also* Br. for the District of Columbia, et al., as *Amici Curiae* in Support of the Emergency Application to Stay the Vacatur of the Rule at 11–12 (July 29, 2023) (comparing "ghost gun recovery numbers" from 2018 and 2021 from six police agencies). "Ghost gun" is, of course, a propaganda term that appears nowhere in federal law, the use of which is intended to conflate (as discussed below) several types of unserialized firearms, including those that are manufactured lawfully by individuals and those that have their serial numbers illegally obliterated. *Cf. Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas,

J., dissenting) ("Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance.") (quotation marks omitted). The Government's own sources recognize that the increased numbers generally reflect "education, outreach, and training that ATF has provided to [law enforcement agencies] on how to identify [privately made firearms] and the importance of submitting them for tracing." NFCT Report at 5. Indeed, many law enforcement agencies did not track privately made firearms until recently. *See Growing ghost gun problem adds to America's violence woes*, CNN (Apr. 5, 2022), https://cnn.it/3OyvpZL (explaining that the LAPD "did not start separately tracking ghost gun recoveries until 2020" and that "plenty of police departments around the country do not" track "ghost gun" recoveries); Travis Taniguchi, et al., *The Proliferation of Ghost Guns: Regulation Gaps and the Challenges for Law Enforcement*, at 25, NAT'L POLICE FOUND. (2021), https://bit.ly/43PtfcT (recognizing that "[i]nconsistencies around the procedures to collect and report [reliable information about ghost guns used in crime and firearm-related injuries] make it difficult to estimate the national prevalence of crime-involved ghost guns"). Furthermore, even by the Government's own numbers, the number of suspected privately made firearms recovered by law enforcement agencies and submitted to ATF for tracing represents a minuscule fraction of overall firearms submitted for tracing: in 2021, there were 19,273 suspected privately made firearms submitted for tracing compared to 460,024 firearm trace requests overall

(*i.e.*, 4.19%). NFCT Report at 1, 5–6. And to be clear, these are *suspected* privately made firearms, *see id.* at 5 & n.3; they may in fact include firearms that lack serial numbers for other reasons, such as the number having been illegally removed from the firearm after purchase.

That tracing is not an effective way to solve crimes should come as no surprise, given that criminals generally do not purchase their firearms at retail. *See* Mariel Alper and Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016* at Tbl. 5, BUREAU OF JUST. STAT., DEP'T OF JUST. (Jan. 2019), *available at* https://bit.ly/3fIswDC (10.1% of prisoners purchased firearm used in crime at retail). That means that in most cases even a successful trace of a firearm to its retail purchaser will not connect it to the criminal. In addition, there is little reason to suspect that criminals desiring to have unserialized firearms will be substantially affected by the Rule. Such criminals could continue acquiring unserialized firearms on the black market or, if they come into possession of a serialized firearm, obliterate the serial number. *See* Cesare Beccaria, AN ESSAY ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci, tr., Bobbs-Merrill, 1963) (1764) ("Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary [laws], which can be violated with ease and impunity and which, if strictly obeyed, would put an end to personal liberty[?]").

The preceding goes to show that, as the Government knows, tracing data and trends cannot prove much of anything about the causes of crime nor are they

generally helpful tools for solving crime. According to ATF, "[t]he firearms selected for tracing are *not* chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes." *Firearms Trace Data – 2019*, ATF, https://bit.ly/3rPBwQB (last visited Aug. 1, 2023) (emphasis added). "The firearms selected *do not* constitute a random sample and *should not* be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe." *Id.* (emphasis added). This accords with the judgment of Congress, as it instructed ATF to use this language in any data releases about tracing. Consolidated & Further Continuing Appropriations Act, 2013, P.L. 113-6, § 514, 127 Stat. 198, 271–72 (2013). Changes in tracing activity show just that—changes in tracing activity; nothing more.

Turning to irreparable injury, first, the government misconstrues the proper status quo at issue when it argues that "the Rule has been the 'status quo' since August 2022 for everyone except some respondents and their customers who secured preliminary relief." Pet. at 39. As the Fifth Circuit correctly explained, however, the proper "status quo" at issue here is the *status quo ante* that existed for the 54 years before the Rule became effective, from the Act's enactment in 1968 to until the Rule became effective in August 2022. App.3a; *see also Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022) (explaining that vacatur "does nothing but re-establish the status quo absent the unlawful agency action" and that "vacatur neither compels nor restrains further agency decision-making"); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 598 (9th Cir. 2023) (Friedland, J., concurring) (recognizing

that vacating an agency rule "restores the state of the law to the status quo before the challenged agency action"); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) (explaining that when a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect). The Court's analysis of irreparable injury and the balance of the equities should take proper account of the correct *status quo ante* and recognize that *vacating* the rule, not *maintaining* it, restored the status quo.

Second, as the district court held, and as Respondents explain above, ATF's interpretation of the Gun Control Act in the Rule conflicts with the Act's plain meaning, and the Government has failed to show a likelihood of success on the merits on appeal. Consequently, ATF has no lawful authority to regulate the products at issue and cannot rely on alleged harms that may purportedly result from vacatur of the challenged provisions of the Rule to obtain a stay of the district court's judgment. To the extent that there is any "problem" caused by the products at issue in this case, the proper entity to deal with that "problem" is Congress. The Government should not be able to point to an alleged public safety harm as justification for its *ultra vires* conduct where that public safety harm has not prompted Congress to act. Indeed, Congress's failure to act is not for want of opportunity, as several failed bills have sought to extend the Gun Control Act to reach the conduct the Rule seeks to reach. *See*, *e.g., Ghost Guns Are Guns Act*, H.R. 1278, 115th Cong. (Mar. 1, 2017) (not enacted); *Untraceable Firearms Act of 2018*, H.R. 6643, 115th Cong. § 2(a)(36) (July 31, 2018) (not enacted); *Untraceable Firearms Act of 2018*, S. 3300, 115th Cong. §

2(a)(36) (July 31, 2018) (not enacted); *Stopping the Traffic in Overseas Proliferation of Ghost Guns Act*, S. 459, 116th Cong. (Feb. 12, 2019) (not enacted).

Third, the Government will not be harmed by letting this case proceed through the normal appellate process, especially in light of the Fifth Circuit's expedition of argument for early September. *See Danco Labs., LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1076 (2023) (Alito, J., dissenting from the grant of applications for stays) ("[B]ecause the applicants' Fifth Circuit appeal has been put on a fast track . . . there is reason to believe that they would get the relief they now seek—from either the Court of Appeals or this Court—in the near future if their arguments on the merits are persuasive.").

Fourth, the Government seems to imply that the Rule is the only way for it to address the perceived problem, but ATF's hands are tied by the district court's vacatur only because they are tied by the text of the Act itself. ATF may not first identify an issue it wants to address, and second redefine terms in a statute so as to reach that problem, if doing so impermissibly exceeds the scope of the statute. By contrast, of course, ATF is free to consider making appropriate new rules that respect the limits set on its authority by Congress.

Fifth, as the Government recognizes, Pet. at 38, the Rule has been enjoined with respect to Respondents and their customers for varying amounts of time, with the earliest injunction date being September 2, 2022. Yet the Government provides no indication that the injunction has led to *any* negative results. Indeed, although the Government appealed the grant of the preliminary injunction, it neither sought to

expedite that appeal nor to stay the injunction during the pendency of the appeal, undermining its current argument that not being able to enforce the Rule will result in irreparable harm. While the Court should deny the stay in its entirety, in the alternative the Court should deny it at least to the extent it seeks a stay of the vacatur with respect to the entities and individuals that were covered by the preliminary injunction. Notably, the Government never sought emergency relief with respect to the district court's preliminary injunction; such inaction severely undercuts its assertion now that there is an emergency basis to stay the vacatur. That is doubly true for a stay that would embrace even the parties who already obtained preliminary relief.

Sixth, the states remain free to address any alleged issues with unserialized firearms, and several have in legislation that is in no way affected by the district court's vacatur. *See* D.C. Amicus Br. at 10–11 (describing the various laws in fourteen states that regulate unserialized firearms in some manner); *see also Which states regulate ghost guns?*, EVERYTOWN (Jan. 12, 2023), https://bit.ly/3Ygtuwf; *Ghost Guns*, GIFFORDS LAW CTR., https://bit.ly/3rSl2Yc (last visited Aug. 1, 2023). Respondents do not concede that any of these laws are valid, but simply cite them as examples of the states addressing the same perceived issue as ATF with laws that are not affected by the Rule's vacatur. That only a minority of states have enacted laws on this issue cuts against the Government's narrative—if there is such a widespread issue, presumably many more states would be seeking to address it.

Seventh, any "confusion" that would purportedly result from not staying the district court's vacatur and any "additional resources" ATF would allegedly spend to re-educate its officers and the public do not justify staying the vacatur. It is hard to imagine how the vacatur could require substantial re-education of officers when all it accomplishes is a return of the *status quo ante* that reigned for more than 50 years before the Rule was promulgated. Furthermore, the Government can mitigate any "confusion"—if it exists at all, since the Government has not pointed to any evidence that "confusion" resulted from either the district court's preliminary injunction of certain provisions of the Rule nor its recent vacatur—through educational materials while this appeal remains pending, and any retailers and consumers are free to follow the Rule's requirements even if it is not actually in effect. *See Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, --- F.4th ----, 2023 WL 4377914, at *12 (D.C. Cir. 2023) (in rejecting the government's argument that "some consumers and manufacturers would have to manage switching back to the prior standards after several years of preparing to comply with the new, more stringent standards," recognizing that manufacturers could produce products that meet both standards); *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1268 (11th Cir. 2019) (J. Pryor, J., concurring in the denial of the motion for a stay) (noting that the Secretary had sent a bulletin to parties effected by an injunction instructing them to comply with the injunction and explaining how to do so, and that the Secretary had not submitted any evidence that any party reported difficulty complying with the guidance). In any event,

unsubstantiated allegations of confusion should not suffice to keep in place a rule that has been found to exceed the Government's lawful authority.

The Government has thus failed to demonstrate that it would likely suffer irreparable harm absent the stay.

The Government next argues that "respondents will incur minimal, if any, injuries from a stay of the vacatur of the challenged provisions" because, in its view, the Rule merely "clarif[ies]" that the products at issue in this case must be sold in accordance with the Gun Control Act's regulatory scheme, and both firearms owners and firearms sellers "regularly bear" the associated costs. Pet. at 37–38. The Government misconstrues the harms that will result to Respondents if this Court stays the district court's judgment.

It is *Respondents* who face irreparable injury in that case. For example, the district court preliminarily enjoined the Rule's enforcement against Respondent Tactical Machining almost immediately after it went into effect (the Rule took effect on August 24, 2022 and the preliminary injunction was entered 9 days later, on September 2, 2022), finding that Tactical Machining faced "irreparable harm, either by shutting down its operations forever or paying the unrecoverable costs of compliance." *VanDerStok*, 625 F. Supp. 3d at 584. That same harm awaits Tactical Machining (and the other producer and retailer Respondents) if this Court stays the district court's judgment. And all Respondents risk the possibility of criminal penalties for production, sale, purchase, possession, or trafficking of items that have not historically been considered firearms if the Rule's vacatur is stayed.

Finally, it is well settled that "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). "[T]here is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58–59 (D.C. Cir. 1977). To the extent that this Court considers this a "close case"—and it should not—the balance of the equities and the public interest thus weigh in Respondents' favor. The Government cannot show a likelihood of success on the merits, so declining to stay the district court's judgment will ensure that ATF faithfully adheres to its statutory mandate.

IV. If The Court Issues A Stay, Respondents Request That This Court Grant The Government's Petition For A Writ of Certiorari Before Judgment.

Finally, while Respondents would oppose a petition for certiorari if the Fifth Circuit affirms the district court, Respondents concede that in that circumstance there would be a reasonable prospect that the Court would grant certiorari. That prospect does not suffice to grant a stay, however, because the Government is unlikely to succeed and because the balance of equities favor Respondents. But if the Court were to disagree and issue a full stay, Respondents would join the Government's alternative request for an order granting certiorari before judgment. The issues presented by this case are important, and if the challenged Rule were going to remain in effect during the appellate process, we would invite this Court's prompt review.

CONCLUSION

The Court should deny the Government's petition. In the alternative, the Court

should at a minimum limit the stay to individuals and entities that were not covered by the preliminary injunctions entered in this case. In the final alternative, if the Court orders a full stay, it should grant certiorari before judgment.

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Respectfully submitted,

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