No.

In the Supreme Court of the United States

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

v.

JENNIFER VANDERSTOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10718

JENNIFER VANDERSTOK; MICHAEL G. ANDREN; TACTICAL MACHINING, L.L.C., A LIMITED LIABILITY COMPANY; FIREARMS POLICY COALITION, INCORPORATED, A NONPROFIT CORPORATION, PLAINTIFFS-APPELLEES

BLACKHAWK MANUFACTURING GROUP, INCORPORATED, DOING BUSINESS AS 80 PERCENT ARMS; DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED; NOT AN L.L.C., DOING BUSINESS AS JSD SUPPLY ; POLYMER80, INCORPORATED, INTERVENOR PLAINTIFFS-APPELLEES

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, DEFENDANTS-APPELLANTS

[Filed: Nov. 9, 2023]

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-691

Before WILLETT, ENGELHARDT, and OLDHAM, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

It has long been said—correctly—that the law is the expression of *legislative* will.[1] As such, the best evidence of the legislature's intent is the carefully chosen words placed purposefully into the text of a statute by our duly-elected representatives. Critically, then, law-making power—the ability to transform policy into real-world obligations—lies solely with the legislative branch.[2] Where an executive agency engages in what is, for all intents and purposes, "law-making," the legislature is deprived of its primary function under our Constitution, and our citizens are robbed of their right to fair representation in government. This is especially true when

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[1] "Positive law is a manifestation of the legislative will." *Arnold v. United States*, 13 U.S. 104, 119 (1815); *see also Farrar v. United States*, 30 U.S. 373, 379 (1831) ("[The President] cannot in the absence of *law* exercise the power of making contracts, and much less, as in this case, against the expression of the *legislative will*.") (emphasis added); *Kindle v. Cudd Pressure Control, Inc.*, 792 F.2d 507, 512 (5th Cir. 1986) (describing "the express legislative will" as "the determinant"); *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 820 (4th Cir. 1995) (noting the "deference to legislative will" inherent in statutory interpretation); *Winstead v. Ed's Live Catfish & Seafood, Inc.*, 554 So. 2d 1237, 1242 (La. Ct. App. 1989), *writ denied*, 558 So. 2d 570 (La. 1990) ("The supreme expression of legislative will . . . is of course the codes and statutes."); *In re Chin A On*, 18 F. 506, 506-07 (D. Cal. 1883) ("[I]t is the duty of the court to obey the law, as being the latest expression of the legislative will.").

[2] *See Forrest General Hospital v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019) ("The Constitution, after all, vests lawmaking power in Congress. How much lawmaking power? 'All,' declares the Constitution's first substantive word.").

the executive rule-turned-law criminalizes conduct without the say of the people who are subject to its penalties.

The agency rule at issue here flouts clear statutory text and exceeds the legislatively-imposed limits on agency authority in the name of public policy. 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. Accordingly, for the reasons set forth below, we AFFIRM IN PART and VACATE AND REMAND IN PART the judgment of the district court.

I. Statutory and Regulatory Background

In April of 2022, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") issued a Final Rule in which the terms "firearm" and "frame or receiver," among others, were given "an updated, more comprehensive definition." Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) (the "Final Rule"). The Final Rule was almost immediately the subject of litigation claiming that ATF had exceeded its statutory authority. It is that Final Rule that is before this Court now.

First, a brief history of the regulatory agency under fire here. ATF was created in 1972 as an independent bureau of the U.S. Department of the Treasury.[3] The Homeland Security Act of 2002 later transferred ATF to the U.S. Department of Justice, where it remains active today. *See* 6 U.S.C. § 531. Upon its creation, ATF obtained jurisdiction to act under earlier legislation, in-

[3] *ATF History Timeline*, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/our-history/atf-history-timeline.

cluding the Gun Control Act of 1968 ("GCA"),[4] which permits the regulation and taxation of certain "firearms." Under the GCA, Congress granted to the Attorney General the power to prescribe rules and regulations necessary to carry out the GCA's provisions. *See* 18 U.S.C. § 926. The Attorney General thereafter delegated this authority to ATF, to "[i]nvestigate, administer, and enforce the laws related to alcohol, tobacco, firearms, explosives, and arson, and perform other duties as assigned by the Attorney General." 28 C.F.R. § 0.130. Pursuant to this authority, ATF proposed the Final Rule as an extension of the GCA's regulation of firearms.

The GCA requires all manufacturers and dealers of firearms to have a federal firearms license; manufacturers and dealers are thus known as "Federal Firearms Licensees" or "FFLs." When those FFLs sell or transfer "firearms," they must conduct background checks in most cases, record the firearm transfer, and serialize the firearm. *See* 18 U.S.C. §§ 922(t), 923(a), 923(g)(1)(A), 923(i).

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[4] The GCA's predecessor statutes include the National Firearms Act of 1934 and the Federal Firearms Act of 1938, both of which involved the taxation and regulation of firearms. *See* National Firearms Act of 1934, ch. 757, Pub. L. 73-474, 48 Stat. 1236; Federal Firearms Act of 1938, ch. 850, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968).

Of particular note, the Supreme Court has stated: "The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous." *Staples v. United States*, 511 U.S. 600, 622 (Ginsburg, J., concurring) (noting also "the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity").

The primary method by which the GCA ensures that the manufacture and sale of firearms are regulated as intended is through the imposition of criminal penalties.[5] As one example, the GCA generally prohibits "any person" who is not "a licensed importer, licensed manufacturer, or licensed dealer" (i.e., an FFL) from "importing, manufacturing, or dealing in firearms" and from "ship[ping] or transport[ing] in interstate or foreign commerce any firearm to any person." *Id.* at § 922(a). As another example, the GCA prohibits a large class of persons from not only shipping or transporting firearms, but from possessing them at all. *Id.* at § 922(g). 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. *Id.* at § 924.

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[5] The GCA is found in Title 18 of the United States Code, which bears the label "Crimes and Criminal Procedure." *See* 18 U.S.C. § 922.

Interestingly, Congress's jurisdictional hook whereby it finds authority to regulate firearms in the manner described is the requirement that the firearm travelled in interstate commerce. *See generally id.*; 18 U.S.C. § 921(2) (defining "interstate or foreign commerce"); *see also, e.g.*, *2.43D Possession of a Firearm by a Convicted Felon*, Fifth Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (2019) (requiring, under element number four of the offense, that the Government prove beyond a reasonable doubt "[t]hat the firearm [ammunition] possessed traveled in [affected] interstate . . . commerce; that is, before the defendant possessed the firearm, it had traveled at some time from one state to another"). While not challenged in this appeal, the interstate-commerce requirement may call into question ATF's jurisdictional authority to promulgate certain provisions of the Final Rule.

The bedrock of the GCA and its plethora of requirements and restrictions is the word "firearm." The GCA defines a "firearm" as: "(A) any weapon . . . 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." *Id.* at § 921(a)(3)(C). As no definition for "frame or receiver" is given in the GCA, ATF previously defined a "frame or receiver" in 1978 as: "That 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." Title and Definition Changes, 43 Fed. Reg. 13531, 13537 (Mar. 31, 1978). This definition remained unchanged for over forty years, until ATF issued the Final Rule in 2022.

ATF's 1978 regulatory definition sufficiently captured most firearms of the era. Modern firearms, however, have developed such that many firearms no longer fall within the definition. In the Final Rule, ATF states that "the majority of firearms in the United States" no longer have a clear "frame" or "receiver" that includes all three elements of the prior definition (that is, a hammer, bolt or breechblock, and firing mechanism). 87 Fed. Reg. at 24655. ATF uses the example of an AR-15,[6] which does not have a single housing for the bolt

[6] The Supreme Court has held that, to be banned, a weapon must be "both dangerous and unusual," and thus, "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring). Of course, for many years now, millions of AR-15 rifles have been sold to civilians, who may lawfully possess them.

(which is part of the "upper assembly") and the hammer and trigger (which is part of the "lower assembly"). *Id.* Thus, as several district courts have recently recognized, the lower assembly of the AR-15, taken alone, is likely not covered by federal regulations. *See, e.g.*, *United States v. Rowold*, 429 F. Supp. 3d 469, 475-76 (N.D. Ohio 2019) ("The language of the regulatory definition in § 478.11 lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit that holds three, not two, components: 1) the hammer, 2) the bolt or breechblock, and 3) the firing mechanism."). Likewise, weapons such as Glock semiautomatic pistols, which use a "striker" rather than a "hammer" as a firing mechanism, and the Sig Sauer P320 pistol, which has no one unit containing those three parts, seemingly may not be regulated under the prior GCA-related definitions. 87 Fed. Reg. at 24655.

The Final Rule was also concerned with the rise of privately made firearms ("PMFs").[7] These PMFs, also known colloquially as "ghost guns," are often made from readily purchasable "firearm parts kits, standalone frame or receiver parts, and easy-to-complete frames or receivers." *Id.* at 24652. Because the kits and standalone parts were not themselves considered "firearms" under any interpretation of the GCA and ATF's related definitions, manufacturers of such kits are neither subject to licensing requirements nor required to conduct

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[7] The Final Rule defines a PMF as: "A firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced." 87 Fed. Reg. at 24735.

background checks on purchasers. *Id.* Further, when made for personal use, PMFs "are not required by the GCA to have a serial number placed on the frame or receiver." *Id.* These facts, ATF contends, make PMFs attractive to criminal actors and "pose a challenge to law enforcement's ability to investigate crimes." *Id.* at 24658.

Notably, the PMFs that play a central role in the Final Rule were not unknown at the time of the GCA's—or, for that matter, its predecessors'—enactment. "Because gunsmithing was a universal need in early America, many early Americans who were professionals in other occupations engaged in gunsmithing as an additional occupation or hobby." Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 66 (2023). The tradition of at-home gun-making predates this nation's founding, extends through the revolution, and reaches modern times. *See id.* at 48 ("During the Revolutionary War, when the British attempted to prevent the Americans from acquiring firearms and ammunition, the Americans needed to build their own arms to survive."). Considering this long tradition, "[t]he federal government has never required a license to build a firearm for personal use." *Id.* at 80. "In fact, there were *no* restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries." *Id.* at 78 (emphasis added). And in perfect accord with the historic tradition of at-home gun-making, Congress made it exceedingly clear when enacting the GCA that "this title is 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, 82 Stat. 1213, 1213 (Oct. 22, 1968). ATF's Final Rule

alters this understanding by adding significant requirements for those engaged in private gun-making activities.

In response to the observed changes in modern firearm construction, the Final Rule provides (in part) that "[t]he terms 'frame' and 'receiver' shall 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, i.e., to house or provide a structure for the primary energized component of a handgun, breech blocking or sealing component of a projectile weapon other than a handgun." 87 Fed. Reg. at 24739. The Final Rule also supplements the definition of "firearm" 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 action of an explosive." *Id.* at 24728.[8] The Final Rule took effect on August 24, 2022. *Id.* at 24652.

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[8] Among other things not substantially challenged in this litigation, the Final Rule also defined the term "frame" in relation to handguns and the term "receiver" in relation to long guns, defined what "variant" means relative to firearms, required that FFLs serialize PMFs that they accept into inventory, and required FFLs to maintain records on firearms transactions for the entirety of their business operations, replacing a prior twenty-year requirement. Finally, the Final Rule contains a severability clause. *See* 87 Fed. Reg. at 24730.

II. Factual and Procedural Background

On August 11, 2022, the plaintiffs in this case[9] filed a petition for review in the Northern District of Texas. The plaintiffs claimed that two portions of the Final Rule, which redefine "frame or receiver" and "firearm," exceeded ATF's congressionally mandated authority. The plaintiffs requested that the court hold unlawful and set aside the Final Rule, and that the court preliminarily and permanently enjoin the Government from enforcing or implementing the Final Rule.

Roughly a month later, the district court issued its first of several preliminary injunctions. In this first injunction, the district court found that ATF's new definition of "frame or receiver" is facially unlawful because it included "firearm parts that are *not yet* frames or receivers" in contravention of Congress's clear language in the GCA. *VanDerStok v. Garland*, 625 F. Supp. 3d 570, 578-79 (N.D. Tex. 2022), *opinion clarified*, No. 4:22-CV-00691-O, 2022 WL 6081194 (N.D. Tex. Sept. 26, 2022) (emphasis in original). The district court also found that weapon parts kits cannot be regulated by ATF under the GCA because "Congress's definition does not cover weapon parts, or aggregations of weapon

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[9] The plaintiffs and plaintiff-intervenors in this action are two individuals, Jennifer VanDerStok and Michael Andren; Tactical Machining, LLC; Firearms Policy Coalition, Inc.; BlackHawk Manufacturing Group, Inc. d/b/a 80 Percent Arms; Defense Distributed; Second Amendment Foundation, Inc.; Not An LLC d/b/a JSD Supply; and Polymer80, Inc.

The defendants in this action are Merrick Garland, U.S. Attorney General; the United States Department of Justice; Steven Dettelbach, in his official capacity as Director of ATF; and ATF. These defendants are collectively referred to herein as "the Government."

parts, regardless of whether the parts may be readily assembled into something that may fire a projectile." *Id.* at 580 (emphasis in original). Relying on this same logic, the district court subsequently expanded the preliminary injunction and extended similar injunctions to other plaintiffs. The Government timely appealed each of these injunctions.

While those two appeals were pending, the district court granted summary judgment to the plaintiffs and vacated the Final Rule in its entirety. *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2023 WL 4539591 (N.D. Tex. June 30, 2023). The logic of the district court's order closely tracked its logic at the injunctive stage: the court held that "the Final Rule's amended definition of 'frame or receiver' does not accord with the ordinary meaning of those terms and is therefore in conflict with the plain statutory language." *Id.* at *14. ATF "may not," the court continued, "properly regulate a component as a 'frame or receiver' even after ATF determines that the component in question is *not* a frame or receiver." *Id.* (emphasis in original). Additionally, the court held that because "Congress did not regulate firearm parts as such, let alone aggregations of parts," ATF had no authority to regulate weapon parts kits. *Id.* at *17. Holding that vacatur is "the 'default rule' for agency action otherwise found to be unlawful," the court vacated the Final Rule under 5 U.S.C. § 706(2)(C). *Id.* at *18.

The Government promptly filed a notice of appeal, and subsequently filed an emergency motion to stay pending appeal. The district court denied the request for a stay pending appeal but granted a seven-day administrative stay so that the Government might seek

emergency relief from this Court. The Government did so.

This Court considered and denied the Government's emergency motion to stay the district court's judgment as to the two challenged portions of the Final Rule but granted a stay as to the non-challenged provisions of the rule. *VanDerStok v. Garland*, No. 23-10718, 2023 WL 4945360 (5th Cir. July 24, 2023). The Government then requested a full stay from the Supreme Court. Without discussion, the Supreme Court stayed the district court's order and judgment "insofar as they vacate the [F]inal [R]ule" pending (1) this Court's decision and (2) either denial of certiorari thereafter or judgment issued by the Supreme Court after grant of certiorari. *Garland v. Vanderstok*, No. 23A82, 2023 WL 5023383 (U.S. Aug. 8, 2023).

This Court held oral argument on September 7, 2023. Shortly beforehand, the Government voluntarily dismissed the two appeals relating to the injunctions. Thus, all that remains before this Court now is the appeal of the district court's final judgment vacating the Final Rule in its entirety.

III. Standard of Review

"We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007) (citing *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

IV. Analysis

The plaintiffs challenged two portions of the Final Rule in the underlying lawsuit: (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. We analyze each challenged portion of the Final Rule in turn below, before addressing the appropriate relief should these specific portions of the Final Rule be held unlawful.

At the outset, we must ensure that we look through the proper lens when analyzing ATF's actions here.[10] "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Clean Water Action v. U.S. Env't Prot. Agency*, 936 F.3d 308, 313 n.10 (5th Cir. 2019) ("To be sure, agencies, as mere creatures of statute, must point to explicit Congressional authority justifying their decisions."). In the GCA—the source of ATF's capacity to promulgate the Final Rule—Congress delegated authority to ATF through the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." 18 U.S.C. § 926(a). Such a grant of authority from the legislature to an executive

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[10] Notably, the *Chevron* doctrine has not been invoked on appeal. Even if the Government had done so, *Chevron* would likely not apply for several reasons, including the GCA's unambiguous text and its imposition of criminal penalties. *See, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 464-66, 472-73 (5th Cir. 2023).

agency is generally policed by the Administrative Procedure Act ("APA"), which allows courts to set aside agency action found to be, among other things, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Thus, a core inquiry in a case such as this one is whether the proposed agency rule is a lawful extension of the statute under which the agency purports to act, or whether the agency has indeed exceeded its "statutory jurisdiction, authority, or limitations." *See id.*

How do we know when an agency has exceeded its statutory authority? Simple: the plain language of the statute tells us so. Therefore, "[w]e start, as we always do, with the text." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 671 (2023); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("[T]he best evidence of Congress's intent is the statutory text."). "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Here, we read the words of the GCA "in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Only where the statutory text shows that ATF has "clear congressional authorization" to enact a regulation can such a regulation withstand judicial scrutiny. *See West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2614 (2022) (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)). As explained below, we hold that ATF lacked congressional authorization to promulgate the two challenged portions of the Final Rule.

a. ATF's proposed definition of "frame or receiver"

The GCA includes as a "firearm" the "frame or receiver" of a weapon. 18 U.S.C. § 921(a)(3)(C). The GCA itself does not define the term "frame or receiver." *See id.* The Final Rule, however, newly defines the term "frame or 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." 87 Fed. Reg. at 24739.

Because Congress did not define "frame or receiver" in the GCA, the ordinary meaning of the words control. *See Bouchikhi v. Holder*, 676 F.3d 173, 177 (5th Cir. 2012). Both a "frame" and a "receiver" had set, well-known definitions at the time of the enactment of the GCA in 1968. In 1971, Webster's Dictionary defined a "frame" as "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm" and a "receiver" as "the metal frame in which the action of a firearm is fitted and which the breech end of the barrel is attached." *Webster's Third International Dictionary* 902, 1894 (1971). Similarly, ATF's 1978 definition of frame and receiver—the most recent iteration of the definition before the Final Rule's proposed change—defined "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 position to receive the barrel."[11]

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[11] ATF's 1968 definition of "frame or receiver" was identical: "That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded

43 Fed. Reg. at 13537. As is apparent from a comparison of the dictionary definitions and the regulatory definition, ATF's previous understanding of "frame or receiver" closely tracked the public's common understanding of such terms at the time of enactment.[12]

After almost fifty years of uniform regulation, ATF, via the Final Rule, now purports to expand the terms "frame" and "receiver," as they were understood in 1968, to include changes in firearms in modern times. But the meanings of statutes do not change with the times. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). "This Court normally interprets a statute in accord with the ordinary public meaning of its terms *at the time of its enactment*. After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* (emphasis added). ATF's inclusion now of "partially complete, disassembled, or nonfunctional" frames and receivers materially deviates from past definitions of these words to encompass items that were not originally understood to fall within the ambit of the GCA. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("[W]ords generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute" because "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered,

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at its forward portion to receive the barrel." Commerce in Firearms and Ammunition, 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968).

[12] The Government itself acknowledged that "ATF's prior regulatory definitions have been 'consistent with common and technical dictionary definitions.'" *VanDerStok*, 2023 WL 4539591, at *13 (quoting Defs.' Supp. Br.) (emphasis removed).

procedure the Constitution commands.") (cleaned up). As such, the proposed definition is an impermissible extension of the statutory text approved by Congress.

A plain reading of the Final Rule demonstrates ATF's error. In the GCA's definition of "firearm," the first subsection includes flexible language such as "designed to or may readily be converted to expel a projectile by the action of an explosive." *See* 18 U.S.C. § 921(a)(3)(A). But the subsection immediately thereafter, which contains the term "frame or receiver," does not include such flexibility. "[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) (citation omitted). ATF's assertion that Congress has repeatedly used language such as "designed to" and "readily" in other definitions or statutes only emphasizes the point: Congress explicitly declined to use such language in regard to frames or receivers. Thus, we presume the exclusion of the phrase "designed to or may readily be converted" in the "frame or receiver" subsection to be purposeful, such that ATF cannot add such language where Congress did not intend it to exist. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

There is also a clear logical flaw in ATF's proposal. As written, the Final Rule states that the phrase "frame or receiver" includes things that are admittedly not yet frames or receivers but that can easily become frames

or receivers—in other words: parts. As the district court put it, under the Final Rule, "ATF may properly regulate a component as a 'frame or receiver' even after ATF determines that the component in question is *not* a frame or receiver." *VanDerStok*, 2023 WL 4539591, at *14 (emphasis in original). Such a proposition defies logic: "a part cannot be both *not yet* a receiver and a receiver at the same time." *Id.* (emphasis in original). This confusion highlights ATF's attempt to stretch the GCA's language to fit modern understandings of firearms without the support of statutory text.[13]

The Government argues that ATF has historically regulated parts that are not yet frames or receivers as frames or receivers, thus making the Final Rule a valid extension of past agency practice. This argument fails for two reasons. First, as the district court aptly stated, "historical practice does not dictate the interpretation of unambiguous statutory terms." *VanDerStok*, 2023 WL 4539591, at *15. Simply because ATF may have acted outside of its clear statutory limits in the past does not mandate a decision in its favor today. Second, the Government's current argument regarding the "readily converted" language as it applies to frames and receivers is at odds with its recent arguments in other courts. For example, in its briefing for a case in the

[13] Perhaps noticing the error in its incredibly broad and murky proposal, ATF affirmatively excluded from the definition's scope "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.)." 87 Fed. Reg. at 24739. ATF's attempt to carve out this vague laundry list of unfinished products further demonstrates that the proposed definition lacks any objective hook in the statute.

Southern District of New York in early 2021, the Government stated that "the 'designed to' and 'readily converted' language are only present in the first clause of the statutory definition. 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." Fed. Defs.' Mem. of Law in Support of Mot. for Summ. J., Doc. 98 at 4, *Syracuse v. ATF*, No. 1:20-cv-06885 (S.D.N.Y. Jan. 29, 2021). Clearly, the Government has arbitrarily reversed course since authoring the *Syracuse* brief, yet it offers no explanation for its new regulatory position. *See Acadian Gas Pipeline Sys. v. FERC*, 878 F.2d 865, 868 (5th Cir. 1989) ("[A]ny departure from past interpretations of the same regulation must be adequately explained and justified."). The sharp change in the Government's argument over a few short years emphasizes the harm in relying so heavily on an agency's historical practice, rather than the unambiguous text of the statute.

Because it clearly conflicts with the plain language of the GCA, the challenged portion of the Final Rule that redefines "frame or receiver" to include partially complete, disassembled, or nonfunctional frames or receivers constitutes unlawful agency action.

b. ATF's proposed definition of "firearm"

The Final Rule purports to supplement the GCA's definition of "firearm" by including the following language: "The term shall 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." 87 Fed. Reg. at 24728. In other words, ATF expanded the scope of the GCA from

the explicit "firearm" to now include aggregations of weapon parts that can be "readily" assembled into a functional weapon. *See id.*

The district court correctly held that ATF has no authority whatsoever to regulate parts that might be incorporated into a "firearm" simply because Congress explicitly *removed* such authority when it enacted the GCA. The GCA's predecessor statute, the Federal Firearms Act ("FFA"), had specific language that authorized regulation of "any part or parts of" a firearm. *See* Federal Firearms Act of 1938, Ch. 850, Pub. L. No. 75-785, 52 Stat. 1250, 1250 (1938) (repealed 1968). However, Congress *removed* this language when it enacted the GCA, replacing "any part or parts" with just "the frame or receiver of any such weapon." Thus, the GCA does not allow for regulation of all weapon parts; rather, it limits regulation to two specific types of weapon parts.[14] The Final Rule ignores this change completely and improperly rewrites and expands the GCA where Congress clearly limited it. *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.") (citation omitted). Again, the legislative will has been expressed, and we are bound to follow it.

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[14] In the Senate Report connected to the passage of the GCA, the committee stated in reference to the amended definition of "firearm" in section 921(a)(3): "It has been found that it is impractical to have controls over each small part of a firearm. Thus, the revised definition substitutes only the major parts of the firearm; that is, frame or receiver for the words 'any part or parts.'" S. Rep. No. 90-1097 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2200.

Further, Congress has shown that it knows how to regulate "parts" of weapons when it so chooses. For example, section 921(a)(4)(C) of the GCA, in defining a "destructive device" (one of the four subsections of the "firearm" definition), states that such term means "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). 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.[15] Another helpful exam-

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[15] Yet another example within the same statute: Congress defined "firearm silencer" and "firearm muffler" in section 921(a)(25) to include "any combination of *parts*, designed or redesigned, and intended for us in assembling or fabricating a firearm silencer or firearm muffler." 18 U.S.C. § 921(a)(25) (emphasis added).

And another example: In section 921, Congress defined "handgun" to include "any combination of *parts* from which a firearm described in subparagraph (A) can be assembled." 18 U.S.C. § 921(a)(30)(B) (emphasis added).

And another: In section 922, when defining certain unlawful acts under the GCA, Congress explicitly stated that "[i]t shall be unlawful for any person to assemble from imported *parts* any semiautomatic rifle or any shotgun." 18 U.S.C. § 922(r) (emphasis added).

Moreover, to further demonstrate the particular use by Congress of the term "parts" and the assembling of parts: The 1990 Crime Control Bill, H.R. 5269, would have made it unlawful to assemble a semi-automatic rifle or shotgun that is identical to one that could not be imported. *See* Crime Control Act, § 2204, P.L. 101-647 (1990), enacting current 18 U.S.C. § 922(r). Congresswoman Jolene Unsoeld (D., Wash.) offered an amendment to kill the ban on domestic manufacturing by inserting "from imported parts" into the bill such that the enactment, as passed, made it unlawful "to assemble from imported parts any semi-automatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation . . . " She argued—correctly—that "Congress, not a nameless,

ple is the definition of "machinegun" in 26 U.S.C. § 5845(b), which includes "any part . . . or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled." Conversely, in defining "firearm" under the GCA, Congress used more constrained language aimed at specifically named weapon parts, not any and all combinations of weapon parts that could later be assembled into a functioning weapon. In sum, the word "parts" is conspicuously absent from the definition of "firearm" in section 921, despite Congress's consistent—and meticulous—use of the word in other statutory provisions. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) ("Our more natural reading is confirmed by the use of the word . . . elsewhere in the United States Code."). The point is a simple one: If Congress wanted to regulate aggregations of weapon parts with respect to "firearms," it could have. Congress, however, chose not to do so,[16] and ATF may not alter that decision on its own initiative. ATF cannot legislate.

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faceless bureaucrat in the Treasury Department, should decide which firearms Americans can own." 136 Cong. Rec. H8863-64 (Oct. 4, 1990). The Unsoeld amendment passed by a vote of 257 to 172. *See id.* at H8867; 18 U.S.C. § 922(r).

[16] The Government apparently recognized as much in recent litigation, arguing that "Congress has chosen to exclude firearm parts from the scope of the GCA, including parts that could be assembled with a homemade receiver and frame to make a firearm." Gov't's Mot. to Dismiss, *California v. ATF*, No. 3:20-cv-06761, 2020 WL 9849685 (N.D. Cal. Nov. 30, 2020). Notably, the Government went on to assert that "Congress has also chosen to permit the home manufacture of unserialized firearms for personal use." *Id.* Much like in the *Syracuse* brief, *supra*, the Government seemingly took a com-

ATF finds its primary justification for regulating weapon parts kits in the "designed to or may readily be converted to" language in the GCA's definition of "firearm." The Government argues that the statute captures any item or items that may be transformed or changed into a working firearm, based on the dictionary definition of "convert"[17] at the time of the GCA's enactment. Because weapon parts kits allow individuals to "convert" various parts into an operational firearm, the Government argues, the Final Rule's proposed definition falls clearly within the GCA's ambit.

But this stretches the words too far. The Government wants the word "convert" to be all-encompassing, such that any process or procedure that could ultimately lead to a finalized firearm can be regulated under the GCA's language. The language, however, is much more precise than that. In fact, the Government's emphasis on the word "convert" ignores the surrounding words: the GCA does not just regulate anything that can be "converted" (or, to use the Government's proposed synonym, "transformed") into a firearm but rather regulates "any weapon" that "may *readily* be converted" into a functional firearm. The phrase "may readily be converted"[18] cannot be read to include any objects that

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pletely opposite position in previous litigation than it takes before this Court in the present matter.

[17] The Government cites to Webster's 1968 edition to define "convert" as "to change from one state to another; alter in form, substance, or quality; transform, transmute." *Webster's Third New International Dictionary of the English Language* 499 (1968) (formatting altered).

[18] Further demonstrating its misunderstanding and misuse of the statutory text, ATF apparently equates the phrase "readily be converted" from the GCA with the phrase "be readily restored" in the

could, if manufacture is completed, become functional at some ill-defined point in the future. This would strip the word "readily"[19] of its meaning, revert the GCA to

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National Firearms Act ("NFA"). However, these two different statutes have radically different regulatory scopes: the former regulates ordinary firearms (like a standard-issue pistol or rifle), while the latter regulates machine guns, suppressors, and short-barreled shotguns that are among the most heavily controlled items in our country (if not the world). It is unsurprising that, given their very different scopes, courts have interpreted these texts to reach very different results. *Compare United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2d Cir. 1971) (interpreting the GCA's "readily be converted" text to mean something as short as twelve minutes), *with United States v. Smith*, 477 F.2d 399, 400-01 (8th Cir. 1973) (interpreting the NFA's "be readily restored" text to mean up to eight hours of work, done in a professional shop, by an individual with an advanced understanding of metallurgy). Despite these differences, in the Final Rule, ATF expressly conflates the two statutory phrases and claims that it can regulate partially complete "frames or receivers" using *either* standard. *See, e.g.*, 87 Fed. Reg. at 24661 n.43 (relying on *Winlee Derringer* and *Smith*); *id.* at 24678-79 (relying on NFA and GCA interchangeably). This haphazard combination of standards employed by ATF in its Final Rule is the direct result of an agency that has strayed too far from its statutory foundation provided by Congress.

[19] ATF itself understood the importance of the word "readily" in the statute—the Final Rule includes numerous factors that might help ATF determine when something can "readily" be made into a working firearm. 87 Fed. Reg. at 24735. The appellees make many well-reasoned arguments regarding the ambiguity and vagueness of the Final Rule's "readily" standard. To the extent ATF relies on such a subjective multi-factor test to determine on a case-by-case basis when parts may "readily" be converted into a working firearm, this Court looks to the wisdom of the Supreme Court: "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpre-

its prior articulation in the FFA, and allow for regulation of weapon parts generally, which, as we have seen, was not Congress's intent in passing the GCA. Look no further than the words ATF used in the Final Rule's proposed "firearm" definition: it includes weapon parts kits that "may readily be completed, assembled, restored, or otherwise converted to expel a projectile." 87 Fed. Reg. at 24728. Reading "converted" in conjunction with the other listed verbs—"completed, assembled, restored"—we can see that the definition itself contemplates less drastic measures than the full transformation actually required by these parts kits. *See Hilton v. Sw. Bell Tel. Co.*, 936 F.2d 823, 828 (5th Cir. 1991) ("When general words follow an enumeration of . . . things, such general words are not to be construed in their widest extent, but are to be held as applying only to . . . things of the same general kind or class as those specifically mentioned."). The Government's attempt to use the word "convert" to justify its unprecedented expansion of the GCA thus collapses upon a cursory reading of the text.

The Government responds that courts have long recognized that disassembled, or nonoperational, weapons constitute "firearms" under the GCA, and cites our decision in *United States v. Ryles*, 988 F.2d 13, 16 (5th Cir. 1993). There, a defendant was in possession of a "disassembled [firearm] in that the barrel was removed from the stock and that it could have been assembled in thirty seconds or less." *Id.* We held that because this "disassembled shotgun could have been 'readily converted' to an operable firearm," it constituted a firearm

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tations in advance or else be held liable . . . " *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012).

under the GCA. *Id.* Unlike the firearm in *Ryles*, weapon parts kits are far from being "operable." Assembling a weapon parts kit takes much longer than thirty seconds, and the process involves many additional steps. Because of these differences, weapon parts kits are not "'readily converted' to an operable firearm," and thus they do not constitute "firearms" under the GCA. *Id.*

Consider the long-standing tradition of at-home weapon-making in this country. *See* Greenlee, *supra*. We assume Congress was familiar with the relevant historical context when writing the GCA, yet Congress made no clear reference to aggregations of weapon parts or PMFs generally in the text of the GCA. Rather, as noted above, Congress clearly stated that the GCA "is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." 82 Stat. at 1213. Congress also emphasized that "it is not the purpose of [the GCA] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity." *Id.* at 1213-14. ATF's Final Rule, however, places 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." *Id.* at 1213.

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. 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." 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,[20] transport to another state,[21] or, in some instances, possess the parts at all.[22] 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.[23] 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. 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. ATF cannot so transform the GCA to include aspects of

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[20] 18 U.S.C. § 922(a)(1).

[21] *Id.* at § 922(a)(2).

[22] *Id.* a § 922(g).

[23] *See United States v. Nat'l Dairy Corp.*, 372 U.S. 29, 32-33 (1963) ("[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."); *Johnson v. United States*, 576 U.S. 591, 595 (2015) ("Government violates [the due process clause] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

the nation's firearm industry that were previously—and purposefully—excluded from the statute.[24]

As the district court succinctly stated, "the Gun Control Act's precise wording demands precise application." *VanDerStok*, 2023 WL 4539591, at *17. Yet ATF's proposed definition is not only imprecise, ambiguous, and violative of the statutory text, it also *legislates*. Thus, the challenged portion of the Final Rule that redefines "firearm" to include weapon parts kits constitutes unlawful agency action.

c. Public policy concerns

The Government and *amici* argue that the challenged portions of the Final Rule must be upheld to promote important public policy interests and carry out the essential purpose of the GCA. They point to serious concerns regarding public safety, the apparent rise in criminal usage of "ghost guns," and the current difficulties in firearm tracing for law enforcement. Without the Final Rule, they argue, bad actors will use the "substantial loopholes" in the text to completely circumvent the GCA and, ultimately, gut the law entirely.

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[24] Congress has been particular in limiting ATF's authority in a number of respects. In fact, when the NFA was reenacted as Title 2 of the GCA, and remained a chapter of the Internal Revenue Code, it set forth definitions including "machine gun" and "rifle," as well as for particular parts. It also excluded from the definition of "firearm" certain weapons. Thereafter, ATF began removing excepted weapons from this category, thus bringing them within the NFA's definition of prohibited weapons. Congress responded in kind and acted to prevent ATF from doing so. *See* Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, 125 Stat. 552, 609 (Nov. 18, 2011).

"However, the fact that later-arising circumstances cause a statute not to function as Congress intended does not expand the congressionally-mandated, narrow scope of the agency's power." *Texas v. United States*, 497 F.3d 491, 504 (5th Cir. 2007). Likewise, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Where the statutory text does not support ATF's proposed alterations, ATF cannot step into Congress's shoes and rewrite its words, regardless of the good intentions that spurred ATF to act.

As this Court stated in *Cargill v. Garland*, "it is not our job to determine our nation's public policy. That solemn responsibility lies with the Congress." 57 F.4th 447, 472 (5th Cir. 2023). While the policy goals behind the Final Rule may be laudable, neither ATF nor this Court may, on its own prerogative, carry out such goals. That heavy burden instead falls squarely on Congress. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023) ("The question here is not whether something should be done; it is who has the authority to do it."). "If judges could add to, remodel, update, or detract from old statutory terms . . . we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock*, 140 S. Ct. at 1738. Any "loopholes" in the law must be filled by Congress, not by ATF, and not by this Court. *See Cargill*, 57 F.4th at 461 ("Perhaps Congress's choice of words was prudent, or perhaps it was not. That is not for us to decide.").

Our concern for strict adherence to statutory text is especially heightened here where the Final Rule purports to criminalize what was previously lawful conduct. As described above, section 922 of the GCA describes a plethora of "unlawful acts" related to firearm possession, use, and sale, and section 924 describes the penalties for any violations, including hefty fines and imprisonment of up to ten years. *See* 18 U.S.C. §§ 924, 926. Because ATF's Final Rule expands the scope of the GCA to include previously unregulated conduct, an ordinary citizen who owns certain firearm-related items (and which items are included is only ATF's guess) may now be subjected to the criminal penalties contained within the GCA practically overnight, without the input of Congress. While agencies may enact regulations under a penal statute that result in criminal liability, the agencies must always look to statutory authority to sanction their actions. Only Congress can actually criminalize behavior.[25] Yet the Final Rule plainly exceeds the limits Congress itself placed on criminal liability in the realm of firearm regulation.[26] We therefore hold

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[25] *See, e.g.*, 1 Charles E. Torcia, WHARTON'S CRIMINAL LAW § 10 (15th ed. 2019) ("It is for the legislative branch of a state or the federal government to determine . . . the kind of conduct which shall constitute a crime."); *but see* Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855 (2020) (analyzing the growing trend in "administrative crimes," or crimes created and defined by agencies' rules).

[26] Even if the Court (and the parties) were wrong in concluding that the statute is unambiguous, we would nevertheless reach the same conclusion here because under the rule of lenity, we construe ambiguous statutes against imposing criminal liability—precisely what ATF has done here. The rule of lenity is a "time-honored interpretive guideline" used by this Court and others "to construe ambiguous statutes against imposing criminal liability." *Cargill*, 57

unlawful the two challenged portions of the Final Rule as improper expansions of ATF's statutory authority.

d. The remedy

We turn now to the appropriate remedy. The Government argues that the district court's universal vacatur of the entire Final Rule (i.e., not just the two challenged portions) was overbroad, regardless of the merits of the case. While this Court's precedent generally sanctions vacatur under the APA,[27] we VACATE the district court's vacatur order and REMAND to the dis-

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F.4th at 471 (quoting *Liparota v. United States*, 471 U.S. 419, 429 (1985)). This interpretive rule mandates 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. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) ("Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one," and therefore, it is "proper . . . to apply the rule of lenity and resolve the ambiguity in [the citizens'] favor."); *Crandon v. United States*, 494 U.S. 152, 168 (1990) ("[W]e are construing a criminal statute and are therefore bound to consider application of the rule of lenity."). To the extent an argument for the statute's ambiguity holds any water, we would rely on the rule of lenity to further bolster the conclusion that ATF, a non-legislative government agency, exceeded its statutory authority in promulgating the challenged portions of the Final Rule. *See Cargill*, 57 F.4th at 471 ("[A]ssuming the definition . . . is ambiguous, we are bound to apply the rule of lenity.").

[27] *Data Mktg. P'ship, LP v. United States Dep't of Lab.*, 45 F.4th 846 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate remedy" for unlawful agency action.); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation."); *accord United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action.").

trict court for further consideration of the remedy, considering this Court's holding on the merits.

V. Conclusion

ATF, in promulgating its Final Rule, attempted to take on the mantle of Congress to "do something" with respect to gun control.[28] But it is not the province of an executive agency to write laws for our nation. That vital duty, for better or for worse, lies solely with the legislature. Only Congress may make the deliberate and reasoned decision to enact new or modified legislation regarding firearms based on the important policy concerns put forth by ATF and the various *amici* here. But unless and until Congress so acts to expand or alter the language of the Gun Control Act, ATF must operate within the statutory text's existing limits. The Final Rule impermissibly exceeds those limits, such that ATF has essentially rewritten the law. This it cannot do, especially where criminal liability can—and, according to the Government's own assertions, *will*—be broadly imposed without any Congressional input whatsoever. An agency cannot label conduct lawful one day and felonious the next—yet that is exactly what ATF accomplishes through its Final Rule. Accordingly, the judgment of the district court is AFFIRMED to the extent it holds unlawful the two challenged portions of the Final Rule, and VACATED and REMANDED as to the remedy.

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[28] As Justice Thurgood Marshall once wisely advised: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

ANDREW S. OLDHAM, *Circuit Judge*, concurring:

I join my esteemed colleagues' majority opinion without qualification. I write only to explore additional problems with the Final Rule promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) ("Final Rule"). Part I provides additional background. Part II discusses ATF's unlawful conflation of two fundamentally different statutory regimes. Part III addresses the weapon parts kit provision. And Part IV considers the unfinished frame or receiver provision.

I.

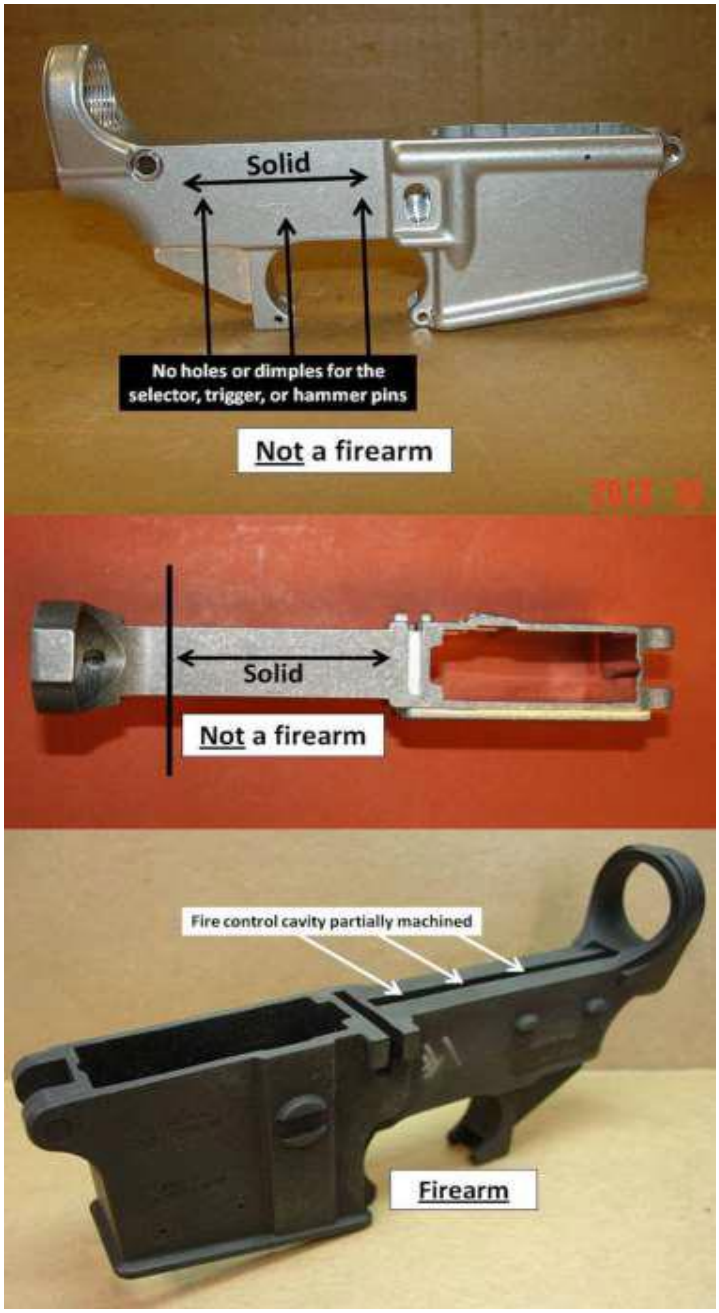
ATF's overarching goal in the Final Rule is to replace a clear, bright-line rule with a vague, indeterminate, multi-factor balancing test. ATF's rationale: The new uncertainty will act like a Sword of Damocles hanging over the heads of American gun owners. Private gunmaking is steeped in history and tradition, dating back to long before the Founding. Millions of law-abiding Americans work on gun frames and receivers every year. 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. 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.

OLD RULE (A.K.A. 80% RULE)

Let's start with the Old Rule. Since 1968, Congress has defined the word "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 [or] *the frame or receiver of any such weapon*." 18 U.S.C. § 921(a)(3)(A)-(B) (emphasis added). What is a "frame or receiver"? ATF defined that by regulation in 1968, too: The "frame or receiver" of a firearm is "[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." 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968) (to be codified at 26 C.F.R. pt. 178); *see also* 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978) (formerly codified at 27 C.F.R. § 478.11 (2020)). That is clear: It tells law-abiding gun owners, hobbyists, and gunsmiths when a piece of metal stops being a just a piece of metal and starts being the "frame or receiver" of a federally regulated firearm subject to federal gun laws and felony penalties.

The Old Rule even came with numerical certainty. In longstanding regulatory guidance, ATF took the position that a hunk of metal became a federally regulated "frame or receiver" only after it was 80% complete: "ATF has long held that 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 [under the 1968 Old Rule]." ATF, *Are 80% or "Unfinished" Receivers Illegal?*, https://perma.cc/QX2X-8UHQ (last reviewed Apr. 6, 2020). The uninitiated might wonder what constitutes an unmachined receiver blank or solid fire-control area. So ATF helpfully provided pictures. Here are ATF's Old Rule pictures for an AR-15's frame or receiver:


Solid
No holes or dimples for the selector, trigger, or hammer pins
Not a firearm
Solid
Not a firearm
Fire control cavity partially machined
Firearm

Ibid. (annotations in original). This Old 80% Rule is thus easy to understand, predict, and apply: the top two silver receiver pictures are only 80% complete; they are thus "unfinished"; and they do not constitute "firearms" under federal gun laws. Under the Old 80% Rule, any law-abiding American consumer or manufacturer knew that as long as the fire-control area remained solid, the silver pieces of metal were just that—metal. They could be bought and sold without concern for the federal gun laws.[1]

For decades, millions of Americans have lawfully purchased pieces of metal like those silver ones and worked on them in garages and workshops across the country. Such homemade firearms have a rich history and tradition, dating back to the Founding. *See, e.g.*, Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 45-71 (2023). So the Old Rule allowed Americans to purchase the silver pieces of metal, to machine the final 20% of the metal in their homes or garages, and thus to make 100%-complete receivers. *See* ROA.228-44 (ATF's pre-2022 Old Rule classification letters on partially complete frames and receivers). An enthusiast or amateur gunsmith might mill the fire-control area with a drill press so the receiver could hold a trigger assembly. And the enthu-

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[1] Insofar as the Old Rule applied to frames and receivers that were, say, 81% complete, ATF regulated pieces of metal that were both (1) frames and receivers and (2) things that were not yet frames and receivers. As the majority opinion notes, *see ante*, at 15, it is unclear how the GCA permits that. My point in this separate concurrence is that even if the GCA permits the Old 80% Rule, it cannot permit ATF's attempt to regulate any piece of metal that has been machined beyond its "primordial" state. *E.g.*, Final Rule, 87 Fed. Reg. at 24678.

siast or amateur gunsmith might drill three holes through the receiver to hold the safety selector, trigger, and hammer pins. And voila: the modern analogue to the homemade rifle Daniel Boone's father gave him when he was 12. Greenlee, *supra*, at 69.

NEW RULE (A.K.A. FINAL RULE)

Congress has done nothing to change the statutory definition of "firearm" or "frame or receiver" since 1968.[2] And for 54 years, the regulatory text stayed the same too. Then in 2022, without any direction or authorization from Congress, ATF changed everything:

- ATF eliminated the 80% threshold for unfinished "frames or receivers." And it replaced that numerical certainty with "I-know-it-when-I-see-it" subjectivity that is evocative of Justice Stewart's obscenity standard. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Under the New Rule, a hunk of metal turns into a federally regulated "frame or receiver" when ATF thinks "it is *clearly identifiable* as an unfinished component part of a weapon." Final Rule, 87 Fed. Reg. at 24728 (emphasis added).

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[2] Indeed, Congress has considered several bills to regulate so-called "ghost guns" and rejected them. *See, e.g.*, Untraceable Firearms Act of 2021, S.1558, 117th Cong. (2021). No such bill has made it past bicameralism and presentment. Thus, ATF and the Executive Branch sought to do through this Final Rule what they could not do through the normal legislative process. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) ("The Secretary's assertion of administrative authority has conveniently enabled him to enact a program that Congress has chosen not to enact itself." (internal quotation and citation omitted)).

- ATF promulgated a non-exhaustive list of eight factors that its Director may balance in considering whether a hunk of metal constitutes a partially complete or disassembled "frame or receiver": "[T]he Director may consider any associated [1] templates, [2] jigs, [3] molds, [4] equipment, [5] tools, [6] instructions, [7] guides, or [8] marketing materials that are sold, distributed, or possessed with [or otherwise made available to the purchaser or recipient of] the item or kit." *Id.* at 24739. So the silver pieces of metal in the pictures above are now federally controlled firearms, so long as they are sold with a jig, template, or other item useful in finishing the receiver. *See ibid.*

- ATF promulgated a non-exhaustive list of eight factors that its Director may balance in considering whether a hunk of metal can be "readily" converted to a "frame or receiver": "(1) Time, i.e., how long it takes to finish the process; (2) Ease, i.e., how difficult it is to do so; (3) Expertise, i.e., what knowledge and skills are required; (4) Equipment, i.e., what tools are required; (5) Parts availability, i.e., whether additional parts are required, and how easily they can be obtained; (6) Expense, i.e., how much it costs; (7) Scope, i.e., the extent to which the subject of the process must be changed to finish it; and (8) Feasibility, i.e., whether the process would damage or destroy the subject of the process, or cause it to malfunction." *Id.* at 24735.

- And ATF changed the statutory definition of firearm to include "weapon parts kit[s]." *Id.* at

> 24727-28. Such a "kit" consists of gun parts. And ATF concedes that *none* of those parts is a "firearm" under federal law. Still, ATF says that a collection of parts is "firearm" if ATF, in its wisdom and its subjective judgment, determines the parts *look* like the building blocks of a firearm. *Id.* at 24689 (weapon parts kits are firearms if they are "clearly identifiable" as such).

Why did ATF promulgate a 98-page Final Rule—replete with multiple, non-exhaustive, eight-factor balancing tests and subjective standards evocative of *Jacobellis*—to replace the Old 80% Rule? ATF says its concern is so-called "ghost guns": Frames and receivers finished in private homes and garages do not have serial numbers, and that makes it difficult for the Government to track the homemade guns. *Id.* at 24652. (Hence the Government's "ghostly" moniker.) But if that was all ATF cared about, it would just require serialization of all frames and receivers—even those (like the silver pieces of metal pictured above) that are only 80% complete. *See* 27 C.F.R. § 479.102 (requiring "a manufacturer" to serialize frames and receivers). ATF expressly did not do that, however; it instead expressly *exempted* private individuals from serializing their frames and receivers. *See* Final Rule, 87 Fed. Reg. at 24653. That is the precise opposite of what ATF would do if it cared about tracing so-called "ghost guns."

ATF instead chose to change the meaning of "firearm" so that it can apply to any piece of metal that has been machined beyond its "primordial" state. Why? ATF wants the "flexibility" to regulate unformed, unfinished pieces of metal when it, in its judgment, thinks regulation is "necessary." *Id.* at 24669. And ATF

wants to "deter" people from relying on "a minimum percentage of completeness (e.g., '80.1%')." *Id.* at 24686. So it deleted the Old 80% Rule and replaced it with new, indeterminate, multi-factor-balancing, and eye-of-the-beholder standards. But it never pointed to a single homemade gun that escaped regulation under the Old Rule but would stay out of criminals' hands under the New Rule.

II.

ATF's foundational legal error is that it conflated two very different statutes: the Gun Control Act of 1968 and the National Firearms Act of 1934. Those two statutes give ATF very different powers to regulate very different types of weapons. To take just one very obvious example, when it comes to things like machine guns, the National Firearms Act empowers ATF to maintain a central registry called "the National Firearms Registration and Transfer Record." 26 U.S.C. § 5841(a). That database requires registration of every machine gun; registration of every person who ever possesses it; and strict limitations on every machine gun transfer (including a $200 tax on each sale and six-to-twelve month waiting periods). None of these restrictions apply to transactions involving ordinary firearms under the Gun Control Act. And ATF promulgated the Final Rule under the Gun Control Act to apply to *all* firearms—not just machine guns. Still, ATF mushed the statutes together and then liberally borrowed terms from both.

I first (A) explain the statutory conflation. Then I (B) explain how ATF exploited that conflation to generate its multi-factor balancing tests.

A.

First, the statutory conflation. As the majority notes, *see ante* n.16, ATF's Final Rule repeatedly uses the word "restored":

> Firearm. . . . The term shall 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.
> . . .
> Partially complete, disassembled, or nonfunctional frame or receiver. The terms "frame" and "receiver" shall 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.

Final Rule, 87 Fed. Reg. at 24735, 24739 (emphasis added).

This is unlawful because (1) ATF took the word "restored" from a different statute with a very different scope and meaning. And (2) ATF cannot defend that choice by pretending that the relevant statute fairly includes the word "restored."

1.

First, the two very different gun control statutes. The first is the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 ("GCA"). The GCA was Congress's response to the assassination of President Kennedy. According to the FBI, Lee Harvey Oswald used the pseudonym "A. Hidell" to purchase a 6.5x52mm Carcano bolt-action hunting rifle from a mail-order adver-

tisement in the back of *American Rifleman* magazine. VINCENT BUGLIOSI, RECLAIMING HISTORY: THE ASSASSINATION OF JOHN F. KENNEDY 200 (2007). "A. Hidell" mailed a money order for $21.45 ($19.95 for the rifle and $1.50 for postage) and later picked up the rifle from P.O. Box 2915 in Dallas, Texas. *Ibid.* Congress's response in the GCA was, *inter alia*, to prohibit mail-order weapons and to impose identification requirements that prohibit pseudonymous purchases. *See Interstate Shipment of Firearms: Hearings on S. 1975 and S. 2345 Before S. Comm. on Com.*, 88th Cong. (1964). The GCA regulates interstate transactions involving *any* firearm—including common bolt-action hunting rifles.[3]

By contrast, the National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 ("NFA") applies to a much narrower class of firearms and firearm accessories—such as fully automatic machine guns.[4] The NFA was Congress's response to gangster shootouts like the St. Valentine's Day Massacre of 1929. On that bloody Valentine's Day, seven members of Bugs Moran's gang

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[3] Throughout this opinion, I use "GCA" and "ordinary" to refer to the firearms captured in 18 U.S.C. § 921(a)(3)(A)-(B). That includes the types of firearms Americans can buy at sporting-goods and big-box stores, like semiautomatic pistols, revolvers, hunting rifles, and shotguns.

[4] Throughout this opinion, I use "NFA items" to refer to the items captured in 26 U.S.C. § 5845. These include suppressors, *id.* § 5845(a)(7), and destructive devices, *id.* § 5845(f). Both are NFA items even though they also appear in 18 U.S.C. § 921(a)(3)(C)-(D). For the sake of simplicity, I use "machine guns" and "NFA items" interchangeably—both because machine guns are prototypical NFA items and because ATF's Final Rule relies extensively on court precedents involving machine guns. *See infra* Part II.B.2.

were gunned down in Chicago. The four shooters used at least two Thompson submachine guns. Congress's response in the NFA was, *inter alia*, to impose a 100% tax on machine gun purchases in an effort to reduce or eliminate them. *See* National Firearms Act: *Hearings Before the H. Comm. on Ways & Means on H.R. 9066*, 73d Cong. 12 (1934). That explains why the NFA appears in Title 26 (the Internal Revenue Code), as opposed to alongside the GCA in Title 18. Today, the NFA applies only to weapons like machine guns, short-barreled shotguns and rifles, and suppressors. And it imposes numerous restrictions (including transfer taxes and registration requirements) that apply *only* to NFA weapons and not to non-NFA weapons like common bolt-action hunting rifles. *See, e.g.*, 26 U.S.C. § 5821 (taxes on NFA weapons).

ATF promulgated the Final Rule under the GCA—not the NFA. *See, e.g.*, Notice of Proposed Rulemaking, Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27720, 27726-27 (May 21, 2021) ("NPRM") (citing as statutory basis the terms "firearm," "frame," and "receiver" in GCA); Final Rule, 87 Fed. Reg. at 24734 (same). That makes some sense because ATF wants the Final Rule to apply to *every* firearm, *every* frame, and *every* receiver (the GCA's scope)—not just to NFA items like machine guns.

The problem is that Congress chose to use the word "restored" *only* in the NFA and not in the GCA. "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015); *see also Russello v. United States*, 464 U.S. 16, 23 (1983). When

Congress defined NFA weapons like machine guns, it chose to reach weapons that could be "restored" to be machine guns. *See, e.g.*, 26 U.S.C. § 5845(b) ("The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily *restored* to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.") (emphasis added). But when Congress defined ordinary GCA "firearms," it chose not to reach weapons that could be "restored" to function as firearms. Rather, the GCA defined "firearm" in relevant part 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." 18 U.S.C. § 921(a)(3)(A) (emphasis added). We must interpret the two statutes to have different scopes consistent with their different texts.[5]

2.

At oral argument, ATF's counsel conceded the agency took the word "restored" from the NFA and inserted it into a GCA regulation. *See* Oral Arg. at 0:30-8:00. Counsel defended conflating the two statutes by arguing that "restored" (used only in the NFA) is close enough to the text used in the GCA ("converted") that the Government could mush together the two statutes

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[5] The textual distinction is particularly powerful because Congress knew how to use the word "converted" in the NFA when it wanted to. For example, the GCA added the definition of "destructive device" to the NFA in 1968. And when it did so, Congress used "converted" in the definition of the NFA item "destructive device." 18 U.S.C. § 921(a)(4)(B). That further underscores the textual anomaly of the word "restored"—which appears only in the NFA provisions governing things like machine guns, short-barreled rifles, and short-barreled shotguns. 26 U.S.C. § 5845(b)-(e).

and promulgate a Final Rule that uses both terms interchangeably.

This argument fails for two reasons. First, the ordinary meaning of "converted" is not the same as "restored." To "convert" means to change something from one form to a new, different form: "To alter, as a vessel or *firearm*, so as to change from one class or type to another." *Convert*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 583 (2d ed. 1934; 1950) ("WEBSTER'S SECOND") (emphasis added). To "restore," by contrast, means to bring something back to its original form: "To bring back to, or put back into, the former or original state; to repair; to renew; specif. [] To rebuild; reconstruct." *Restore*, WEBSTER'S SECOND at 2125. Thus, a firearm *A* can be *converted* to a new, different *B*. Or an old, broken firearm *A* can be *restored* to new, functional *A*. But it makes no sense to say *A* is *restored* to *B*, nor does it make sense to say *A* is *converted* to *A*.[6]

For example, a semi-automatic rifle like an AR-15 can be "converted" to function as a fully automatic machine gun. Such conversions can be accomplished by filing away internal parts of a semi-automatic firearm. *See Staples v. United States*, 511 U.S. 600, 603 (1994). Or by replacing them. *See Roe v. Dettelbach*, 59 F.4th 255, 257 (7th Cir. 2023). But either way, the firearm is "converted" from one thing (*A*, a semi-automatic weapon) into a different class or type of firearm (*B*, a

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[6] Note that this critique of "restored" also applies to the Final Rule's similarly inappropriate uses of the words "completed" and "assembled." *See* Final Rule, 87 Fed. Reg. at 24735, 24739. Neither word appears in the pertinent text of the GCA. *See* 28 U.S.C. § 921(a)(3). And both words have definitions that diverge from that of the relevant word in § 921(a)(3), "converted."

fully automatic weapon). And either way, the AR-15 is *not* "restored" into a machine gun because its original state (semi-automatic) was not an old version of the renewed one (fully automatic). *Cf. United States v. TRW Rifle 7.62x51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 691 (9th Cir. 2006) ("The United States argues, and we agree, that the 'former or original state' of the rifle refers to the essential definition of a machinegun, that is whether it was ever capable of firing automatically more than one shot, without manual reloading, by a single function of the trigger.").

Consider another example. If a lifelong Anglican decides to become Roman Catholic, a "reasonable person, conversant with the relevant social and linguistic conventions" might say that she "converted" from *A* (Anglicanism) to *B* (Catholicism). *Cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392-93 (2003). But no one would say the lifelong Anglican "restored" her new Catholic faith.[7] In faith as in firearms, the words "converted" and "restored" are not interchangeable.

Thus, in the context of ordinary GCA firearms, like bolt-action hunting rifles, Congress used the word "converted." In the context of NFA machine guns, Con-

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[7] Some may dismiss such "homey examples" on the grounds that ordinary meaning is a legal concept without concern for everyday conversation. *See, e.g.*, Tara Leigh Grove, *Foreword: Testing Textualism's 'Ordinary Meaning'*, 90 GEO. WASH. L. REV. 1053, 1082-83 (2022); Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEX. L. REV. (forthcoming 2024). To the extent that the critique has purchase as a theoretical matter, it is irrelevant here. ATF has provided no argument that the analysis of ordinary meaning as a legal concept changes the definition of commonplace words like "converted" or "restored."

gress used the word "restored." That means the GCA covers firearms (*B*) and things (*A*) that can be readily converted into firearms (*B*). Whereas the NFA concerns firearms that start as machine guns (*A*) and can be restored to functioning machine guns (*A*).

B.

All of this matters because the central dispute in this case is how far back ATF can reach to regulate the *A* that can be converted to *B*. Everyone agrees ATF can regulate the gun itself, *B*. 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? ATF concedes that it cannot reach all the way back to "unformed blocks of metal" or metal in its "primoradial state." Final Rule, 87 Fed. Reg. at 24663. So primordial ooze is not *A*. But anything more refined than that is subject to the Final Rule's multi-factor balancing tests and eye-of-the-beholder standards.

The GCA, however, says nothing about primordial ooze, unformed blocks of metal, or any of ATF's various indeterminate standards for *A*. Rather, the GCA says ATF can regulate *A* as a "firearm" only if *A* can "readily be converted" into a firearm *B*. 18 U.S.C. § 921(a)(3)(A). That is, a firearm is anything (*B*) that expels a projectile with an explosive, or anything (*A*) that can be *readily converted* to a thing (*B*) that fires a projectile with an explosive.

Consider (1) how courts distinguish "readily be converted" from "readily restored." Then consider (2) how ATF ignores that distinction. The result is (3) a fatally vague Final Rule.

1.

Let's start with ordinary GCA firearms. When it comes to ordinary firearms, like bolt-action hunting rifles, courts have interpreted "readily be converted" to mean minimal effort—something like "three to twelve minutes" with a drill and no special skills. *See, e.g.*, *United States v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2d Cir. 1971). The GCA standard arises with some frequency when criminal defendants are charged with possessing gun parts or inoperable guns that nonetheless count as firearms because they can "readily be converted" to fire. *See ibid.* For example, this disassembled Tec-9 handgun is still a "firearm":

*United States v. Morale*s, 280 F. Supp. 2d 262, 277 (S.D.N.Y. 2003). That is because it might be reassembled "in about five seconds." *Id.* at 272. Similarly, an inoperable shotgun can "readily be converted" to GCA firearm if it only requires "about fifteen to twenty minutes" of manipulation. *United States v. Reed*, 114 F.3d 1053, 1056 (10th Cir. 1997). And a starter gun—which is expressly mentioned in the text of § 921(a)(3)—is a GCA firearm because it can be converted to expel projectiles using basic tools, without any specialized knowledge, "in a matter of minutes" and "easily [in] less than an hour." *United States v. Mullins*, 446 F.3d 750, 755-56 (8th Cir. 2006).

NFA weapons like machine guns are a different story. Recall that machine guns face an entirely different and more onerous regulatory regime—including registration requirements for every machine gun, registration requirements for every seller and purchaser, $200 taxes for every transfer, and multi-month waiting periods. Owing in part to the significantly heavier burdens that attach to machine gun ownership, courts have interpreted the NFA's text ("readily restored") to reach *much* further than the GCA's text ("readily be converted"). While the GCA only reaches conversions that can be accomplished in *minutes* using *minimal* effort, the NFA reaches restorations that can be accomplished in *hours* using *maximal* effort.

Take, for example, *United States v. Smith*, 477 F.2d 399 (8th Cir. 1973) (per curiam). That case concerned possession of an unregistered Thompson submachine gun. The gun had been permanently decommissioned: Its barrel had been filled with metal. *Id.* at 400. And the gun was welded in *two* places to make it impossible

to fire: "The barrel of the gun was welded closed at the breech and was also welded to the receiver on the outside under the handguard." *Ibid.* Nonetheless, the Government proffered an expert to prove that a permanently decommissioned weapon could be "readily restored":

> [The Government's expert] testified that there are two possible ways by which the firearm could be made to function as such. The most feasible method would be to cut the barrel off, drill a hole in the forward end of the receiver and then rethread the hole so that the same or another barrel could be inserted. To do so would take about an 8-hour working day in a properly equipped machine shop. Another method which would be more difficult because of the possibility of bending or breaking the barrel would be to drill the weld out of the breech of the barrel.

Ibid. The court held that was sufficient to support Smith's NFA conviction because eight hours in a properly equipped shop with a sophisticated understanding of metallurgy constituted a ready restoration. *See id.* at 400-01. Other courts have interpreted the NFA to reach a machine gun that was permanently decommissioned by the military "by torch-cutting its receiver—the frame portion of the rifle that contains the firing mechanisms, located between the barrel and the stock—into two pieces." *TRW Rifle*, 447 F.3d at 688. The court reasoned the machine gun could be "readily restored" by welding the two pieces back together and then using "a hand grinder (or dremel tool), a splitting disk, a drill press, and hand files" to restore its firing mechanism. *Id.* at 692. The court credited expert testimony that someone with the proper tools and know-

ledge could do that in two hours. *Ibid.* A similar case estimated that the same restoration could be done in six hours. *See United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422-24 (6th Cir. 2006).

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These cases illustrate what should be obvious to any law-abiding American: Federal law treats NFA machine guns differently from ordinary GCA firearms like bolt-action rifles.

2.

The distinction was not obvious to ATF, however. In Footnote 43 of the Final Rule, ATF says "readily" means *either* "readily be converted" under the GCA *or* "readily restored" under the NFA—terms ATF understands as interchangeable in a string cite of cases arising under both statutes. *See* Final Rule, 87 Fed. Reg. at 24661 n.43. ATF points to Footnote 43 and its mishmash of GCA-NFA precedents over and over throughout the Final Rule. *See id.* at 24684 n.96, 24685 n.103, 24698 n.123, 24700 n.125 (pointing to footnote 43). As ATF explains, "this rule is guided by . . . relevant case law." *Id.* at 24698.

The problem is that NFA precedents are not "relevant case law." *Ibid.* As to ordinary GCA firearms, ATF is limited to regulating things that can "readily be converted" into firearms. 18 U.S.C. § 921(a)(3). That means things that are close enough to firearms that they can be finished "in about five seconds," *Morale*s, 280 F. Supp. 2d. at 272, in "about fifteen to twenty minutes," *Reed*, 114 F.3d at 1056, or in "easily less than an hour," *Mullins*, 446 F.3d at 755. ATF cannot avail itself of the NFA's *much* broader for machine guns. Yet in inter-

preting the GCA's ordinary-gun standard, ATF expressly relied on cases like *Smith* and its eight-hours-in-a-professional-shop-with-expertise standard. *See* Final Rule, 87 Fed. Reg. at 24662 n.43; *see also id.* at 24678-79 (explicitly linking the Final Rule's understanding of "readily" to the machine-gun-restoration standard under the NFA).

The practical implications of ATF's position are staggering. According to ATF, the word "readily" means the same thing in the GCA, the NFA, and the Final Rule. If that were true, then millions and millions of Americans would be felons-in-waiting. That is because the AR-15 is the most popular rifle in America; almost 20 million of them were in American homes as of 2020. *See* NSSF Releases Most Recent Firearm Production Figures, https://perma.cc/TBS8-JSSH (Nov. 16, 2020). But every single AR-15 can be converted to a machine gun using cheap, flimsy pieces of metal—including coat hangers. *See* Mike Searson, *Turning Your AR-15 into an M-16*, RECOIL MAGAZINE, https://perma.cc/L5G9-E9BJ (June 5, 2019). That is obviously far easier than the 8-hour-in-a-professional-shop standard announced in *Smith* to govern "ready restoration" under the NFA.

For decades, America's AR-15 owners have relied on the fact that AR-15s are not subject to the NFA's ready-restoration standard. Recall the NFA applies to machine guns *B* and things that can be "readily restored" to function as machine guns *B*. *See supra* Part II.A.2. By contrast, an AR-15 was never a machine gun *B* and hence cannot be "readily restored" to a machine gun *B*. Of course, an AR-15 *A* could be "converted" to a machine gun *B*. But unless that conversion could be done in a few seconds or minutes, *see Morale*s, 280 F. Supp. 2d. at

272; *Reed*, 114 F.3d at 1056, AR-15 owners had no reason to worry that their rifles were capable of ready conversion into unregistered machine guns. The Final Rule eliminates that certainty, says "readily" means the same thing in the GCA and the NFA, and says Americans violate federal gun laws if they could in theory manufacture a prohibited weapon in eight hours in a professional shop with metallurgical expertise. *See Smith*, 477 F.2d at 400; Final Rule, 87 Fed. Reg. at 24661 n.43 (relying on *Smith*).

3.

After conflating the GCA and the NFA, the Final Rule includes a list of eight non-exhaustive factors to guide ATF's understanding of "readily":

> (1) Time, i.e., how long it takes to finish the process; (2) Ease, i.e., how difficult it is to do so; (3) Expertise, i.e., what knowledge and skills are required; (4) Equipment, i.e., what tools are required; (5) Parts availability, i.e., whether additional parts are required, and how easily they can be obtained; (6) Expense, i.e., how much it costs; (7) Scope, i.e., the extent to which the subject of the process must be changed to finish it; and (8) Feasibility, i.e., whether the process would damage or destroy the subject of the process, or cause it to malfunction.

Final Rule, 87 Fed. Reg. at 24735. The Final Rule emphasizes this list is "nonexclusive." *Id.* at 24698. And ATF explicitly disclaimed the need to explain how any of these factors would balance in practice: "It is not the purpose of the rule to provide guidance so that persons may structure transactions to avoid the requirements of the law." *Id.* at 24692.

This approach violates the Fifth Amendment and its guarantee of fair notice. *See FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). The "Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). Even if "some conduct [] clearly falls within the provision's grasp," a law can still be vulnerable to a vagueness challenge. *Id.* at 602. 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." *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018) (citation omitted).

ATF dismisses the problem by pointing to courts that have rejected vagueness challenges to the term "readily." Final Rule, 87 Fed. Reg. at 24700, n.126 (pointing to cases listed in 87 Fed. Reg. at 24679 n.79). But that argument fails for two reasons. Nearly all of ATF's cited precedents involve the NFA, not the GCA. *See id.* at 24679 n.79 (also citing cases on state laws and the ADA). And as discussed above, courts have interpreted the NFA more expansively than the GCA. But more relevantly, the cited precedents dealt with the word "readily" as it exists in statutory text. They did not consider ATF's nonexclusive eight-factor balancing test with no concrete examples. It is the text of the Fi-

nal Rule, not the text of the statute, which falls short of the Due Process Clause.[8]

ATF also argues that it could provide sufficient guidance in individual cases: Where "persons remain uncertain" as to the exact scope of the Rule, "they may submit a voluntary request to ATF for a classification." Final Rule, 87 Fed. Reg. at 24692. But this does nothing to cure the Final Rule's vagueness. As important as the Fifth Amendment's guarantee of fair notice to individuals is the Amendment's prohibition against "arbitrary enforcement" by government officials. *See Johnson*, 576 U.S. at 595 (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)). It is thus of no use for ATF to say that it will tell ordinary people what they can do. The law exists to tell both the people *and* government officials what they can do. *See Sessions*, 138 S. Ct. at 1228 (Gorsuch J., concurring in part and concurring in the judgment) ("Vague laws [] threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). The nonexclu-

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[8] ATF essentially responded with variation of the motte-and-bailey argument. *See* Scott Alexander, *All in All, Another Brick in the Motte*, SLATE STAR CODEX (Nov. 3, 2014), https://perma.cc/PA2W-FKR9. The Final Rule is clearly more expansive than the text of § 921(a)(3). When pressed on due process concerns with the Final Rule, ATF retreated to the text of § 921(a)(3) and argued that courts have rejected such attacks on the GCA. But the Final Rule is not the GCA. ATF may either have the text of the GCA, as upheld against due process challenges by various courts, or the more expansive Final Rule, which has never encountered such a challenge. But it may not mix and match legal texts with defenses.

sive eight-factor balancing test provides no guidance to anyone and hence is void for vagueness.

III.

Next consider the Final Rule's approach to weapon parts kits. The Final Rule expands the GCA's definition of "firearm" to include weapon parts kits:

> Firearm . . . . The term shall 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.

Final Rule, 87 Fed. Reg. at 24735. But this expansion cannot stand for two reasons.

First, as the majority cogently explains, *see ante* at 19, Congress knows how to regulate gun parts, either individually or as a collection. The GCA's predecessor, the Federal Firearms Act, defined "firearm" to mean "any weapon . . . *or any part or parts of such weapon*." Pub. L. No. 75-782, 52 Stat. 1250, 1250 (1938) (repealed 1968) (emphasis added). But Congress removed this language when it enacted the GCA. Moreover, Congress regulates parts elsewhere in the GCA (as well as in the NFA). *See, e.g.*, 18 U.S.C. § 921(a)(4)(C) (defining "destructive device" as, *inter alia*, "any combination of parts. . . . "). The omission of any reference to "parts" in § 921(a)(3) indicates that Congress did not sweep "parts" into the GCA's definition of firearm.

Second, the structure of § 921(a)(3) presumes that all covered firearms have either a frame or a receiver. Therefore, a weapon parts kit that does not include a frame or receiver cannot be regulated under § 921(a)(3).

Start with the statutory text. Section 921(a)(3) defines the term "firearm" in four sub-sections: (A), (B), (C), and (D). Consider only (A) and (B). Subsection (A) 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." 18 U.S.C. § 921(a)(3)(A). Subsection (B) defines "firearm" to include "the frame of receiver of *any such weapon*." *Id.* § 921(a)(3)(B) (emphasis added). With its placement immediately following (A), we can easily understand (B)'s "any such weapon" language to incorporate the definition of "weapon" in (A). Thus, Subsection (B) defines "firearm" to include "the frame of receiver of any such 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 put another way, § 921(a)(3) defines "firearms" to include, *inter alia*, certain weapons (A) and the frame or receiver of said weapons (B). Section 921(a)(3) does not contemplate a weapon covered by (A) that does *not* have a frame or receiver covered by (B).

Contrast the statute with two hypothetical weapon parts kits covered by the Final Rule. The first kit contains a frame as defined by § 921(a)(3)(B). That means that the kit contains a firearm under § 921(a)(3). The frame (separate and apart from anything else in the kit) triggers the GCA and its various requirements. *See, e.g.*, 18 U.S.C. § 923(i) ("Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer."). In this hypothetical, the frame is doing all the work—it is suffi-

cient to trigger the GCA, so it does not matter what else is included in the frame-containing kit.

Now consider a different kit covered by the Final Rule: This second kit contains *no* frame or receiver as defined by § 921(a)(3)(B). *See* Final Rule, 87 Fed. Reg. at 24685 ("The Department disagrees with the comment that weapon parts kits must contain all component parts of the weapon to be 'readily' converted to expel a projectile."). This kit is incomplete because it does not contain a frame or receiver—and hence contains *nothing* that triggers § 921(a)(3)'s text. It beggars belief to suggest that such an incomplete parts kit is a weapon in any sense of the word. An incomplete weapon parts kit will *never* turn itself into a functioning weapon of any sort. Any argument to the contrary is "[p]ure applesauce." *King v. Burwell*, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting).

ATF's only response is to say that it'll deem incomplete kits as "firearms" based on "a case-by-case evaluation of each kit." Final Rule, 87 Fed. Reg. at 24685; *cf. Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring). How is any American supposed to know when a collection of gun parts meets that standard?

In sum, § 921(a)(3) contemplates that a covered "weapon" (A) has a "frame or receiver" (B). Insofar as the Final Rule seeks to regulate weapons that do not, the rule is unlawful.

IV.

Finally, consider the Final Rule's treatment of *unfinished and incomplete* frames and receivers. This is perhaps ATF's most aggressive attempt to bootstrap hunks of metal and plastic into the GCA's definition of a

"firearm." As explained in the preceding sections of this opinion, the GCA's definition of a "firearm" includes (1) functioning guns, (2) weapons that are "designed" to be functioning guns, (3) weapons that can "readily be converted" to functioning guns, and (4) the "frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3)(A)-(B). Thus, if a felon possesses a functioning handgun, that obviously violates the GCA. If the same felon possesses a non-functioning handgun, that still might violate the GCA if the gun was "designed" to be a functioning gun. And if the same felon possesses a field-stripped handgun,[9] that violates the GCA in two separate ways: the gun can be reassembled (and hence "readily be converted" to a functioning gun), and the frame or receiver of the field-stripped weapon is a "firearm" under § 921(a)(3)(B) even without reassembly.

But that statutory definition is not capacious enough for ATF. In the Final Rule, ATF asserts that anything beyond primordial ooze, liquid polymer, and wholly unformed raw metal *can* constitute a firearm. Here's how ATF explains the bootstrapping:

> (c) Partially complete, disassembled, or nonfunctional frame or receiver. The terms "frame" and "receiver" shall include a partially complete, disassembled, or nonfunctional frame or receiver, includ-

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[9] Field stripping a firearm involves disassembling it without any special tools for routine cleaning and maintenance. *See, e.g.*, Bob Boyd, *DIY Guide: Field-Stripping a Glock*, SHOOTING ILLUSTRATED (Dec. 17, 2019), https://perma.cc/A7CA-YVKC; *cf. United States v. Spencer*, 439 F.3d 905, 911 (8th Cir. 2006) (noting a "field stripped" machine gun was disassembled "into approximately ten to fifteen different parts" and "could be reassembled in about five or ten minutes") (quotation omitted).

> ing 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, i.e., to house or provide a structure for the primary energized component of a handgun, breech blocking or sealing component of a projectile weapon other than a handgun, or internal sound reduction component of a firearm muffler or firearm silencer, as the case may be. The terms shall not include 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).

Final Rule, 87 Fed. Reg. at 24739. But this expansion cannot stand, because (A) a frame or receiver parts kit is not a frame or receiver, (B) the Final Rule's examples defining "frame or receiver" are nonsensical, and (C) the Final Rule fails to sufficiently engage with then-contemporaneous definitions of "frame" or "receiver."

A.

To begin, a frame or receiver *parts kit* is not a frame or receiver within the meaning of § 921(a)(3)(B).

Seven years before the GCA was passed, WEBSTER'S THIRD defined *frame* as "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm," WEBSTER'S THIRD INTERNATIONAL DICTIONARY 902 (1961), and *receiver* as "the metal frame in which the action of a firearm is fitted and which the breech end of the barrel is attached." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1894 (1961).

Now, the Final Rule attempts to expand those definitions, so that "frame" includes a "frame parts kit" and "receiver" includes a "receiver parts kit." Final Rule, 87 Fed. Reg. at 24739.

But ATF cannot simply add the phrase "parts kit" and regulate as if the frame/receiver *parts* are the frames/receivers themselves. A frame parts kit does not serve as "the basic unit of a handgun which serves as a mounting for the barrel"; it is a collection of parts that could in theory be assembled into a frame. A receiver parts kit is not a "metal frame"; it is a collection of parts that can be assembled into a metal frame. Thus, as a matter of commonsense statutory interpretation, the parts kits cannot qualify as frames or receivers under § 921(a)(3)(B). *See Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 12 (1877) (presuming that words in statutory text are to be given "their natural and ordinary signification.").

ATF's contrary view has no stopping point. For example, ATF says it will regulate "[a] complete frame or receiver of a weapon that has been disassembled, damaged, split, or cut into pieces, but not destroyed in accordance with paragraph (e)." Final Rule, 87 Fed. Reg. at 24739. Paragraph (e) in turn states that "[a]cceptable methods of destruction include completely melting, crushing, or shredding the frame or receiver." *Ibid.* It is thus unclear if any gun part could *ever* fall outside ATF's definition of a "firearm." On the front end, anything that has been refined beyond primordial ooze or raw liquid polymer could one day be a firearm. And on the back end, anything that has not been melted down into primordial ooze or raw liquid polymer could one day be restored to function as a firearm.

This makes little sense. If I went to a junk yard and picked up a piece of metal that used to be part of a truck, no reasonable person would say I'm holding a truck because the metal has been formed beyond primordial ooze and hence could be "completed, assembled, restored, or otherwise converted to function" as either a truck or truck frame. Likewise, if I cut a truck into 100 pieces, scattered them on the ground, and then picked up some, no reasonable person would say I'm holding a truck or truck frame because the piece hadn't been melted down to its primordial state.

B.

Next, the Final Rule says even unformed pieces of metal or plastic can constitute frames and receivers when they are found with instructions or jigs. In the section on frames and receivers, the Final Rule gave multiple examples of what is or is not a frame or receiver within the meaning of § 921(a)(3)(B). *See* Final Rule, 87 Fed. Reg. at 24739. Examples 1 and 4 are key. Example 1 provides:

> Frame or receiver: A frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template is a frame or receiver, as a person with online instructions and common hand tools may readily complete or assemble the frame or receiver parts to function as a frame or receiver.

Ibid. In contrast, Example 4 provides:

> Not a receiver: A billet or blank of an AR-15 variant receiver without critical interior areas having been indexed, machined, or formed that is not sold, distrib-

> uted, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver.

Ibid. Note the difference between Example 1 (frame or receiver) and Example 4 (not a frame or receiver): the presence of a jig or other template. Thus, it is the jig or template that triggers the GCA.

The implication of these examples is stark. On a workbench you find two receiver blanks like the silver ones pictured on page 3 of this opinion. Neither has "critical interior areas" that are "indexed, machined, or formed." *Ibid.* But the right receiver blank is accompanied by a plastic jig. The left one is not. Under the Final Rule, the right receiver blank is a frame or receiver, thus triggering a five-year prison sentence for unlicensed manufacturing, importing, or dealing. *See* 18 U.S.C. §§ 922(a)(1)(B), 924 (a)(1). The left is just innocuous metal. How can this be? It seems that the presence of the jig changes that receiver blank from something that is not a firearm under § 921(a)(3) to something that is. But § 921(a)(3)(B) only refers to frames and receivers. Section 921(a)(3)(B) does not mention jigs (or instructions, templates, equipment, tools). How can the jig or template change the nature of the receiver blank, such that the blank goes from unregulable to regulable under § 921(a)(3)(B)?

It obviously cannot. Consider the lumber in every Home Depot across America. It obviously has been machined beyond its primordial state; much of it has been pressure treated, and all of it has been cut to specified lengths. The same is true about every screw, nut, and bolt in the store; all of them have been machined beyond their primordial states and cut to specified

lengths. Now, if I walk into the Home Depot with instructions for making a chair, would any reasonable person say I possess a chair? Of course not.[10]

C.

Let's close with the ATF's eye-of-the-beholder standard. As noted in previous sections of this opinion, dictionaries define *frame* and *receiver*—like the Old 80% Rule—in terms of critical components, parts, and functions. For example, the frame or receiver must be able to hold a trigger or the breechblock. Or it must have certain parts milled, etc. In the place of these standards, ATF said metal or plastic is a frame or receiver if it has "reached a stage of manufacture where it is *clearly identifiable* as an unfinished component part of a weapon." Final Rule, 87 Fed. Reg. at 24739 (emphasis added). Or rather, once an ordinary person can look at an object and say that it looks like an "unfinished component part of a weapon," *see ibid.*, it has become a frame or receiver within the meaning of § 921(a)(3)(B). How does this interact with ATF's assertions throughout the Final Rule that it now regulates anything machined beyond primordial ooze and liquid polymer?

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[10] In its briefing before our court, ATF attempts to engage a related hypothetical by arguing that a person possesses a bicycle when they buy a disassembled one. See Blue Br. 19. That is a red herring for two reasons. First, a disassembled bicycle is no different than a field-stripped gun; the former is a bicycle just as the latter is a gun. *See supra* note 9 and accompanying text. Second, the Final Rule reaches far, far beyond a bicycle "shipped with plastic guards attached to the gears or brakes that must be removed before it is used." Blue Br. 19. To make the analogue work, ATF would have to contend that metal machined beyond its primordial state and rubber machined beyond liquid ooze constitutes a bicycle if possessed with a template or instructions for manufacturing the bike.

Unclear. What does "clearly identifiable" mean? Also unclear. What objects do ordinary people (who might associate "receivers" more readily with football than guns) think are "clearly identifiable" as firearm components? Yet again, unclear. All we know is that ATF, like Justice Stewart, is confident that it can identify a GCA firearm when it sees one.

ATF's problem is that § 921(a)(3)(B) covers objects that *are* frames and receivers, not objects that *look* like frames or receivers.[11] A recent Internet fad illustrates the point. Consider the "cakes that look like food" Internet trend. *See, e.g.*, Chelsweets, *Cakes That Look Like Food: 10 Amazing Cakes*, YouTube (Jan. 22, 2018), https://perma.cc/UGH6-MXA2. One could make a cake that looks like a hamburger, just as one could make a cake that looks like a gun frame or receiver. One is "clearly identifiable" as a hamburger, just as the other is "clearly identifiable" as a gun part. But that does not make the former taste like a Big Mac, just as it does not make the latter covered by the GCA.

* * *

The Final Rule is limitless. It purports to regulate any piece of metal or plastic that has been machined beyond its primordial state for fear that it might one day

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[11] It is no answer to say that the Old 80% Rule allowed the regulated community to escape regulation by making 79%-complete frames and receivers. *See* Final Rule, 87 Fed. Reg. at 24686. Such a response might be valid on public policy grounds, but as the majority notes above, *see ante* at 24-26, public policy is the purview of Congress, not the federal courts. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

be turned into a gun, a gun frame, or a gun receiver. And it doesn't stop regulating the metal or plastic until it's melted back down to ooze. The GCA allows none of this. I concur in the majority's opinion holding the Final Rule is unlawful. And I further concur that the matter should be remanded to the district court to fashion an appropriate remedy for the plaintiffs.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-cv-00691-O

JENNIFER VANDERSTOK, ET AL., PLAINTIFFS

v.

BLACKHAWK MANUFACTURING GROUP INC., ET AL.,
INTERVENOR-PLAINTIFFS

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v.

MERRICK GARLAND, ET AL., DEFENDANTS

Filed: June 30, 2023

MEMORANDUM OPINION & ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT & MOTIONS TO INTERVENE

Before the Court are Plaintiffs Jennifer VanDerStok, Michael G. Andren, Tactical Machining, LLC, and Firearms Policy Coalition, Inc.'s ("Original Plaintiffs") Motion for Summary Judgment (ECF No. 140), Brief (ECF No. 141), and Appendix in support (ECF No. 142), filed December 23, 2022; Intervenor-Plaintiff BlackHawk Manufacturing Group Inc. d/b/a 80 Percent Arms' Motion for Summary Judgment (ECF No. 144), Brief (ECF

No. 145), and Appendix in support (ECF No. 146), filed December 23, 2022; Intervenor-Plaintiffs Defense Distributed and The Second Amendment Foundation, Inc.'s Motion for Summary Judgment (ECF No. 165) and Brief in support (ECF No. 166), filed January 12, 2023; Defendants' Combined Opposition to Original Plaintiffs' and Intervenor-Plaintiffs' Motions for Summary Judgment and Cross-Motion for Summary Judgement (ECF No. 180), Brief (ECF No. 181), and Appendix in Support (ECF No. 182), filed February 13, 2023; Original Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment (ECF No. 191), filed March 6, 2023; Intervenor-Plaintiff BlackHawk Manufacturing Group Inc.'s Reply Brief and Opposition to Defendants' Cross-Motion for Summary Judgment (ECF No. 192), filed March 6, 2023; Intervenor-Plaintiffs Defense Distributed and The Second Amendment Foundation, Inc.'s Summary Judgment Response/Reply Brief (ECF No. 193), filed March 6, 2023; and Defendants' Reply Brief (ECF No. 204) and Appendix (ECF No. 205) in support of their Motion for Summary Judgment, filed April 19, 2023. Also before the Court is the Amici Curiae Brief of Gun Owners for Safety and Individual Co-Amici in Support of Defendants' Opposition to Original Plaintiffs' and Intervenor-Plaintiffs' Motions for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment (ECF No. 187), filed February 23, 2023. Also before the Court are Defendants' Supplemental Brief Regarding Rule 65(a)(2) Consolidation and Plaintiffs' Count I (ECF No. 132), filed December 5, 2022; Original Plaintiffs' Brief (ECF No. 133), filed December 5, 2022; and Intervenor-Plaintiff

BlackHawk Manufacturing Group Inc.'s Brief (ECF No. 134), filed December 5, 2022.

On January 18, 2023, the Court deferred ruling on putative intervenors' motions to intervene until summary judgment briefing concluded. *See* Order, ECF No. 172. Now ripe for review are Not An LLC d/b/a JSD Supply's Motion to Intervene (ECF No. 149) and Brief in support (ECF No. 150), filed January 5, 2023; Defendants' Opposition (ECF No. 207), filed April 27, 2023; Original Plaintiffs' Opposition (ECF No. 212), filed May 10, 2023; and JSD Supply's Reply (ECF No. 213), filed May 11, 2023. Also before the Court are Polymer80's Motion to Intervene (ECF No. 157), Brief (ECF No. 158), and Appendix (ECF No. 159) in support; filed January 9, 2023; Defendants' Opposition (ECF No. 206), filed April 27, 2023; Original Plaintiffs' Opposition (ECF No. 212), filed May 10, 2023; and Polymer80's Reply (ECF No. 214), filed May 11, 2023.

Also pending are Original Plaintiffs' unopposed Motion for Leave to Provide Supplemental Authority to Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment (ECF No. 197), filed March 24, 2023, which the Court **GRANTS** for good cause shown; and JSD Supply's proposed Motion for Injunction (ECF No. 151) and Brief in support (ECF No. 152), filed January 5, 2023, and Defendants' Notice Regarding the Same (ECF No. 156), filed January 9, 2023, which the Court **DENIES** as prematurely filed.

Having considered the briefing and applicable law, the Court **GRANTS** JSD Supply's and Polymer80's motions to intervene on permissive grounds. For the reasons that follow, the Court **GRANTS** Plaintiffs' and In-

tervenors' motions for summary judgment, **DENIES** Defendants' cross-motion for summary judgment, and **VACATES** the Final Rule.

I. INTRODUCTION

This case presents the question of whether the federal government may lawfully regulate partially manufactured firearm components, related firearm products, and other tools and materials in keeping with the Gun Control Act of 1968. Because the Court concludes that the government cannot regulate those items without violating federal law, the Court holds that the government's recently enacted Final Rule, Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (codified at 27 C.F.R. pts. 447, 478, and 479), is unlawful agency action taken in excess of the ATF's statutory jurisdiction. On this basis, the Court vacates the Final Rule.

II. STATUTORY & REGULATORY BACKGROUND

In 1934, Congress enacted the National Firearms Act ("NFA") to authorize federal taxation and regulation of certain firearms such as machineguns, short-barreled shotguns, and short-barreled rifles. National Firearms Act of 1934, ch. 757, Pub. L. 73-474, 48 Stat. 1236, 1236. A few years later, Congress enacted the Federal Firearms Act ("FFA"), which more broadly defined "firearm" and thereby authorized federal regulation of "any weapon . . . designed to expel a projectile or projectiles by the action of an explosive . . . or any part of such weapon." Federal Firearms Act of 1938, ch. 850, Pub. L. No. 75-785, 52 Stat. 1250, 1250 (1938) (repealed 1968).

Thirty years later, Congress enacted the Gun Control Act of 1968 ("GCA"), which superseded the FFA's regulation of firearms in interstate commerce. The GCA requires manufacturers and dealers of firearms to have a federal firearms license.[1] 18 U.S.C. §§ 921, *et seq*. Dealers must also conduct background checks before transferring firearms to someone without a license, and they must keep records of firearm transfers. *Id.* §§ 922(t), 923(g)(1)(A).

The GCA also redefines "firearm" more narrowly than the earlier statute it superseded, defining the term as: "(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." *Id.* § 921(a)(3). But "[s]uch term does not include an antique firearm." *Id.* Notably, the GCA departs from the FFA's prior definition of "firearm" by restricting federal authority over "any part" of a firearm to only the "frame or receiver" of such firearm.

Congress delegated authority to administer and enforce the GCA to the Attorney General by authorizing him to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." *Id.* § 926(a). The Attorney General, in turn, delegated that authority to the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). 28 C.F.R. § 0.130(a). Those who violate the federal firearms laws

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[1] A manufacturer or dealer authorized to transfer firearms under the Gun Control Act is known as a Federal Firearms Licensee ("FFL").

are subject to potential fines and imprisonment. 18 U.S.C. § 924(a).

In 1978, ATF promulgated a rule interpreting the phrase "frame or receiver," which the GCA does not define. The rule defined the "frame or receiver" of a firearm 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." Title and Definition Changes, 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978). That definition remained in place until last year.

In April 2022, ATF published the Final Rule changing, among other things, the 1978 definition of "frame or receiver." *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, and 479 (2022)).[2] ATF split the phrase into two parts, assigning the term "frame" to handguns and the term "receiver" to any firearm other than a handgun, such as rifles and shotguns. *See* 27 C.F.R. § 478.12(a)(1), (a)(2). ATF then defined the terms "frame" and "receiver" along the same lines as the 1978 rule, though with updated, more precise technical terminology.[3]

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[2] The Final Rule took effect on August 24, 2022, in the midst of the parties' initial briefing. *See* 27 C.F.R. pts. 447, 478, and 479 (2022).

[3] Here are the two definitions, in full:

> (1) The term "frame" means the part of a handgun, or variants thereof, that provides housing or a structure for the component (i.e., sear or equivalent) designed to hold back the hammer, striker, bolt, or similar primary energized component prior to initiation of the firing sequence, even if pins or other attachments are required to connect such

But ATF did not stop there. Rather than merely updating the terminology, ATF decided to regulate *partial* frames and receivers. Under the new Final Rule, "[t]he terms 'frame' and 'receiver' shall 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." *Id.* § 478.12(c). But "[t]he terms shall not include 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.*

Further, the Final Rule permits the ATF Director to consider extrinsic factors when determining if an object is a frame or receiver. Specifically, "[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 [or otherwise made available to the purchaser or recipient of] the item or kit." *Id.*

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component (i.e., sear or equivalent) to the housing or structure.

(2) The term "receiver" means the part of a rifle, shotgun, or projectile weapon other than a handgun, or variants thereof, that provides housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence (i.e., bolt, breechblock, or equivalent), even if pins or other attachments are required to connect such component to the housing or structure.

27 C.F.R. § 478.12(a).

The Final Rule also amends ATF's definition of "firearm" to include weapon parts kits that are "designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." *Id.* § 478.11 (definition of "firearm").

III. PARTIES & PROCEDURAL BACKGROUND

Individual Plaintiffs Jennifer VanDerStok and Michael Andren are Texas residents who own firearm components that they intend to manufacture into firearms for personal, lawful use.[4] They claim that the Final Rule prohibits them from directly purchasing products online that they want to use to manufacture their own firearms.[5] Now, to purchase these products in compliance with the Final Rule, Individual Plaintiffs would have to route their purchases of the regulated products through an FFL and incur associated transfer fees ($30 in Individual Plaintiffs' case), plus additional time and expense.

Tactical Machining, LLC manufactures and sells items that are subject to regulation under the Final Rule.[6] Over 90% of Tactical Machining's business consists of selling items that individuals can use to manufacture frames and receivers and to build functioning firearms.[7]

The Firearms Policy Coalition, Inc. ("FPC") is a nonprofit organization dedicated to promoting the constitu-

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[4] VanDerStok Decl. 1, ECF No. 16-2; Andren Decl. 1, ECF No. 16-3.

[5] VanDerStok Decl. 2, ECF No. 16-2; Andren Decl. 2, ECF No. 16-3.

[6] Peters Decl. 1, ECF No. 16-1.

[7] *Id.* at 2.

tional rights of American citizens through public education and legislative and legal advocacy.[8] In support of its educational and advocacy efforts, FPC owns and uses several firearm parts and products that are subject to the Final Rule.[9] FPC has hundreds of thousands of members, donors, and supporters nationwide, many of whom are plaintiffs in this lawsuit.[10] Individuals and organizations become FPC members by making a donation via the non-profit corporation's website.[11] FPC seeks to bring this lawsuit on behalf of itself and its members.[12]

Shortly before the Final Rule took effect in August 2022, Original Plaintiffs sued the U.S. Attorney General, the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), and the ATF Director over the legality of the Final Rule.[13] Days later, the Original Plaintiffs sought preliminary injunctive relief, which the Court granted on grounds that they were likely to succeed on their claim that ATF exceeded its statutory authority in issuing the Final Rule.[14]

BlackHawk Manufacturing Group, Inc. is a manufacturer and retailer that sells products newly subject to ATF's Final Rule, with most of its revenue earned

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[8] *See generally* Combs Decl., ECF No. 62-4.

[9] *Id.* ¶¶ 9-10.

[10] *Id.* ¶¶ 6-7. Individual Plaintiffs, Tactical Machining, LLC, BlackHawk Manufacturing Group, Inc. d/b/a 80 Percent Arms, and Defense Distributed are members of FPC. *Id.*

[11] *Id.* ¶ 8.

[12] Orig. Pls.' Reply 5, ECF No. 191.

[13] *See generally* Compl., ECF No. 1.

[14] Orig. Pls.' Mot. for Prelim. Inj., ECF No. 15; Mem. Opinion, ECF No. 56.

through sales of those products.[15] Defense Distributed is a private defense contractor that primarily manufactures and deals products now subject to the Final Rule.[16] Defense Distributed is also a member of its co-intervenor, the Second Amendment Foundation ("SAF"), a non-profit organization that promotes and defends constitutional rights through educational and legal efforts.[17] Like FPC, SAF brings this suit on behalf of itself and its members.[18] The Court subsequently allowed these parties to intervene in the suit and granted BlackHawk and Defense Distributed their preliminary injunctions on the same grounds as the Original Plaintiffs.[19]

In the weeks after BlackHawk, Defense Distributed, and SAF were permitted to join the lawsuit, and after summary judgment briefing had begun, movants Not An LLC d/b/a JSD Supply and Polymer80, Inc. filed their pending motions to intervene.[20] JSD Supply is a manufacturer and distributor that earns most of its revenue through sales of products now subject to the Final Rule.[21] Likewise, Polymer80, Inc. is a designer, manufacturer, and distributor of firearms and non-firearm products.[22] Through letters issued by ATF since the Final Rule's enactment, Polymer80 learned that some of its products are considered subject to the Final Rule

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[15] Lifschitz Decl. 6-8, ECF No. 62-5 ¶¶ 8, 11, 13.

[16] *See generally* Defense Distributed Compl., ECF No. 143.

[17] *Id.* ¶¶ 11-12.

[18] *Id.*

[19] Mem. Opinions, ECF Nos. 118, 188.

[20] JSD Supply Mot. to Intervene, ECF No. 149; Polymer80 Mot. to Intervene, ECF No. 157.

[21] JSD Supply Br. 4-5, ECF No. 150.

[22] Polymer80 Br. 1-3, ECF No. 158.

and, if not afforded relief, that its "corporate existence" is at stake.[23]

Plaintiffs and Intervenor-Plaintiffs claim the Final Rule violates several of the Administrative Procedure Act's ("APA") substantive and procedural requirements and various constitutional guarantees.[24] Though some raise unique claims, all contend that the Final Rule was issued in excess of the agency's statutory authority and the Court preliminarily agreed.[25] Earlier in the proceedings, the Court considered consolidating its hearing

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[23] *See generally id.*; *id.* at 4.

[24] Orig. Pls.' Am. Compl., ECF No. 93 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates APA's Notice and Comment Requirement (Count II), Violates APA's Ban on Arbitrary and Capricious Conduct (Count III), Violates Nondelegation Principles (Count IV), Violates Take Care Clause (Count V), Violates Due Process (Count VI), Violates the First Amendment (Count VII)); *see also* BlackHawk's Compl., ECF No. 99 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates Separation of Powers (Count II), is Unconstitutionally Vague (Count III), is Arbitrary and Capricious (Count IV), Violates the APA's Procedural Requirements (Count V), Violates the Nondelegation Doctrine (VI), is Contrary to Constitutional Right, Power, Privilege, or Immunity (VII), Violates the Commerce Clause (VIII), Unlawfully Chills First Amendment Speech (IX), Constitutes an Unconstitutional Taking Without Just Compensation (Count X)); *see also* Defense Distributed, et al.'s Compl., ECF No. 143 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates the APA's Procedural Requirements (Counts II and IV), Violates Delegation Principles (Count III), Violates the Second Amendment (Count V), Violates Due Process (Count VI)); *see also* JSD Supply's Mem. 10, ECF No. 150 (expressing intent to adopt Plaintiffs' claims and legal theories in full); *see also* Polymer80's Mem. 6-7, ECF No. 158 (expressing intent to adopt the current plaintiffs' pending claims in full but to assert several additional claims).

[25] Mem. Opinion, ECF No. 56.

on the parties' motions for preliminary injunction with a trial on the merits under Federal Rule of Civil Procedure 65(a)(2).[26] After review of the parties' responsive briefing, however, the Court did not consolidate and now considers Plaintiffs' and Intervenor-Plaintiffs' claims at the summary judgment stage.

Thus, based on the Court's prior decisions in this case, Defendants are preliminarily enjoined from enforcing the Final Rule against Individual Plaintiffs VanDerStok and Andren; and, with limited exception, Tactical Machining, BlackHawk, and Defense Distributed and the companies' customers. Now ripe for the Court's review are the parties' cross-motions for summary judgment on all statutory and constitutional claims, as well as JSD Supply's and Polymer80's motions to intervene. In part A below, the Court will resolve the motions to intervene before turning to the parties' cross-motions for summary judgment in part B.

IV. DISCUSSION

A.

1. Legal Standard[27]

Federal Rule of Civil Procedure 24(b) vests a district court with considerable discretion to permit permissive intervention in a lawsuit, provided (1) the movant's in-

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[26] *See* Orders, ECF Nos. 33, 107.

[27] Original Plaintiffs and Defendants (the "opponents" for purposes of the following intervention analysis only) contest the propriety of allowing additional intervenors to join the lawsuit by either intervention as of right or permissive intervention. Because the Court concludes that permissive intervention under Rule 24(b) is appropriate in this case, it does not reach the merits of intervention as of right under Rule 24(a)(2). FED. R. CIV. P. 24.

tervention is timely, (2) the movant "has a claim or defense that shares with the main action a common question of law or fact," and (3) intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(1)(B), (b)(3); *United States v. City of New Orleans*, 540 F. App'x 380, 380-81 (5th Cir. 2013). With respect to the first element of "timeliness," courts are to consider four distinct factors:

> (1) the length of time between the would-be intervenor's learning of his interest and his petition to intervene;
>
> (2) the extent of prejudice to existing parties from allowing late intervention;
>
> (3) the extent of prejudice to the would-be intervenor if the petition is denied; and
>
> (4) any unusual circumstances [weighing in favor of or against intervention].

In re Lease Oil Antitrust Litig., 570 F.3d 244, 247-48 (5th Cir. 2009) (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977)). Like permissive intervention itself, any determination of timeliness is committed to the court's discretion. *Id.* at 248.

Finally, in addition to the three permissive elements above, courts *may* also consider factors such as "whether the intervenors' interests are adequately represented by other parties" and whether the intervenors "will significantly contribute to full development of the underlying factual issues in the suit." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.* ("*NOPSI*"), 732 F.2d 452, 472 (5th Cir. 1984) (citations omitted).

2. Analysis

The Court begins with timeliness, which requires consideration of four factors. *In re Lease Oil Antitrust Litig.*, 570 F.3d at 247. With respect to the first factor, opponents of intervention argue that JSD Supply and Polymer80's interventions are untimely because they "waited five months after the commencement of this action to seek intervention"[28] and that they were presumably aware of the other "multiple competing lawsuits challenging the Final Rule filed before [it] took effect on August 24, 2022."[29] In other words, they waited too long. But these arguments fail because the relevant inquiry for timeliness is how soon the movant intervened in the instant lawsuit after learning its interest was at risk, which may or may not occur when the complaint is filed. *Id.* at 248. Moreover, a movant's decision to forego intervention in another case is irrelevant to the issue of timeliness in the instant case. *See id.* ("The first timeliness factor is '[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in *the case* before he petitioned for leave to intervene.") (emphasis added). Thus, "[t]he timeliness clock runs either from the time the applicant knew or reasonably should have known of his interest [in the instant litigation] *or* from the time he became aware that his interest would no longer be protected by the existing parties to the lawsuit." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (emphasis added) (citation omitted). Either way, there "are no absolute measures of timeliness," *id.*, and any

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[28] Defs.' Opp. to JSD Supply 3, ECF No. 207; Defs.' Opp. to Polymer80 5, ECF No. 206.

[29] Orig. Pls.' Opp. 6-7, ECF No. 212.

assessment of this factor is wholly committed to the court's discretion. *In re Lease Oil Antitrust Litig.*, 570 F.3d at 248.

Here, the Original Plaintiffs commenced this suit and moved for injunctive relief in early August 2022, shortly before the Final Rule took effect.[30] Among those was Firearms Policy Coalition, a nonprofit organization that sought to protect the interests of its entire member base—of which JSD Supply is a part.[31] On October 1, 2022, the Court concluded that FPC had not demonstrated its associational right to seek injunctive relief on its members' behalf.[32] At that point, JSD Supply recognized its interests would no longer be protected via its membership in FPC and, within three months, it moved to intervene.[33] Days later, on January 9, 2023, Polymer80 similarly moved to intervene.[34] Polymer80 says it sought to intervene only 13 days after ATF issued letters identifying Polymer80's products as violative of the Final Rule.[35] And while the Court will not consider evidence "outside the administrative record" in deciding the *merits* of an APA claim, the Court is not aware of any rule that prohibits it from considering extrinsic evidence for purposes of *timeliness of intervention*.[36] Under these circumstances, the Court is of the view that neither movant waited too long between the time it

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[30] ECF Nos. 1, 15.

[31] Vinroe Decl. ¶ 3, ECF No. 213-1.

[32] Mem. Opinion 15, ECF No. 89.

[33] JSD Supply's Mot., ECF No. 151.

[34] Polymer80's Mot., ECF No. 157.

[35] *Id.* at 2-6.

[36] Orig. Pls.' Opp. 7, ECF No. 212.

learned of its interests in the suit and its motion to intervene.

Next, the Court considers "the extent of prejudice to existing parties from allowing late intervention." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 247. The opponents claim permitting intervention will prejudice the existing parties by delaying ultimate resolution of the case.[37] But here the proper inquiry is the extent to which the existing parties were prejudiced by the intervenors' delay in seeking to intervene, not how the existing parties may be inconvenienced after the intervenors have successfully joined. *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994); *Adam Joseph Res. v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir. 2019). Delay of proceedings, on its own, is not equivalent to prejudice. And the opponents to intervention have offered no explanation about *how* a purported delay of proceedings would be prejudicial. Instead, the opponents have claimed prejudice due to the resulting inconvenience associated with the intervenors' subsequent participation in the lawsuit. That is not enough. "Any potential prejudice caused by the intervention *itself* is irrelevant, because it would have occurred regardless of whether the intervention was timely." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 248 (emphasis added) (citation omitted). Moreover, as permitted by Rule 54, the Court finds no just reason it should delay entry of summary judgment on the existing parties' pending claims,

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[37] Defs.' Opp. to JSD Supply 3, 7, ECF No. 207; Defs.' Opp. to Polymer80 5-6, 9-10, ECF No. 206 (noting Polymer80 asserts ten causes of action separate from those of the existing plaintiffs); Original Pls.' Opp. 8, ECF No. 212.

which the intervenors have expressly agreed to adopt.[38] FED. R. CIV. P. 54(b). Thus, any prejudice that delayed proceedings might cause the parties (though doubtful) is cured by this Court's resolution and entry of judgment now as to those shared claims.

Third, the Court considers the "extent of prejudice to the would-be intervenor if the petition is denied." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 247-48. Denying intervention would prejudice the would-be intervenors by delaying a favorable judgment, without which their declining revenues would be prolonged, potentially forcing their dissolution.[39] Polymer80 concedes it would not be prejudiced if denied intervention in this case, provided its separate lawsuit and preliminary injunction in that case is not dismissed.[40] This conditional concession undoubtedly minimizes its claims of

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[38] JSD Supply's Mem. 10, ECF No. 150 (expressing intent to adopt Plaintiffs' claims and legal theories in full); Polymer80's Mem. 6-7, ECF No. 158 (expressing intent to adopt Plaintiffs' summary judgment briefing in full and to assert additional distinct claims). To the extent Polymer80 wishes to seek summary judgment on its alternate claims, it may do so. That Defendants may be required to litigate the additional claims is irrelevant, because they would be required to do so whether Polymer80 brought those claims in this case or a separate case.

[39] Kelley Decl. ¶¶ 13-14, Polymer80 App. 6, ECF No. 159 (noting the "profound economic harm" that Polymer80 has experienced following the Final Rule's effective date); Vinroe Supp. Decl. ¶ 3, ECF No. 213-1 (noting JSD Supply's revenues have dropped by more than 73% since the Final Rule's effective date).

[40] Polymer80's Reply 6, ECF No. 214. After it sought intervention and learned resolution of that motion would be deferred for several months, Polymer80 filed an independent lawsuit before this Court. *See Polymer80, Inc. v. Garland*, Civil Action No. 4:23-cv-00029-O (N.D. Tex. Jan. 9, 2023).

prejudice in the instant suit. But because the "most important consideration" in determining intervention is the prejudice to the parties *opposing* intervention—and the Court finds that none exists—this concession is of little weight in the Court's decision. *Rotstain v. Mendez*, 986 F.3d 931, 938 (5th Cir. 2021).

Fourth, the Court finds no "unusual circumstances" that weigh heavily for or against intervention. *In re Lease Oil Antitrust Litig.*, 570 F.3d at 248. Defendants contend that permitting Polymer80's intervention in this case while the company's independent and duplicative suit is pending would violate the rule against claim-splitting.[41] That rule permits—but does not require—a court to dismiss a second complaint that "alleg[es] the same cause of action as a prior, pending, related action." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) (authorizing courts to dismiss a second complaint whether it is duplicative of a previously filed and still active suit). The claim-splitting rule is permissive, however, and does not require the Court to take any action at all. *Id.* In any event, if the rule were applied here, the appropriate course would be to dismiss Polymer80's independent suit, which it filed *after* attempting its initial intervention here.

Nor are the other permissible timeliness factors—"whether the intervenors' interests are adequately represented by other parties" and whether the intervenors "will significantly contribute to full development of the underlying factual issues in the suit"—particularly compelling. *NOPSI*, 732 F.2d at 472. Defendants argue

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[41] Defs.' Opp. to Polymer80 3-4, 9, ECF No. 206.

intervention will not "significantly contribute to the full development of the underlying factual issues" because the existing parties have already "fully developed and briefed their claims," and intervenors therefore cannot meaningfully contribute.[42] Elsewhere, however, Defendants point out that Polymer80 raises ten distinct causes of action, all of which presumably require further development.[43] In response, Polymer80 says its status as "the industry leader in the design, manufacture, and distribution of the products that ATF" seeks to regulate will significantly contribute to the factual development of the underlying issues in dispute but offers no more than that bare assertion.[44] For its part, JSD Supply offers no rebuttal to Defendants. Thus, on the briefing before it, the Court finds that this factor is, at best, neutral for purposes of intervention or weighs slightly against intervention. But given that the other factors favor intervenors, the Court does not find this sufficient to bar intervention.

Finally, the opponents also argue that JSD Supply and Polymer80 have other means of asserting their interests.[45] Indeed, Polymer80 has a separate suit currently pending before this Court.[46] But whether an intervenor has other adequate means of protecting its in-

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[42] Defs.' Opp. to Polymer80 9, ECF No. 206; Defs.' Opp. to JSD Supply 7, ECF No. 207.

[43] Defs.' Opp. to Polymer80 6 n.3, ECF No. 206.

[44] Polymer80's Reply 8, ECF No. 214.

[45] Defs.' Opp. to JSD Supply 6-7, ECF No. 207; Defs.' Opp. to Polymer80 9-10, ECF No. 206; Original Pls.' Opp. 5-6, ECF No. 212.

[46] *Polymer80, Inc. v. Garland*, Civil Action No. 4:23-cv-00029-O (N.D. Tex. Jan. 9, 2023).

terests is not a dispositive or necessary factor for the Court's decision to grant permissive intervention. Though the Court could require the parties to initiate or maintain their own lawsuits, the purpose of Rule 24 and the principle of judicial efficiency counsel against that course of action. *See United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991) (noting Rule 24's goals of achieving "judicial economies of scale by resolving related issues in a single lawsuit" while preventing the single lawsuit "from becoming fruitlessly complex or unending") (cleaned up). Allowing intervention preserves judicial resources by preventing multiple parallel proceedings from running concurrently in multiple courts or before multiple jurists when this Court is already well-acquainted with the parties' respective claims. Nor is there a need to divide lawsuits where, as here, the would-be intervenors largely agree to adopt the claims and briefing schedule already before the Court, which reduces the complexity of the case.

* * * *

In sum, the Court holds that all requisite elements for permissive intervention—timeliness, shared causes of action, and prejudice—weigh in favor of allowing the intervenors to join the lawsuit. For these reasons, the Court **GRANTS** JSD Supply's and Polymer80's motions to intervene on permissive grounds. Because JSD Supply and Polymer80 have agreed to adopt the current Plaintiffs' summary judgment briefing with respect to their shared claims, and because those express intentions inform the Court's discretionary decision to permit intervention here, the intervenors are barred from separately moving for summary judgment or filing supplemental briefing on any of the existing claims. How-

ever, Polymer80 may move for summary judgment on its unique claims to the extent those claims are not mooted by the Court's decision today.

B.

1. Legal Standards

Disputes arising under the APA are commonly resolved on summary judgment, wheredistrict courts sit as an appellate tribunal to decide legal questions on the basis of the administrative record. *See Amin v. Mayorkas*, 24 F.4th 383, 391 (5th Cir. 2022). Summary judgment is proper where the Court finds that there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Upon review of agency action, district courts apply the APA, which requires the reviewing court to "hold unlawful and set aside agency action" that the court finds to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and] (D) without observance of procedure required by law." 5 U.S.C. § 706(2).

Among other procedural requirements, the APA requires agencies to provide "legislative" rules (i.e., substantive regulations) for public notice and comment, *id.* § 553(b), and to ensure that the final version of such a rule is a "logical outgrowth" of the agency's initial regulatory proposal. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021). The APA's arbitrary and capricious standard requires that agency action be

both "reasonable and reasonably explained," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), meaning agencies must not "rel[y] on factors which Congress has not intended it to consider" or "entirely fail[] to consider an important aspect of the problem" when issuing regulations. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Once a court determines the contested agency action falls short of the APA's substantive or procedural requirements, the reviewing court "shall" set aside the unlawful agency action. 5 U.S.C. § 706(2); *Data Mktg. P'ship, LP v. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022).

2. Article III Standing

As a preliminary defense, Defendants argue that some of the plaintiffs, the Individual Plaintiffs and the non-profit organizations, are not entitled to entry of summary judgment because they lack standing to challenge the Final Rule. Because "standing is not dispensed in gross," the general rule is that each plaintiff must demonstrate a personal stake in the outcome of the case or controversy at bar. *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017). This means each plaintiff to a case "must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (cleaned up). When there are multiple plaintiffs or intervenors to a lawsuit that request the same form of relief, however, only "*one* plaintiff must have standing to seek each form of relief requested." *Id.* at 1651 (emphasis added).

Here, among other requested forms of relief, all plaintiffs and intervenors—including those litigants whose standing is not in question—ask this Court to declare unlawful and set aside the Final Rule.[47] Accordingly, the Court could address the legality of the Final Rule regardless of whether the Individual Plaintiffs and the non-profit organizations have standing. Nevertheless, because these parties will not be entitled to unique forms of relief (e.g., party-specific injunctive relief or attorneys' fees) without independently demonstrating standing, the Court addresses the individuals' and the organizations' standing before turning the merits of their claims.[48]

To establish Article III standing, a plaintiff must show it has suffered (1) an injury-in-fact (2)that is fairly traceable to the defendants' conduct, and (3) is likely to be redressed by a favorable judicial decision. *Id.* at 1650. As the parties invoking federal jurisdiction, plaintiffs bear the burden of proving each element of standing. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992).

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[47] Orig. Pls.' Am. Compl. 57, ECF No. 93 (seeking vacatur, injunctive relief, attorneys' fees and costs, etc.); BlackHawk's Compl. 33, ECF No. 99 (same); Defense Distributed, et al.'s Compl. 27, ECF No. 143 (same); JSD Supply's Proposed Compl. 29-30, ECF No. 149-2 (same); Polymer80's Proposed Compl. 43-44, App. 101-02, ECF No. 159 (same).

[48] To be entitled to attorneys' fees, a plaintiff must independently establish standing and prevail on the merits of an underlying claim. *See, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("An interest in attorney's fees is insufficient to create an Article III case or controversy *where none exists on the merits of the underlying claim*.") (cleaned up) (emphasis added).

i. Individual Plaintiffs

First, Defendants argue that Individual Plaintiffs VanDerStok and Andren cannot demonstrate standing because "the only purported injury they plausibly invoke—a $30 transfer fee that certain FFLs purportedly would charge them to facilitate a firearm purchase—is not fairly traceable to the Rule."[49] Defendants contend that an FFL's independent decision to charge Individual Plaintiffs a transfer fee to facilitate purchase of newly regulated products bears no causal relationship to the Final Rule, and is therefore not fairly traceable to Defendants' conduct.[50] But Defendants are wrong on this point.

While the Supreme Court has declined to endorse theories of standing "that rest on *speculation* about the decisions of independent actors," where a plaintiff can make a showing of *de facto* causality, standing's traceability element is satisfied. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (emphasis added). Here, Individual Plaintiffs' theory of standing is not speculative. Instead, it relies "on the predictable effect of Government action on the decisions of third parties." *Id.* Individual Plaintiffs have confirmed that the FFLs they would use to facilitate their purchases will in fact charge a transfer fee.[51] And it is highly predictable that FFLs would charge for this service, particularly when faced with the prospect of an influx of customers who need to make purchases of certain products through

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[49] Defs.' Reply 2, ECF No. 204; Defs.' Cross-Mot. 11-12, ECF No. 181.

[50] Defs.' Reply 2-3, ECF No. 204.

[51] VanDerStok Decl. ¶¶ 2-6, ECF No. 62-1; Andren Decl. ¶¶ 2-6, ECF No. 62-2.

an FFL as a result of a recent government mandate. Absent the requirements of the Final Rule, the Individual Plaintiffs would not purchase the regulated products through an FFL and would therefore not incur an associated transfer fee. This is sufficient to show *de facto* causality. Thus, the Court is satisfied that Individual Plaintiffs' purported injury is fairly traceable to Defendants' actions.

Even if the FFLs' independent decision to charge a transfer fee broke the chain of causation, Individual Plaintiffs have an alternative basis for standing that Defendants largely ignore. In a footnote, Defendants dismiss Individual Plaintiffs' other alleged injury—the threat of criminal prosecution should they violate the Rule—as simply "not credible."[52] They say the risk of criminal prosecution is not a cognizable injury because the costs Individual Plaintiffs would have to incur to avoid criminal liability "are merely *de minimis*."[53]

Here, however, Defendants conflate the injury analysis required for Article III standing with the irreparable harm analysis required for a preliminary injunction.[54] It is true that, for purposes of injunctive relief,

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[52] Defs.' Reply 2 n.3, ECF No. 204.

[53] *Id.* (""Plaintiffs do not face a 'Hobson's choice' whether to comply with a regulation or risk criminal prosecution when the costs of compliance are merely *de minimis*.").

[54] Plaintiffs respond that "[t]he Agencies provide no argument as to . . . how Individual Plaintiffs could suffer irreparable harm [as the Court previously held] and yet not have standing." Pls.' Reply 3, ECF No. 191. But irreparable harm for purposes of injunctive relief and Article III injury-in-fact are not equivalents. And Plaintiffs offer no authority indicating that a showing of irreparable harm for purposes of injunctive relief automatically satisfies Article III's injury-in-fact requirement. Moreover, many courts

a plaintiff must allege an irreparable injury that is more than merely *de minimis*. *See Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). But Defendants offer no authority for the proposition that a plaintiff's alleged injury must pass a certain threshold to be cognizable for purposes of Article III. Nor is the Court aware of any such requirement.

It is well established that a credible threat of government action, on its own, provides a plaintiff with a sufficient basis for bringing suit. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). This remains true even if a plaintiff takes steps to protect themselves from prosecution. As the Supreme Court has made clear, a "plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id.* Thus, even if Individual Plaintiffs in this case ameliorated the threat of government enforcement by making their purchases through an FFL and paying the associated fee (action), or by simply refraining from purchasing the regulated products they want to buy (inaction), they do not lose their right to challenge the Final Rule.[55] Defendants offer no argu-

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address these issues separately, confirming that the analysis is distinct. *See, e.g.*, *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378 (6th Cir. 2020) (analyzing Article III standing and irreparable harm for purposes of injunctive relief separately); *East Bay Sanctuary v. Trump*, 932 F.3d 742, 762 (9th Cir. 2018) (same); *Geer's Ranch Café v. Guzman*, 540 F. Supp. 3d 638 (N.D. Tex. 2021) (same) (O'Connor, J.).

[55] For the same reasons, Defendants' argument that FPC cannot establish Article III standing *in its own right* fails. *See* Defs.' Reply 3 n.4. As FPC avers, it owns and uses products now subject to the Final Rule and, though a corporate entity, will suffer the same

ment regarding the traceability or redressability of this alternative injury. Nor could they. Thus, the Court holds that Individual Plaintiffs' threat of civil or criminal penalties is a cognizable injury under Article III and that, on this basis also, they have demonstrated standing to pursue their claims.

ii. Non-profit Organizations

Second, Defendants claim the organizations—Firearms Policy Coalition and the Second Amendment Foundation—have failed to demonstrate associational (or organizational) standing. The associational standing doctrine permits a traditional membership organization "to invoke the court's [injunctive or declaratory] remedial powers on behalf of its members." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). To do so, the organization must satisfy a three-prong test showing that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, --- S. Ct. ---, 2023 WL 4239254, at *8 (U.S. June 29, 2023) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

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financial injury as Individual Plaintiffs if required to comply and the same threat of prosecution for non-compliance. Orig. Pls.' Br. 50, ECF No. 141; Combs Decl. ¶¶ 9-11, ECF No 62-4.

Defendants do not meaningfully contend that FPC and SAF cannot satisfy the three-prong *Hunt* test.[56] Instead, they challenge the non-profits' statuses as "traditional membership organizations" arguing that, because they cannot satisfy this threshold requirement, they cannot establish associational standing. Defendants contend that, under Fifth Circuit precedent, an organization can only prove itself a "traditional membership organization" if it provides evidence that its members both fund and control the organization's activities. By contrast, FPC and SAF contend that they are traditional membership organizations because they have members nationwide who, by donating to their organizations, have "joined voluntarily to support [the non-profits'] mission[s]."[57] *Students for Fair Admissions, Inc. v. University of Texas at Austin*, 37 F.4th 1078, 1084 (5th Cir. 2022). Under the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, that is all the evidence that is required. 2023 WL 4239254, at *9. "Where, as here, an organization has identified members and represents them in good faith, [the Supreme Court's decisions] do not require further scrutiny into how the organization operates." *Id.* at 9.

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[56] Defs.' Br. 13, ECF No. 181; Defs.' Reply 3-4, ECF No. 204. Defendants simply point to the Court's earlier conclusion that, at the preliminary injunction stage, FPC did not carry its burden to demonstrate associational standing. Defs.' Br. 13, ECF No. 181 (citing Mem. Opinion 12-15, ECF No. 89).

[57] Orig. Pls.' Reply 8, ECF No. 191; Combs Decl. ¶ 8, ECF No. 62-4 (describing the voluntary and mission-driven membership base of FPC); Defense Distributed, et al.'s Reply 2, ECF No. 193; Gottlieb Decl. ¶ 2, ECF No. 166-2 (describing SAF's national membership base).

As Defendants concede, the Court has already recognized that SAF satisfies the *Hunt* test.[58] Based on its summary judgment briefing, so does FPC. First, several of FPC's members—Individual Plaintiffs, Tactical Machining, and BlackHawk, who are all parties to this suit—have standing to sue in their own right. Second, FPC's organizational purpose to advocate for their members' individual liberties, separation of powers, and limited government are clearly germane to this suit challenging Defendants' asserted authority to regulate the manufacture of personal firearms.[59] Third, because FPC seeks equitable remedies of declaratory relief and vacatur of the Final Rule, there is no need for FPC's individual members to participate in the lawsuit.

* * * *

In sum, the Court holds that Individual Plaintiffs and FPC—in its own right—have standing to pursue their claims for relief. Furthermore, FPC and SAF have demonstrated associational standing and may pursue relief on their members' behalf. Because Defendants do not contest the standing of Tactical Machining, BlackHawk, or Defense Distributed, these parties are similarly entitled to pursue their respective claims for relief.

3. Statutory Claims

The Original Plaintiffs and Intervenors (collectively "Plaintiffs" going forward) attack theFinal Rule on a host of statutory and constitutional grounds. However, there exists an ordinary rule "that a federal court

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[58] Order 5, ECF No. 137.

[59] *See generally* Combs Decl., ECF No. 62-4; Orig. Pls.' Br. 49, ECF No. 144.

should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine*, 415 U.S. 528, 547 (1974); *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. Before deciding the constitutional question, it was incumbent on [the lower] courts to consider whether the statutory grounds might be dispositive.") (cleaned up). Thus, "if a case raises both statutory and constitutional questions, the inquiry should focus initially on the statutory question[s]. . . . If the lower court finds that statutory ground dispositive, resolution of the constitutional issue will be obviated." *Jordan v. City of Greenwood, Miss.*, 711 F.2d 667, 669 (5th Cir. 1983). Because the Court concludes that the ATF has clearly and without question acted in excess of its statutory authority, and that this claim is dispositive, the Court declines to address the constitutional questions presented.

The Court begins with Plaintiffs' shared claim that, in attempting to regulate products that are not yet a "frame or receiver," and therefore not a "firearm" for purposes of the Gun Control Act, the ATF has acted in excess of its statutory jurisdiction. 5 U.S.C. § 706(2)(C). As they argued at the preliminary injunction stage, Plaintiffs maintain that the Final Rule exceeds ATF's statutory authority in two primary ways. First, they argue that the Final Rule expands ATF's authority over parts that may be "readily converted" into frames or receivers, when Congress limited ATF's authority to "frames or receivers" as such. Second, they argue that the Final Rule unlawfully treats component parts of a

weapon in the aggregate (i.e., a weapon parts kit) as the equivalent of a firearm.[60] The Court agrees with Plaintiffs.

Basic principles of statutory interpretation decide this case. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (quoting *Roberts v. Sea-Land Services, Inc.*, 556 U.S. 93, 101 (2012)). If the disputed statutory language is unambiguous, as it is here, "the sole function of the courts is to enforce [the law] according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (cleaned up). The Court begins with "the assumption that the words were meant to express their ordinary meaning." *United States v.*

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[60] Orig. Pls.' Supp. Br. Regarding Count I, ECF No. 133; *see also* Defense Distributed, et al.'s Br. in Support of Mot. for Summ. J., ECF No. 166 (joining and adopting Original Plaintiffs' Counts and summary judgment briefing on behalf of Defense Distributed and Second Amendment Foundation). BlackHawk offers additional arguments in support of its claim that the agency has exceeded its statutory authority, some of which are closely related to the arguments before the Court and other that are novel. *See generally* BlackHawk's Supp. Br. Regarding Count I 7-10, ECF No. 134 (e.g., arguing that the Final Rules requirement that FFLs retain records indefinitely exceeds the agency's statutory authority). But because Plaintiffs' primary arguments in support of their shared Counts I are dispositive, the Court need not consider each of the alternative grounds for reaching the same result.

Kaluza, 780 F.3d 647, 659 (5th Cir. 2015) (quoting *Bouchikhi v. Holder*, 676 F.3d 173, 177 (5th Cir. 2012)). If a statute "includes an explicit definition," however, the Court "must follow that definition, even if it varies from a term's ordinary meaning." *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) (cleaned up).

i. Parts that *may become* receivers are not receivers.

Congress carefully defined its terms in the Gun Control Act. The primary definition of "firearm" in the GCA contains three parts: "any weapon (including a starter gun) which [1] will or [2] is designed to or [3] may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). Under this primary definition, a firearm is first and foremost a *weapon*. Underscoring that point, Congress explicitly named starter guns in the definition because starter guns are not obviously weapons. Then, because weapon parts also are not "weapons," Congress created a secondary definition covering specific weapon parts: "the frame or receiver of any such weapon." *Id.* § 921(a)(3)(B).[61] Notably, Congress did not cover all weapon parts—only frames and receivers. And *only* the frames and receivers "of any such weapon" that Congress described in its primary definition.

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[61] The Gun Control Act defines "firearm" in full as: "(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." *Id.* § 921(a)(3).

Because Congress did not define "frame or receiver," the words receive their ordinary meaning. *See* 18 U.S.C § 921 (defining other terms); *Kaluza*, 780 F.3d at 659. Contrary to Defendants' assertion, in an interpretive dispute over a statutory term's meaning, the Court does not simply "leav[e] the precise definition of that term to the discretion and expertise of ATF."[62]

Nor is the Court bound by the agency's definition of an unambiguous statutory term, even if the ATF has "long provided regulations defining . . . 'frame or receiver.'"[63]

Plaintiffs do not take issue with ATF's 1978 definition of "frame or receiver." This is because, as Defendants themselves acknowledge, ATF's prior regulatory definitions have been "*consistent with common and technical dictionary definitions*."[64] Statutory construction entails "follow[ing] the plain and unambiguous meaning of the statutory language, [and] interpreting undefined terms according to their ordinary and natural meaning and the overall policies and objectives of the statute. In determining the ordinary meaning of terms, diction-

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[62] Defs.' Supp. Br. Regarding Count I 9, ECF No. 132 (citing no supporting authority for the proposition that agency's definition of an unambiguous statutory term controls).

[63] Defs.' Supp. Br. Regarding Count I 6-7, ECF No. 132. Even if the phrase "frame or receiver" was ambiguous, the Court would not defer to ATF's interpretation under *Chevron* because Defendants have not invoked the doctrine in this case, because the statute in question imposes criminal penalties, and because the Final Rule is a reversal of the ATF's prior interpretive position. *Cargill v. Garland,* 57 F.4th 447, 464-68 (5th Cir. 2023); Defs.' Opp. to Pls.' Mot. for Prelim. Inj. 17-18, ECF No. 41.

[64] Defs.' Supp. Br. Regarding Count I 9, ECF No. 132 (emphasis added).

aries are often a principal source." *NPR Invs., L.L.C. ex rel. Roach v. United States*, 740 F.3d 998, 1007 (5th Cir. 2014) (cleaned up). Near the time of the GCA's enactment in 1968, Webster's Dictionary defined "frame" as "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm" and "receiver" as "the metal frame in which the action of a firearm is fitted and which the breech end of the barrel is attached." *Webster's Third International Dictionary* 902, 1894 (1971).[65] ATF's prior regulatory definition, which defined "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," tracks that common definition.[66] Title and Definition Changes, 43 Fed. Reg. at 13,537.

But the Final Rule's amended definition of "frame or receiver" does not accord with the ordinary meaning of those terms and is therefore in conflict with the plain statutory language. Departing from the common understanding of "frame or receiver," Defendants now assert ATF's authority to regulate "partially complete, disassembled, or nonfunctional frame[s] or receiver[s]" that are "designed to or may readily be completed, assembled, restored, or otherwise be converted to function as a frame or receiver." 27 C.F.R. § 478.12(c). The

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[65] *See also John Olson*, *Olson's Encyclopedia of Small Arms* 72 (1985) (defining a receiver as "the part of a gun that takes the charge from the magazine and holds it until it is seated in the breech. Specifically, the metal part of a gun that houses the breech action and firing mechanism").

[66] ATF's 1968 definition of "frame or receiver" was identical. *Commerce in Firearms and Ammunition*, 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968).

parts must be "clearly identifiable as an unfinished component part of a weapon." *Id.* In deciding whether something is a partially complete frame or receiver, ATF may consider other materials such as molds, instructions, and marketing materials "that are sold, distributed, or possessed with the item." *Id.*

As this Court has previously discussed, the definition of "firearm" in the Gun Control Act does not cover all firearm parts. It covers specifically "the frame or receiver of any such weapon" that Congress defined as a firearm. 18 U.S.C. § 921(a)(3)(B). And that which *may become* or *may be converted to* a functional receiver is not itself a receiver. Congress could have included firearm parts that "may readily be converted" to frames or receivers, as it did with "weapons" that "may readily be converted" to fire a projectile. *Id.* § 921(a)(3)(A), (a)(4)(B). But it omitted that language when talking about frames and receivers. "[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) (citation and internal quotation marks omitted). Likewise, when Congress uses a phrase in one part of a definition and excludes that phrase from another part of the very same definition, courts should give effect to Congress's deliberate exclusion.

Congress excluded other adjectives that ATF adds to its definition. Specifically, the Final Rule covers "disassembled" and "nonfunctional" frames and receivers. 27 C.F.R. § 478.12(c). Congress's definition does not. Again, compare the language in Congress's primary def-

inition of "firearm" to its secondary definition covering frames and receivers. The primary definition of "firearm" includes any "weapon" that "is designed to" fire a projectile. 18 U.S.C. § 921(a)(3)(A). That language covers disassembled, nonfunctional, and antique firearms because they are "designed" to fire projectiles even if they are practically unable to do so. But Congress wanted to exclude antiques, so it explicitly said the "term does not include an antique firearm," once again demonstrating awareness of the scope of the language it chose. *Id.* § 921(a)(3). In contrast, Congress did not choose to cover firearm parts that are "designed" to be frames or receivers—that is, incomplete, nonfunctional frames or receivers. "That omission is telling," particularly when Congress used the more expansive terminology in the same definition. *Collins*, 141 S. Ct. at 1782. In sum, ATF's new definition of "frame or receiver" in 27 C.F.R. § 478.12(c) is facially unlawful given its conflict with the ordinary meaning of those terms as read within their immediate statutory context. *Sturgeon*, 577 U.S. at 438 (cleaned up).

The Court's earlier acknowledgement that ATF does indeed have discretion to decide "whether a particular component is a frame or receiver" based upon that component's "degree of completeness" does not alter this analysis.[67] Relying on the Court's acknowledgement, Defendants claim that is all the Final Rule purports to do: "provide[] more specific guidance about the criteria ATF uses in making th[e] determination" whether a component is a frame or receiver.[68] But that is not all the regulation does. Rather, the Final Rule sets outs

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[67] Mem. Opinion 10, ECF No. 56.

[68] Defs.' Supp. Br. Regarding Count I 10, ECF No. 132.

the criteria ATF will use to determine whether a component "may readily be . . . *converted to function*" as a frame or receiver. 27 C.F.R. § 478.12(c) (emphasis added). As the Court previously explained, the issue in this case is whether ATF may properly regulate a component as a "frame or receiver" even after ATF determines that the component in question is *not* a frame or receiver.[69] It may not. Logic dictates that a part cannot be both *not yet* a receiver and receiver at the same time. Defendants' reliance on that logical contradiction is fatal to their argument.

Predictably, Defendants disagree with the Court's interpretation of how the regulation operates and argue that "the Final Rule's amended definition treats a component as a frame or receiver only when ATF has determined that the component *is* a frame or receiver."[70] Again, a plain reading of the Final Rule's text belies this objection.[71] A part that has yet to be completed or converted to function as frame or receiver is *not* a frame or receiver. ATF's declaration that a component is a "frame or receiver" does not make it so if, at the time of evaluation, the component does not yet accord with the ordinary public meaning of those terms.

Thus, the Court's prior acknowledgment that "[a]n incomplete receiver may still be a receiver *within the meaning of the statute*, depending on the degree of completeness" is not a contradiction.[72] To be a receiver "within the meaning of the statute" requires that the

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[69] *Id.*

[70] *Id.*

[71] Nor do Defendants invoke *Auer* deference here.

[72] Mem. Opinion 10, ECF No. 56 (emphasis added).

particular component possess all the attributes of a receiver as commonly understood (i.e., the component must "provide[] housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel") at the point of evaluation, not "readily" in the near term.

Nevertheless, Defendants continue to press their case with reference to historical agency action. Defendants offer several classification letters in which ATF previously determined that a particular component was (or was not) a "firearm" for purposes of the GCA based on the item's stage of manufacture.[73] They contend that this historical practice proves that ATF does, in fact, hold statutory authority to regulate firearm components that may "readily" become a frame or receiver.[74] But historical practice does not dictate the interpretation of unambiguous statutory terms. The ordinary public meaning of those terms does. If these administrative records show, as Defendants contend, that ATF has previously regulated components that are not *yet* frames or receivers but could *readily be converted into* such items, then the historical practice does nothing more than confirm that the agency has, perhaps in multiple specific instances over several decades, exceeded the lawful bounds of its statutory jurisdiction.[75] That the agency may have historically acted *ultra vires*

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[73] *See* Defs.' Supp. Br. Regarding Count I 7-10, ECF No. 132.

[74] *See id.*

[75] *Id.* at 8 ("Under the previous definition, then, ATF regularly applied the definition of 'frame or receiver' to some unfinished or incomplete frames or receivers if they had reached a sufficiently advanced stage of the manufacturing process that they *could be readily converted to a functional state*.").

does not convince the Court it should be permitted to continue the practice.

Finally, Defendants argue that the Final Rule's redefinition of the "frame or receiver" is appropriate because it better achieves the goals Congress intended to accomplish in enacting the federal firearms laws.[76] They warn that "[u]nder any other approach, persons could easily circumvent the requirements of the GCA and NFA by producing or purchasing almost-complete [purported] frames or receivers that could easily be altered to produce a functional frame or receiver."[77] But "the best evidence of Congress's intent is the statutory text." *NFIB v. Sebelius*, 567 U.S. 519, 544 (2012). And the text of 18 U.S.C. § 921(a)(3), read in context, indicates that when Congress sought to regulate *parts* of weapons, it did so meticulously. Vague countervailing assertions about Congress's purpose in enacting the federal firearms laws do not override this analysis.

ii. A weapon parts kit is not a firearm.

The Gun Control Act defines a "firearm" as "(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). The Final Rule amends that definition, adding that the term "firearm" "shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to

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[76] *Id.* at 11.

[77] *Id.*

expel a projectile by the action of an explosive." 27 C.F.R. § 478.11 (definition of "firearm"). But that language conflicts with the statute's definition of "firearm."

As this Court previously concluded, ATF has no general authority to regulate weapon parts.[78] When Congress enacted the GCA, it replaced the FFA that authorized regulation of "any part or parts of" a firearm. Federal Firearms Act of 1938, Ch. 850, Pub. L. No. 75-785, 52 Stat. 1250, 1250 (1938) (repealed 1968). In proposing the new regulation, Defendants even acknowledged as much.[79] Instead, under the GCA, the only firearm parts that fall under ATF's purview are "the frame or receiver of any such weapon" that Congress defined as a firearm. 18 U.S.C. § 921(a)(3)(B). But the Final Rule goes further by regulating weapon parts kits (that is, "aggregations of weapon parts")[80] that are "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.

The GCA covers "any *weapon*" that is "designed to" or "may readily be converted to" fire a projectile. 18 U.S.C. § 921(a)(3)(A) (emphasis added). And Defendants contend that weapon parts kits satisfy this defini-

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[78] Mem. Opinion, ECF No. 56.

[79] *Definition of "Frame or Receiver" and Identification of Firearms* ("Proposed Rule"), 86 Fed. Reg. 27,720, 27,720 (May 21, 2021) ("Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that '[t]he present definition of this term includes "any part or parts" of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words "frame or receiver" for the words "any part or parts."'").

[80] Defs.' Resp. to Mot. for Prelim. Inj. 13, ECF No. 41.

tion because they are clearly "'designed to' fire a projectile" and are sold to customers "for the sole purpose of assembling the kits into functional weapons capable of firing a projectile."[81] They say "[a] weapon parts kit is nothing more than a disassembled, currently nonfunctional weapon incapable of firing a projectile in its present form, but that is designed and intended to be assembled or completed to do so."[82] But Congress's definition does not cover weapon *parts*, or aggregations of weapon parts, regardless of whether the parts may be readily assembled into something that may fire a projectile. To read § 921(a)(3)(A) as authorizing ATF to regulate any aggregation of weapon parts that may readily be converted into a weapon would render § 921(a)(3)(B)'s carveout for "frame[s] or receiver[s]" superfluous. Accepting Defendants' interpretation would be to read the statute as authorizing regulation of (A) weapon parts generally, and (B) two specific weapon parts. *SEC v. Hallam*, 42 F.4th 316, 337 (5th Cir. 2022) (noting courts should be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law") (citation omitted). This despite Congress's purposeful change in the law between the FFA and the GCA, which limited agency authority to regulation of only frames and receivers. "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." *Id.* (quoting *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020)).

The statutory context repeatedly confirms that Congress intentionally chose not to regulate "weapon" parts

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[81] Defs.' Supp. Br. Regarding Count I 13, ECF No. 132.

[82] *Id.* at 14.

generally. As further evidence, look to § 921(a)(4)(C), which does allow for the regulation of "parts," but only parts of "destructive devices"—one of the four statutory sub-definitions of "firearm." *Id.* § 921(a)(3)(D). The term "destructive device" is defined as "any explosive, incendiary, or poison gas," such as a bomb, grenade, mine, or similar device. *Id.* § 921(a)(4)(A). The definition of "destructive device" also includes "any type of weapon" that "may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter." *Id.* § 921(a)(4)(B). For example, suppose a manufacturer tried to sell a parts kit to make a homemade grenade. ATF could regulate that parts kit because it can regulate "any combination of parts either designed or intended for use in converting any device into" a grenade, from which a grenade "may be readily assembled." *Id.* § 921(a)(4)(C). Likewise for bombs, rockets, missiles, and other destructive devices. But commonly sold firearms such as 9mm pistols or .223 rifles do not fall under the specialized definition of "destructive devices," so weapon parts kits for those firearms cannot be properly regulated as components of "destructive devices." *Id.* § 921(a)(4).

In sum, the Gun Control Act's precise wording demands precise application. Congress *could have* described a firearm as "any combination of parts" that would produce a weapon that could fire a projectile. It used that language elsewhere in the definition. *Id.* § 921(a)(4)(C). Congress could have described a firearm as any part "designed" to be part of a weapon. It used that language, too. *Id.* § 921(a)(3)(A), (a)(4)(C). Congress could have described a firearm as a set of parts that "may be readily assembled" into a weapon, as

it did for "destructive device." *Id.* § 921(a)(4)(C). Congress could have written all those things, and the very definition of "firearm" demonstrates that Congress knew the words that would accomplish those ends.[83] But Congress did not regulate firearm parts as such, let alone aggregations of parts that are "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. Accordingly, the Final Rule's attempt to regulate weapon parts kits lacks statutory support.

As the Court has previously discussed, Defendants' arguments that the Final Rule's regulation of weapon parts kits is consistent with existing judicial interpretations of the Gun Control Act are unavailing.[84] Defendants' cited cases demonstrate that courts understand

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[83] Congress's definition of "machinegun" elsewhere in the U.S. Code is a great example of a definition that would fit the kind of rule ATF has in mind:

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

26 U.S.C. § 5845(b) (emphases added); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) ("Our more natural reading is confirmed by the use of the word 'contract' elsewhere in the United States Code. . . . ").

[84] *See* Defs.' Supp. Br. Regarding Count I 13; Defs.' Resp. to Mot. for Prelim. Inj. 20-21, ECF No. 41.

the constraints of the Gun Control Act's definitions. The only Fifth Circuit case Defendants cite held that a disassembled shotgun was still a "firearm" under the Gun Control Act's definition. *See United States v. Ryles*, 988 F.2d 13, 16 (5th Cir. 1993). There, the government argued the shotgun "was only 'disassembled' in that the barrel was removed from the stock and that it could have been assembled in thirty seconds or less." *Id.* But the Fifth Circuit only agreed after surveying other cases in which courts held that inoperable weapons were still firearms "so long as those weapons 'at the time of the offense did not appear clearly inoperable.'" *Id.* No weapon parts kit would pass that test, and Defendants do not claim they would.[85]

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[85] The best case in support of Defendants is *United States v. Wick*, 697 F. App'x 507 (9th Cir. 2017), in which the Ninth Circuit upheld a conviction for unlicensed firearm dealing based on evidence that the defendant had sold a "complete Uzi parts kits that could 'readily be converted to expel a projectile by the action of an explosive,' thus meeting the statute's definition of a firearm." *Id.* at 508 (quoting 18 U.S.C. § 921(a)(3)(A)). But *Wick* is outside this circuit, nonprecedential, and contains no analysis of the statutory text.

Defendants' remaining cases are even less applicable. *See United States v. Stewart*, 451 F.3d 1071, 1073 n.2 (9th Cir. 2006) (affirming the district court's denial of an evidentiary hearing on whether probable cause supported a search warrant based on the defendant's possession of weapon parts kits that could "readily be converted" into firearms), *overruled on other grounds by Dist. of Columbia v. Heller*, 554 U.S. 570, 594-95 (2008); *United States v. Annis*, 446 F.3d 852, 857 (8th Cir. 2006) (affirming a sentence enhancement for possession of a firearm because the defendant had a disassembled rifle but "could easily 'make the rifle operational in just a few seconds by putting the bolt in'"); *United States v. Theodoropoulos*, 866 F.2d 587, 595 n.3 (3d Cir. 1989) (affirming a conviction for possession of an unregistered, disassembled machine

In sum, there is a legal distinction between a weapon parts kit, which may be an aggregation of partially manufactured parts not subject to the agency's regulatory authority, and a "weapon" which "may readily be completed [or] assembled . . . to expel a projectile." 18 U.S.C. § 921(a)(3)(A). Defendants contend that drawing such a distinction will produce the absurd result whereby a person lawfully prohibited from possessing a firearm can obtain the necessary components and, given advances in technology, self-manufacture a firearm with relative ease and efficiency.[86] Even if it is true that such an interpretation creates loopholes that as a policy matter should be avoided, it not the role of the judiciary to correct them. That is up to Congress. And until Congress enacts a different statute, the Court is bound to enforce the law as written.

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Because the Final Rule purports to regulate both firearm components that are not yet a "frame or receiver" and aggregations of weapon parts not otherwise subject to its statutory authority, the Court holds that the ATF has acted in excess of its statutory jurisdiction by promulgating it.

4. Remedy

The proper remedy for a finding that an agency has exceeded its statutory jurisdiction is vacatur of the unlawful agency action. While Defendants claim the APA

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pistol), *overruled by United States v. Price*, 76 F.3d 526 (3d Cir. 1996).

[86] *See* Defs.' Supp. Br. Regarding Count I 14, ECF No. 132; Defs.' Resp. to Mot. for Prelim. Inj. 1-3, ECF No. 41.

does not allow for such a remedy, the Fifth Circuit says otherwise. *Data Mktg. P'ship, LP v. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) (permitting vacatur under 5 U.S.C. § 706(2)).[87] While in some cases the court may remand a rule or decision to the agency to cure procedural defects, the Fifth Circuit considers vacatur the "default rule" for agency action otherwise found to be unlawful. *Id.* at 859-60; *accord Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75, 375 n.29 (5th Cir. 2022) (concluding that "[v]acatur is the *only* statutorily prescribed remedy for a successful APA challenge to a regulation") (emphasis added). The D.C. Circuit agrees. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action. . . . In rare cases, however, we do not vacate the action but instead remand for the agency to correct its errors."). Whether remand-without-vacatur is the appropriate remedy "turns on two factors: (1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision

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[87] Defendants argue that any Fifth Circuit precedent recognizing the permissibility of vacatur is not binding, because those decisions did not squarely address the issue of whether the APA authorizes such a remedy. Defs.' Reply 52-53. As such, Defendants contend this Court may not be bound by a legal "assumption" of a Fifth Circuit panel. *Ochoa-Salgado v. Garland*, 5 F.4th 615, 619 (5th Cir. 2021). But even if this Court is not bound by the Circuit's view that the APA permits vacatur, Defendants have not offered a compelling justification why this Court should depart from the mass of persuasive authority—developed over decades—that has assumed that vacatur is permissible. *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1178 n.270 (2020) (collecting cases from all Circuits).

on remand; and (2) the disruptive consequences of vacatur." *Id.* (cleaned up).

Vacatur is appropriate given the Court's conclusion that the ATF has exceeded its statutory authority. An illegitimate agency action is void *ab initio* and therefore cannot be remanded as there is nothing for the agency to justify. Defendants tacitly acknowledge this, noting that "if vacatur is authorized under the APA, it is not warranted here in the event that Plaintiffs succeed on the merits of any *procedural claim*, because the agency can likely correct any such error on remand."[88] Moreover, vacating the unlawful assertion of the agency's authority would be minimally disruptive because vacatur simply "establish[es] the status quo" that existed for decades prior to the agency's issuance of the Final Rule last year. *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022).

Defendants argue that any vacatur should only be applied to the parties before the Court while citing no binding authority in support.[89] But such a remedy is more akin to an injunction that would prohibit the agencies from enforcing their unlawful Final Rule against only certain individuals. And indeed, "[t]here are meaningful differences between an injunction, which is a 'drastic and extraordinary remedy,' and vacatur, which is 'a less drastic remedy.'" *Id.* at 219 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)) (assuming the availability of vacatur under the APA)). "[A] vacatur does nothing but re-establish the status quo absent the unlawful agency action. Apart

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[88] Defs.' Reply 53, ECF No. 204 (emphasis added).

[89] Defs.' Reply 54-55, ECF No. 204.

from the . . . statutory basis on which the court invalidated an agency action, vacatur neither compels nor restrains further agency decision-making." *Id.* at 220. Thus, the Court applies the default remedy and **VACATES** the Final Rule on grounds that the agency acted beyond the scope of its legitimate statutory authority in promulgating it.

Finally, because vacatur provides Plaintiffs full relief, the Court will not address the parties' remaining statutory claims, all of which raise procedural defects that might properly result in remand of the Final Rule that the Court has already deemed vacated.

V. CONCLUSION

In sum, the Court **GRANTS** Original Plaintiffs' unopposed Motion for Leave to Provide Supplemental Authority, and the Court **DENIES** JSD Supply's proposed Motion for Injunction as prematurely filed. The Court **GRANTS** Intervenor-Plaintiffs JSD Supply's and Polymer80's Motions to Intervene. Further, for the reasons discussed, the Court **GRANTS** Plaintiffs' and Intervenor-Plaintiffs' Motions for Summary Judgment, **DENIES** Defendants' Cross-Motion, and **VACATES** the Final Rule. Separate final judgment shall issue as to the appropriate parties and claims. As discussed, Polymer80 may move for summary judgment on its unique claims to the extent those remaining claims are not mooted by this decision.

SO ORDERED this **30th day** of **June, 2023**.

/s/ REED O'CONNOR
REED O'CONNOR
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-cv-00691-O

JENNIFER VANDERSTOK, ET AL., PLAINTIFFS

v.

BLACKHAWK MANUFACTURING GROUP INC., ET AL.,
INTERVENOR-PLAINTIFFS

---

v.

MERRICK GARLAND, ET AL., DEFENDANTS

Filed: July 5, 2023

FINAL JUDGMENT

This Judgment is issued pursuant to Fed. R. Civ. P. 58(a).

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. Plaintiffs' and Intervenor-Plaintiffs' motions for summary judgment on grounds that the Final Rule was issued in excess of ATF's statutory ju-

risdiction (Counts I and III) are **GRANTED** and Defendants' cross-motion for summary judgment as to those claims are **DENIED**.

2. On these grounds, the Final Rule, Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, and 479 (2022)), is hereby **VACATED**.

3. The parties' remaining claims are **DENIED** as moot.[1]

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[1] Orig. Pls.' Am. Compl., ECF No. 93 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates APA's Notice and Comment Requirement (Count II), Violates APA's Ban on Arbitrary and Capricious Conduct (Count III), Violates Nondelegation Principles (Count IV), Violates Take Care Clause (Count V), Violates Due Process (Count VI), Violates the First Amendment (Count VII)).

See also BlackHawk's Compl., ECF No. 99 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates Separation of Powers (Count II), is Unconstitutionally Vague (Count III), is Arbitrary and Capricious (Count IV), Violates the APA's Procedural Requirements (Count V), Violates the Nondelegation Doctrine (VI), is Contrary to Constitutional Right, Power, Privilege, or Immunity (VII), Violates the Commerce Clause (VIII), Unlawfully Chills First Amendment Speech (IX), Constitutes an Unconstitutional Taking Without Just Compensation (Count X)).

See also Defense Distributed, et al.'s Compl., ECF No. 143 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates the APA's Procedural Requirements (Counts II and IV), Violates Delegation Principles (Count III), Violates the Second Amendment (Count V), Violates Due Process (Count VI)).

See also Polymer80's Compl., ECF No. 229 (claiming Final Rule: Violates Separation of Powers (Count I), Exceeds Statutory Authority (Count III), Violates Nondelegation Doctrine (Count V), Violates APA's Procedural Requirements (Counts VII and XII), is Arbitrary and Capricious (Count IX), Violates First Amendment (Count XV),

4. All other relief not expressly granted herein is denied. **SO ORDERED** this **5th day** of **July, 2023.**

/s/ REED O'CONNOR
REED O'CONNOR
UNITED STATES DISTRICT JUDGE

Violates Second Amendment (Count XIV), is Unconstitutionally Vague (Count XIII), Exceeds Limits of Commerce Clause (Count XVI), Violates the Takings Clause (Count XVII)).

As discussed in the Court's Memorandum Opinion, Polymer80, Inc. may move for summary judgment on any remaining claims not mooted by the Court's opinion. Mem. Opinion at 16, ECF No. 227. Polymer80 **SHALL** file a notice on the docket **no later than July 12, 2023**, informing the Court whether its remaining claims are moot and, if so, proposing an order of Final Judgment as to those claims.

See also JSD Supply's Compl., ECF No. 230 (claiming Final Rule: Exceeds Statutory Authority (Count I), Violates Separation of Powers (Count II), is Unconstitutionally Vague (Count III), is Arbitrary and Capricious (Count IV), Violates APA's Procedural Requirements (Count V), Violates the Nondelegation Doctrine (Count VI), is Contrary to Constitutional Right, Power or Privilege (Count VII), Violates the Commerce Clause (Count VIII), Violates First Amendment (Count IX), Violates the Takings Clause (Count X)).

APPENDIX D

(ORDER LIST: 601 U.S.)

MONDAY, OCTOBER 16, 2023

ORDER IN PENDING CASE

23A302 GARLAND, ATT'Y GEN. V. BLACKHAWK MFG. GROUP, INC., ET AL.

The application to vacate injunction presented to Justice Alito and by him referred to the Court is granted. The September 14, 2023 order of the United States District Court for the Northern District of Texas, case No. 4:22-cv-691, is vacated.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10718

JENNIFER VANDERSTOK; MICHAEL G. ANDREN; TACTICAL MACHINING, L.L.C., A LIMITED LIABILITY COMPANY; FIREARMS POLICY COALITION, INCORPORATED, A NONPROFIT CORPORATION, PLAINTIFFS-APPELLEES

BLACKHAWK MANUFACTURING GROUP, INCORPORATED, DOING BUSINESS AS 80 PERCENT ARMS; DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED; NOT AN L.L.C., DOING BUSINESS AS JSD SUPPLY ; POLYMER80, INCORPORATED, INTERVENOR PLAINTIFFS-APPELLEES

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, DEFENDANTS-APPELLANTS

Filed: Oct. 2, 2023

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-691

Before WILLETT, ENGELHARDT, and Oldham, *Circuit Judges*.

UNPUBLISHED ORDER

PER CURIAM:

The Government's motion to vacate the district court's injunction is GRANTED IN PART.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") promulgated a Final Rule that, among other things, changed the longstanding federal definition of a firearm "frame or receiver." A group of plaintiffs brought a lawsuit challenging two provisions in the Final Rule. The district court held that those provisions exceeded ATF's statutory authority and vacated the entire Final Rule. The Supreme Court stayed the district court's rulings "insofar as they vacate the final rule." Two of the plaintiffs—manufacturers of "frames or receivers" regulated by the Final Rule—then asked the district court for injunctive relief pending appeal. The district court enjoined the Government from enforcing the challenged portions of the Final Rule against the two plaintiffs and their customers. The Government has now asked us to vacate the district court's injunction.[1]

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[*] Such a request formally differs from an application for a stay, which would require consideration of the four factors from *Nken v. Holder*, 556 U.S. 418 (2009). Vacatur would eliminate the district court's injunction entirely, whereas a stay would "operate[] upon the judicial proceeding itself" and place a hold on the injunction. *Id.* at 428. Nevertheless, we still look to *Nken*, not because a motion to vacate and an application to stay are "one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclu-

We agree with the Government that the district court's injunction sweeps too broadly. Injunctions that afford relief to non-parties are potentially problematic. *See, e.g.*, *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring in the judgment); *cf.* Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 Notre Dame L. Rev. 2037, 2060-61 (2023). And it appears the district court's injunction sweeps too broadly insofar as it affords relief to non-party customers. That is particularly true because the Government has been adamant—in both writing and at oral argument on this motion—that it will not enforce the Final Rule against customers who purchase regulated "frames or receivers" and who are otherwise lawfully entitled to purchase firearms. Of course, if circumstances change, the district court is free to narrowly tailor injunctive relief to meet the changed circumstances. But as things stand today, the Government is correct that the injunction cannot extend to non-party customers.

But we disagree with the Government that the district court's injunction as to two plaintiff-party manufacturers "directly conflicts with the Supreme Court's determination that the [G]overnment should be permitted to enforce the Rule as to everyone while this appeal proceeds." Gov't Vacatur Mot. 8. We have three reasons. First, the Supreme Court limited its stay to the global

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sively determined." *Id.* at 434. We note that the federal courts rarely consider emergency motions to vacate an injunction issued by a lower court. And in those rare occasions, the opinions do not provide guidance on their rule of decision. *See United States v. New York, Delaware*, 328 U.S. 824 (1946); *Lucy v. Adams*, 350 U.S. 1, 2 (1955) (per curiam); *see also FG Hemisphere Assocs. LLC v. Republique Du Congo*, 212 F. App'x 358, 359 (5th Cir. 2007) (per curiam).

relief afforded by the district court's vacatur order. Here is what the Court said in its August 8 stay order:

> Application for stay presented to Justice Alito and by him referred to the Court granted. The June 30, 2023 order and July 5, 2023 judgment of the United States District Court for the Northern District of Texas, case No. 4:22-cv-691, *insofar as* they vacate the final rule of the Bureau of Alcohol, Tobacco, Firearms and Explosives, 87 Fed. Reg. 24652 (April 26, 2022), is stayed pending the disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

--- S. Ct. ---, No. 23A82, 2023 WL 5023383 (U.S. 2023) (Mem.) (emphasis added). The Supreme Court could have simply stayed the district court's vacatur order and judgment without qualification. Instead, the Court stayed them "insofar as they vacate the [F]inal [R]ule."

Second, we cannot say that the district court abused its discretion in granting traditional, limited injunctive relief to two parties. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). The party-plaintiff manufacturers would be irreparably harmed by being forced to shut down their companies or by being ar-

rested pending judicial review of the Final Rule. *VanDerStok v. BlackHawk Mfg. Grp. Inc.*, No. 4:22-CV-00691-O, 2023 WL 5978332, at *18 (N.D. Tex. Sept. 14, 2023). The party-plaintiff manufacturers are likely to succeed on the merits because the Final Rule is contrary to law. And both the balance of equities and the public interest weigh in favor of allowing orderly judicial review of the Final Rule before anyone shuts down their businesses or sends them to jail. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) ("The authority to hold an order in abeyance pending review allows an appellate court to act responsibly.").

We are sensitive to the fact that the Government is irreparably harmed whenever its rules are enjoined. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *cf. Nken*, 556 U.S. at 435-36 (noting Government's irreparable injury can sometimes merge with public interest). Still, the federal definitions of "frame or receiver" have endured for decades before ATF changed them in the Final Rule. ATF's desire to change the *status quo ante* does not outweigh the few additional weeks or months needed to complete judicial review of ATF's work. Thus, under *Winter* or *Nken* or any other standard, *see supra* n.*, we cannot say the Government has shown that it is entitled to emergency vacatur of the district court's injunction as to the two party-plaintiff manufacturers.

Third, we are unpersuaded by the Government's insistence that the district court flouted the Supreme Court's August 8 order. There is a meaningful distinction between vacatur (which is a universal remedy) and an injunction that applies only to two named plaintiffs (which is a traditional equitable remedy). *See, e.g.*,

John C. Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37 (2020). The August 8 order considered only the first—a universal vacatur. The Government points out that its briefing to the Supreme Court also raised, in the alternative, that the district court's universal vacatur should be limited to the parties to this case; and that the Court did not follow that alternative path. It is unclear that there is such a thing as an "as-applied vacatur" remedy under the APA. *See, e.g.*, John C. Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 Yale J. Reg. Bull. 119, 120 (2023) ("An injunction can be limited to the defendant's actions concerning the plaintiff, and its preclusive effect can be limited to the relations between the parties. Vacatur, by contrast, eliminates a rule's binding force altogether."). So it is unclear that we should read much into the Government's purported alternative. And in any event, we think it best to read the order the Supreme Court issued rather than one it did not.

* * *

At the end of the day, we think four things are paramount. First, inferior federal courts must exhibit unflinching obedience to the Supreme Court's orders. Second, the Court has directed us to be skeptical (if not altogether unwilling) to order universal relief that extends to non-parties. Third, insofar as possible, we should have orderly judicial review in which the *status quo* is maintained, and the legal rules sorted, without asking courts to make monumental decisions in short-fuse emergency dockets. Fourth and finally, courts should be able to review ATF's 98-page rule, and the

decades of precedent it attempts to change, without the Government putting people in jail or shutting down businesses. For these reasons, the Government's motion is GRANTED IN PART, the district court's preliminary injunction is VACATED as to non-parties, and the Government's motion is otherwise DENIED.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-cv-00691-O

JENNIFER VANDERSTOK, ET AL., PLAINTIFFS

v.

BLACKHAWK MANUFACTURING GROUP INC., ET AL.,
INTERVENOR-PLAINTIFFS

---

v.

MERRICK GARLAND, ET AL., DEFENDANTS

Filed: Sept. 14, 2023

OPINION & ORDER ON DEFENSE DISTRIBUTED AND BLACKHAWK MANUFACTURING GROUP INC. d/b/a 80 PERCENT ARMS' EMERGENCY MOTIONS FOR INJUNCTIVE RELIEF PENDING APPEAL

Before the Court are Defense Distributed and Black-Hawk Manufacturing Group Inc. d/b/a 80 Percent Arms' ("Intervenor-Plaintiffs") Emergency Motions for Injunction Pending Appeal (ECF Nos. 249, 251), filed August 9, 2023 and August 14, 2023; the Attorney General of the United States, the United States Department of Justice, the Director of the Bureau of Alcohol, Tobacco,

Firearms and Explosives, and the Bureau of Alcohol, Tobacco, Firearms and Explosives' (the "Government Defendants") Objection and Response in Opposition (ECF No. 254), filed August 17, 2023; and Intervenor-Plaintiffs' Replies (ECF Nos. 256, 257), filed August 21, 2023. Having considered the parties' briefing and applicable law, the Court **GRANTS** Intervenor-Plaintiffs' emergency motions for injunctive relief pending appeal to enforce unstayed portions of the Court's Order Granting Summary Judgment (ECF No. 227) and Final Judgment (ECF No. 231) against the Government Defendants.

I. BACKGROUND

The United States Congress established the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to regulate "firearms" in interstate commerce under the Gun Control Act of 1986 ("GCA"). *See* 26 U.S.C. § 599A(a); 28 C.F.R. § 0.130(a); 18 U.S.C. § 921(a)(3). In April 2022, the ATF promulgated a Final Rule that purports to regulate partially manufactured firearm parts and weapon parts kits, which took effect on August 24, 2022. *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, 479). The Final Rule departed from nearly a half century of ATF precedent, during which the agency declined to interpret the GCA's term "firearms" as encompassing partially manufactured frames and receivers.[1] ATF subsequently issued an "Open Letter to All Federal Firearms Licensees," declaring that certain products are consid-

[1] *See* First Op. 2-3, ECF No. 56 (discussing ATF's Title and Definition Changes, 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978) and others)

ered "frames" (and thus qualify as "firearms") under the GCA pursuant to the Final Rule's redefinition of that term.[2] Those products include partially complete Polymer80, Lone Wolf, and similar striker-fired semi-automatic pistol frames, including those sold within parts kits.[3]

Jennifer VanDerStok, Michael Andren, Tactical Machining, LLC, and the Firearms Policy Coalition, Inc. (the "Original Plaintiffs") filed this suit on August 11, 2022, to challenge the Final Rule's validity, claiming that the regulation exceeds the lawful scope of statutory authority that Congress vested in the ATF.[4] The Original Plaintiffs subsequently moved for a preliminary injunction that sought to broadly enjoin the Government Defendants from enforcing the Final Rule.[5] On September 2, 2022, the Court issued its First Opinion in which it held that the Original Plaintiffs were substantially likely to succeed on the merits of their claim that provisions of the ATF's Final Rule—namely, 27 C.F.R. §§ 478.11, 478.12(c)—exceed the scope of the ATF's lawful jurisdictional grant under the GCA.[6] Having made this preliminary finding, the Court enjoined the Government Defendants, along with their officers, agents, servants, and employees, from implementing or enforcing

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[2] U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, Open Letter to All Federal Firearms Licensees (Dec. 27, 2022) ("ATF Open Letter (Dec. 27, 2022)"), https://www.atf.gov/rulesandregulations/docs/open-letter/all-ffls-dec2022-open-letter-impact-final-rule-2021-05f/download.

[3] *Id.*

[4] Compl. 1, ECF No. 1.

[5] Pls.' Mot. for Prelim. Inj., ECF No. 15.

[6] First Opinion 15, 22-23, ECF No. 56.

the Final Rule against Tactical Machining, LLC ("Tactical")—the only Original Plaintiff to establish irreparable harm.[7] The Court denied injunctive relief to the remaining Original Plaintiffs in its First Opinion.[8] The Court issued its Second Opinion (ECF No. 89) on the proper scope of the preliminary injunction on October 1, 2022, which expanded the injunction to include the additional Original Plaintiffs and—for the purpose of providing Tactical complete relief—Tactical's customers.[9] The Court declined any invitation to issue a "nationwide" injunction.[10]

In the ensuing months, the Court further extended this injunctive relief to Intervenor-Plaintiffs on the same grounds and with the same scope as that of the Original Plaintiffs.[11] BlackHawk Manufacturing Group Inc. d/b/a 80 Percent Arms ("BlackHawk") is a manufacturer and retailer that sells products newly subject to the Final Rule, with most of its revenue earned through sales of those products.[12] Defense Distributed is a private defense contractor that primarily manufactures and deals products now subject to the Final Rule.[13] By March 2023, the Government Defendants and their officers, agents, servants, and employees were enjoined from implementing and enforcing against Intervenor-Plaintiffs and their customers the provisions in 27 C.F.R. §§ 478.11 and 478.12 that the Court preliminarily

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[7] *Id.*

[8] *Id.*

[9] Second Op. 20-22, ECF No. 89.

[10] *Id.* at 19.

[11] *See* Mem. Ops., ECF Nos. 118, 188.

[12] Lifschitz Decl. 6-8, ECF No. 62-5 ¶¶ 8, 11, 13.

[13] *See generally* Defense Distributed Compl., ECF No. 143.

held to be unlawful.[14] The Government Defendants appealed these individualized, Plaintiff-specific preliminary injunctions, but did not seek stays pending appeal.

On June 30, 2023, the Court ruled in favor of the Original Plaintiffs and Intervenor-Plaintiffs on the merits and granted their motions for summary judgment.[15] The Court held on the merits that both challenged provisions of the Final Rule were invalid and that the ATF "acted in excess of its statutory jurisdiction by promulgating [the Final Rule]."[16] In Section IV(B)(4) of the Memorandum Opinion and Order Granting Summary Judgment (ECF No. 227), the Court vacated the entire Final Rule pursuant to section 706 of the Administrative Procedure Act ("APA").[17] The Court predicated its APA vacatur on the "default rule" of the Fifth and D.C. Circuits with respect to the appropriate statutory remedy for unlawful agency action.[18] On July 5, 2023, the

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[14] *See* Mem. Ops., ECF Nos. 118, 188 (injunctive relief did not extend to customers prohibited from possessing firearms under 18 U.S.C. § 922(g)).

[15] Summ. J. Mem. Op. & Order 37-38, ECF No. 227.

[16] *Id.* at 35.

[17] *Id.* at 35-37 (setting forth the Court's "Remedy"); *see* 5 U.S.C. § 706(2)(C) (directing the reviewing court to "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

[18] *Id.* at 35-37 (citing *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859-60 (5th Cir. 2022) (permitting APA vacatur under 5 U.S.C. § 706(2) as the "default rule"); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75, 375 n.29 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation."); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action.")).

Court entered its Final Judgment (ECF No. 231), which categorically memorialized each of the Court's June 30, 2023 determinations: (1) grant of summary judgment to Plaintiffs and (2) APA vacatur of the Final Rule.[19]

The Government Defendants appealed the Memorandum Opinion and Order Granting Summary Judgment (ECF No. 227) and Final Judgment (ECF No. 231) to the United States Court of Appeals for the Fifth Circuit.[20] At the same time, the Government Defendants moved for this Court to issue an emergency stay pending appeal.[21] On July 18, 2023, the Court denied the Government Defendants' motion for stay of the Memorandum Opinion and Order (ECF No. 227) and the Final Judgment (ECF No. 231) pending appeal.[22] On July 24, 2023, the United States Court of Appeals for the Fifth Circuit granted the Government Defendants' request for a stay of this Court's APA vacatur remedy insofar as it applied to provisions of the Final Rule that were neither challenged by Plaintiffs nor held unlawful by this Court. *See VanDerStok v. Garland*, No. 23-10718, 2023 WL 4945360, at *1 (5th Cir. July 24, 2023) (per curiam). The Fifth Circuit otherwise declined to stay the APA vacatur of provisions of the Final Rule that this Court held unlawful on the merits. *See id.* The Fifth Circuit expedited the Government Defendants' appeal. *See id.*[23]

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[19] Final J. 1, ECF No. 231.

[20] Defs.' Notice of Interlocutory Appeal, ECF No. 234.

[21] Defs.' Emergency Mot. for Stay Pending Appeal, ECF No. 236.

[22] Order, ECF No. 238.

[23] *See* C.A. Doc. No. 63 (July 25, 2023). Following the Supreme Court's stay, the Fifth Circuit heard oral arguments on September 7, 2023.

On July 5, 2023, the Government Defendants filed an application with the Supreme Court of the United States for a stay of this Court's Final Judgment (ECF No. 231).[24] In its application briefing, the Government Defendants sought a full stay of the Final Judgment, but secondarily argued that, "[a]t a minimum, the [Supreme] Court should stay the district court's judgment *to the extent it apples to nonparties*."[25] More specifically, the Government Defendants requested that, "*to the extent* the [Supreme] Court concludes that the June 30 [summary judgment] order might *continue to have independent effect*," the Supreme Court's order should "stay *both* the June 30 [summary judgment] order and the July 5 final judgment" of this Court.[26] On August 8, 2023, the Supreme Court accepted the Government Defendants' secondary invitation and granted its application for a stay. *See Garland v. VanDerStok*, No. 23A82, 2023 WL 5023383, at *1 (U.S. Aug. 8, 2023) (mem.). The Supreme Court's Stay Order provides, in relevant part, that:

> [t]he June 30, 2023 [summary judgment] order and July 5, 2023 [final] judgment of the United States District Court for the Northern District of Texas, case No. 4:22-cv-691, *insofar as they vacate* the final rule of the [ATF], 87 Fed. Reg. 24652 (April 26, 2022), is stayed pending the disposition of the appeal in the

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[24] *See* Government's Application for a Stay of the Judgment Entered by the United States District Court for the Northern District of Texas, *Garland, Att'y Gen., et al. v. Vanderstok, Jennifer, et al.*, No. 23A82 (July 2023).

[25] Defense Distributed's Reply Ex., ECF No. 257-3, at 20 (emphasis added).

[26] *Id.* at 20-21, 21 n.4 (emphasis added).

> United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought.

Id. (emphasis added).

Following the U.S. Supreme Court's Stay Order, Intervenor-Plaintiffs each filed Opposed Emergency Motions for Injunction Pending Appeal on August 9, 2023 and August 14, 2023, respectively.[27] Following the completion of expedited briefing,[28] Intervenor-Plaintiffs' motions are now ripe for the Court's review.[29]

II. JURISDICTION

The core issue in dispute between the parties is whether the Court, following the Supreme Court's Stay Order, has jurisdiction to afford individualized, post-judgment equitable relief to Intervenor-Plaintiffs enjoining the Government Defendants from enforcing the challenged provisions of the Final Rule against each Intervenor-Plaintiff, pending final disposition of the appellate process. Upon review of the parties' briefing and applicable law, the Court answers in the affirmative and holds that it retains Article III jurisdiction to enforce—through party-specific relief against the Government Defendants—the concrete aspects of its Summary Judgment Order (ECF No. 227) and Final Judg-

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[27] *See* Defense Distributed's Mot., ECF No. 249; BlackHawk's Mot., ECF No. 251.

[28] *See* Orders, ECF Nos. 250, 253.

[29] *See generally* Defense Distributed's Mot., ECF No. 249; BlackHawk's Mot., ECF No. 251; Defs.' Resp., ECF No. 254; BlackHawk's Reply, ECF No. 256; Defense Distributed's Reply, ECF No. 257.

ment (ECF No. 231) that the Supreme Court declined to stay.

A. Legal Standard

The judicial power "extend[s] to all Cases, in Law and Equity," that arise under the Constitution and Laws of the United States. U.S. CONST. art. III § 2. When the demands of a particular case require a federal court to ascertain the scope of its Article III jurisdiction, it is instructed to look to "history and tradition" as a "meaningful guide." *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023) (cleaned up); *cf. Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J.) ("[T]he framers of [Article III] gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union.").

The judicial power of Article III encompasses the inherent authority of federal courts to grant equitable remedies in the execution of their judgments. *See Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 222-23 (1809) (Marshall, C.J.); *see also Peacock v. Thomas*, 516 U.S. 349, 356 (1996). The question of whether a federal court can properly exercise this inherent authority over a given matter, therefore, is constrained by historical and traditional equity practice. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999); *see also Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 404-05 (1971) (Harlan, J., concurring in the judgment) (explaining that the reach of a federal court's inherent equitable powers is "determined according to the distinctive historical traditions of equity"). Congressional authorizations of equitable remedies must be construed and exercised in a manner compatible with

the same preestablished body of rules and principles. *Guaranty Trust Co. v. York*, 326 U.S. 99, 105-06 (1945); *Boyle v. Zacharie*, 31 U.S. 648, 658 (1832) (Story, J.). A federal district court's equitable remedial power is further subject to the external constraints found elsewhere in the Constitution, as well as in federal common law and congressional enactment. *See Peacock*, 516 U.S. at 354-59, 354 n.5; *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

B. Analysis

Intervenor-Plaintiffs seek post-judgment injunctive relief pending the outcome of appeal of the Court's Summary Judgment Order (ECF No. 227) and Final Judgment (ECF No. 231). The requested relief would afford individualized, party-specific protection to Intervenor-Plaintiffs that enjoins the Government Defendants from implementing and enforcing against each Intervenor-Plaintiff and their respective customers the provisions of the Final Rule that this Court, preliminarily and on the merits, held are unlawful.[30]

In its Summary and Final Judgments,[31] the Court issued the default legal remedy prescribed by federal statute for unlawful agency action: vacatur of the entire Final Rule. *See* 5 U.S.C. § 706(2)(C) (authorizing courts to "hold unlawful and set aside agency action"); *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859-60 (5th Cir. 2022) (discussing vacatur as the de-

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[30] *See* Defense Distributed's Mot., ECF No. 249 (citing 27 C.F.R. §§ 478.11, 478.12); BlackHawk's Mot., ECF No. 251 (same).

[31] Summ. J. Mem. Op. & Order 35-38, ECF No. 227; Final J. 1, ECF No. 231.

fault remedy for unlawful agency action); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75, 375 n.29 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation."); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). Following the Supreme Court's Stay Order, however, Intervenor-Plaintiffs no longer enjoy the protection previously afforded to them by the default remedy at law that Congress provided in the APA. *See Vanderstok*, 2023 WL 5023383, at *1 (staying the Summary Judgment Order and Final Judgment "insofar as they vacate the final rule"). Moreover, Intervenor-Plaintiffs will remain deprived of the standard statutory relief until "disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari." *Id.*

On account of Intervenor-Plaintiffs' prolonged lack of shelter from the Final Rule under the default statutory relief, they now seek the refuge of this Court's equitable remedial authority in the interim. Intervenor-Plaintiffs pray for the Court to exercise its equitable jurisdiction—to the extent that Intervenor-Plaintiffs each receive individual interlocutory protection against the Government Defendants' enforcement of the Final Rule—and at least until such time that the pending appeal and potential certiorari, as well as the Supreme Court's Stay Order, have been exhausted upon final conclusion.

The Court finds that the injunctive relief prayed for by Intervenor-Plaintiffs accords with (1) the historical and traditional maxims of equitable remedial jurisdic-

tion prescribed by the Framers in Article III; and (2) the additional jurisdictional constraints imposed by the Constitution and contemporary judicial doctrine.

1. The History and Tradition of Equity Support Jurisdiction

Article III vests in this Court the equitable power to enforce its federal judgments. *Zacharie*, 31 U.S. at 658 (Story, J.) ("The chancery jurisdiction [is] given by the constitution and laws of the United States."); *cf.* THE FEDERALIST NO. 80, at 415 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[I]t would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction"). The Court is further vested with general congressional grants of equity jurisdiction that are applicable in the pending motion.[32]

"We are dealing here with the requirements of equity practice with a background of several hundred years of history." *Hecht*, 321 U.S. at 329. The equity jurisdiction vested in district courts is an authority to administer "the principles of the system of judicial remedies

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[32] *See* 5 U.S.C. § 705 (providing that "to the extent necessary to prevent irreparable injury," the Court "to which a case may be taken on appeal from . . . may issue all necessary and appropriate process to . . . preserve status or rights pending conclusion of the review proceedings"); Fed. R. Civ. P. 62(d) (providing that the Court "may suspend, modify, restore, or grant an injunction" pending appeal of a final judgment); Fed. R. App. P. 8(a)(1) (providing that the Court may issue "an order suspending, modifying, restoring, or granting an injunction while an appeal is pending."); *see also* 28 U.S.C. § 1651 (providing that the Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.")

which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939). Its contours are outlined by "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano*, 527 U.S. at 318 (citing A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)); *see Hayburn's Case*, 2 U.S. (Dall.) 409, 410-11 (1792) (Jay, C.J.). Beyond the equity jurisdiction conferred by Article III, courts must also construe general statutory grants of equitable remedial authority to harmonize with "the body of law which had been transplanted to this country from the English Court of Chancery" at the Founding. *Guaranty Trust Co.*, 326 U.S. at 105. It is "settled doctrine" that broad congressional authorizations of "remedies in equity are to be administered . . . according to the practice of courts of equity in the parent country." *Id.* (quoting *Zacharie*, 31 U.S. at 658 (Story, J.)).[33] The Court finds that the rules, principles, and practices of equity familiar to the Founding generation counsel in favor of the Court's jurisdiction to enjoin the Government Defendants from enforcing challenged provisions of the Final Rule against Intervenor-Plaintiffs—at least until the outcome of those judgments are finalized on appeal and certiorari.

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[33] To be sure, the "substantive principles of Courts of Chancery remain unaffected" by the fusion of law and equity in our Federal Rules of Civil Procedure. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949).

Since King James I decreed the supremacy of English Chancery in 1616,[34] the reigning predominance of equity over law has remained a cornerstone of our Anglo-American legal tradition. *See* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 335 (2009). Equity supremacy was originally intertwined with royal prerogative and divinely ordained absolutism.[35] Yet in spite of its philosophical underpinnings, the prevailing jurisdiction, principles, and practices of equity occupied such an "integral part in the machinery of the law," that the Court of Chancery and its wide body of jurisprudence nonetheless survived and maintained preeminent status after nearly two hundred years of war and revolution in England and the United States—which had been marked by bloody hostilities, violent overthrows, and abolitionist attempts against the English Crown—and by extension, the institution of equity itself. LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 7-8 (D. E. C. Yale ed. 1965); *see generally* LANGBEIN ET AL., at 329-35, 345-55. Equity triumphed in the midst of these existential threats on ac-

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[34] *The King's Order and Decree in Chancery*, Cary 115, 21 Eng. Rep. 61 (1616) (decreeing the supremacy of "relief in equity . . . notwithstanding any proceedings at common law . . . as shall stand with the true merits and justice of [] cases")

[35] *See The King's Order and Decree in Chancery*, Cary 115, 21 Eng. Rep. 61 (1616) (decreeing that "God, who hath placed [the monarch] over" the people, had vested within the king's "princely care and office only to judge over all Judges, and to discern and determine such differences as at any time may or shall arise between our several Courts, touching their Jurisdictions, and the same to settle and decide as we in our princely wisdom shall find to stand most with our honor. . . . ").

count of the three "Great Chancellors,"[36] who carefully doctrinalized and enshrined centuries of deeply ingrained Chancery practices into a system of clearly established rules, jurisdictional contours, and binding precedents to govern the administration of equitable remedies. *See* 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 465 (1922-1966) (16 vols.); 1 LORD NOTTINGHAM'S CHANCERY CASES xxxvii-lxxiii (D. E. C. Yale ed. 1957) (2 vols. 1957, 1961). It was this abundant and systematized body of equity jurisprudence that was peculiarly familiar to the jurists of our Founding generation. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432-33 (Oxford 1765-1769) (describing relief in equity as a "connected system, governed by established rules, and bound down by precedents"); THE FEDERALIST NO. 83, at 438 n.* (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (describing Article III relief in equity as mirroring "the principles by which that relief is governed [in England, which] are now reduced to a regular system").[37]

The equitable remedial jurisdiction exercised by the Court of Chancery was necessarily forged out of (and therefore mirrored) the remedial gaps left behind by the

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[36] LANGBEIN ET AL., at 348-55. Lord Nottingham (1673-1682), Lord Hardwicke (1737-1756), and Lord Eldon (1801-1806, 1807-1827) are widely accredited with the systemization of modern equity. *See* S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 95 (2d ed. 1981).

[37] Of course, the long legacy of equity's triumph over law endures in our fused-civil procedure system today. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PENN. L. REV. 909 (1987).

austerity and incompleteness of relief available at law. *See* FRANZ METZGER, "The Last Phase of the Medieval Chancery," *in* LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 84 (Alan Harding ed. 1980). Equity jurisdiction was supplemental in nature—it neither competed with, nor contradicted, nor denied the validity of the law—but rather aided, followed, and fulfilled the law. *See* CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550-1660, vol. I, p. xli (William Hamilton Bryson, ed. 2001); *Cowper v. Earl Cowper* (1734) 24 Eng. Rep. 930, 941-42; 2 P. Wms. 720, 752-54 (Jekyll, MR). The "primary use of a court of equity [was] to give relief in *extraordinary cases*" where ordinary law remedies could not, which held steady as a routine phenomenon in the Anglo-American system by and through the Founding Era. THE FEDERALIST No. 83, at 438 & n.* (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see id.* NO. 80, at 415 (Alexander Hamilton) ("There is hardly a subject of litigation between individuals which may not involve those ingredients . . . which would render the matter an object of equitable rather than legal jurisdiction"); *see also* CASES CONCERNING EQUITY, at li ("The term 'extraordinary' is used [in equity] in the sense of going beyond the basic rather than in the sense of unusual; equity is both extraordinary and quite usual and frequent").

Through the development of equity's complementary function toward law, the scope of its jurisdiction became defined by a series of maxims well known to early American jurists—principally, (i) that equity acts *in personam*, *see* JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 72, at 74 (Boston, 2d ed. 1840); (ii) that equity "follows the law," 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 19, at 22 (Boston 1836);

and (iii) that equity "suffers not a right to be without a remedy," RICHARD FRANCIS, MAXIMS OF EQUITY, no. 6, at 24 (London 1728). These primary maxims were crystalized in the rich tradition of injunctive relief practice in English Chancery and furthermore in the courts of equity of the Early Republic. The Court finds that the equitable maxims and their historic illustrations are in harmony with the injunctions presently sought by Intervenor-Plaintiffs in their motions before the Court.

i. The Prayed Injunctions Act in Personam

Like the rest of its remedial toolbox, English Chancery's decree of injunction operated *in personam* (*i.e.*, on the person that is a party), rather than *in rem* (*i.e.*, on the underlying subject matter in dispute). *See* CASES CONCERNING EQUITY, at xlv, li; LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 17 (D. E. C. Yale ed. 1965); ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 141 (London 1821). This maxim served to demarcate the boundaries of equitable jurisdiction relative to that of law and to prevent conflict between the two. *See, e.g.*, *Massie v. Watts*, 10 U.S. 148, 156-59 (1810) (Marshall, C.J.) (adjudicating the issue of the court's equitable jurisdiction to issue the prayed relief based on whether it operated *in personam*). Whereas relief *in rem* was cabined to courts of law, equity jurisdiction began at matters *in personam* and any relief touching upon the conduct of a person was the sole prerogative of Chancery. *See* L. B. CURZON, ENGLISH LEGAL HISTORY 106 (2d ed. 1979); CASES CONCERNING EQUITY, at li. Injunctions were crafted as orders directed upon a living person to either undertake or refrain from undertaking a specific act—subject to

enforcement via contempt of court or imprisonment to ensure compliance. *See* LANGBEIN ET AL., at 286; *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 447-48, 27 Eng. Rep. 1132, 1134-35, 1139 (1750) (Ld. Hardwicke, Ch.) (decreeing that, on the basis of Chancery's *in personam* jurisdiction over any party to a proceeding that is present within England, the parties are compelled to specifically perform their agreed-upon contract terms governing the resolution of boundary disputes; but declining to exercise any equitable authority on the original right of the boundaries).

The *in personam-in rem* jurisdictional dichotomy is well documented in the landmark case that gave rise to equity's supremacy over the law. In *Glanvile's Case*, Richard Glanvile won a judgment on a sales contract that the buyer entered under Glanvile's fraudulent misrepresentations. 72 Eng. Rep. 939 (K.B. 1615). In a law court, Glanvile entered judgment for an exorbitant bond debt. *See id.*; CASES CONCERNING EQUITY, at xlvi. But in Chancery, Lord Ellesmere decreed an injunction that operated against Glanvile himself, rather than the underlying property or judgment at law. *See* LANGBEIN ET AL., at 333-34. The injunction restrained Glanvile from attempting to enforce the law court judgment and compelled him to pay back the buyer-debtor, repossess the merchandise, and acknowledge satisfaction of the judgment. *See Glanvile's Case*, 72 Eng. Rep. 939. When Glanvile refused to comply, Chancery exercised its contempt power over Glanvile and imprisoned him for breach of a decree. *Id.* From the King's Bench, Lord Coke ruled that a judgment at law prevails over Chancery decree and granted the common law writ of *habeas corpus* for Glanvile's release from prison. *Id.* Lord Coke's maneuver "struck at the heart of the Court

of Chancery's *in personam* power," *i.e.*, the remedial power over a party's own person that is backed by the force of contempt. LANGBEIN ET AL., at 330. It also leveled a direct challenge to the finality and binding effect of an equity order when a conflicting legal order had been entered. The 1616 decree of King James settled equity's supreme status on both fronts and enshrined the rule of jurisdiction that endures to this day: where the results of an equity order acting *in personam* and the results of a legal order acting *in rem* "are in disagreement, the equity rule and decree will prevail." CASES CONCERNING EQUITY, at xlvii; *see The King's Order and Decree in Chancery*, Cary 115, 21 Eng. Rep. 61 (1616).

Decisions of the Chancery Court of New York under James Kent are instructive as to how traditional equity maxims applied to injunction practice in the Early Republic. *See, e.g.*, *Manning v. Manning*, 1 Johns. Ch. 527, 530 (N.Y. Ch. 1815) (Kent, Ch.) ("It is the duty of this Court to apply the principles of [English Chancery] to individual cases, . . . and, by this means, endeavor to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions.").[38] In officer suits, Chancellor Kent exercised equitable remedial jurisdiction to directly enjoin government officials from acting in excess of statutory authority and infringing upon the legal rights of private persons. *E.g.*, *Belknap v. Belknap*, 2 Johns. Ch. 463 (N.Y. Ch. 1817) (Kent, Ch.); *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (Kent, Ch.); *see also Bonaparte v. Camden & A.R. Co.*,

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[38] *See also generally* Charles Evans Hughes, *James Kent: A Master Builder of Legal Institutions*, 9 A.B.A. J. 353 (1923).

3 F. Cas. 821, 827, 831-34 (C.C.D.N.J. 1830) (collecting cases).

In *Belknap v. Belknap*, for example, private plaintiffs sought an injunction to restrain government inspectors, who were authorized by statute to drain certain swamps and bog meadows for the benefit of some properties, from proceeding to cut down the outlet to a pond that supplied the source of water to plaintiffs' mills. 2 Johns. Ch. 463, 463-67, 468-70 (N.Y. Ch. 1817) (Kent, Ch.). Chancellor Kent determined that the officers gave "too extended a construction to their powers under the act" and that "this power should be kept within the words of the act" through an injunction. *Id.* at 470, 472. On the question of jurisdiction to provide such relief, Kent concluded that if the court is "right in the construction of the act, then the jurisdiction of the Court, and the duty of exercising it, are equally manifest." *Id.* at 472-74. In *Gardner v. Village of Newburgh*, a private plaintiff prayed a similar injunction to restrain government trustees, who were authorized by statute to supply a village with water, from proceeding to divert a stream away from the plaintiff's farm that his brickyard and distillery depended on. 2 Johns. Ch. 162, 162-64 (N.Y. Ch. 1816) (Kent, Ch.). The Chancery Court found that the impending diversion exceeded the limits of the officers' authority under statute for failing to provide adequate compensation to the plaintiff pursuant to his rights vested under law. *Id.* at 164, 166-67. Chancellor Kent held that the statute "ought not to be enforced . . . until such provision should be made," *id.* at 164, asserting the Court's jurisdiction to enjoin the officers from proceeding to divert the water course until the plaintiff's legal rights were indemnified. *Id.* at 164-65, 167-69.

Applying on-point precedent from English Chancery, Chancellor Kent concluded that the equitable remedial jurisdiction in the cases before him was "well settled, and in constant exercise." *Belknap*, 2 Johns. Ch. at 473-74 (citing *Hughes v. Trs. of Morden Coll.*, 1 Ves. Sen. 188, 27 Eng. Rep. 973 (1748) (Ld. Hardwicke, Ch.); *Shand v. Henderson*, 2 Dow. P.C. 519 (1814) (Ld. Eldon, Ch.)); *see Gardner*, 2 Johns. Ch. at 168 (citing *Agar v. Regent's Canal Co.*, G Coop. 77, 14 R. R. 217 (1815) (Ld. Eldon, Ch.)). Moreover, in each of these cases where the controversy between parties "turn[ed] upon the construction of [an] act," Chancellor Kent tailored the injunctive decrees to directly "confine [the officers] and their operations . . . within the strict precise limits prescribed by the statute," but not extend jurisdiction *in rem* over the underlying statute itself. *Belknap*, 2 Johns. Ch. at 471-74; *see Gardner*, 2 Johns. Ch. at 162. Each injunction acted strictly *in personam* on the officers themselves, dictating *only* their specific actions *in relation* to the law at issue between the parties. The impact *in rem* of each injunction on the underlying law was merely incidental. Thus, by operating exclusively within the territory of *in personam*, Chancellor Kent's injunctions could not be dissolved or superseded by an order or judgment at law with conflicting effects. *See Belknap*, 2 Johns. Ch. at 474 (Kent, Ch.) ("These cases remove all doubt on the point of jurisdiction, and the observation of Lord *Hardwicke* alludes to its preeminent utility."); CASES CONCERNING EQUITY, at xlvii; LANGBEIN ET AL., at 334-36 (citing *The King's Order and Decree in Chancery*, Cary 115, 21 Eng. Rep. 61 (1616)).

In the instant motions before the Court, Intervenor-Plaintiffs each seek injunctions that act *in personam* on the Government Defendants. The Court is asked to en-

join the Government Defendants from enforcing against Intervenor-Plaintiffs the two challenged provisions of the Final Rule—along the same lines as the relief issued by the Court during the preliminary injunction stage of the litigation.[39] Such relief would entail that the Government Defendants and their officers, agents, servants, and employees are enjoined from implementing and enforcing against Intervenor-Plaintiffs and their customers the provisions in 27 C.F.R. §§ 478.11 and 478.12(c) that the Court has determined are unlawful.[40] The Government Defendants contend that, following the Supreme Court's stay of the APA vacatur of the Final Rule, the prayed injunctions would carve out exemptions from the stayed vacatur and re-vacate the Final Rule for each Intervenor-Plaintiff.[41] The Government Defendants further assert that the prayed injunctive relief before the Court—as it relates to the APA vacatur relief issued at Final Judgment and the stay relief issued after Final Judgment—are "distinctions without a difference," and thus the Court is without jurisdiction to grant the motions.[42] However, the Government Defendants misunderstand the nature of equitable relief and are wrong on all counts.

In the Summary and Final Judgments, the Court vacated the Final Rule, which is the default remedy prescribed by section 706 of the APA for successful challenges to an agency regulation. *See Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75, 375 n.29 (5th Cir.

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[39] Defense Distributed's Mot., ECF No. 249; BlackHawk's Mot., ECF No. 251.

[40] *See, e.g.*, Mem. Ops., ECF Nos. 118, 188.

[41] Defs.' Resp., ECF No. 254.

[42] *Id.*

2022). As courts uniformly recognize, vacatur "does not order the defendant to do anything; it only removes the source of the defendant's authority." *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-10362, 2023 WL 5266026, at *30 (5th Cir. Aug. 16, 2023) (citing *Nken v. Holder*, 556 U.S. 418, 428-29 (2009)); *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Vacatur in legal parlance as the "act of annulling or setting aside"). In the agency context, "vacatur effectively rescinds the unlawful agency [rule]" upon a successful APA challenge. *Id.* (citations omitted). And where the final rule is vacated, that relief "neither compels nor restrains [any] further agency decision-making" on the part of the government. *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022). Applied here, the APA vacatur merely operated on the Final Rule *itself*—specifically the two provisions deemed unlawful—which was entirely annulled, and thus no longer in existence, until the Supreme Court placed its stay on that vacatur. In that sense, it can fairly be said that the vacatur relief prescribed under section 706 of the APA—and ordered by the Court in the Summary and Final Judgments—operated *in rem* on the underlying provisions of the Final Rule in controversy between the parties.

The Supreme Court's stay on the Court's APA vacatur operates as an additional action *in rem* on the underlying provisions of the Final Rule. *See All. for Hippocratic Med.*, 2023 WL 5266026, at *30 (expounding that "a stay is the temporary form of vacatur"). It temporarily supplanted the vacatur *in rem* with a restoration *in rem* on the existence of the Final Rule *itself*. *See id.* But as the foundational history and tradition of equity practice demonstrate, this is wholly different than the

prayed relief before the Court. Whereas APA vacatur "unwinds the challenged agency [rule]," an injunction "blocks enforcement" of it. *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021). Similar to the historical officer injunctions granted in English and Early Republic chancery courts, the preventive injunctions sought by Intervenor-Plaintiffs here operate to directly restrain the Government Defendants from taking actions (*i.e.*, enforcing provisions of the Final Rule) that are in excess of the ATF's statutory authority under the GCA. The injunctions confine the Government Defendants' investigative and enforcement actions regarding the Intervenor-Plaintiffs within the precise limits prescribed by the GCA.

In this sense, the prayed injunctions act purely *in personam* over the Government Defendants *themselves*. The relief would dictate *only* the Government Defendants' specific actions *in relation* to the Final Rule in controversy between the parties, without issuing any commands or alterations on the Final Rule *itself*. And the prayed injunctions' binding effect *in personam* over the Government Defendants' enforcement decisions is backed by the traditional force of contempt, which is wholly lacking in both the Court's original APA vacatur and the Supreme Court's stay that each act *in rem* over the Final Rule. *See All. for Hippocratic Med.*, 2023 WL 5266026, at *31. Furthermore, to the extent that the secondary impact of the prayed injunctions may incidentally conflict with the *in-rem* operation of the unvacated Final Rule, the force and effect of the *in personam* decree sought by Intervenor-Plaintiffs predominates. *See Belknap*, 2 Johns. Ch. at 474 (Kent, Ch.); CASES CONCERNING EQUITY, at xlvii; LANGBEIN ET AL., at 334-36 (citing *The King's Order and Decree in Chancery*,

Cary 115, 21 Eng. Rep. 61 (1616)). Accordingly, the prayed injunctive relief satisfies the first maxim of equity jurisdiction.

ii. The Prayed Injunctions Follow the Law

An outflow of the *in personam* equity maxim is a companion contour that the exercise of equitable remedial jurisdiction "follows the law" and "seeks out and guides itself by the analogies of the law." 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 19, 64 at 22, 71-72. This maxim neatly complements that of equity's *in personam* posture. That is, if equity power cannot be exercised *in rem*, it cannot modify judgments at law or declare new rights at law either. *See* CASES CONCERNING EQUITY, at xlv, li (citing *Ward v. Fulwood*, No. 118-[201] (Ch. 1598)). In this regard, the Chancellors of England drew upon the wisdom of the ancients. *See* 1 LORD NOTTINGHAM'S CHANCERY CASES, at lii, n.2. Building upon a principle of Aristotle's original formulation of equity, the English Chancellors recognized that "laws properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges." ARISTOTLE, RHETORIC 1353a-b (J. H. Freese trans., Harvard 1926). By the 18th century, Chancery fleshed out this antique maxim into a more clearly defined framework: "[Equitable remedial] discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy. In others again, it relieves against the abuse, or allays the rigour [sic] of it, but in no case does it contradict or overturn the grounds or principles thereof." *Cowper v. Earl Cowper* (1734) 24 Eng. Rep. 930, 942 (Jekyll, MR); *see also Dudley v. Dudley*, Prec. Ch. 241, 244, 24 Eng.

Rep. 118, 119 (Ch. 1705) ("Equity therefore does not destroy the law, nor create it, but assist it.").

Specifically, where a rule of statutory law is directly on point and governs the entire case or particular point at issue, a "Court of Equity is as much bound by it, as a Court of Law, and can as little justify departure from it." 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 64 at 72 (citing *Kemp v. Pryor* (1802) 32 Eng. Rep. 96, 101; 7 Ves. Jr. 237, 249-51 (Ld. Eldon, Ch.)). To that end, it became a "familiar principle of equity jurisdiction to protect by injunction statutory rights and privileges which [were] threatened to be destroyed or rendered valueless to the party by unauthorized interference of others." *Tyack v. Bromley*, 4 Edw. Ch. 258, 271-72 (N.Y. Ch. 1843), *modified sub nom. Tyack v. Brumley*, 1 Barb. Ch. 519 (N.Y. Ch. 1846). If upon following the applicable law, it was conclusive that a party seeking injunctive relief was in "actual possession" of a "clear and undisputed" statutory right, the "settled" doctrine of chancery courts was that an "injunction is the proper remedy to secure to [that] party the enjoyment" of their right against invasion by others. *Croton Tpk. Co. v. Ryder*, 1 Johns. Ch. 611, 611, 615-16 (N.Y. Ch. 1815) (Kent, Ch.) (granting injunctive relief to secure a company's statutory right to a tollway and explaining that the "equity jurisdiction in such a case is extremely benign and salutary," without which "all our statute privileges . . . would be rendered of little value"); *see Newburgh & C. Tpk. Rd. Co. v. Miller*, 5 Johns. Ch. 101, 111-14 (N.Y. Ch. 1821) (Kent, Ch.) (granting a perpetual injunction to secure a company's statutorily vested right to a operate a bridge); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 927, at 206 (Boston, 2d ed. 1839).

A favorable judgment at law on a statutory right asserted by the plaintiff was sufficient to establish the possession of a legally vested right entitled to the protection of an injunctive decree. *Tyack*, 4 Edw. Ch. at 271 (explaining that "it is discreet to await the decision of a court of law upon the legal right set up" for a court of chancery to enforce it in equity); 2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 927, at 207 ("And when the right is fully established a perpetual injunction will be decreed.") (citations omitted)); *see Livingston v. Livingston*, 6 Johns. Ch. 497, 497, 499-501 (N.Y. Ch. 1822) (Kent, Ch.) (holding, after a right was decided in favor of the plaintiff in one action and while another was still pending, that it was "just and necessary" to grant injunctive relief to prevent "further disturbance" of the plaintiff's asserted legal right "until the right is settled" at law).

The question of whether the prayed injunctions follow the law depends on whether Intervenor-Plaintiffs are legally vested with the statutory right of having the Final Rule set aside. *See* 5 U.S.C. § 706(2)(C) (providing a right of action for regulated entities to have courts "hold unlawful and set aside agency [rules]" that are determined to be "in excess of statutory jurisdiction, authority, or limitations"). And whether Intervenor-Plaintiffs are legally vested with the statutory right to have the Final Rule set aside falls upon the "law of the case" with respect to that right. Herein lies the dispute between the parties.

The law-of-the-case doctrine posits that "when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case." *Med. Ctr. Pharmacy v. Holder*, 634

F.3d 830, 834 (5th Cir. 2011) (cleaned up). In the present litigation, the Court held on the merits that both challenged provisions of the Final Rule were unlawful and that the Government Defendants "acted in excess of its statutory jurisdiction by promulgating [the Final Rule]." Later on in the Court's Opinion and Order Granting Summary Judgment (ECF No. 227), the Court vacated the Final Rule pursuant to the default statutory remedy that Intervenor-Plaintiffs were entitled to. The Court entered a Final Judgment (ECF No. 231) categorically memorializing the grant of summary judgment to Intervenor-Plaintiffs (*i.e.*, statutory right) and the vacatur of the Final Rule (*i.e.*, statutory remedy). By this point at least, or upon Summary Judgment, Intervenor-Plaintiffs had been vested with the statutory right to have the unlawful provisions of the Final Rule set aside under the APA. The Government Defendants contend that that Intervenor-Plaintiffs were divested of that right by the Supreme Court's Stay Order, which now controls as the "law of the case" on that issue. *See VanDerStok*, 2023 WL 5023383, at *1 (mem.). The Stay Order provides, in relevant part, that this Court's Summary and Final Judgments are "staying pending the disposition of the appeal . . . *insofar as they vacate* the final rule of the [ATF]." *Id.* (emphasis added). The controlling "law of the case" that is dispositive of Intervenor-Plaintiffs' statutory right turns upon an interpretation of the Stay Order.

In any case involving the interpretation of an order, the Court examines the text to give each word its ordinary meaning and each phrase its intended effect. *United States v. Kaluza*, 780 F.3d 647, 659 (5th Cir. 2015); *Cargill v. Garland*, 57 F.4th 447, 458 (5th Cir. 2023). Here, the plain language of the Stay Order indi-

cates that the Supreme Court did not order a full stay of the Court's Summary and Final Judgments. Rather, the inclusion of the phrase "insofar as" is an express limitation of the scope of the Stay Order. The meaning of "insofar as" in legal parlance is "[t]o the degree or extent that." BLACK'S LAW DICTIONARY (10th ed. 2014); *see Pub. Serv. Co. of Ind. v. EPA*, 682 F.2d 626, 635 n.15 (7th Cir. 1982) (noting "the primary definition of 'insofar as' is to such extent or degree") (cleaned up)). It is clear to the Court that this phrase narrows the operative scope of the Stay Order "to the extent that" it merely stays the portion of the Court's Summary and Final Judgments that issued an APA vacatur remedy on the Final Rule.

So too, if the Supreme Court intended to order a full stay, it certainly could have used the familiar phrase of "full stay" that it has in prior stay orders. *See, e.g., Morrison v. Olson*, 484 U.S. 1058 (1988) (granting "application for full stay"). The Supreme Court could have also crafted a verbatim stay order that simply omitted of any limiting or conditional language, as it did in a separate case just months before. *See Danco Lab'ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1075 (2023) (mem.).[43] Instead, the Supreme Court followed prior stay orders that incorporated "insofar as" and like phrases that narrow the scope and frame the specific

[43] "The April 7, 2023 order of the United States District Court for the Northern District of Texas, case No. 2:22-cv-223, is stayed pending disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court." *Id.*

target of the stay. *See, e.g.*, *Berbling v. Littleton*, 409 U.S. 1053, 1053-54 (1972) ("The application for stay of judgment . . . is granted *insofar as it applies to applicants O'Shea and Spomer* pending the timely filing of a petition for a writ of certiorari.") (emphasis added)); *see also Rsrv. Nat. Ins. Co. v. Crowell*, 507 U.S. 1015 (1993) ("The application for stay . . . is granted and it is ordered that execution *upon the punitive damages portion* of the judgment . . . is stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari") (emphasis added)).

Furthermore, in its application briefing, the Government Defendants requested that, "*to the extent* the [Supreme] Court concludes that the June 30 [summary judgment] order might *continue to have independent effect*," the Supreme Court's order should "stay *both* the June 30 [summary judgment] order and the July 5 final judgment" of this Court.[44] The Supreme Court accepted that invitation and combined it with language confining the stay to cover only this Court's grant of vacatur—the statutorily prescribed remedy for unlawful agency actions under the APA—and not the Court's judgment on the merits that the challenged provisions of the Final Rule are unlawful. Accordingly, the Court finds that the law of the case—with respect to the issue of Intervenor-Plaintiffs' legal rights—remains decided by the Court's own Summary and Final Judgments. Having decided in their favor, each Intervenor-Plaintiff remains legally vested with the statutory *right* to have the Final Rule set aside under the APA, even while the

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[44] Defense Distributed's Reply Ex., ECF No. 257-3, at 20-21, 21 n.4 (emphasis added).

statutory *remedy* for that right is presently stayed pending appeal.

Intervenor-Plaintiffs pray for the Court to preserve their statutory right against the Final Rule through injunctive relief. In accordance with historical and traditional equity practice, the Court's prior judgment of law in favor of Intervenor-Plaintiffs' asserted statutory right establishes their possession of a legally vested right within the reach of equity jurisdiction. *Tyack*, 4 Edw. Ch. at 271; 2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 927, at 207 (citations omitted); *see Livingston*, 6 Johns. Ch. at 497, 499-501 (Kent, Ch.). Based on the law-following maxim of equity, therefore, the Court may enforce Intervenor-Plaintiffs' APA-vested right against the Final Rule with an injunctive decree.

iii. The Prayed Injunctions Relieve Rights Without Remedy

Lastly, and inversely proportional to "equity follow[ing] the law," is the maxim that "equity suffers not a right to be without a remedy." FRANCIS, MAXIMS OF EQUITY, no. 6, at 24; *see* 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 56, at 75 ("[I]t cannot be generally affirmed, that, where there is no remedy at law in the given case, there is none in Equity.") (citing *Kemp v. Pryor* (1802) 32 Eng. Rep. 96, 101; 7 Ves. Jr. 237, 249-250, (Ld. Eldon, Ch.))).[45] This maxim reflects

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[45] "The maxim that 'equity follows the law' is also reflected in the notion that injunctions were not to be granted unless the legal remedy was inadequate—*equity begins when law ends*." Henry E. Smith, *Equity as Meta-Law*, 130 YALE L. J. 1050, 1116 (2021) (emphasis added).

the original teleology of equity in Western law, *see id.* §§ 2-3, at 2-5 (discussing the ancient and natural law underpinnings of equity), which was "to give remedy in cases where none was before administered" under the ordinary law. 3 BLACKSTONE, COMMENTARIES, at 50. Though historically utilized to expand equitable intervention in the law, the maxim nonetheless functions as another cabining mechanism on the scope of equity jurisdiction. *See* 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33, at 32. In addition to the *in personam*- and law-following constraints, equitable remedial jurisdiction is further confined to "cases of rights recognised [sic] and protected by municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the . . . Law." *Id.* (citations omitted). The adequate remedy rule of traditional injunction practice posited, as it does today, that equity lacks jurisdiction in cases where remedies prescribed by law are at least as adequate as those available in chancery—measured against the deficiencies of the party seeking relief for a vested right. *See Lewis v. Lord Lechmere* (1722) 88 Eng. Rep. 828, 829; 10 Mod. 503, 506, (K.B.) ("The Lord Chancellor was of opinion, that the remedy the [plaintiff] had at law upon the articles was not adequate to that of a bill in equity for a specific performance."); *see also, e.g.*, *Bonaparte*, 3 F. Cas. at 834 ("[T]his is deemed an irreparable injury, for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for [equity's] interference.").

The historical case law highlights several common threads that, each taken on their own, were sufficient to render legal relief inadequate *per se* and call upon preventive injunctive relief to secure plaintiffs' legal rights.

The first, and most straightforward scenario, is where there is *no* statutory remedy available to enforce a party's legal right vested by that statute. In *Bodley v. Taylor*, for example, the Marshall Court was presented with the argument that because the legal right at issue was "given by a statute " and the "[statute] affords no remedy against a person who has defeated this right," that a "court of chancery, which can afford it, ought to consider itself as sitting in the character of a court of law, and ought to decide those questions as a court of law would decide them." 9 U.S. (5 Cranch) 191, 222 (1809). Chief Justice Marshall retorted that the "jurisdiction exercised by a court of chancery is *not* granted by statute; it is assumed by itself." *Id.* (emphasis added). In that case, the Marshall Court held that a federal court in such scenarios "will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this court as the principles of equity require its application." *Id.* at 223 (Marshall, C.J.). A second scenario is where the "loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensure from the wrongful act." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 926, at 204-205. "[I]n every such case," Justice Story observed, "Courts of Equity will interfere by injunction, in furtherance of justice and the violated rights of the party. *Id.* at 205 (citations omitted). It is of no significance that "an action for damages would lie at law," either, "for the latter can in no just sense be deemed an adequate relief in such a case." *Id.* (citations omitted). Thus, where either of these scenarios are present, traditional injunction practice dictates that equity subsume jurisdiction over the cause and secure the legal rights of plaintiffs.

The no-right-without-remedy maxim also played a prolific role in actions to enjoin the *ultra vires* conduct of public officers during the 18th and 19th centuries. *E.g.*, *Hughes v. Trs. of Morden Coll.*, 1 Ves. Sen. 188, 27 Eng. Rep. 973 (1748) (Ld. Hardwicke, Ch.); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 845 (1824) (Marshall, C.J.); *see also Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845) ("[R]elief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress."); *Bonaparte*, 3 F. Cas. at 827 (collecting cases).

In *Hughes v. Trustees of Merton College*, English Chancery asserted its equity mandate over a bill to enjoin turnpike commissioners, acting under color of statute, from proceeding to take possession of, dig through, and destroy garden grounds that the plaintiff was legally entitled to. 1 Ves. Sen. 188, 27 Eng. Rep. 973 (1748) (Ld. Hardwicke, Ch.). The commissioners' authorizing statute had specifically excluded gardens from their lawful mandate. *Id.* Despite the availability of a remedy at law, Lord Hardwicke held that the plaintiff was entitled to a preventive injunction to restrain the commissioners from acting outside of the statute's provisions, at the expense of the plaintiff's garden grounds, any further. *Id.* Lord Hardwicke's reasoning was grounded in the recognition that the plaintiff was a gardener by trade, and that the impending "destruction of what a man was using as his *trade or livelihood*" could never receive adequate remedy at law. *Jerome v. Ross*, 7 Johns. Ch. 315, 335 (N.Y. Ch. 1823) (Kent, Ch.) (citing *Hughes*, 1 Ves. Sen. 188, 27 Eng. Rep. 973). Thus, Lord Hardwicke found it squarely within the jurisdictional prerogative of equity to protect the pleading tradesman from permanent economic loss at the hands of govern-

ment officers. *Id.* The precedent set by Lord Hardwicke in *Hughes*—that equity has jurisdiction to protect plaintiffs' trades and livelihoods entangled in their legal rights, by preventive injunctive relief, from impending destruction at the hands of officer actions that are *ultra vires*—was directly followed and extended in subsequent cases under the Court of Chancery of Lord Eldon. *See Agar v. Regent's Canal Co.*, G Coop. 77, 14 R. R. 217 (1815) (Ld. Eldon, Ch.) (granting an injunction to restrain defendants, empowered by act of parliament to cut a canal, from departing from the statutorily prescribed boundaries of the canal and destroying a tradesman's brickyard and garden).

By the 19th century, the equity jurisdiction head enshrined in *Hughes* had become "well settled" and of "preeminent utility" to traditional injunction doctrine. *Belknap*, 2 Johns. Ch. at 473-74 (Kent, Ch.). Its preeminence was demonstrated in *Osborn v. Bank of the United States*, where the Marshall Court affirmed an injunction that restrained the state auditor from acting outside of his lawful authority to impose an annual levy of $100,000 on the national bank, threatening both to destroy its franchise and expel it from the State of Ohio. 22 U.S. (9 Wheat.) 738, 838-40 (1824). The Supreme Court rejected the state auditor's challenge to the equitable jurisdiction of federal courts to provide or affirm injunctive relief, notwithstanding the availability of remedies at law. *See id.* at 841-45. The Supreme Court found that "the probability that remedy [at law] would be adequate, is stronger in the cases put in the books, than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay." *Id.* at 845. Based upon this finding of impending destruction to the bank's statutory franchise and business operations,

Chief Justice Marshall, writing for the Supreme Court, held that "it is the province of a Court of equity, in such cases, to arrest the injury, and prevent the wrong," and that the Court's injunctive decree "is more beneficial and complete, than the law can give." *Id.*

In the instant motions, the prayed injunctions embody both scenarios from classical injunction practice that implicate equitable remedial jurisdiction as a *per se* matter. First, Intervenor-Plaintiffs possess a legally vested *right* that is bereft of any legal *remedy*. Even assuming their businesses survive the appeals process, Intervenor-Plaintiffs will never be able to recoup monetary damages at law due to the Government Defendants' sovereign immunity. In traditional and modern injunction practice, this bar on recovery at law is already more than enough to justify equitable remedial intervention, as such harms cannot be undone through monetary remedies. *Dennis Melancon*, 703 F.3d at 279 (citation omitted); *Wages & White Lion*, 16 F.4th at 1142. Furthermore, the only statutory *remedy* available to vindicate Intervenor-Plaintiffs' statutory *right* is the vacatur prescribed by § 706(2) of the APA. But because this exclusive remedy is subject to stay pending appeal and Intervenor-Plaintiffs lack any other remedy at law, the grounds for equity jurisdiction over the prayed injunctive relief is without doubt at this stage in the litigation. *See Bodley*, 9 U.S. (5 Cranch) at 222-23 (1809) (Marshall, C.J.); *Louisiana v. Biden*, 55 F.4th at 1033-34. Otherwise, Intervenor-Plaintiffs "may be unable to . . . pursue [their] legal rights."[46]

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[46] BlackHawk's Mot. 8, ECF No. 251.

Second, compliance with the unlawful interpretation of the GCA carries the potential for serious economic costs and existential threats to the trades and livelihoods of Intervenor-Plaintiffs. *Jerome*, 7 Johns. Ch. at 335 (Kent, Ch.) (citing *Hughes*, 1 Ves. Sen. 188, 27 Eng. Rep. 973); *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). Without intervening equitable relief in the interim, Intervenor-Plaintiffs will suffer substantial economic costs should the Government Defendants enforce the Final Rule. Indeed, any resumed enforcement efforts against Intervenor-Plaintiffs would result in significant harm to their businesses. Defense Distributed has already shown that it "will go out of business and cease to exist."[47] This harm is even more salient today than when the Court first took up this issue. The longer the business sustains economic costs, the more likely that the Final Rule "will destroy Defense Distributed, soon, unless the government is enjoined from enforcing" the Final Rule in the interim.[48] Similarly, BlackHawk "will be unable to continue its core business operations" and "may cease to exist."[49] BlackHawk previously demonstrated that complying with the Final Rule's requirements would entail an overhaul of its entire online, direct-to-consumer business model, along with requiring it to incur costs through administrative compliance and other FFL-related fees.[50] While the vacatur of the Final Rule is on appeal, preventing the incurrence of such prohibitive costs will avoid irreversible damage to Intervenor-Plaintiffs' businesses.

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[47] Defense Distributed's Mot. 5, ECF No. 249.

[48] *Id.*

[49] BlackHawk's Mot. 8, ECF No. 251.

[50] Second Mem. Op. 7, ECF No. 118.

But even if the Court's original APA vacatur remedy is ultimately affirmed on appeal, any incurred economic losses will be for naught. Harms that flow from "complying with a regulation later held invalid almost always produce[] the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d at 433 (cleaned up). This is especially true when such harms "threaten the existence of the [Intervenor-Plaintiffs'] business[es]" and could lead to catastrophic economic losses—including closing the business—absent interim protection from an injunction pending appeal. *Atwood Turnkey*, 875 F.2d at 1179. Where a plaintiff occupied the status of tradesman, traditional equity practice posited that the impending "destruction of what [that plaintiff] was using as his *trade or livelihood*" can never receive adequate remedy at law. *Jerome*, 7 Johns. Ch. at 335 (Kent, Ch.) (citing *Hughes*, 1 Ves. Sen. 188, 27 Eng. Rep. 973). Under the historical no-right-without-remedy maxim of equity, therefore, there can be no uncertainty as to the Court's equitable remedial prerogative over Intervenor-Plaintiffs' prayed injunctions. *See Osborn*, 22 U.S. (9 Wheat.) at 845 (Marshall, C.J.); *Carroll*, 44 U.S. (3 How.) at 463 (1845). Further than that, an injunctive decree awarded to Intervenor-Plaintiffs would affirm the maxim's core tenet that "equity suffers not a right to be without a remedy." FRANCIS, MAXIMS OF EQUITY, no. 6, at 24; *see* 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 56, at 75.

Accordingly, the Court finds that the history and tradition of equity practice familiar to our Founding generation, along with its accompanying jurisdictional maxims, are in perfect parity with the injunctions presently sought by Intervenor-Plaintiffs in their motions before the Court. The Court proceeds by testing this holding

against applicable constitutional and doctrinal restraints.

2. Jurisdiction Lies Within Constitutional and Doctrinal Boundaries

Drawing from the classical roots of equity jurisprudence, contemporary judicial doctrine recognizes that "it is axiomatic that federal courts possess inherent power to enforce their judgments." *Thomas v. Hughes*, 27 F.4th 363, 368 (5th Cir. 2022) (cleaned up). "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled." *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). A court's ancillary enforcement jurisdiction over its orders and judgments is a "creature of necessity," *see Peacock*, 516 U.S. at 359, without which "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868); *Bank of U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825). This ancillary enforcement jurisdiction includes the power to "enter injunctions as a means to enforce prior judgments." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 577-78 (5th Cir. 2005) (citing *Santopadre v. Pelican Homestead & Sav. Ass'n*, 937 F.2d 268 (5th Cir.1991)). When a federal district court had subject-matter jurisdiction over the principal action containing the order or final judgment that a party seeks to enforce in a post-judgment proceeding, there is no doubt as to the jurisdiction of that same court to enjoin actions threatening to contravene that prior order or judgment in which the

court itself had originally entered. *See Hunt*, 292 U.S. at 239; *Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 551-52 (7th Cir. 2021). This is true of the instant injunction proceedings and is not disputed by either of the parties.

But a district court's ancillary equitable enforcement power is cabined by the additional constraints found within Article III and contemporary judicial doctrine. As "inferior Courts" ordained and established by Congress, the judicial power of a district court is limited by and subservient to the judicial power exercised by higher inferior courts, the judicial power exercised by the Supreme Court of the United States, and Congressional enactments defining or limiting the scope of the district court's judicial power. U.S. CONST. art. III §§ 1, 2; *see Martin v. Hunter's Lessee*, 14 U.S. 304, 314-15 (1816); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). To that end, a district court retains ancillary enforcement jurisdiction pending direct appeal only insofar as its prior order or judgment is not stayed or superseded by a superior federal court. *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 n.2 (5th Cir. 1984); *Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145-46 (5th Cir. 1982); *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1128-29 (D.C. Cir. 1978). Moreover, its jurisdiction over an injunction pending appeal is "limited to maintaining the status quo" and cannot extend so far as to "divest the court of appeals [of] jurisdiction" while the appealed issues are before it. *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989) (citing FED. R. CIV. P. 62(c)); *see also EEOC v. Locs. 14 & 15, Int'l Union of Operating Engineers*, 438 F. Supp. 876, 880 (S.D.N.Y. 1977). The parties *are* in dispute over whether the Court would upset these

boundaries by exercising jurisdiction over the prayed relief. The Court finds that the exercise of equitable remedial jurisdiction over the prayed relief is safely within the boundaries prescribed by the Constitution of the United States and federal judicial doctrine.

For starters, the Government Defendants' assertion that the Supreme Court's Stay Order functions as a bar to jurisdiction falls short. Guided by the history and tradition of equity and the plain meaning of the Supreme Court's Stay Order, the Court's prior analysis of how the equitable maxims comport with the prayed relief are dispositive of the matter. Very simply, the Stay Order merely acts *in rem* over the Final Rule, while the prayed injunctions act *in personam* on the Government Defendants and their conduct *in relation* to the Final Rule. Thus, if the Court were to issue the injunctive decrees sought by Intervenor-Plaintiffs, the Final Rule would remain on the books and carry the force and effect of law—unless and until the Supreme Court's stay is lifted and the Court's original APA vacatur remedy is reinstated. Moreover, the breadth of the Stay Order is limited to the statutory *remedy* decreed by the Court at Final Judgment, while the statutory *rights* decreed by the Court at Final Judgment remain the applicable law of the case. Under that law of the case, Intervenor-Plaintiffs are vested with a statutory *right* against the Final Rule that is enforceable in equity. And to the degree that the material results of the prayed injunctions, if granted, might intersect with the material results of the stay insofar as it concerns enforcement of the challenged provisions of the Final Rule against Intervenor-Plaintiffs, our system rests on the bedrock principle that "the equity rule and decree will prevail." CASES CONCERNING EQUITY, at xlvii; *see The King's Order and De-*

cree in Chancery, Cary 115, 21 Eng. Rep. 61 (1616). In sum, the Stay Order does not bar the Court's equitable remedial jurisdiction to issue relief in equity to Intervenor-Plaintiffs.

Lastly, the injunctive decree sought by Intervenor-Plaintiffs would merely preserve the status quo pending appeal and potential certiorari. According to the Fifth Circuit, the *status quo ante* this litigation is the "world before the [Final] Rule became effective." *VanDerStok v. Garland*, No. 23-10718, 2023 WL 4945360, at *1 (5th Cir. July 24, 2023) (per curiam). With vacatur stayed, the full scope of the *status quo ante* is currently unattainable, as it would require some form of rescission operating *in rem* on the Final Rule itself. However, within the *status quo* world before the Final Rule became effective is the next closest analog at a lower level of generality, which is the world before the Final Rule became *enforceable* against Intervenor-Plaintiffs. And indeed, the Government Defendants themselves conceded this in their stay application briefing before the Supreme Court of the United States.[51] The Court agrees with the Government Defendants and finds that the injunctive relief sought by Intervenor-Plaintiffs would merely preserve the *status quo ante* this litigation with respect to the legal relationship between the parties before the Court in the present motion.

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[51] Defense Distributed's Reply Ex., ECF No. 257-1, at 41 ("To begin with, the [Final] Rule has been the "status quo" since August 2022 for everyone except some respondents and their customers who secured preliminary relief."); *Id.* No. 257-3, at 19 ("First, the Rule has been the "status quo" for nearly a year for everyone except some respondents who secured preliminary relief (and their customers).").

Accordingly, the Court finds that the exercise of equity jurisdiction over the prayed injunctions falls within constitutional and judicial constraints. The historical and traditional grounds for the Court's equity jurisdiction neatly trace the separate boundaries erected by the Constitution of the United States and federal judicial doctrine. Overall, the Court holds that it is properly vested with equitable remedial jurisdiction under Article III to afford injunctive relief to Intervenor-Plaintiffs, pending appeal, that would secure their legally vested rights under the APA against the Government Defendants' enforcement of the Final Rule. The Court proceeds to the merits of Intervenor-Plaintiffs' emergency motions for injunctive relief to determine if such shall warrant.

III. LEGAL STANDARD

Having established ancillary enforcement jurisdiction, the decision to extend interlocutory relief now rests with the sound discretion of this Court. *See Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (laying out the criteria for preliminary injunctive relief); *see also Hecht*, 321 U.S. at 329 ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." (cleaned up)). The factors governing the Court's discretion on whether to grant an injunction pending appeal are virtually identical to those governing whether to grant a preliminary injunction. *See, e.g.*, *Chamber of Com. v. Hugler*, No. 3:16-CV-1476-M, 2017 WL 1062444, at *2 (N.D. Tex. Mar. 20, 2017); *Cardoni v. Prosperity Bank*, No. CIV.A. H-14-1946, 2015 WL 410589, at *1 (S.D. Tex. Jan. 29, 2015).

To establish entitlement to injunctive relief pending disposition of appeal, Intervenor-Plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that the balance of hardships weighs in their favor; and (4) that the issuance of injunctive relief will not disserve the public interest. *Daniels Health Servs., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013). The final two elements merge when the opposing party is the government. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As movants, Intervenor-Plaintiffs seeking relief bear the burden of proving all four elements. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008); *Miss. Power & Light Co.*, 760 F.2d at 621.

Upon determination that a party is entitled to injunctive relief, a court must make a separate determination regarding the appropriate scope of the prospective relief, which is "dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). As an extraordinary remedy, an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (cleaned up). Thus, an injunction must "redress the plaintiff's particular injury," and no more. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted).

IV. ANALYSIS

A. Substantial Likelihood of Success on the Merits

At the outset, Intervenor-Plaintiffs must demonstrate that they are substantially likely to succeed on the merits of their APA claims. *Daniels Health Servs.*, 710 F.3d at 582. Intervenor-Plaintiffs contend that the Final Rule exceeds the scope of lawful authority that Congress conferred upon the ATF. The Court agrees.

Very simply, the Court has already decided on the merits that there exists no genuine dispute of material fact that the challenged provisions of the Final Rule—specifically, 27 C.F.R. §§ 478.11, 478.12(c)—exceed the scope of the ATF's statutory jurisdiction under the GCA, *see* 18 U.S.C. § 921(a)(3), and that Intervenor-Plaintiffs are entitled to judgment as a matter of law on their APA claims. *See* 5 U.S.C. § 706(2)(c) (codifying the statutory cause of action and relief for agency actions "in excess of statutory jurisdiction, authority, or limitations").[52] In their motions before the Court, Intervenor-Plaintiffs seek injunctive relief from the Government Defendants' enforcement of the Final Rule on identical grounds.[53] As discussed earlier in this Opinion, the Court finds that its previous judgments on the merits of these APA claims have not been stayed by the Supreme Court and continue to embody the "law of the case." *Med. Ctr. Pharmacy v. Holder*, 634 F.3d

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[52] *See* Summ. J. Mem. Op. & Order 35, ECF No. 227 (holding on the merits that both challenged provisions of the Final Rule were invalid and that the ATF "acted in excess of its statutory jurisdiction by promulgating [the Final Rule].").

[53] *See* Defense Distributed's Mot., ECF No. 249; BlackHawk's Mot., ECF No. 251.

830, 834 (5th Cir. 2011) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case.") (cleaned up)).

Based on the foregoing, Intervenor-Plaintiffs have demonstrated, *a fortiori*, an *actual* success on the merits of their claims.

B. Substantial Threat of Irreparable Harm Absent Injunctive Relief

Intervenor-Plaintiffs are also obliged to show a substantial threat of irreparable harm. Irreparable harm exists where "there is no adequate remedy at law." *Louisiana v. Biden*, 55 F.4th 1017, 1033-34 (5th Cir. 2022) (cleaned up). The Fifth Circuit considers harm irreparable "if it cannot be undone through monetary remedies." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir. 1984)). A showing of economic loss is usually insufficient to establish irreparable harm because damages may be recoverable at the conclusion of litigation. *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). However, "an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989). Or where costs are nonrecoverable because the government-defendant enjoys sovereign immunity from monetary damages, as is the case here, irreparable harm is generally satisfied. *See Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). Irreparable harm must be concrete, non-speculative, and more than merely *de minimis*. *Daniels Health*

Servs., 710 F.3d at 585; *Dennis Melancon, Inc.*, 703 F.3d at 279. Finally, a movant's "delay in seeking relief is a consideration when analyzing the threat of imminent and irreparable harm." *Anyadike v. Vernon Coll.*, No. 7:15-cv-00157, 2015 WL 12964684, at *3 (N.D. Tex. Nov. 20, 2015).

Compliance with an impermissible or illegal interpretation of the law carries the potential for economic costs. *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). Without an injunction pending appeal, Intervenor-Plaintiffs will suffer substantial economic costs should the Government Defendants enforce the Final Rule. Indeed, any resumed enforcement efforts against Intervenor-Plaintiffs would result in significant harm to their businesses. Defense Distributed has already shown that it "will go out of business and cease to exist."[54] This harm is even more salient today than when the Court first took up this issue. The longer the business sustains economic costs, the more likely that the Final Rule "will destroy Defense Distributed, soon, unless the government is enjoined from enforcing" the Final Rule in the interim.[55] Similarly, BlackHawk "will be unable to continue its core business operations" and "may cease to exist."[56] BlackHawk previously demonstrated that complying with the Final Rule's requirements would entail an overhaul of its entire online, direct-to-consumer business model, along with requiring it to incur costs through administrative compliance and other FFL-related fees.[57] While the vacatur of the Final Rule is on

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[54] Defense Distributed's Mot. 5, ECF No. 249.

[55] *Id.*

[56] BlackHawk's Mot. 8, ECF No. 251.

[57] Second Mem. Op. 7, ECF No. 118.

appeal, preventing the incurrence of such prohibitive costs will avoid irreparable damage to Intervenor-Plaintiffs' businesses.

If this Court's vacatur is ultimately affirmed on appeal, any incurred economic losses will be for naught. Harms that flow from "complying with a regulation later held invalid almost always produce[] the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d at 433 (cleaned up). This is especially true when such harms "threaten the existence of the [Intervenor-Plaintiffs'] business[es]" and could lead to catastrophic economic losses—including closing the business—absent interim protection from an injunction pending appeal. *Atwood Turnkey*, 875 F.2d at 1179. And even if the businesses somehow survive beyond the appeals process, Intervenor-Plaintiffs would never be able to recoup monetary damages due to the Government Defendants' sovereign immunity. This bar on recovery is enough to show irreparable harm because such harms cannot be undone through monetary remedies. *Dennis Melancon*, 703 F.3d at 279 (citation omitted); *Wages & White Lion*, 16 F.4th at 1142. In fact, only one remedy at law is available to the Intervenor-Plaintiffs: vacatur under § 706(2) of the APA. Because this exclusive remedy is the subject of the appeal and the parties lack any other remedy at law, the need for injunctive relief pending appeal is even more critical at this stage to preserve the status quo. *Louisiana v. Biden*, 55 F.4th at 1033-34 (explaining that irreparable harm exists where "there is no adequate remedy at law"). Other-

wise, Intervenor-Plaintiffs "may be unable to . . . pursue [their] legal rights."[58]

Further underscoring the need for an injunction pending appeal is the timing of the requested relief. Intervenor-Plaintiffs filed their emergency motions immediately after the Supreme Court issued its stay order.[59] This timing demonstrates the urgency of the need for an injunction. *Anyadike*, 2015 WL 12964684, at *3. Because Intervenor-Plaintiffs are no longer protected by this Court's Final Judgment during the appeals process, an individualized injunction pending appeal is the only way to preserve the status quo and prevent irreparable harm in the interim until the appeals process concludes.

For these reasons, the Court finds that Intervenor-Plaintiffs have carried their burden to show that irreparable harms exist at this stage.

C. The Balance of Equities and Public Interest Favor Issuing Injunctive Relief

The final two elements necessary to support a grant of injunctive relief—the balance of equities (the difference in harm to the respective parties) and the public interest—merge together when the government is a party. *Nken*, 556 U.S. at 435. In this assessment, the Court weighs "the competing claims of injury" and con-

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[58] BlackHawk's Mot. 8, ECF No. 251.

[59] The Supreme Court issued its Order staying the Final Judmgent on August 8, 2023. *Vanderstok*, 2023 WL 5023383, at *1. Defense Distributed filed its emergency motion *the very next day* on August 9, 2023. Defense Distributed's Mot., ECF No. 249. BlackHawk filed its emergency motion *less than a week* later on August 14, 2023. BlackHawk's Mot., ECF No. 251.

siders "the effect on each party of the granting or withholding of the requested relief," paying close attention to the public consequences of granting an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citations omitted).

The Court has established on multiple occasions—and again in this Opinion—that Intervenor-Plaintiffs each face a substantial threat of irreparable harm absent relief from enforcement of the Final Rule. But at the other end of the scale, there can be "*no* public interest in the perpetuation of unlawful agency action." *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022) (emphasis added). As it relates to enforcement of the Final Rule against Intervenor-Plaintiffs, "neither [the Government Defendants] nor the public has *any* interest in enforcing a regulation that violates federal law." *All. for Hippocratic Med. v. FDA*, No. 23-10362, 2023 WL 5266026, at *28 (5th Cir. Aug. 16, 2023) (emphasis added). In this respect, the government-public-interest equities evaporate entirely upon adverse judgment on the merits. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 43 (D.D.C. 2013) (Jackson, J.) (expounding that public interest arguments are "derivative of . . . merits arguments and depend in large part on the vitality of the latter"). The controlling law of this case is that the Government Defendants' promulgation of the two challenged provisions of the Final Rule, *see* 27 C.F.R. §§ 478.11, 478.12(c), transgress the boundaries of lawful authority prescribed by Congress, *see* 18 U.S.C. § 921(a)(3), and are in violation of the federal APA. *See* 5 U.S.C. § 706(2)(c). It follows, of course, that there is *no* injury that the Government Defendants and the public at-large could possibly suffer from.

Having no equities to balance against those of Intervenor-Plaintiffs, the Court finds that the public's interest is entirely undisturbed by a grant of the prayed-for relief.

* * * *

Having considered the arguments, evidence, and applicable law, the Court holds that it has ancillary jurisdiction to enforce, in equity, the portions of its Summary Judgment Order (ECF No. 227) and Final Judgment (ECF No. 231) that remain in effect following the Stay Order of the Supreme Court of the United States. *See VanDerStok*, 2023 WL 5023383, at *1 (mem.). The Court also holds that the relevant factors weigh in favor of granting injunctive relief to Intervenor-Plaintiffs. The proper scope of relief is that which mirrors the relief previously granted to Intervenor-Plaintiffs at the preliminary injunction stage—plus an extended effective period that mirrors the expiration timetable of the stay ordered by the Supreme Court of the United States on August 8, 2023.

V. CONCLUSION

The Court is properly vested with the jurisdiction to dispense—and each Intervenor-Plaintiff has demonstrated their individual entitlement to—injunctive relief against the Government Defendants' enforcement of provisions of the Final Rule that this Court has repeatedly held to be void.

For the foregoing reasons, the Court **GRANTS** the Emergency Motions for Injunction Pending Appeal. Accordingly, the Court **ORDERS** that the Government Defendants—the Attorney General of the United States; the United States Department of Justice; the Di-

rector of the Bureau of Alcohol, Tobacco, Firearms and Explosives; and the Bureau of Alcohol, Tobacco, Firearms and Explosives—and each of their respective officers, agents, servants, and employees—are **ENJOINED** from implementing and enforcing against Intervenor-Plaintiffs Defense Distributed and BlackHawk Manufacturing Group Inc. d/b/a 80 Percent Arms the provisions in 27 C.F.R. §§ 478.11 and 478.12 that the Court has preliminarily and on the merits determined are unlawful. Reflecting the scope of relief previously afforded to each Intervenor-Plaintiff, this injunctive relief shall extend to each of Defense Distributed's and BlackHawk Manufacturing Group Inc. d/b/a 80 Percent Arms' respective customers (except for those individuals prohibited from possessing firearms under 18 U.S.C. § 922 (g)). Reflecting the scope of the stay on the final-judgment remedy decreed in this case, so ordered by the Supreme Court of the United States on August 8, 2023, this injunctive relief shall take effect immediately and shall remain in effect pending the disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought, absent other order on this issue. Should certiorari be denied, this injunctive relief shall terminate automatically. In the event certiorari is granted, this injunctive relief shall terminate upon the sending down of the judgment of the Supreme Court of the United States.

The Court waives the security requirements of Federal Rules of Civil Procedure 62(d) and 65(c). *See*

Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996).[60]

SO ORDERED this **14th day** of **September, 2023**.

/s/ REED O'CONNOR
REED O'CONNOR
UNITED STATES DISTRICT JUDGE

[60] Because neither party raises the security requirement in Rule 65(c), no security is ordered. *See* FED. R. CIV. P. 65(c).

APPENDIX G

(ORDER LIST: 600 U.S.)

TUESDAY, AUGUST 8, 2023

ORDER IN PENDING CASE

23A82 GARLAND, ATT'Y GEN., ET AL. V. VANDERSTOK, JENNIFER, ET AL.

The application for stay presented to Justice Alito and by him referred to the Court is granted. The June 30, 2023 order and July 5, 2023 judgment of the United States District Court for the Northern District of Texas, case No. 4:22-cv-691, insofar as they vacate the final rule of the Bureau of Alcohol, Tobacco, Firearms and Explosives, 87 Fed. Reg. 24652 (April 26, 2022), are stayed pending the disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would deny the application for stay.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10718

JENNIFER VANDERSTOK; MICHAEL G. ANDREN; TACTICAL MACHINING, L.L.C., A LIMITED LIABILITY COMPANY; FIREARMS POLICY COALITION, INCORPORATED, A NONPROFIT CORPORATION, PLAINTIFFS-APPELLEES

BLACKHAWK MANUFACTURING GROUP, INCORPORATED, DOING BUSINESS AS 80 PERCENT ARMS; DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED; NOT AN L.L.C., DOING BUSINESS AS JSD SUPPLY ; POLYMER80, INCORPORATED, INTERVENOR PLAINTIFFS-APPELLEES

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, DEFENDANTS-APPELLANTS

Filed: July 24, 2023

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-691

UNPUBLISHED ORDER

Before SMITH, SOUTHWICK, and WILSON, *Circuit Judges*.

PER CURIAM:

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") asks this panel for a stay of the district court's judgment vacating the entirety of *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24652 (Apr. 26, 2022) (the "Rule").[1] Relevant to the present case, the Rule amends the ATF's regulations by removing and replacing the agency's regulatory definitions of "frame or receiver" and "firearm" as applied to the Gun Control Act of 1968 ("GCA"), *see* 18 U.S.C. § 921(a)(3)(A)-(B).[2] Plaintiffs challenged those changes to the regulations as unlawful.[3]

At summary judgment, the district court found that the two challenged provisions in the Rule exceeded the statutory jurisdiction and authority of the ATF and va-

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[1] The Final Rule took effect on August 24, 2022, in the midst of the district court litigation. *See id*.

[2] The Attorney General is authorized to administer and enforce the GCA. 18 U.S.C. § 926(a). That authority was subsequently delegated to the ATF, which promulgates the Rule pursuant to that Act. *See* 28 C.F.R. § 0.130.

[3] Specifically, plaintiffs alleged that the ATF acted in excess of its statutory authority in two ways. First, the Rule expanded the ATF's authority over partially complete, disassembled, or nonfunctional frames and receivers that may be "readily converted" into "frames and receivers," when Congress limited the ATF's authority to only "frames or receivers" in the GCA. Second, another provision of the Rule unlawfully treats component parts of weapons, e.g., a weapon parts kit, as the equivalent of a firearm under the GCA.

cated the entire Rule per the Administrative Procedure Act, 5 U.S.C. § 706(2)(C). The district court rejected a stay pending appeal but granted a seven-day administrative stay to allow the ATF to bring an emergency appeal.

In considering an emergency stay requested by the government, we consider four factors:

> (1) whether the government makes a strong showing that it is likely to succeed on the merits; (2) whether the government will be irreparably injured in the absence of a stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies.

Texas v. Biden, 10 F.4th 538, 545 (5th Cir. 2021) (per curiam) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

Because the ATF has not demonstrated a strong likelihood of success on the merits, nor irreparable harm in the absence of a stay, we DENY the government's request to stay the vacatur of the two challenged portions of the Rule. "[V]acatur . . . reestablish[es] the *status quo ante*," *Defense Distributed v. Platkin*, 55 F.4th 486, 491 (5th Cir. 2022), which is the world before the Rule became effective. This effectively maintains, pending appeal, the *status quo* that existed for 54 years from 1968 to 2022.

The ATF is likely correct, however, that the vacatur was overbroad. The district court analyzed the legality of only two of the numerous provisions of the Rule, which contains an explicit severability clause. *See* 87 Fed. Reg. at 24730. Where a court holds specific portions of a rule unlawful, severance is preferred when doing so "will not impair the function of the [rule] as a

whole, and there is no indication that the regulation would not have been passed but for its inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988); *see also Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only challenged portions of a rule). Because the agency has shown a strong likelihood of success on its assertion that the vacatur of the several non-challenged parts of the Rule was overbroad, we STAY the vacatur, pending appeal, as to the non-challenged provisions.

We *sua sponte* EXPEDITE the appeal to the next available oral argument calendar. To allow time for additional proceedings as appropriate, this order is administratively STAYED for 10 days.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-cv-00691-O

JENNIFER VANDERSTOK, ET AL., PLAINTIFFS

v.

BLACKHAWK MANUFACTURING GROUP INC., ET AL.,
INTERVENOR-PLAINTIFFS

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v.

MERRICK GARLAND, ET AL., DEFENDANTS

Filed: July 18, 2023

ORDER GRANTING 7-DAY ADMINISTRATIVE STAY

Before the Court is Defendants' Emergency Motion for Stay Pending Appeal (ECF No. 236), filed July 14, 2023. Defendants seek a stay of this Court's recently entered Memorandum Opinion & Order (ECF No. 227) and Final Judgment (ECF No. 231) pending appeal. Defendants ask this Court to consider their motion on an expedited basis and issue a decision no later than 10:00 a.m. CDT on July 24, 2023. Having considered the motion, the Court summarily **DENIES** the request for a stay pending appeal but **STAYS** the applicability of

its Opinion and Final Judgment for **7 days** in order that Defendants may seek emergency appellate relief.

SO ORDERED this **18th day** of **July, 2023**.

/s/ REED O'CONNOR
REED O'CONNOR
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Case No. 4:22-cv-00691-O

JENNIFER VANDERSTOK, ET AL., PLAINTIFFS

v.

MERRICK GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Filed: July 14, 2023

DECLARATION OF MATTHEW P. VARISCO

I, Matthew P. Varisco, hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

Introduction

1. I am the Assistant Director for the Office of Enforcement Programs and Services (Regulatory Operations) within the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), United States Department of Justice (DOJ). I have been in this position for 9 months, and have also served as an ATF Special Agent for over 22 years, including as the Special Agent in Charge of the Philadelphia Field Division, which encompasses the Commonwealth of Pennsylvania.

Before that, I was an ATF Industry Operations Investigator for over 2 years. I hold a Master of Science degree in Criminal Justice from Iona University, New Rochelle, New York, and a Master of Science degree in Strategic Studies from the U.S. Army War College, Carlisle, Pennsylvania. I have testified in numerous grand jury proceedings as well as criminal trials and hearings in U.S. District Court.

2. In my current senior executive position, I direct policy, conduct planning, and oversee rulemakings for Bureau-wide programmatic offices, including ATF's National Tracing Center Division, Firearms Ammunition Technology Division, Regulatory Affairs Division, and National Firearms Act Division. These divisions support every aspect of ATF's mission to protect the public and reduce violent crime throughout the United States. I supervise around 833 personnel and currently manage an approximately $57 million budget.

3. I am authorized to provide this Declaration on ATF's behalf and am providing it in support of the Defendants' Emergency Motion for Stay Pending Appeal in this civil case. This declaration is based on my personal knowledge and belief, my training and experience, as well as information conveyed to me by ATF personnel in the course of my official duties. This declaration does not set forth all of the knowledge and information I have on the topics discussed herein and it does not state all of the harms to ATF and the public from the judgment in this case.

4. I am familiar with the definition of "firearm" and the enforcement provisions in the Gun Control Act of 1968, as amended ("GCA"), and the National Firearms Act of 1934, as amended ("NFA"). I am also familiar with ATF's Final Rule, *"Definition of 'Frame or Receiver' and Identification of Firearms"* ("Rule"), 87 FR 24652 (Apr. 26, 2022), which implemented several of these GCA and NFA provisions.

5. Congress and the Attorney General delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1)-(2); 28 C.F.R. 0.130(a)(1)-(2).

6. ATF's top priority is public safety. ATF recognizes the role that firearms play in violent crimes and, as part of its efforts to administer and enforce the GCA and NFA, ATF pursues an integrated regulatory and enforcement strategy. ATF uses the GCA and NFA to target, investigate, and recommend prosecution of offenders to reduce the level of violent crime and to enhance public safety. ATF also takes steps to increase State and local awareness of available federal prosecution under these statutes through, among other things, devoting its limited resources to developing and presenting relevant training and conducting outreach.

7. ATF uses its regulatory authority to similarly fulfill its public safety mission. In order to curb the illegal use of firearms and enforce the federal firearms laws, ATF issues licenses to fire-

arms manufacturers, importers, dealers, and curio or relic collectors, and conducts federal firearms licensee ("licensee") qualification and compliance inspections. In addition to aiding the enforcement of federal requirements for firearm purchases, compliance inspections of existing licensees focus on assisting law enforcement to identify and apprehend criminals who illegally purchase and possess firearms. As part of this effort, ATF also takes steps to increase awareness of the legal obligations among the firearms industry and the public. To accomplish this, ATF devotes its limited resources to educational campaigns and helping to ensure that those engaged in the business of manufacturing, importing, or dealing in firearms follow the law and have the essential education, training, and support to comply with federal law.

8. ATF issues rulemakings, rulings, forms, open letters, public safety advisories, Q&As, marking and recordkeeping variances (alternate methods to comply with the regulations), and a variety of publications to implement, administer, and enforce the GCA and NFA.

9. Among the critical public safety issues ATF has identified and attempted to address is the impact of the proliferation of unserialized and unregulated firearms on efforts to reduce violent crime, including: (1) the proliferation of "privately made firearms"("PMFs"), sometimes referred toas "ghost guns;" and (2) limitations of certain regulatory definitions that, as described below, could result in the vast majority of firearms in

circulation in the United States having no frame or receiver.

The Rule

10. This rule updated the regulatory definitions of "frame or receiver," "firearm," and associated marking and recordkeeping regulations. This update helped prevent firearms, particularly, easy-to-complete firearm parts kits, from falling into the hands of felons and other prohibited persons[1] who, without the Rule, were able to purchase them without a background check or transaction records. The Rule also curbs the proliferation of unserialized privately made firearms, typically assembled from those kits, by ensuring that those weapons, or the frames or receivers of those weapons, are subject to the same requirements as commercially produced firearms whenever they are accepted into inventory by licensees. This, in turn, helps law enforcement solve crime by providing law enforcement officers with the ability to trace those weapons

[1] Among other GCA prohibitions, 18 U.S.C. § 922(g) makes it unlawful for persons who fall into one or more of the following categories of "prohibited persons" to ship, transport, receive, or possess firearms: felons, fugitives from justice, drug abusers, persons adjudicated as amental defective or committed to a mental institution, illegal aliens, certain nonimmigrant aliens, persons dishonorably discharged from the military, persons who have renounced their U.S. citizenship, persons subject toa qualifying domestic violence restraining order, and persons who have been convicted of a misdemeanor crime of domestic violence. Additionally, under 18 U.S.C. § 922(b)(1), juveniles under the age of 21 are prohibited from purchasing firearms other than a rifle or shotgun from a licensee, and if under 18, any firearms.

to a potential suspect if they are later found at a crime scene.

11. ATF issued the Rule to increase public safety with the goal of ensuring proper marking, record-keeping, and traceability of all firearms manufactured, imported, or otherwise acquired, and sold or otherwise disposed of by licensees.

12. I am aware that in an Opinion and Order dated June 30, 2023, and a Final Judgment dated July 5, 2023, the district court in *VanDerStok v. Garland*, 4:22-cv-00691-O (N.D. Tex.), determined that two provisions of the Rule, *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24,652f (Apr. 26, 2022), exceeded ATF's regulatory authority, and vacated the Rule.

13. The Court's prior preliminary injunction decisions and June 30 Opinion and Order were limited to determining that these two specific provisions in the Rule—namely, 27 CFR 478.12(c) ("frame or receiver"), regulating certain partially complete frames and receivers (*i.e.*, those are designed to or may readily be designed to or may readily be completed, assembled, restored, or otherwise converted to a functional state) as falling within the definition of "frame or receiver," and the portion of 27 CFR 478.11 ("firearm") that addresses certain weapon parts kits (*i.e.*, those that are designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive) as falling within the definition of "firearm."

14. The Rule, which was published with 90 days of public notice and comment, and which evaluated over 290,000 public comments, did considerably more than amend the regulatory definition of "frame or receiver" to include certain partially complete frames or receivers, 27 CFR 478.12(c), and amend the regulatory definition of "firearm" to include certain weapon part kits, 27 CFR 478.11.

15. In addition to these amendments, the Rule also: (a) defines the terms "frame" for handguns, and "receiver" for long guns and other projectiles weapons, to identify the specific part that provides the housing for one primary fire control component with respect to those weapons, and grandfathers pre-existing designs; (b) addresses how and by when unserialized firearms that are privately made and are voluntarily accepted into the inventory of a licensee must be marked and recorded; (c) provides silencer manufacturers with important clarifications as to which portion of a complete muffler or silencer device must be marked with a serial number and other required identification, and when (often tiny) individual silencer parts must be marked; (d) explains how "multi-piece" frames or receivers that are modular—those that may be disassembled into standardized multiple subparts—are required to be marked; (e) updates the marking requirements for manufacturers to allow them to mark their abbreviated license number as an alternative to "city" and "state," by clarifying what it means to mark "conspicuously," and permits adoption of markings when firearms are being

transferred prior to first sale or distribution into commerce and when gunsmithing operations are performed; (f) requires all licensees to consolidate records of manufacture, importation, acquisition, and disposition of firearms; and (g) updates existing regulations to require that all records retained by firearms licensees be maintained until they discontinue business or licensed operations rather than requiring them to be maintained for only 20 years.

Overview of Harms

16. Eliminating the entire Rule—including provisions other than those evaluated by the Court in its opinions and orders—would irreparably harm the public, the regulated community, and ATF. Such elimination would damage public safety by allowing felons and other prohibited purchasers (including underage persons) and possessors to easily buy and assemble both serialized and unserialized firearms, by permitting the widespread proliferation of unserialized firearms, and by impairing law enforcement's ability to trace firearms recovered at crime scenes. In addition, the Rule provides clarity to, and eases certain regulatory burdens on, the regulated community, such that its elimination would cause confusion among, and costs to, that community. ATF has already spent substantial resources to implement the Rule. Thus, eliminating the Rule would—especially if any elimination were later narrowed or reversed—require ATF to spend additional substantial resources and

would create confusion both inside and outside the agency.

Harm to Public Safety

17. A number of the Rule's provisions are aimed at ensuring that all firearms have a single frame or receiver subject to the statutory serialization, licensing, background check, recordkeeping, and other requirements. The effective implementation of those requirements is critically important to public safety, primarily for two separate reasons.

18. First, these requirements prevent felons and other prohibited persons throughout the country from acquiring firearms by ensuring that licensees sell firearms only after the purchaser undergoes a background check (or falls within an exception) and completes an ATF Form 4473, Firearms Transaction Record.

19. Second, as detailed extensively in the Rule and the administrative record, unserialized firearms, which have been increasingly recovered at crime scenes, are nearly impossible to trace and therefore pose a significant challenge to law enforcement. (87 FR 24655 – 24660; AR 818-819; 825-827; 855-859; 871-901;71,465-71,657). The number of suspected unserialized firearms recovered by law enforcement agencies and submitted to ATF for tracing increased by 1,083% from 2017 (1,629) to 2021 (19,273). (National Firearms Commerce and Trafficking Assessment Vol. II: Part III, Page 5). With the Rule in its infancy, the threat of unserialized firearms continues.

Between August 24, 2022, and July 6, 2023, a total of approximately 23,452 suspected privately made firearms were recovered at crime scenes and submitted for tracing. (ATF PMF Trace Data, queried July 14, 2023). These numbers are likely far lower than the actual number of privately made firearms recovered from crime scenes because some law enforcement departments incorrectly trace some privately made firearms as commercially manufactured firearms, or may not see a need to use their resources to attempt to trace firearms with no serial numbers or other markings. (87 FR 24656 n.18).

20. Eliminating all of the Rule's provisions would thus irreparably harm public safety by allowing the continued proliferation of unserialized firearms—generally acquired by individuals who have not undergone a background check and sold with no record of their sale—on a number of different dimensions.

21. At the outset, the two provisions that the Court determined exceeded ATF's regulatory authority in its opinion vacating the Rule are critical to public safety because they prevent easy circumvention of the GCA's entire regulatory scheme. 27 CFR 478.12(c) ("frame or receiver"), which explains when a partially complete, disassembled, or nonfunctional frame or receiver has reached the stage of manufacture to be considered a "frame" or "receiver," ensures that companies that produce and sell frame or receiver parts kits, or standalone partially complete

frames or receivers, that allow ready completion and assembly to be *functional* frames or receivers: (a) are properly licensed; (b) place traceable marks of identification on them; (c) conduct background checks when they are sold to prevent felons and other prohibited persons from acquiring them; and (d) maintain records through which the weapons that incorporate them can traced if later used in crime. Under the Court's decision, unlike every other firearms manufacturer, a manufacturer of frames or receivers can easily avoid the regulatory requirements of the GCA simply by producing and selling frames or receivers that are missing, for example, a single hole necessary to install the applicable fire control component, or that has a small piece of plastic that can easily be removed to allow installation of that component (*i.e.*, a frame or receiver that is "partially complete").

22. The same is true of weapon parts kits. 27 CFR 478.11 ("firearm") ensures that companies that produce and sell weapon parts kits, or aggregations of parts that allow a weapon to readily be completed and assembled to expel a lethal projectile, are subject to the same requirements as all other firearms manufacturers. Again, these requirements help prevent violent crime by requiring manufacturers to conduct background checks to prevent prohibited persons from receiving them, and requiring licensees to mark and keep records that allow those weapons to be traced to a potential suspect if they are later used in a crime.

23. In recognition of these risks to public safety, the Court had previously limited its preliminary injunctions so that it did not apply to plaintiffs' customers who were prohibited from possessing firearms pursuant to 18 U.S.C. § 922(g). In vacating the Rule, that important limitation to the Court's prior rulings no longer exists, which will only encourage felons and other prohibited purchasers (including underage persons) and possessors to buy firearms in the configuration of weapon parts kits or partially complete frames or receivers that enable those individuals to easily acquire the parts and readily complete and assemble a functional unserialized firearm for use in violent crime. (87 FR 24686 & n.107).

24. For example, in New Orleans, Louisiana, from August 19, 2021, to February 1, 2022, a 20-year-old named Tyrese Harris committed a series of carjackings using a privately made 9mm caliber semiautomatic pistol that had been completed and assembled from a Lone Wolf parts kit that could not be traced. During one attempted carjacking, Harris fired the weapon at the driver, and in another, the victim was dragged by the car resulting in serious bodily injury. He was sentenced to 45 years in prison. *See also, Teens buying ghost guns online, with deadly consequences*, Washington Post (July 12, 2023), available at https://www.washingtonpost.com/dc-md-va/2023/07/12/teens-ghost-guns-deadly-shootings/.

25. In addition, numerous other provisions of the Rule, which were not addressed by the Court, seek to combat the proliferation of unserialized,

or otherwise untraceable, firearms in different ways. Eliminating those provisions would thus further undermine public safety.

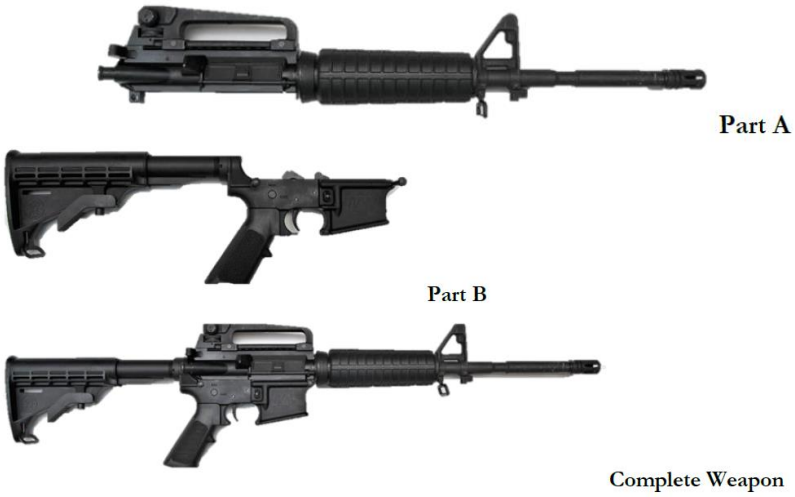
26. First, one provision of the Rule updates the regulatory definitions of "frame" and "receiver" to reflect advances in weapons technology. As noted in the Rule (87 FR 24691, 24655) and administrative record (AR 628-687; 701-709; 719-722; 71,330), the 1968 regulatory definition of "frame or receiver" meant "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism." But today, 90% of firearms currently available do not have a single part that houses a hammer, bolt or breechblock, and firing mechanism; instead, most firearms have split frames or receivers (*i.e.*, they house those three components in two or more separate parts), or they house a striker rather than a hammer. As a result, under a strict reading of the previous regulatory definition—which had been adopted by at least three federal district courts (87 FR 24691, 24655)[2]—the vast majority of available firearms would have no frame or receiver.

27. The practical result of that strict reading is that every individual part of almost all firearms in circulation in the United States may be sold separately without compliance with the statutory background check, licensing, serialization, and recordkeeping requirements. As illustrated

---

[2] *See United States v. Jimenez,* 191 F. Supp. 3d 1038 (N.D. Cal 2016); *United States v. Roh*, 8:14-cr-00167-JVS, May 16, 2019; *United States v. Rowold*, 429 F. Supp. 3d 469 (N.D. Ohio 2019).

below, a felon or other prohibited person could easily purchase online Part A and Part B (*i.e.*, the upper and lower receiver) as "non-firearms" and assemble a fully functional AR-variant firearm within a minute. And that firearm may not have a serial number, and even if it did, there would be no recordkeeping required that would allow ATF to trace it if it were later recovered at a crime scene.



28. Notably, a court in the Northern District of Ohio encouraged ATF to alter the 1968 regulatory definition of "frame or receiver," stating that "[A]TF retains the authority—and has the duty—to fix the regulatory scheme and to regulate AR-15 lower receivers as firearms within the GCA. The result I reach only prevents the agency from using an unreasonable and legally unacceptable application of its current regula-

tion to accomplish that worthwhile objective." *Rowold*, 429 F. Supp. 3d at 476.

29. Second, the Rule requires that firearms licensees mark unserialized firearms whenever they are voluntarily accepted into the licensee's inventory. The GCA requires that licensees record the acquisition and disposition of each firearm, but without unique identifying information to record, those records are ineffective as a means of tracing or locating unserialized firearms. Thus, eliminating that provision of the Rule would undermine the GCA's requirements that ensure every licensee has recorded each firearm's acquisition and disposition for purposes of tracing.

30. As explained above, the lack of proper records makes it nearly impossible to trace firearms that are recovered at crime scenes. But it also harms public safety in other, related ways. For example, it is difficult, if not impossible, for licensees and ATF (during inspections) to match accurately and reliably the unserialized firearms in a licensee's inventory with those in required records, or to determine whether a particular unserialized firearm recorded as disposed on a Form 4473 (which details information of a purchaser) are those recorded as disposed in the records. Such difficulty not only makes it hard for ATF to ensure that licensees are keeping accurate records during inspections, but also means that licensees and ATF will have difficulty accurately determining which unserialized firearms were stolen or lost from inventory if such an incident

occurs, or were the same crime guns listed on an ATF Form 4473. In addition, the lack of such a serialization requirement makes it much more difficult for police to locate stolen unserialized firearms in the business inventories of pawnbrokers, for example, or to return any recovered stolen or lost unserialized firearms to their rightful owners. (87 FR 24659-60)

31. Third, the Rule imposes a number of requirements related to silencers and mufflers that are important for public safety. The Rule explains how, by when, and where on the device, including one that is modular, the silencer or muffler must be marked so that law enforcement officers can trace them if later found at a crime scene. The Rule also prohibits manufacturers from marking a removable end cap on the device, which can be damaged during use, thus destroying the information necessary to trace the firearm. (87 FR 24660, 24727, 24739)

32. Fourth, the Rule updates existing regulations to require that all records retained by firearms licensees be maintained (including allowing storage of old paper records at a separate warehouse) until they discontinue business or licensed operations, rather than destroying them after a twenty-year period. As the Rule and administrative record make clear, numerous older firearms could not be traced after having been used in crime because the records were destroyed after 20 years. (87 FR 24667, 24712; AR 68,595-597; 68,605-606; 68,626-628; 68,640-644; 68,655; 68,659-661). There are currently

81,808 total active federal firearms licensees. Of those, 14,048 have been in business 20 years or more, and an additional 751 have been in business for 19 years. With the Rule vacated, these thousands of licensees are able to destroy their dated records now and every day the Rule remains vacated without recourse. Once these firearms transactions records are destroyed, there is no way to recover the information they contained, which will make any additional traces of the firearms involved unsuccessful.

33. As explained in the Rule, the National Tracing Center conducted an analysis of all trace requests submitted between January 1, 2010, and December 31, 2021, that were closed under a particular code in the tracing system indicating the licensee specifically informed ATF that it did not have records for that firearm because the records were more than 20 years old and had been destroyed. A total of approximately 16,324 traces, or 1,360 on average per year, could not be completed during this time period because ATF was informed the records had been destroyed. Of these total unsuccessful traces, approximately 182 of the traces were designated as "Urgent," 1,013 were related to a homicide or attempted homicide (not including suicide), and 4,237 were related to "Violent Crime." (87 FR 24712)

Harm to the Regulated Community

34. In addition to harming public safety, eliminating the entire Rule would substantially injure the regulated community, in primarily two different

ways. First, it would create substantial confusion among the regulated community regarding their legal obligations. Second, it would increase regulatory burdens on the regulated community.

35. First, eliminating the Rule will create, and indeed has already created, significant confusion among the regulated community—impacting approximately 80,000 licensees. Vacating the entire Rule also has a significant impact on formal ATF Rulings that were superseded by the Rule because the firearms industry is unclear how to proceed with their current business practices. ATF has already received inquiries from members of the firearms industry, a trade association that represents many of those members, and a software company, seeking clarification whether they must now reverse their newly implemented business practices (*e.g.*, whether these licensees must now separate their recently consolidated records) and methods of operation. This confusion will only increase if the Court's ruling, or the scope of relief, is reversed on appeal, which may require licensees to overhaul certain business practices twice in a short period of time.

36. Second, a number of provisions of the Rule were aimed at easing burdens on the regulated community, and their elimination harms that community by reimposing those requirements. For example, the Rule authorizes manufacturers to mark the "frame" or "receiver" with their abbreviated license number instead of "city" and "state" of manufacture, and enumerates specific

exceptions as to when and how a licensee may adopt existing markings. Without the Rule, these codified allowances and blanket "marking variances" would not exist, increasing burdens on the firearms industry. These burdens may be particularly onerous because manufacturers must set up their manufacturing processes to comply with marking requirements, a process that costs substantial time and money to accomplish.

37. In addition, the Rule provides silencer manufacturers with important clarification as to which portion of a complete muffler or silencer device must be marked with a serial number and other required identification. Under the GCA, the term "silencer" is defined to include each small individual part designed and intended only to be used to fabricate a silencer. It is extremely difficult and expensive for silencer manufacturers to mark each tiny individual silencer part. For this reason, the Rule only requires them to mark what is defined as the "frame or receiver" of the silencer. (AR 917; 937-938).

38. Similarly, the Rule also provides an exception for qualified manufacturers to delay or avoid registration of silencer parts if they become part of a complete device, or gunsmithing operations are being performed on an existing marked and registered silencer device. Without the Rule, there is no exception for manufacturers from the requirement that they mark and register each and every silencer part, and no grace period in

which to mark them after completion of manufacture.

39. The Rule replaced many prior ATF Rulings with updated information that explained how to conduct business under law. (87 FR 24664 n.53, 24665-66, 24688, 24702-03, 24729-30). For example, the Rule superseded ATF Rulings 2009-5 (Firearms Manufacturing Activities, Identification Markings of Firearms) and 2013-3 (Adopting Identification of Firearms). Under the applicable provisions of the Rule, manufacturers may adopt existing markings on a firearm and a "non-marking variance request" or notice is no longer required under the new regulations under certain circumstances. Without the Rule, manufacturers will either have to mark firearms they remanufacture, or apply for a variance not to mark firearms they remanufacture even though they have already been marked by another manufacturer. These additional markings are expensive for licensees to place, and confusing to law enforcement when conducting a trace of a crime gun.

40. In addition, the Rule superseded ATF Ruling 2011-1 (Importers Consolidated Records) and ATF Ruling 2016-3 (Consolidation of Records Required for Manufacturers), which allowed licensed manufacturers and importers to consolidate their records of both production/importation, and disposition, but only under certain conditions. The Rule made this consolidation a requirement. If the Rule is removed, manufacturers and importers would need to undo this consolidation

and keep their production/importation records separately from their records of sale or distribution unless they obtain a variance.

Harm to ATF

41. In addition, elimination of the Rule will substantially harm ATF, which has devoted significant resources to training and implementing the Rule, and which will need to devote substantial additional resources to comply.

42. For example, after the issuance of the Rule, ATF amended its Form 4473, Firearms Transaction Record, to comport with the updates made by the Rule. This form must be completed every time a licensee transfers a firearm to a non-licensee. ATF will incur substantial monetary costs to publish a revised version of Form 4473. This would include the cost of creating, printing, and shipping approximately 25 million replacement forms to licensees throughout the United States. This cost could double if the Court's decision is overturned or rendered inconsistent with rulings by other courts. In addition to ATF's costs to change the Form 4473, there are also costs to the industry to develop the electronic Form 4473 for their electronic systems; in addition to the costs, these changes can take roughly several months to complete.

43. After publication of the Rule, ATF and the Department of Justice conducted extensive training and outreach to federal, state, and local law enforcement partners, and United States Attorney's Offices nationwide regarding the impact of

the Rule. ATF extensively trained its personnel on the scope of the Rule and identified one Industry Operations Investigator and one Special Agent in each ATF field division as the local subject matter expert on the Rule. ATF conducted approximately 18 internal trainings which around 1,978 ATF employees attended. Additionally, ATF presented at least four virtual trainings for over 5,200 regulated industry members and in person trainings to regulated industry members at the Orchid Advisors Conference, SAAMI Conference, National Shooting Sports Foundation conference, and Firearms and Ammunition Import Roundtable Conference. ATF's Office of Field Operations also conducted over 150 licensee seminars from June 22, 2022, to the present which included explaining the Rule.

44. Each training covered the Rule's definition of "frame or receiver"; its definition of "privately made firearm"; marking and recordkeeping for licensees; general changes to the marking, recordkeeping, and record retention requirements for licensees; and affected ATF Rulings/ Procedures. In each training, experts from ATF's Firearms and Ammunition Technology Division, Firearms and Explosives Services Division, National Firearms Act Division, Field Operations, and Firearms and Explosives Law Division answered numerous questions.

45. In addition to training, ATF established a robust public facing webpage, (https://www.atf.gov/rules-and-regulations/definition-frame-or-receiver) dedi-

cated to the Rule. The website includes a summary of the Rule, resource guides explaining the impact of the Rule, and it provides access to the regulation's website with the Rule's text, the detailed PowerPoint training, frequently asked questions, and a recorded training video on the Rule.

46. Removal of the Rule will result in widespread confusion among law enforcement officers and prosecutors, firearms industry members, and the general public. ATF has already begun to receive these inquiries, and will need to devote the agency's limited time and resources to retraining internal personnel and educating the regulated industry, law enforcement, and the public on implementation of this decision. The potential of an appeal or contrary decision by the court of appeals or another district court further increases the risk that ATF will need to expend further resources to undertake continual efforts to update the public on the status of the Rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of July, 2023.

/s/ MATTHEW P. VARISCO
MATTHEW P. VARISCO
Assistant Director, Enforcement Programs and Services (Regulatory Operations)
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice

APPENDIX K

Apr. 20, 1978

T:T:F:CHB
7540

Mr. Dan C. Kingsland
American Arms and Ammunition Corporation
915 NW. 72nd Street
Miami, Florida 33150

Dear Mr. Kingsland:

This is in reply to your letter of March 15, 1978, and enclosed samples which were received by our office on March 21, 1978.

Section 92(a)(3) of Title I of the Gun Control Act of 1968 defines the term firearm to include (A) any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive; and (B) the frame or receiver of any such weapon. The three samples which were received are identified as follows:

1. Norton Model TP-70 pistol, caliber .25, serial number 005.
2. Rough frame as received from casting company.
3. Machined frame which you propose to import from a foreign source.

Our examination reveals that Item 2, the rough frame, is not a firearm as defined. However, Item 3, the machined frame, has reached a stage of manufacture such

that it may be readily converted to functional condition. Therefore, it is a firearm and is subject to all applicable controls under the provisions of the Act and the implementing regulations in Part 178, Title 27, Code of Federal Regulations. This frame would not be approved for importation into the United States under Section 925(d)(3) of the Act.

It is our further determination that eliminating either the grooves for the slide rails or the grooves for the barrel rails from the machined frame, would not be sufficient to exempt it from controls under the Act.

Mr. Dan C. Kingsland

We regret that our response in this matter has not been more favorable. If you have any further questions, please feel free to contact us.

Sincerely yours,

Chief, Firearms Technology Branch

CODE	INITIATOR	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER
SUR-NAME	Bartlett	Townsend					
DATE	4/17/78	4/19/78					

ATF F 1325.6 (2-75) CORRESPONDENCE APPROVAL AND CLEARANCE DEPARTMENT OF THE TREASURY
REPLACES ATF FORM 92 (9-73) WHICH MAY BE USED BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

ATF000011

AMERICAN ARMS & AMMUNITION CORPORATION

Dear Sir:

Pursuant to my telephone conversation of 14 March 1978 with your Mr. Bartlett, under separate cover we are forwarding you the following items for examination:

1 Norton TP-70 Pistol, Complete S/N 005, 25 Cal.

1 Frame as received from our casting company

1 Frame as we would like to have it machine from an off shore source

We would like to have some of our castings forwarded to a machine shop outside the United States for partial machining. Upon completion, they would be returned to us for final machining and assembly. Our purpose is to lighten the burden on our equipment to increase production without expending large sums of money for additional equipment and labor.

We presently have in mind a company located in Portugal with the necessary equipment and machine time available.

We are open to any suggestions or changes that you might have after your examination of the above items and look for ward to your reply.

In the meantime, should you require any additional information, please feel free to contact me.

Very truly yours,

/s/ DAN C. KINGSLAND
DAN C. KINGSLAND
Executive Vice President

DCK/id
Encl: FFL's

915 N.W. 72nd STREET, MIAMI, FLORIDA 33150
• PHONE: AREA 305-836-9112

Bureau of Alcohol, Tabacco & Firearms
Room B-230
Attn: Chief, Firearms Technical Brance
12 Pennsylvania Ave.
Washington, D.C. 20226

15 March 1978

June 11, 1980

T:T:F:CHB
7540

Mr. William M. York
York Arms Company
Hurricane, Utah 84737

Dear Mr. York:

This refers to your letter of April 4, 1980, in which you ask about the meaning of the phrase "readily converted to a functional condition."

Due to the vast variation in firearms design, construction, material, production techniques, and other variables, it is not possible to provide you with a simple answer to you question which would be applicable in all cases. Certainly, if an unfinished receiver could be converted to functional condition within a few hours time using common hand tools, or simple grinding, cutting, drilling, or welding operations, it would likely qualify as a firearm. However, for us to provide you with a positive determination regarding the status of any particular unfinished receiver, it would be necessary for us to examine a sample.

We trust that the foregoing has been responsive to your inquiry. If we can be of further assistance, please contact us.

Sincerely yours,

Edward M. Owen, Jr.
Chief, Firearms Technology Branch

CODE	INITIATOR	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER
SURNAME	T.I.T.E. Bartlett	Owen					
DATE	6/10/82	6/11/82					

ATF F 1325.6 (5-73)
REPLACES ATF FORM 82 (9-72) WHICH MAY BE USED
CORRESPONDENCE APPROVAL AND CLEARANCE
DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

May 3, 1983

T:T:F:CHB
7540

Mr. Henry A. Roehrich
SGW, Incorporated
624 Old Pacific Highway SE
Olympia, Washington 98503

Dear Mr. Roehrich:

This refers to your letter of March 25, 1983, in which you ask about the status of an unfinished AR-15 type firearm receiver which you submitted for our examination.

Examination of the sample reveals that it is identifiable as the receiver of a firearm. It is basically complete except that the interior cavity has not been milled. For test purposes, the interior of the sample was drilled out using a 5/8 inch drill and then finished with a 1/2 inch rotary file. Approximately 75 minutes time was required to make the receiver functional.

Based on our examination, we have determined that the unfinished receiver as provided, is still a firearm subject to the provisions of the Gun Control Act of 1968. Should a customer of yours require unfinished receivers of this type, without conventional aerial number or other markings, we would be happy to consider your request for a variance from the marking requirements in Title 27, Code of Federal Regulations (CFR), Part 178, Section 178.92.

An alternate form of identification may be approved only if it is determined that the proposed markings are

reasonable under the particular circumstances involved, and will not hinder effective administration of the law and implementing regulations. Your customer must be a licensed manufacturer of firearms who will apply all required markings to the finished receiver. Further, it will be necessary for you to apply some sort of identifying mark to the unfinished receiver to identify SGW as the original manufacturer.

We trust that the foregoing has been responsive to your inquiry. If you have further questions concerning this matter, please do not hesitate to contact us.

Sincerely yours,

Edward M. Owen, Jr.
Chief, Firearms Technology Branch

U.S. Department of Justice
Bureau of Alcohol, Tobacco,
Firearms and Explosives
Office of Chief Counsel

December 4, 2020

Washington, DC 20226
www.atf.gov

CCM-20-255446

MEMORANDUM TO: Acting Director

From: Chief Counsel

Subject: Classification of Polymer80 "Buy Build Shoot" Kits

This memorandum sets out the Office of Chief Counsel's opinion whether certain Polymer80 "Buy Build Shoot" (BBS) kits are, as a matter of law, "firearms" under the Gun Control Act of 1968 (GCA), 18 U.S.C. § 921(a)(3). Determining whether an item is properly classified as a firearm is necessary for ATF to perform its legal duties to administer and enforce the GCA. These duties include ensuring that persons who manufacture them for sale or distribution secure Federal Firearms Licenses (FFLs), identify firearms with traceable markings, complete Firearms Transaction Records (ATF Forms 4473), run NICS checks, pay Federal Firearms Excise Tax administered by the Tax and Trade Bureau, U.S. Department of the Treasury, and abide by all other applicable legal requirements. For the following reasons, the Office of Chief Counsel (OCC) concludes that these kits are weapons that are "designed to or may readily be con-

verted to expel a projectile by the action of an explosive," and therefore, "firearms" under the GCA.

Background

Polymer80, located in Nevada, is licensed by ATF as a manufacturer (Type 07) of firearms. Among the products it sells are unfinished frames or receivers, and two varieties of a "Buy Build Shoot" (BBS) Kit—the PF940C and PF940v2. According to the manufacturer's website, these kits contain "all of the necessary components to build a complete PF940C or PF940v2 pistol." More specifically, the $590.00 kits include an "80% frame kit, complete slide assembly, complete frame parts kit" as well as an ammunition magazine and a pistol case. In addition, Polymer80 sells each of the components that constitute the BBS kits as separate items.

Both of these kits were purchased by an undercover (UC) ATF Special Agent, a firearm nexus (origin) expert, who determined that they contained all of the components necessary to assemble functional Glock-type semiautomatic pistols. The kits included a polymer grip and rails, as well as a jig (template) and two milling/drill bits used to complete the pistol frames. The slides were already completely assembled, including installation of the barrel and capture recoil spring. On April 28, 2020, the agent attempted to assemble the BBS PF940C kit, but encountered a defective part. The agent was able to fix the part and complete a functional pistol in a total of 73 minutes (after subtracting approximately two hours to troubleshoot and repair the defective part).

A few months later, the agent provided a purchased BBS PF940v2 kit to a confidential informant (CI). The CI had experience as an automobile mechanic. The CI was generally familiar with firearms to the extent the CI previously used and cleaned firearms, but the CI had never assembled a Polymer80 pistol. After reviewing publically available YouTube videos, and using common personally owned tools (C-clamp, power drill, nippers, Dremel tool, file, wire cutters, needle nose pliers, hammer, and punch tool), the CI was able to mill and assemble the kit's components into a complete pistol within 21 minutes. Upon review of the CI's work, the UC agent determined that the slide lock was installed incorrectly. The failure of the slide lock would have prevented the slide from automatically locking in the rear position after the final round of ammunition was expended, or from locking in the rear position at the user's discretion. It would not have prevented expulsion of a projectile and subsequent rounds from the completed firearm. The agent properly reinstalled the lock in approximately one minute, and successfully dry fired the weapon.

Previously, in 2017, at the request of Polymer80, ATF examined a "PF940C Blank." Unlike the BBS Kit, the "PF940C Blank" did not incorporate all of the parts necessary to assemble the firearm. The submission for classification only included an incomplete ("80%") PF940C frame. ATF determined that the item was not sufficiently complete to be classified as the frame or receiver of a firearm, and thus, was not a "firearm" as defined in the GCA, 18 U.S.C. § 921(a)(3)(B). In 2018, a similar request was made to ATF to examine a Glock-type "PF940V2 Blank." The submission did not incorporate all of the parts necessary to assemble the firearm. After a review of the Polymer 80 products being

offered on its website, ATF determined that the PF940V2 Blank was only one part of the product being sold by Polymer 80 and refused to render a classification solely on this partial product.

Applicable Statute

Under the GCA, the term "firearm" means:

> (A) any weapon (including a starter gun) which ***will***, ***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) (emphasis added).

Analysis

[REDACTED]

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[1] **[REDACTED]**

[2] *Compare Bond v. U.S.*, 134 S. Ct. 2077 (2014) (non-lethal irritant chemical was not a weapon); *Lunde Arms Corp. v. Stanford*, 107 F. Supp. 450 (S.D. Cal. 1952), aff'd, 211 F.2d 464 (9th Cir. 1954) (small muzzle loading toy cap gun that expelled non-lethal bird shot was not a weapon); Rev. Rul. 54-519 (inexpensive plastic toy gun was not a weapon); CC.Op. #22357 (flare gun that could not chamber a shotgun shell was not a weapon); CC.Op. #21306 (miniature replica of .15 caliber Luger carbine for which there was no commercial or experimental ammunition was not a weapon); CC.Op. #21176 (pen 'lifesaver' kit for launching flares and smoke signals was not a weapon); CC.Op. #23786 (marking pistol was not a weapon); CC.Op. #22378 (pencil heater was not designed as a weapon); *with* CC.Op. #22868-1 (syringe gun made from a shotgun was a weapon); CC.Op.

[REDACTED]

#24833 and #24877 (tranquilizing dart gun was a weapon); CC.Op. #22518 (signal cannon was a weapon); CC.Op. #21306 (miniature replicas of handguns that utilize .22 caliber ammunition were firearms); CC.Op. #21088 (bean bag stun gun was a weapon).

[3] *See U.S. v. Thompson/Center Arms*, 504 U.S. 505, 526 n.6 (1992) (carbine parts kit was a rifle—a weapon made and intended to be fired from the shoulder); *U.S. v. Drasen*, 845 F.2d 731, 736-37 (7th Cir. 1988) (rejecting argument that a collection of rifle parts cannot be a weapon); *U.S. v. Hunter*, 843 F. Supp. 235 (E.D. Mich. 1994) ("If Defendants believe that conversion kits are not in and of themselves "weapons" under § 921(a)(3), they forget that that section clearly envisions machineguns as weapons."); Rev. Rul. 62-169 (shotgun kits were portable weapons in knockdown condition even though the purchaser must 'final-shape,' sand, and finish the fore-arm and the stock).

[4] *See U.S. v. Hardin*, 889 F.3d 945 (8th Cir. 2017) (pistol with broken trigger and numerous missing internal parts was a weapon designed to expel a projectile by the action of an explosive); *U.S. v. Dotson*, 712 F.3d 369 (7th Cir. 2013) (damaged pistol with corroded, missing and broken components); *U.S. v. Davis*, 668 F.3d 576 (8th Cir. 2012) (pistol without a trigger); *U.S. v. Rivera*, 415 F.3d 284 (2nd Cir. 2005) (pistol with a broken firing pin and flattened firing-pin channel); *U.S. v. Brown*, 117 F.3d 353 (7th Cir. 1997) (no firing pin); *U.S. v. Reed*, 114 F.3d 1053 (10th Cir. 1997) (shotgun with broken breach bolt); *U.S. v. Hunter*, 101 F.3d 82 (9th Cir. 1996) (pistol with broken firing pin); *U.S. v. Yannott*, 42 F.3d 999 (6th Cir. 1995) (shotgun with broken firing pin); *U.S. v. Ruiz*, 986 F.2nd 905 (5th Cir. 1993) (revolver with hammer filed down); *U.S. v. York*, 830 F.2d 885 (8th Cir. 1987) (revolver with no firing pin and cylinder did not line up with barrel). *Compare U.S. v. Wada*, 323 F. Supp. 2d 1079 (D. Ore. 2004) (firearms redesigned as ornaments that "would take a great deal of time, expertise, equipment, and materials to attempt to reactivate"); CC.Op. #21697 (double-barreled shotgun redesigned as a 'show piece' was not a weapon designed to expel a projectile).

[5] *See, e.g., Dodson*, 519 Fed. Appx. 344 (6th Cir. 2013) (gun that was restored with 90 minutes of work, using widely available parts and equipment and common welding techniques, fit comfortably

within the readily restorable standard); *U.S. v. TRW Rifle 7.62X51mm Caliber*, 447 F.3d 686, 693 (9th Cir. 2006) ("A two-hour restoration process using ordinary tools, including a stick weld, is within the ordinary meaning of 'readily restored.' As to the temporal component, two hours, while not an insignificant amount of time, is still within a range that may properly be considered 'with fairly quick efficiency,' 'without needless loss of time,' or 'reasonably fast.' As to the means of restoration, requiring the use of ordinary tools and a stick weld, even by a skilled worker, is likewise within what may properly be considered 'with a fair degree of ease,' 'without much difficulty,' or 'with facility.'"); *U.S. v. Mullins*, 446 F.3d 750, 756 (8th Cir. 2006) (a starter gun that can be modified in less than one hour by a person without any specialized knowledge to fire may be considered "readily convertible" under the GCA); *U.S. v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422-24 (6th Cir. 2006) ("the Defendant weapon here had all of the necessary parts for restoration and would take no more than six hours to restore"); *U.S. v. Woods*, 560 F.2d 660, 664 (5th Cir. 1977) ("The fact that the weapon was in two pieces when found is immaterial considering that only a minimum of effort was required to make it operable."); *U.S. v. Smith*, 477 F.2d 399 (8th Cir. 1973) (machinegun that would take around an 8-hour working day in a properly equipped machine shop was readily restored to shoot); *U.S. v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463 (2d Cir. 1971) (starter guns converted in no more than 12 minutes to fire live ammunition were readily convertible under the GCA); *U.S. v. Morales*, 280 F. Supp. 2d 262 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within a short period of time could readily be converted to expel a projectile); *U.S. v. Catanzaro*, 368 F. Supp. 450, 453 (D. Conn. 1973) (Where missing parts of sawed-off shotgun could be identified by consulting standard firearms reference work, inquiries directed to knowledgeable people in firearms field revealed fact that certain manufacturer of firearms owned an inventory of such parts and where, after receipt of parts, shotgun was put in working condition in approximately one hour, shotgun had been "readily restorable to fire"). *Compare U.S. v. Seven Miscellaneous Firearms*, 503 F. Supp. 565 (D.D.C. 1980) (weapons could not be "readily restored to fire" when restoration re-

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Conclusion

Based on the facts and law presented, the Office of Chief Counsel concludes that the BBS kits are weapons which are designed to, or may readily be converted to expel a projectile by the action of an explosive, and, therefore, "firearms" under 18 U.S.C. § 921(a)(3)(A). As such,

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quired master gunsmith in a gun shop and $65,000 worth of equipment and tools).

[6] The Polymer 80 assembly may be completed in under thirty minutes. *See, e.g.,* Silverback Reviews, *Polymer 80 Lower Completion/Parts Kit Install*, YOUTUBE (Aug. 19, 2019), https://www.youtube.com/watch?v=ThzFOIYZgIg (21 minute video of the completion of a Polymer 80 lower parts kit with no slide).

[7] Indeed, the internet is replete with people with no experience completing these firearms. *See, e.g.,* HandleBandle, *DIY: How to Build a Gun at Home (That Shoots) Part 1*, YouTube (Oct. 7, 2018), https://www.youtube.com/watch?v=nO-8Pns9aq4; HandleBandle, *Polymer 80 with No Experience Tips (Build Part 2)*, YouTube (Oct. 7, 2018), https://www.youtube.com/watch?v=a0JM5v45vsg; HandleBandle, *Legally Building a Gun in My Living Room (5D Tactical Glock Kit)*, YouTube (Oct. 18, 2018), https://www.youtube.com/watch?v=5SaNLrhnnuA.

[8] *See* Footnote 5 *infra*.

they are subject to all requirements, limitations, and prohibitions under the Gun Control Act.

/s/ JOEL ROESSNER
JOEL ROESSNER
Chief Counsel

AFFIDAVIT

I, Tolliver Hart, being duly sworn, declare and state as follows:

I. PURPOSE OF AFFIDAVIT

1. I make this affidavit in support of an application for a warrant to search a business at 134 Lakes Blvd, Dayton, NV 89403 (the "SUBJECT PREMISES") as described more fully in Attachment A.

2. The requested search warrant seeks authorization to seize evidence, fruits, or instrumentalities of violations of 18 U.S.C. §§ 922(a)(2) (Shipment or Transport of a Firearm by a Federal Firearms Licensee ("FFL") to a Non-FFL in Interstate or Foreign Commerce); 922(b)(2) (Sale or Delivery of a Firearm by an FFL in Violation of State Law or Ordinance); 922(b)(3) (Sale or Delivery of a Firearm by an FFL to Person Not Residing in the FFL's State); 922(b)(5) (Sale or Delivery of a Firearm by an FFL Without Notating Required Information in Records); 922(d) (Sale or Disposition of a Firearm to a Prohibited Person); 922(e) (Delivery of a Package Containing a Firearm to a Common Carrier Without Written Notice); 922(g) (Possession of a Firearm by a Prohibited Person); 922(m) (False Records by an FFL); 922(t) (Knowing Transfer of Firearm without a Background Check); 922(z) (Sale, Delivery, or Transfer of a Handgun by an FFL Without a Secure Gun Storage or Safety Device); 371 (Conspiracy); and 22 U.S.C. §§ 2278(b) (2) and (c) and 50 U.S.C. § 4819 (Violations of the Arms Export Control Act and Export Control Regulations) (collectively, the "Subject Offenses").

* * * * *

E. Undercover Purchase and Assembly of POLYMER80 Buy Bui1d Shoot Kit By ATF Senior Special Agent

49. On or about February 26, 2020, Senior Special Agent ("SSA") David Hamilton, acting in a UC capacity, accessed POLYMER80.COM through a UC computer. SSA Hamilton added one "P80® Buy Build Shoot™ kit PF940v2 - 10 Round Magazine" in black color and one "P80® Buy Build Shoot™ kit PF940C - 10 Round Magazine" in flat dark earth color to his POLYMER80 website shopping cart. SSA Hamilton selected two kits with ten round magazines to comply with California Penal Code ("CPC") § 32310 which, among other things, prohibited the importation and receipt of any large-capacity magazine (more than 10 rounds) by any person in the state.[2]

50. During the checkout process, SSA Hamilton provided an undercover name, address, telephone number, e-mail address, and credit card number. POLYMERB0 did not request or require a date of birth, social security number, driver's license number, or other identifier necessary to verify the buyer's identity, and which I know, based on my training and experience, is required in order to conduct a National Instant Criminal Background Check System ("NICS") background check, to allow an FFL to legally sell or transfer a firearm.

51. However, SSA Hamilton was asked to check a box agreeing to the "Terms and Conditions," which in-

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[2] The Ninth Circuit has since invalidated California's ban on high-capacity magazines in Duncan v. Becerra, No. 19-55376 (9th Cir. Apr. 14, 2020).

cluded a series of statements similar to those on ATF Form 4473,[3] used to determine a purchaser's eligibility to acquire a firearm:

- I am not under indictment or information in any court for a felony, or any other crime, for which the judge could imprison me for more than one year.
- I have never been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned me for more than one year, even if I received a shorter sentence including probation.
- I am not prohibited by federal, state, or local laws from purchasing, acquiring, possessing, manufacturing, using or owning a firearm.
- I agree to comply all state, federal, and local laws relating to purchasing, acquiring, possessing, manufacturing, using or owning a firearm.
- I am not an unlawful user of, or addicted to, marijuana or any depressant stimulant, narcotic drug, or any other controlled substance.
- I am not a fugitive from justice.
- I have never been adjudicated mentally defective (which includes a determination by court, board, commission, or other lawful authority that I am a danger to myself or others or an incompetent to manage my own affairs

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[3] Unlike with the ATF Form 4473, however, POLYMER80's website does not require an attestation, nor is the form signed and submitted by the buyer under penalty of perjury.

- Nor have I been involuntarily held for a mental health evaluation within the last 5 years.
- I have never been committed to a mental institution.
- I have never renounced my United States citizenship.
- I am not an alien illegally in the United States.
- I am not prohibited from possessing firearms under federal or state law.
- I have not had any suicidal thoughts or suicidal ideations now or at any time prior to my presence here today.
- I will not use any of the training and instruction provided for any unlawful purpose.
- I have read and understand all legislation that pertains to ownership of 80% products, building a firearm at home, and firearm ownership in the State that I reside in.

52. After acknowledging by checking the box on POLYMER80.COM, SSA Hamilton placed the order for the two kits, costing a total of $1300.96 ($590.00 each, plus tax).[4] POLYMER80 did not verify any specific identifying information provided by SSA Hamilton, which would have been required in order for POLYMER80 to have conducted a NICS background check.

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[4] POLYMER80 notes on its website that, in addition to payment by credit card, it accepts payment by money order, cashier's check, personal check, or company check. Based on my training and experience, some of these forms of payment could allow for the payer to pay either anonymously or by false or fictitious name.

53. On the same date, SSA Hamilton received an email titled "Transaction Receipt from POLYMERB0 for $1300.96 (USO)" from "noreply@mail.authorize.net." Merchant contact information was listed as: POLYMER80 INC, Dayton, NV 89403 US, support@polymer80.com.

54. On or about April 10, 2020, SSA Hamilton, again acting in an undercover capacity, sent an e-mail to "support@polymer80.com" requesting an update on when shipment of the order could be expected.

55. That same day, SSA Hamilton received an e-mail from "support@polymer80.com" stating, "I am going to see if I can't get these out in the next few days, we have a very limited crew and are trying to get stuff handled. Watch your e-mail for tracking." The e-mail was signed "Al M, Director of Customer Support." Later that day, SSA Hamilton received an e-mail from "sales@polymer80.com." The e-mail indicated that the purchased items had shipped.

56. On or about April 20, 2020, SSA Hamilton and another ATF SA obtained the items from a UC location in Los Angeles County. SSA Hamilton then transported the items to the ATF Los Angeles Field Division in Glendale, California. The package shipping label showed the SUBJECT PREMISES as the return address: Polymer80 Fulfilment Team, PolymerB0, Inc., 134 Lakes Blvd., Dayton NV 89403.

57. Later that day SSA Hamilton opened the package in my presence. The package contained a POLYMERB0 invoice dated February 26, 2020, and two black plastic pistol cases with "P80®" over "POLYMER80" molded into the top covers.

58. One pistol case was labelled "POLYMERB0 PF940C COMPACT BBS."[5] Unlike the parts that POLYMER80 asked the ATF to render an opinion on, as I discussed above, this kit appeared to contain all components necessary to assemble a complete pistol, as well as two milling/drill bits to be used in the completion of the pistol. The slide was completely assembled, including installation of the barrel and captured recoil spring. The included magazine had a 15-round capacity, rather than the 10-round magazine that was ordered, in violation of California Law at the time. Neither the frame, nor any of the component parts, included a manufacturer's serial number.

[5] I understand "BBS" to be an abbreviation for "Buy Build Shoot."

59. The other pistol case was labelled "POLYMERB0 PF940v2 STANDARD BBS." It appeared to contain all components necessary to assemble a complete pistol, as well as two milling/drill bits to be used in the completion of the pistol. The slide was completely assembled, including installation of the barrel and captured recoil spring. The included magazine had round count holes indicating that it has a 17-round capacity, rather than the 10-round magazine that was ordered, also in violation of California law at the time.

60. On April 28, 2020, SSA Hamilton, who is also an ATF Firearms and Ammunition Interstate Nexus Expert, built a complete handgun assembled from the components contained in the POLYMER80 model PF940C Buy Build Shoot Kit that he purchased in an undercover capacity. The build, which began at approximately 11:10 a.m., occurred at the ATF Los Angeles Field Division office in Glendale, California, and was recorded.

61. It took SSA Hamilton less than 19 minutes to mill the frame blank, including his inspection, narration, and transitions between his work areas. The tools SSA Hamilton used to complete this process included a power hand drill (with the two drill bits provided by POLYMER80), a Dremel rotary tool (with three different wheels/bits), a hobby knife, a utility knife, sand paper, and needle nose pliers.

62. During assembly, SSA Hamilton encountered issues beyond those normally expected for fitting new parts to a firearm. The PF940C instructions provided by POLYMER80 stated that "after the milling is completed, the build process seems to be where most people get into trouble, particularly during assembly and cleaning," and that some hand fitting may be required. At this time, SSA Hamilton determined the PF940C was not operable in its current condition, and stopped the attempted build, and the recording, at approximately 12:08 p.m.

63. Over the course of the next two hours, SSA Hamilton troubleshot the problem. He viewed the YouTube video "pf940c P80 g19 trigger reset issue" posted by user Thyertek. The presenter in the video stated that he contacted POLYMER80 regarding the inability of his trigger to reset. According to the video,

POLYMERB0 told him that this was an issue with its rear rails, that there could be a burr on the metal insert where the trigger bar meets it, or the part was misstamped. POLYMER80 advised the presenter that a quick fix was to file off the burr, and failing that, POLYMER80 could send a replacement part. According to the video, POLYMER80 also advised that the metal arm of the part might be bent too far inward, in which case its inner edge should be filed.

64. Based on this video, SSA Hamilton determined that the issue appeared to be a quality control matter for the kit he received, rather than a design flaw of the kits generally. SSA Hamilton followed the instructions in the video and modified the part. After re-installing all the components into the frame, SSA Hamilton resumed the building of the kit, and the recording, at approximately 2:29 p.m. SSA Hamilton then completed the firearm and successfully test-fired twice using 9mm caliber ammunition that had the projectile and propellant removed. SSA Hamilton ceased the assembly at approximately 2:34 p.m.

65. SSA Hamilton determined that the purchased POLYMER80 model PF940C Buy Build Shoot Kit is a "firearm" as that term is defined under 18 U.S.C. § 921(a)(3), as a weapon designed to, or that may readily be converted to, expel a projectile by the action of an explosive.[6] In addition, SSA Hamilton determined that the purchased POLYMER80 model PF940C Buy Build Shoot Kit is also a "handgun" as that term is defined under 18 U.S.C. § 921(a)(29) as a combination of

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[6] ATF Chief Counsel has also determined that the Buy Build Shoot kits are, as a matter of law, firearms pursuant to 18 U.S.C. § 921(a)(3).

parts from which a firearm having a short stock and designed to be held and fired by the use of a single hand can be assembled. The firearm is pictured as follows:

F. Undercover Purchase and Assembly of POLYMER80 Buy Build Shoot Kit by Confidential Informant

66. On or about March 3, 2020, a different ATF UC purchased two Buy Build Shoot Kits from POLYMER80's website. The UC used the same procedures as SSA Hamilton to purchase the kits, as described above. The UC purchased the same models and colors as SSA Hamilton, one "PS0® Buy Build Shoot™ kit PF940v2 - 10 Round Magazineu in black color and one "PS0® Buy Build Shoot™ kit PF940C - 10 Round Magazine" in flat dark earth color. The UC obtained the kits in Riverside County, California on or about June 16, 2020. The package shipping label showed the SUBJECT PREMISES as the return address: PolymerB0 Fulfilment Team, PolymerB0, Inc., 134 Lakes Blvd.,

Dayton NV 89403. Each kit appeared to contain all components necessary to assemble a complete pistol. Unlike the kits received by SSA Hamilton, these two kits included the requested 10 round magazines. Neither the frame, nor any of the component parts, included a manufacturer's serial number.

67. On or about July 9, 2020, I presented an ATF Confidential Informant (the "CI"), who has experience as an automobile mechanic and who has previous experience with firearms, with the POLYMERB0 model PF940v2 Buy Build Shoot Kits that was purchased by the UC. According to the CI, who is a convicted felon, the CI had never assembled a POLYMERB0 pistol before. I directed the CI to attempt to assemble a complete handgun using only the components contained in the POLYMERB0 Buy Build Shoot Kit. Prior to initiating the build, the CI viewed publically available YouTube videos to familiarize himself/herself with techniques to mill the frame module as well as to assemble the components.

68. The build process occurred at an ATF controlled location within Los Angeles County. SSA Hamilton and I watched the entire assembly, which we recorded. The CI used his/her own personally-owned tools to complete the build, including a C clamp, power drill, nippers, Dremel tool, file, wire cutters, needle nose plyers, hammer, and punch tool. ATF agents did not provide any guidance on what tools or techniques to use to assemble the kit.

69. The CI began assembly at approximately 2:41 p.m., and was able to successfully complete the build of a functioning handgun by approximately 3:02 p.m. The total time to mill the frame module and assemble the

components into a completed firearm was approximately 21 minutes.

70. SSA Hamilton inspected the firearm and saw that the CI did not install the trigger safety lever within the trigger shoe. The trigger safety lever is not critical to the functioning of the firearm, and is simply a safety feature. SSA Hamilton also saw the slide lock spring was installed in an incorrect orientation. Insufficient pressure to the slide lock can result in the slide coming off the handgun during dry-firing (pulling the trigger without a round of ammunition chambered), and is less secure when firing live ammunition. Because of the potentially unsafe condition, SSA Hamilton reinstalled the slide lock spring and slide lock, a process that took approximately one minute.

71. On or about July 14, 2020, SSA Hamilton test-fired the handgun using a round of commercially-available 9mm caliber ammunition that had the projectile and propellant removed. SSA Hamilton inserted the primed cartridge case into the chamber, and closed the slide. Upon SSA Hamilton pulling the trigger, the firing pin struck with sufficient force to detonate the primer. SSA Hamilton repeated the test using another primed cartridge case with the same result, and the firearm appeared operable. The firearm is pictured as follows:

72. SSA Hamilton determined that the purchased POLYMER80 model PF940v2 Buy Build Shoot Kit is a "firearm" as that term is defined under 18 U.S.C. § 921(a)(3) as a weapon designed and readily converted to expel a projectile by the action of an explosive.[7] SSA Hamilton determined that the purchased POLYMER80 model PF940v2 Buy Build Shoot kit is also a "handgun" as that term is defined under 18 USC § 921(a)(29) as a combination of parts from which a firearm having a short stock and designed to be held and fired by the use of a single hand can be assembled.

73. Because POLYMER80 shipped these Buy Build Shoot Kits from the SUBJECT PREMISES, located in the state of Nevada, to a customer in California, I believe there is probable cause to believe that POLY-

[7] As noted above, this determination is consistent with the determination of ATF Chief Counsel that the Buy Build Shoot kits are, as a matter of law, firearms pursuant to 18 U.S.C. § 921(a)(3).

MER80 has committed violations of 18 U.S.C. §§ 922(a)(2) (Shipment or Transport of a Firearm by an FFL to a Non-FFL in Interstate or Foreign Commerce) and 922(b)(3) (Sale or Delivery of a Firearm by an FFL to a Person Not Residing in the FFL's State), as well as 922(t) (Knowing Transfer of a Firearm without a Background Check) and other Subject Offenses, as described below.

G. Stamps.com and Authorize.net Records Show POLYMER80 Shipments to Potentially Prohibited Persons and Locations

74. On or about June 5, 2020, in response to a subpoena, I received records from the company Stamps.com, which provides mailing and shipping services. According to the records, BORGES was the account holder for POLYMER80's Stamps.com account. The account was opened on May 16, 2013, and the company name is listed as "Polymer80.com." The e-mail address for the account is david@polymer80.com.

75. The Stamps.com records also included shipping label records created by the account. These records, dated between January 1, 2019 and June 4, 2020, included date and time the labels were printed, mail class, postage cost, confirmation number, item weight, the name and address of the recipient, and the return address.

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* * * evidence, change patterns of behavior, or allow flight from prosecution. Premature disclosure of the contents of this affidavit and related documents may have a significant and negative impact on this continuing investigation and may severely jeopardize its effective-

ness. Therefore, I request that the application for search warrant, this affidavit, and all papers in support thereof remain sealed, until execution of the search warrant, at which time the documents will be unsealed.

XI. CONCLUSION

97. Based on the foregoing, I request that the Court issue the requested warrant.

/s/ TOLLIVER HART
TOLLIVER HART, Special Agent
Bureau of Alcohol, Tobacco,
Firearms and Explosives

Subscribed and sworn to before me
by reliable electronic means on
this [9th] day of December, 2020.

/s/ WILLIAM G. COBB
HONORABLE WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE

APPENDIX L

1. 15 U.S.C. 901(3) (1940) provides:

Definitions

As used in this chapter—

(3) The term "firearm" means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.

2. 18 U.S.C. 921(a)(3)-(4) provides:

Definitions

(a) As used in this chapter—

(3) 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.

(4) The term "destructive device" means—

(A) any explosive, incendiary, or poison gas—

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

3. 18 U.S.C. 926(a) provides:

Rules and regulations

(a) The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter, including—

(1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of this license;

(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection; and

(3) regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in subsection (d)(8) or (g)(8) of section 922.

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secre-

tary's[1] authority to inquire into the disposition of any firearm in the course of a criminal investigation.

4. 27 C.F.R. 478.11 provides in pertinent part:

Meaning of terms.

* * * * *

Firearm. 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; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. The term shall 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. The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such weapon is destroyed as described in the definition "frame or receiver".

* * * * *

Readily. A process, action, or physical state that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speediest, or easiest process, action, or physical state. With respect to the classification of firearms, factors relevant in making this determination include the following:

(1) Time, *i.e.*, how long it takes to finish the process;

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[1] So in original. Probably should be "Attorney General's".

(2) Ease, *i.e.*, how difficult it is to do so;

(3) Expertise, *i.e.*, what knowledge and skills are required;

(4) Equipment, *i.e.*, what tools are required;

(5) Parts availability, *i.e.*, whether additional parts are required, and how easily they can be obtained;

(6) Expense, *i.e.*, how much it costs;

(7) Scope, *i.e.*, the extent to which the subject of the process must be changed to finish it; and

(8) Feasibility, *i.e.*, whether the process would damage or destroy the subject of the process, or cause it to malfunction.

* * * * *

5. 27 C.F.R. 478.12 provides in pertinent part:

Definition of Frame or Receiver.

(a) Except as otherwise provided in this section, the term "frame or receiver" means the following—

(1) The term "frame" means the part of a handgun, or variants thereof, that provides housing or a structure for the component (*i.e.,* sear or equivalent) designed to hold back the hammer, striker, bolt, or similar primary energized component prior to initiation of the firing sequence, even if pins or other attachments are required to connect such component (*i.e.,* sear or equivalent) to the housing or structure.

(2) The term "receiver" means the part of a rifle, shotgun, or projectile weapon other than a handgun, or variants thereof, that provides housing or a

structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence (*i.e.,* bolt, breechblock, or equivalent), even if pins or other attachments are required to connect such component to the housing or structure.

(3) The terms "variant" and "variants thereof" mean a weapon utilizing a similar frame or receiver design irrespective of new or different model designations or configurations, characteristics, features, components, accessories, or attachments. For example, an AK-type firearm with a short stock (*i.e.,* pistol grip) is a pistol variant of an AK-type rifle, an AR-type firearm with a short stock (*i.e.,* pistol grip) is a pistol variant of an AR-type rifle, and a revolving cylinder shotgun is a shotgun variant of a revolver.

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(c) *Partially complete, disassembled, or nonfunctional frame or receiver.* The terms "frame" and "receiver" shall 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, *i.e.,* to house or provide a structure for the primary energized component of a handgun, breech blocking or sealing component of a projectile weapon other than a handgun, or internal sound reduction component of a firearm muffler or firearm silencer, as the case may be. The terms shall not include 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). When 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. The following are nonexclusive examples that illustrate the definitions:

Example 1 to paragraph (C)—Frame or receiver: A frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template is a frame or receiver, as a person with online instructions and common hand tools may readily complete or assemble the frame or receiver parts to function as a frame or receiver.

Example 2 to paragraph (C)—Frame or receiver: A partially complete billet or blank of a frame or receiver with one or more template holes drilled or indexed in the correct location is a frame or receiver, as a person with common hand tools may readily complete the billet or blank to function as a frame or receiver.

Example 3 to paragraph (C)—Frame or receiver: A complete frame or receiver of a weapon that has been disassembled, damaged, split, or cut into pieces, but not destroyed in accordance with paragraph (e), is a frame or receiver.

Example 4 to paragraph (C)—Not a receiver: A billet or blank of an AR–15 variant receiver without critical interior areas having been indexed, machined, or formed that is not sold, distributed, or possessed with

instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver.

Example 5 to paragraph (C)—Not a receiver: A flat blank of an AK variant receiver without laser cuts or indexing that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools is not a receiver, as a person cannot readily fold the flat to provide housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence.

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