No. 23A302

In the Supreme Court of the United States

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

Applicants,

v.

Defense Distributed, et al.

Respondents.

On Application to Vacate the Injunction Pending Appeal
entered by the United States District Court
for the Northern District of Texas

Brief in Opposition of Defense Distributed

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Summary of the Argument

The President and his ATF cannot make up statutes that Congress did not really enact. Only what the legislators actually voted to enact counts. Yet by administrative regulation, ATF's "ghost gun" rule tries to criminalize what Congress did not actually and could not constitutionally criminalize. That is why Defense Distributed will win the case and have the Rule set aside.

The President also cannot make up judicial rulings that this Court did not really render. Only what the Court actually voted to issue counts. Yet ATF here treats as conclusively decided what this Court did not actually and could not procedurally adjudicate. That is why Defense Distributed should retain what the courts below rightly upheld: A party-specific injunction against ATF's enforcement of the Rule that serves all of equity's interests and respects the Court's stay.

The Court's stay upholds nothing because the Court issued no opinion upholding anything. Without an opinion, the stay functioned as all stays do—solely in the negative—to halt the order. What the stay negated is categorically different than what Defense Distributed got on remand. Whereas the stayed order gave *nationwide* relief from the Rule's *existence* with an APA *vacatur*, the remedy below gives *individualized* relief from the Rule's *enforcement* with a personal *injunction*.

These legal remedies are not one and the same. They are distinct, differing not just in degree but in kind. A changed mode of relief (vacatur vs. injunction) and changed scope of relief (nationwide vs. individual) alter both the applicable legal rules and key ingredients of the calculus. Legal issues like ATF's leading objection to "universal" vacatur are nowhere to be found now. And a nationwide inquiry about irreparable harm and equity balancing may very well come out differently than the same inquiry done individually—especially where, as here, the company at issue proves a dramatically more compelling case for relief than the Rule's average subject.

Conflating the legal analysis of vacaturs and injunctions is not just wrong on first principles. It is wrong according the Solicitor General, who in many filings has admonished the very conflation ATF now embraces. The government has touted the vacatur/injunction distinction with great enthusiasm in case after case—or at least in case after case not about the Second Amendment.

When ATF sought its stay of the district court order issuing a nationwide APA vacatur, Defense Distributed's personalized injunction pending appeal did not come before the Court because it could not have come before the Court. At that time, Defense Distributed's injunction pending appeal had not been sought at any court below, had not been passed on by any court below, had not been granted by any court below, and therefore was not raised in any filing in this Court. Though some of the respondent's stay filings made an alternative request for individualized relief pending appeal, the Court's stay decision did not resolve that. Routine procedural rules dictate that this Court never has to consider and generally refuses to consider alternative issues that were not passed on below. Since no lower court had passed on this alternative argument, the stay decision did not have to adjudicate it and in all likelihood did not adjudicate it. For if the Court were to actually depart from its standard practices so abruptly, an opinion would have said so. ATF's notion of this extraordinary irregularity having happened *sub silentio* is totally unfounded.

Second Amendment rights are not "second class." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022). Neither are Second Amendment remedies, for it is a "settled and invariable principle, that every right, when withheld, must have a remedy." *Marbury v. Madison*, 5 U.S. 137, 147 (1803). Under the remedies law that would govern any other controversy, an opinionless stay of a nationwide vacatur does not necessarily defeat an individualized injunction. So too here, even and especially as the President's ATF aims to extinguish Defense Distributed.

Statement

The district court and circuit court below correctly stated the facts and procedural posture. The "Rule" at issue is "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).

I. The Rule expands federal law's "firearm" definition to criminalize wide swaths of otherwise legal non-firearm items.

Congress made the word "firearm" one of the law's most impactful statutory keystones. Once an item counts as a "firearm," a mountain of civil and criminal proscriptions come into play. *See, e.g.*, 18 U.S.C. ch. 44 ("Firearms"). It is a crime for many Americans to possess a "firearm," 18 U.S.C. § 922(g), to transport or receive a "firearm," 18 U.S.C. § 923(a)(1)(A); 18 U.S.C. § 923(a)(3), to manufacture a "firearm" at all, 18 U.S.C. § 923(a)(1)(A), and to manufacture a "firearm" without a serial number, 18 U.S.C. § 923(i).

Congress gave "firearm" its keystone definition in the Gun Control Act of 1968. It defines "firearm" to mean both a certain kind of "weapon" and the weapon's "frame or receiver":

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

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

To administer and enforce the Gun Control Act (and other statutes), Congress tapped the Department of Justice and its Bureau of Alcohol, Tobacco, Firearms, and Explosives. 26 U.S.C. § 599A(a)(1). Those agencies and their leading officials are the action's defendants, referred to collectively as . The parties and courts below refer to them collectively as ATF.

Without Congressional action, ATF redefined the statutory "firearm" term in 1978 and 2022. ATFs 1978 action is not challenged here, but sets the stage for the 2022 ATF action that is.

In 1978, the Agencies redefined the Gun Control Act's "firearm" term by redefining the constituent phrase "frame or receiver." Title and Definition Changes, 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978) (hereinafter the 1978 Rule). The 1978 Rule defined "frame or receiver" to mean "[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":

> ***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.**

Id. (formerly codified at 27 C.F.R. § 478.11 (2020)).

Under the 1978 Rule, ATF posited that the Gun Control Act's "firearm" term did *not* cover "receiver blanks that do not meet the definition of a 'firearm." *Id.* Doc. 143 at 8. In other words, ATF posited 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 according to the GCA." *Id.* (emphasis added). So under the 1978 Rule, most of what the firearms industry now calls "80% lowers" did *not* constitute a GCA "firearm." Nor did "kits" that included parts like these.

In 2022, the Agencies again redefined the Gun Control Act's "firearm" term by enacting the Rule at issue: *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24,652 (Apr. 26, 2022). The Rule overhauled ATF's concept of "firearm" in multiple respects.

Key changes addressed (1) *unfinished* firearm components and (2) *kits* used to make firearms. Neither of these qualified as a "firearm" under the 1978 Rule. But with the 2022 Rule, ATF for the first time ever deemed that the Gun Control Act's "firearm" term covers (1) *unfinished* frames and receivers—*i.e.*, non-frame and non-receiver articles that may become a frame or receiver if additional processes sufficiently alter their material constitution, and (2) frame and receiver "part kits"—*i.e.*, kits of non-frame and non-receiver articles that may become a frame or receiver if additional processes sufficiently alter its material constitution. *Id.*

Defense Distributed is a private business corporation headquartered in Austin, Texas. *See* N.D. Tex. Doc. 143 at 4 (complaint); N.D. Tex. Doc. 164-1 at 1 (summary judgment evidence). Cody Wilson founded Defense Distributed and serves as Defense Distributed's Director. *Id.* Defense Distributed is the first private defense contractor in service of the general public. *Id.* Since 2012's Wiki Weapon project, Defense Distributed has defined the state of the art in small scale, digital, personal gunsmithing technology. *Id.* The district court correctly found—and the government does not now challenge—that Defense Distributed "primarily manufactures and deals products now subject to the Final Rule." App 59.

II. The district court issued an injunction pending appeal that the Fifth Circuit upheld.

In the district court, Defense Distributed sued for a judgment setting aside and vacating the Rule's new "firearm" definition. Alongside other plaintiffs, they attacked the Rule "on a host of statutory and constitutional grounds." App. 23a. On summary judgment, the district court accepted Defense Distributed APA claim, "conclud[ing] that the ATF has clearly and without question acted in excess of its statutory authority." App 23a. It did not yet reach other claims. *Id.*

The final judgment issued below did two key things, one as to rights and one as to remedies. App.50a-51a. As to rights, the district court's final judgment granted "summary judgment on grounds that the Final Rule was issued in excess of ATF's statutory jurisdiction":

> 1. Plaintiffs' and Intervenor-Plaintiffs' motions for summary judgment on grounds that the Final Rule was issued in excess of ATF's statutory jurisdiction (Counts I and III) are **GRANTED** and Defendants' cross-motion for summary judgment as to those claims are **DENIED**.

App.50a. As to remedies, the district court's final judgment vacated the Rule:

> 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**.

App.50a. ATF's appeal from that judgment is pending before the Fifth Circuit.

With the appeal pending, ATF sought to stay the summary and final judgments. ATF first sought that relief in the district court, N.D. Tex. Doc. 236, which denied the motion (except for a 7-day administrative stay), N.D. Tex. Doc. 238. ATF then moved for that relief in the Fifth Circuit, 5th Cir. Doc. 9, which denied the motion as to the Rule provisions now at issue, 5th Cir. Doc. 45-1. Then ATF came to this Court, which issued a stay of the district court's summary and final judgments "insofar as they vacate the final rule." App.49. No opinion accompanies the stay.

With the appeal still pending and stay in effect, Defense Distributed moved in the district court for an injunction pending appeal, N.D. Tex. Doc. 239, which the court granted, App.261. ATF then challenged the injunction pending appeal in the Fifth Circuit, which upheld it as to Defense Distributed (and Blackhawk), App.3a-6a, but not as to nonparties, App.3a.

Argument

ATF asks the Court to vacate the injunction pending appeal that both courts below upheld. To earn that, ATF must show as to Defense Distributed in particular (1) a reasonable probability of certiorari, (2) a fair prospect of reversal, (3) a likelihood of irreparable harm to the government, and (4) a favorable balancing of equities. *See Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). ATF agrees (at 14-15) to this test. The request should be denied.

I. The Court's August 8 stay does not decide the question presented.

ATF's leading argument is *not* substantive. ATF's leading argument is purely procedural. Instead of arguing about the merits of whether Defense Distributed deserves the injunction pending appeal upheld below, ATF's leading point says that the Court's August 8 stay foreclosed that relief procedurally. As ATF puts it (at 14), "this Court has already applied the relevant legal standard in the very same case and determined the government should obtain emergency relief."

ATF's procedural argument is wrong. The stay did not impose any procedural bar on the injunction pending appeal upheld below. Obviously, the stay delivers no express decision about Defense Distributed's entitlement to an injunction. The order speaks for itself with utter clarity and says literally nothing about Defense Distributed's entitlement to an injunction pending appeal. The stay also delivers no such decision impliedly, as a "necessary" implication of the actual decree.

The same unlawful paradigm that President Biden uses to attack Second Amendment rights is now being used to attack Second Amendment remedies. As to rights, ATF's regulation unlawfully says that a statute necessarily criminalized what Congress's actual enactment did not. As to remedies, ATF's application wrongly says that a stay necessarily adjudicated what this Court's actual decision did not. ATF's paradigm is wrong in both respects, not to mention ironic. To wage legal war against "ghost guns" the President has manufactured his very own ghost stay.

A. The stay does not *expressly* stop individualized injunctive relief.

Stays do not uphold anything. They give no affirmative decrees. By definition they negate. All that a stay can do is *stop* an order—*i.e.,* "hold an order in abeyance." *Nken v. Holder*, 556 U.S. 418, 426 (2009). That inherently negative operation as to court orders is why, "instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself." *Id.* at 428.

The Court's stay worked in this fashion. Operating only on the order below and only in the negative, stopping the summary judgment order and judgment "insofar as they vacate the final rule." *Garland v. VanDerStok*, No. 23A82, 2023 WL 5023383, at *1 (Aug. 8, 2023). That limited negation is all that the stay yielded. It put a stop to part of the decision below. No more occurred.

Insofar as the stay's express decree is concerned, ATF's contrary view is clearly wrong. The stay did not switch subjects to deliver an "authoritative determination that the government should be allowed to implement the Rule during appellate proceedings," as ATF says (at 2). Nor did it switch modes to become an affirmative decree "about the status quo that should prevail during appellate proceedings in this case," as ATF says at 4. The stay addresses only the district court—not the government—and says only it *cannot* do—not what it can. That is the one and only way that stays function and that is how the instant stay functions. It did nothing more than reject the relief actually issued by the district court. It decreed nothing about how that court should handle the case on remand and nothing about the government's ability to do or not do anything. ATF's supposed procedural bar is nowhere to be found in the stay's actual decree.

Thus, ATF cannot possibly prevail on the theory that the Court's stay expressly barred the courts below from issuing Defense Distributed's injunction pending appeal. ATF resorts instead to an argument about what the stay "necessarily" decided impliedly. That too is wrong.

B. An opinionless stay delivers no ruling beyond the express decree.

Everything here would be different if the Court had accompanied the stay with an opinion. In that case, all would know the legal and factual holdings that this Court had necessarily rendered. But without an opinion, it is impossible to divine any meaningful holding beyond the decree itself. A stay's basis cannot be reliably known where, as here, the decision comes by way of a naked decree with a wide variety of possible underlying justifications.

In this respect, ATF wrongly suggests that all of the Court's stay decisions necessarily apply the same legal test. But they do not. The Court applies different stay tests to different situations, depending on the totality of circumstances. So there is no telling exactly which test applied to this stay request and, in turn, no telling what the Court necessarily held.

The Court's lack of one-size-fits-all stay test is no secret. It has been recognized for years. "Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). Though many stay decisions use the test ATF now articulates, not all of them do. Even the opinion that ATF likes best admits this. *See Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) ("that traditional test for a stay does not apply (at least not in the same way) in election cases"); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (the test changes in "close cases"); *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 10 (2023) (Jackson, J., dissenting) ("the majority mandates a stay even if none of the traditional stay prerequisites are present: likelihood of success on the merits, irreparable harm, favorable balance of equities, and alignment with the public interest"). Because of this indeterminacy, nailing down an unexplained stay decision's precise basis is impossible.

C. "Likelihood of success" was not the test.

ATF's most severe error concerns the issue of what holding the stay necessarily entailed about the action's merits. Contrary to ATF's view (at 3, 15, and 17), the stay does *not* necessarily entail a determination that ATF has a likelihood of success on the merits. That holding can inhere in lower court stay and injunction decisions because their precedent makes it so. But not so here.

Under *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring)—the stay standard for this Court that ATF's stay application expressly invoked and that ATF continues to deem correct—a stay does *not* entail any holding about a likelihood of success on the merits. Instead, ATF's test required only that it show a "fair prospect" that the Court would reverse. *Id.* The Solicitor General made this evident on page sixteen of the stay application:

> **ARGUMENT**
>
> An applicant for a stay pending appeal and certiorari must establish (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the applicant would likely suffer irreparable harm absent the stay" and "the equities" otherwise support relief. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). Those requirements are satisfied here.

A "fair prospect" of success is nothing like a "likelihood" of success. A "likelihood" of success on a case's merits is exclusive; only one party can have it because a "likelihood" of success entails a lead—a comparative advantage over the opposing party. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A "fair prospect" of success is not exclusive. It entails no lead—no comparative advantage—because *both sides* can have a "fair prospect" of success at the same time. The *Merrill* opinion that ATF embraces says this expressly—that *both* sides of a case can have the "fair prospect" of success. *Merrill*, 142 S. Ct. at 881 n.2 (Kavanaugh, J., concurring).

Because of this critical distinction, ATF gains no serious ground by now touting (at 15, 17) that the stay necessarily entailed "the requisite likelihood" that the Court would "reverse." Meeting the "fair prospect" threshold is nothing to write home about, and ATF necessarily did no better than that. The "likelihood of success" ATF claims on page three of its application—"The Court has already concluded that the government has a sufficient likelihood of success to warrant relief"—flatly contradicts the *Merrill* rule that ATF itself has embraced all along.

D. The remedies are drastically different.

Most critically of all, ATF is wrong about what the Court's stay necessarily entailed because of critical differences in the remedies at issue. The relief issued by the district court below does not contradict this Court's stay because these two inquiries did *not* concern the same kind of relief. The *subjects* of relief differed, the *objects* of relief differed, and the *methods* of relief differed. The Supreme Court's stay order rejected relief (1) for the entire nation, (2) from the Rule's existence, (3) by way of an APA vacatur operating essentially *in rem*. In stark contrast, the order below concerns none of that. The district court issued relief (1) for Defense Distributed *personally* (and Blackhawk)—not for the whole country *nationally*. It gave relief (2) from the Rule's *enforcement*—not it *existence*. And it supplies relief (3) by way of an *equitable* injunction operating *in personam*—not by way of an *APA* vacatur operating *in rem*. All three of these distinctions matter.

First, the stay did not decide Defense Distributed's entitlement to a personalized injunction pending appeal because the remedy at issue did not operate with the same scope. Whereas the stay rejected an order relieving the entire nation from the Rule's operation nationally, the order now at issue relieves only Defense Distributed from the Rule's operation against Defense Distributed (and likewise for Blackhawk).

This difference is very material. As with changing an equation's denominator, changing the set of people that an order would benefit triggers cascading effects for nearly every ingredient of remedial analysis. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) (on both stays and injunctions). The district court understood this perfectly.

Second, the stay did not decide Defense Distributed's entitlement to a personalized injunction pending appeal because the remedy at issue did not use the same mode of relief. Whereas the stay order rejected relief by way of an APA vacatur operating *in rem* against the Rule's existence, the district court issued relief by way of an *equitable* injunction operating *in personam* against the Rule's enforcement.

ATF now denies that these distinctions make any difference. But ATF's own prior filings tell a different story, especially as to the method of relief. In the instant motion, ATF says that the Court's stay of an APA vacatur necessarily signals disapproval of a traditional injunction. But ATF's appellant's brief in the Fifth Circuit says that these two remedies are totally distinct. It says (at 36) that an APA vacatur and equitable injunction are "radically different." It even says (at 36) that APA vacatur isn't really a thing, questioning whether vacatur can ever be issued as a remedy. ATF carried that same position into this Court, seeking the stay *because* the district court had used vacatur instead of an injunction.

In light of ATF's own arguments, the Court's decision to stay the remedy of nationwide APA vacatur should be understood to have left the door wide open for the very different remedy of an individualized injunction. It doesn't matter that the Court's order gave no express "suggestion that any alternative relief would have been appropriate." Mot. at 8. That would have been dicta.

The first and only time that Defense Distributed ever sought a personalized injunction pending appeal against ATF's enforcement of the Rule was below, when it moved for that form of relief immediately after this Court issued the stay. The district court had all of the authority it needed to resolve that motion and did so correctly in every respect.

E. The Court did not rule on the respondents' alternative requests for a individualized relief.

During the stay proceedings before this Court, the unavoidable issue ATF presented was whether to stay the district court's nationwide vacatur. The Court had to rule on that and did.

Additionally, some of the respondents' filings presented an alternative argument seeking some kind of individualized relief. ATF says that the stay necessarily ruled on the alternative argument—*i.e.*, that when the Court decided the unavoidable issue of whether to stay the district court's nationwide vacatur, the Court also *sub silentio* decided every other issue in the briefs. This contradicts bedrock principles of Supreme Court practice showing that the Court does not have to resolve such alternative arguments, usually does not resolve such arguments, and did not necessarily resolve any such alternative arguments here.

This Court never has to consider and usually refuses to consider alternative issues that were not passed on below. Technically, the Court sometimes has the jurisdictional power to do so—to go beyond the primary issue passed on below that a petitioner used to get in the door. But the Court is not required to do so and has adopted a wise rule of judicial administration that generally refuses to do so. This aspect of the Court's practice is very well-established. If an issue has not been passed on below, the Court is not obligated to adjudicate and usually does not adjudicate alternative arguments pressed for the first time in this Court. *See, e.g.*, *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022); *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005).

That rule applies to the stay proceedings. The Court had to resolve the primary issue passed on below that ATF used to get in the door—the unavoidable issue of whether to stay the district court's order of nationwide vacatur. But since no court below passed on the respondents' alternative argument (the one requesting individualized relief in event of nationwide vacatur's demise), this Court did not have to adjudicate it and in all likelihood did not adjudicate it. *See id.* Though theoretically possible, a stay decision that decided both the unavoidable primary issue *and* an alternative issue that no court below had passed on would have constituted an extraordinary departure from the Court's general practice. If ever the Court were to take that extraordinary procedural step, it would issue a full-fledged opinion saying so. It would not do so *sub silentio*.

Indeed, the Solicitor General argues all the time that this Court need not and should not adjudicate alternative arguments not passed on below. The Solicitor General's own oft-invoked position translates perfectly to this situation, showing that this Court did not have to and in all likelihood did not in fact adjudicate the respondents' alternative arguments not passed on below:

> In addition, although this Court has the discretion to consider alternative theories that were not passed upon below, it ordinarily does not do so, given its role as "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see, e.g.*, *United States v. Nobles*, 422 U.S. 225, 242 n.16 (1975). In this case, neither the court of appeals nor the district court has passed on respondent's alternative theory. Instead of considering that theory in the first instance, this Court should allow the lower courts to consider it on remand.

Reply Brief for the Petitioners at 12, *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022) (No. 19-896), 2021 WL 6118329, at *12; *accord* Reply Brief for the Petitioner at 9-10, *United States v. Rahimi*, No. 22-915, 2023 WL 3893895, at *9-10 (U.S. June 6, 2023) ("This Court is a 'court of review, not of first view,' and its ordinary practice precludes it from reviewing claims that were not 'pressed or passed upon below." (cleaned up)).

The Solicitor General's usual recommendation for this situation—when the Court does *not* address a respondent's alternative argument not passed on below—is for the Court to "vacate the decision below and remand to allow the lower courts to consider those issues in the first instance." Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 22, *Torres v. Madrid*, No. 19-292, 2020 WL 635278, at *22 (U.S. Feb. 7, 2020). That is essentially what the Court did here. Having resolved the primary issue of what to do with the existing order's nationwide vacatur, the stay left to lower courts the job of evaluating requests for individual relief in the first instance.

II. Defense Distributed is entitled to the injunction pending appeal.

Apart from ATF's main argument about the procedural bar, ATF disputes the substantive issue of whether Defense Distributed met the test for an injunction pending appeal. The Court should reject this aspect of the motion because it is not preserved.

A. The substantive challenge is waived.

ATF's submission to the district court, N.D. Tex. Doc. 254, did *not* make any substantive argument about whether Defense Distributed deserved an injunction pending appeal. ATF there made nothing but the procedural argument. In the Fifth Circuit as well, ATF did *not* preserve any substantive argument about whether Defense Distributed met the test for an injunction pending appeal. There too, ATF challenged only the threshold issue of whether the stay deprived the district court of authority to enter a personalized injunction for Defense Distributed.

ATF is therefore limited to that one preserved argument—the procedural challenge. The substantive arguments are forfeited, and for good reason. If ATF had made such a challenge in the district court, Defense Distributed would have made a different factual record to bolster its already-sufficient showing against the new attacks. And if ATF had made such a challenge below,

the district and circuit courts could have passed on the questions in the first instance. ATF's decision to make only the procedural argument was a bad tactical decision that deserves no rescue.

B. Defense Distributed's irreparable harm and equities warrant relief.

Both courts below held that Defense Distributed's "likelihood of success" in having the Rule set aside warrants an injunction pending appeal. Those rulings are correct for their given reasons given. Both courts below also held that Defense Distributed's likelihood of irreparable harm from the Rule's enforcement against it warranted an injunction pending appeal. Those rulings are also correct for their given reasons, which bear emphasis here because Defense Distributed's particular situation is so markedly more extraordinary than the average person subject to this Rule.

If the Rule is allowed to go into effect vis-à-vis Defense Distributed, irreparable harms will undoubtedly result. For years, Defense Distributed's entire business model has depended on its ability to deal in items that are not "firearms" under Gun Control Act itself and not "firearms" under prior regulations, but that are now defined for the first time ever as "firearms" by the Rule. The Rule's enforcement cuts the foundation of Defense Distributed's business model out from under it, sweeping away critical revenues, saddling it with massive new compliance costs, causing service provider disruptions, and damaging Defense Distributed's reputation and goodwill in the business community. These harms are irreparable and existential.

The key legal rule is that economic losses meet the test if the injury 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), and/or the loss is nonrecoverable because the government-defendant enjoys sovereign immunity from monetary damages, *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). Both situations exist here.

As the declaration of Defense Distributed's director shows, N.D. Tex. Doc. 164-01, the Rule's enforcement inflicts such severe economic harm on Defense Distributed as to threaten its existence. Because of the unprecedented reclassification of unfinished receivers, unfinished frames, and frame and receiver parts kits, Defense Distributed has already suffered immense damages in the form of lost revenues, lost business reputation and good will, interruption of supplying vendor services, and massive compliance costs. *Id.* The Rule's enforcement also harms Defense Distributed by striking fear into its customers and business partners. *Id.* This multifaceted business destruction constitutes irreparable harm.

Defense Distributed's economic harms are also irreparable because Defense Distributed cannot later recover its losses as monetary damages. *See Wages & White Lion*, 16 F.4th at 1142 ("federal agencies generally enjoy sovereign immunity for any monetary damages," making a party's "lack of a guarantee of eventual recovery [one] reason that its alleged harm is irreparable" (quotation marks and citation omitted)); *see also Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." (quotation marks and citation omitted)).

The final considerations of equities and the public interest favor immediate relief. For just as the district court recognized, the "public interest is served when administrative agencies comply with their obligations under the APA." N.D. Tex. Doc. 56 at 21. There is no harm in simply maintaining, pending appeal, a status quo which has existed for decades.

Both courts below correctly recognized that the status quo is a world in which the Agencies are *not* enforcing the Final Rule's challenged provisions (against the action's plaintiffs, at least). The district court returned to the status quo (as it had existed since 1978) when it issued its final

judgment. *See* N.D. Tex. Doc. 227 at 37 ("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"). And as the Fifth Circuit's stay denial correctly put it, letting the Rule's challenged provisions be vacated "effectively maintains, pending appeal, the status quo that existed for 54 years from 1968 to 2022."

The *status quo ante* is "the world before the Rule became effective." *VanDerStok v. Garland*, No. 23-10718, 2023 WL 4945360, at *1 (5th Cir. July 24, 2023) (unpublished order). Indeed, that *status quo ante* was Defense Distributed's reality from March to July 2023 (first due to a preliminary injunction, and then the final judgment). In that crucial period of time, Defense Distributed did not have to comply with the Rule. And yet the sky did not fall. A stay pending appeal applicable only to Defense Distributed will likewise do the government no harm. It will instead just ably serve the higher interest of preserving the constitutional rights that this Rule tramples and ensuring that Defense Distributed survives to see the day when the whole nation is free from it.

Conclusion

The Court should deny the application to vacate the injunction pending appeal.

Respectfully submitted,

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