No. 23A302

IN THE

Supreme Court of the United States

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

Applicants,

v.

BLACKHAWK MANUFACTURING GROUP, INC., ET AL.

Respondents.

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT IN RESPONSE TO APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

RESPONSE TO APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, BlackHawk Manufacturing Group, Inc., states that it has no parent corporation and that no publicly held company owns more than 10% of BlackHawk Manufacturing Group, Inc.'s stock.

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INTRODUCTION

This Court should not place its imprimatur on unlawful agency action. The challenged Final Rule has its beginnings in an Executive Branch directive to the U.S. Attorney General to take action without regard to the lack of statutory authorization to do so.[1] The Justice Department now supports its application on the same policy grounds, claiming vacatur of the district court's injunction is in the "government's interest." Appl. at 20.

The Government's strongly held (but widely contested) public policy views do not justify a departure from separation of powers principles and a respect for the rule of law. Agency action that is premised on a misconception of the agency's authority must be set aside. *SEC v. Chenery Corp.* ("*Chenery I*"), 318 U.S. 80, 95 (1943); 5 U.S.C. § 706(2)(A). Equally so, "[t]here is generally *no public interest* in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (emphasis added). The party-specific injunctive relief first fashioned by the district court, and then limited by the court of appeals, carefully vindicates these two important principles.

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[1] In April 2021, the President specifically stated: "I want to see these kits treated as firearms under the Gun Control Act" and "I asked the Attorney General and his team to identify for me immediate, concrete actions I could can [sic] take now without having to go through the Congress." *Remarks by President Biden on Gun Violence Prevention*, THE WHITE HOUSE (Apr. 8, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/08/remarks-by-president-biden-on-gun-violence-prevention/?utm_source=link (last accessed Oct. 9, 2023). A year later, the President stated: "A year ago this week standing here with many of you I instructed the attorney general to write a regulation that would reign in the proliferation of ghost guns because I was having trouble getting anything passed in the Congress. **But I use what we call 'regulatory authority.'"** *Remarks by President Biden Announcing Actions to Fight Gun Crime*, THE WHITE HOUSE (Apr. 11, 2022) (emphasis added), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/11/press-briefing-by-press-secretary-jen-psaki-april-11-2022/ (last accessed Oct. 11, 2023).

Nor does allowing traditional, limited injunctive relief to two parties threaten vertical stare decisis or impede Congress's purpose as expressed in the plain language of the Gun Control Act ("GCA"). As the court of appeals (and the district court) recognized, the two respondent parties "are likely to succeed on the merits because the Final Rule is contrary to law," and such circumscribed relief is necessary to remedy the irreparable harm caused "by being forced to shut down their companies or by being arrested pending judicial review of the Final Rule." App. 4a. This reasoning is sound; the expedited review previously ordered is well underway; and this Court consequently should reject the Government's application.

ARGUMENT

The Government's application misreads the Court's August 8, 2023 Stay Order, mischaracterizes the underlying record, and misapplies the relevant law and legal principles. The injunctive relief is fully warranted both as a matter of legal right and of basic fairness—indeed, the Government itself in its previous application briefing suggested that such party-specific relief would be appropriate as an alternative to vacatur. *See* 23A82 Appl. at 33–34; 23A82 Gov't Reply at 14.

Nor have the lower courts created an urgent national crisis that requires this Court's extraordinary intervention. Tellingly, the Government raised no urgent concern regarding party-specific relief during its previous application because that claim is not credible. Even so, both the district court and appeals court carefully considered the Government's public policy arguments, the plain language of the Stay Order and courts' inherent and historic authority in granting and shaping,

respectively, the injunction at issue here. That relief should be permitted to remain in place until this matter is finally resolved.

I. BLACKHAWK'S POSITION IS BASED ON A PLAIN READING OF THE STAY ORDER AND A PRINCIPLED VIEW OF VERTICAL STARE DECISIS

The Government's application suggests that BlackHawk intentionally sought to defy the Court's Stay Order or otherwise ignore principles of vertical stare decisis. Neither of those assertions are true. The Government's arguments and portrayal of the record are incorrect in at least four respects.

First, the text of the Stay Order includes the limiting language "insofar as" in its operative sentence. BLACK'S LAW DICTIONARY (10th ed. 2014) (the ordinary meaning of "insofar as" is: "To the degree or extent that."). BlackHawk read that phrase (as did the district court, App. 29a, and court of appeals, App. 4a) to permit the earlier June 30 opinion and July 5 judgment to remain in effect to the extent they do not impose universal vacatur of the Rule. This comports with this Court's guidance that proper interpretation of a legal text—in this case, an order—begins by giving the words used their ordinary meaning, *Artis v. D.C.*, 583 U.S. 71, 83 (2018), and applying the natural reading of the words within the context. *Carcieri v. Salazar*, 555 U.S. 379, 389 (2009).

Second, the Government's reliance on stare decisis or law of the case is misplaced. Because this Court's stay decision was directed at the *remedy* entered by the district court, the Stay Order has *not* decided—let alone by implication—that the Government is likely to succeed on the merits of its argument that the Rule is a lawful exercise of agency authority. Nor is it even clear that the Court's four-sentence Stay

Order granting interlocutory relief implicates the law of the case doctrine with regard to any specific merits issue. *See United States v. Hatter*, 532 U.S. 557, 566 (2001) ("The law of the case doctrine presumes a hearing on the merits."); *cf. Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (a party need show only "a fair prospect" of reversal in order to obtain a stay in this Court).

Third, the Government's suggestion that the injunction analysis has essentially already been briefed and decided by implication in the Stay Order, Appl. at 3, 17–18, is not supported by the record. In the briefing on the Stay Order, both the Government and BlackHawk addressed the issue of irreparable harm for the simple reason that irreparable harm is one of the four factors comprising the stay analysis. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). No party substantively addressed party-specific injunctive relief, nor was this Court asked to make any decision implicating or scrutinizing the district court's analysis or findings in that regard in its earlier-granted preliminary injunctions.

In fact, the Government's first application was wholly preoccupied with *universal vacatur*—mentioning "vacatur" 47 times, "universal" 25 times, and "nationwide" 18 times. *See generally* 23A82 Appl. The universal scope of the *vacatur* remedy dominated the Government's first application from page one to its concluding paragraph requesting "a stay of the district court's *judgment vacating the Rule*" or "[a]t a minimum … to the extent [*the district court's judgment vacating the Rule*] applies to nonparties." *Id.* at 40 (emphasis added). In contrast, "injunction" was

mentioned merely in cursory fashion by way of procedural background and in some of the Government's arguments *regarding universal vacatur*. *See generally id*.

Likewise, the opposition briefs submitted by BlackHawk and the VanDerStok respondents focused on the universal vacatur at the center of the Government's stay application, and made only passing reference to the district court's preliminary injunction in suggesting that any accommodation of the Government's request be limited in scope. *See generally* 23A82 Respondent Opp'n Briefs. The Government's reply remained fixated on the universal scope of the vacatur remedy. *See generally* 23A82 Gov't Reply ("vacatur" mentioned 22 times and "universal" 14 times to modify "vacatur", "relief", or "remedy"). The Government's reply contained only three instances of "injunction", none of which involved any substantive argument regarding the district court's preliminary injunctions. *Id*. at 13, 16.

Nothing in the record supports the notion that this Court conducted an injunction analysis, much less decided any issues with respect to injunctive relief that serves to constrain the lower courts. Nor is the Government correct in asserting that this Court was presented with "extensively briefed" alternatives of acceptable relief beyond either rejecting the district court's vacatur, or allowing it to remain in effect. Appl. at 16. Instead, the record shows that the Court was implored to consider a *vacatur*-focused stay application and *vacatur*-focused briefing and that it subsequently issued a Stay Order that, naturally, was directed specifically at *vacatur*.

Fourth, BlackHawk's return to the district court for injunctive relief was the logical response to the Stay Order and raised no vertical stare decisis issues. The

district court did not enter a permanent injunction in its July 5 judgment, having instead imposed the remedy of universal vacatur of the Rule, consistent with this Court's instructions that an injunction is not warranted "if a less drastic remedy . . . such as … vacatur" is "sufficient to redress [a party's] injury." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). This Court's subsequent stay of that aspect of the district court's judgment left BlackHawk without any relief or protection from enforcement of the provisions of the Rule the district court found to be unlawful. Based upon BlackHawk's reading of the plain language of the Stay Order, it not only was permitted but was required to return to the district court to seek that relief to preserve its ability to stay in business. Both the district court and the court of appeals agreed. This in no way constituted an "affront to basic principles of vertical stare decisis." Appl. at 4.

* * *

BlackHawk, of course, will abide by any Supreme Court order and takes strong exception to the Government's suggestion that it would do anything otherwise. Appl. at 2. Although BlackHawk recognizes the Government's role to zealously represent its view as to the public interest, the Government should not disparage the respondent parties, their industry or their counsel in the process, based on an apparent disagreement regarding the underlying public policy issues at stake. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[the prosecutor] may prosecute with earnestness … [b]ut while he may strike hard blows, he is not at liberty to strike foul ones").

II. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT IN GRANTING THE LIMITED INJUNCTION

The lower courts were keenly aware of this Court's supremacy, and their decisions were correct as a matter of applicable legal authority, justified as a matter of basic fairness and, notwithstanding the Government's claim, respectful to the Court's Order. This is established on at least four grounds.

First, the record refutes the Government's unnecessary commentary suggesting that lower courts "countermanded", "circumvent[ed]", and "openly flouted" this Court's order. Appl. at 16, 20. The district court did anything but ignore the Court's Stay Order, and instead conducted a detailed analysis carefully tracing the origins and parameters of its authority in its 42-page decision, before concluding that it had the continued authority to hear and order injunctive relief as requested by BlackHawk. Likewise, upon a request from the Government, the court of appeals ordered expedited briefing and promptly scheduled oral argument to hear and consider the Government's and appellees' arguments. The challenged party-specific injunction is thus the product of methodical legal reasoning and analysis supported by well-marshaled authority. *See* App. 38a (citing multiple legal authorities in discussing limitations of judicial power exercised by "inferior courts" and finding 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"); App. 6a (sustaining party-specific injunctive relief and affirming that "inferior federal courts must exhibit unflinching obedience to the Supreme Court's orders").

Second, the Government's arguments regarding irreparable harm and the balance of equities misread the Stay Order. *See* Appl. at 14 (claiming "this Court has already applied the relevant legal standard…"). Even so, the irreparable harm and balance-of-equities factors strongly favor the injunctive relief entered by the district court and tailored and sustained by the appeals court.

The Government presents its enforcement agenda as indistinguishable from the public's interest, but fails to consider this Court's admonition that "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–86 (1952), for the proposition that Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization). The Government instead shows continued indifference to the irreparable harm inflicted by the enforcement of regulations that exceed an agency's authority, and its position here offers nothing to refute the district court's findings regarding the specific threat the Rule poses to BlackHawk's survival as a business.

Third, the irreparable harm faced by BlackHawk is qualitatively different from that alleged by the Government. The district court found that BlackHawk established that, in the absence of injunctive relief, the Government's enforcement of the unlawful provisions of the Rule would destroy BlackHawk's business model and force the company to close its doors. App. 36a–37a, 43a–46a; *see also* App. 4a. The Government has no rebuttal to this finding because the Rule is intended to render

businesses like BlackHawk's nonviable by its unlawful redefinition of "firearm" to encompass non-firearm items and products that are now subject to regulatory enforcement, including criminal penalties, for violations.

The Government offers the conclusory assertion that the enjoining of its enforcement of the Rule against BlackHawk subjects the Government and the public to irreparable harm. Appl. at 17–18. However, the Government provides nothing to show the injunction protecting BlackHawk during appellate review will result in any harmful outcomes. As explained *supra* at 3, the Government previously said nothing about any urgent public peril posed by party-specific injunctive relief. *See* 23A82 Appl. at 33–34; 23A82 Gov't Reply at 14.[2] The result is hardly earth-shaking: for several weeks or months, the Government is prohibited from enforcing the Rule's unlawful provisions against two manufacturer parties and instead must abide by the status quo that existed for decades prior to the Rule.[3] *See* App. 5a ("federal definitions of 'frame or receiver' have endured for decades … ATF's desire to change the *status quo ante* does not outweigh the few additional weeks or months needed to complete judicial review...").

While the Government vaguely suggests that BlackHawk's highlighting of the current injunction on its website is somehow illustrative of the purported public

[2] That the Government took no action to stay the earlier preliminary injunctions entered in this case, which persisted for months before entry of final judgment, further undermines the purported urgency claimed in its instant application.

[3] Given the time spans involved—over five decades from passage of the GCA to President's Biden April 2021 directive to the Attorney General to promulgate regulations without Congress, and thereafter another 16 months for the Rule to take effect—a several-month constraint imposed with respect to two parties is a relatively nominal inconvenience to the Government's desired, expanded enforcement agenda.

danger, Appl. at 18, this fact simply demonstrates that injunctive protection from the deemed-unlawful provisions of the Rule is vital to the survival of BlackHawk's business during the pendency of appellate review. The district court found the same in its injunction order, App. 43a–46a, which the Fifth Circuit reiterated, App. 4a, and here the Government's reference to BlackHawk's website is an implicit concession that the district court's finding was well-founded.

Fourth, the injunctive relief currently provided to BlackHawk is not "extraordinary", did not require any unusual actions by the district court or the court of appeals, and did not require any stay of the Rule or imposition of a vacatur. The lower courts simply exercised their discretion to make findings and apply the governing legal authority consistent with those findings. The courts' combined rulings have provided the equitable relief for which injunctions exist, giving BlackHawk and Defense Distributed—parties that have achieved substantial success on the merits of their claims—the ability to remain in business during the pendency of appellate review.

In practical terms, the totality of the lower courts' orders provide for the following limited and party specific relief: (1) BlackHawk is allowed to continue its normal operations of procuring, manufacturing, selling and shipping products to lawful purchasers as it did prior to the Rule; (2) the Government, pursuant to its representation to the court of appeals, will refrain from enforcing the challenged provisions of the Rule—which have been adjudicated as unlawful—against BlackHawk's lawful-purchaser customers; and (3) the Government is still able to

enforce the Rule against individuals, again, subject to its representations to the appeals court that it has no intentions of enforcing the Rule against lawful purchasers from BlackHawk during the pendency of the appeal on the merits.

* * *

In sum, the limited injunctive relief here has been carefully considered, narrowly tailored, and fully comports with this Court's requirement that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 756 (1994) (cleaned up), and must "redress the plaintiff's particular injury," and no more. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted). The injunction is eminently reasonable in these circumstances, as noted by the court of appeals: "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." App. 6a. The Government's application fails to identify any substantive defect or error in the lower courts' rulings that warrant vacating the injunction.

III. FIVE DECADES OF PRECEDENT REFUTE THE SUBSTANTIVE MERITS AND THE PURPORTED PROCEDURAL URGENCY ASSERTED BY THE GOVERNMENT

In 1968, Congress enacted the Gun Control Act of 1968 ("GCA"), which superseded the existing Federal Firearms Act of 1938's regulation of firearms in interstate commerce. Importantly, the GCA redefined "firearm" more narrowly than the statute it superseded, by striking regulatory authority over parts of a firearm and limiting such authority to the "frame or receiver" of such firearm. In 1978, ATF promulgated a rule interpreting the phrase "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." *Title and Definition Changes*, 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978).

For over five decades, ATF steadfastly held the position that Congress's 1968 statutory definition of "firearm", as interpreted in ATF's 1978 regulatory definition of "frame or receiver", set the proscribed limits of ATF's congressionally granted authority to enforce federal firearm regulations. App. 55a–57a; App. 77a–79a. During this time, ATF repeatedly acknowledged that it had no authority to regulate parts of a firearm unless they were a "frame or receiver" of a firearm, 18 U.S.C. § 921(a)(3)(B), including issuing numerous written classification determinations consistently affirming the above interpretation of the GCA as to whether a particular object is a "firearm" subject to regulation under the GCA.

That the challenged Rule reverses this long-standing position should give this Court pause. That the Rule comes through unilateral executive action in the wake of Congressional inaction should give this Court considerable pause. *See, e.g.*, *Ghost Guns Are Guns Act*, H.R. 1278, 115th Cong. (Mar. 1, 2017) (not enacted); *Untraceable Firearms Act of 2018*, H.R. 6643, 115th Cong. § 2(a)(36) (July 31, 2018) (not enacted); *Untraceable Firearms Act of 2018*, S. 3300, 115th Cong. § 2(a)(36) (July 31, 2018) (not enacted); *Stopping the Traffic in Overseas Proliferation of Ghost Guns Act*, S. 459, 116th Cong. (Feb. 12, 2019) (not enacted).[4]

[4] On April 11, 2022, President Biden confessed to "instruct[ing] the Attorney General to write a regulation that would rein in the proliferation of 'ghost guns' because [he] was having trouble getting it passed in the Congress[.]" *Biden announces new rules for 'ghost guns,' introduces ATF director*

Throughout this litigation, the Government has failed to acknowledge, much less resolve, the dissonance created by the five decades of its own contrary history. The application continues this trend and demonstrates that the claims of eminent public peril, like its arguments on the merits, are neither credible nor compelling.

In fact, the injunction entered in this case does nothing more than what the Government has proposed on previous occasions. *See* 23A82 Appl. at 33–34; 23A82 Gov't Reply at 14. It provides no protection to prohibited persons and will not hamper the Government's enforcement of the Rule with respect to non-parties during the pendency of the appeals process. The district court's injunction, narrowed by the Fifth Circuit, is tailored to provide BlackHawk the injunctive protection it rightfully obtained and needs to continue operating while its claims are finally decided.

CONCLUSION

The Government's Application should be denied.

Dated: October 11, 2023

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nominee, CBS NEWS, video at 2:51 (Apr. 11, 2022), https://www.cbsnews.com/video/biden-ghost-guns-atf-director-nominee/#x (last accessed Oct. 9, 2023).