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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,

versus

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.

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UNPUBLISHED ORDER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 vacated 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.

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.

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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.

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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.

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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.

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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 Intervenors' 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

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

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

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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

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,

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 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).

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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.* 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.

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.

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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 non-profit organization dedicated to promoting the constitutional 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 through sales of those

⁶ Peters Decl. 1, ECF No. 16-1.

⁷ *Id.* at 2.

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.

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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 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

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.

²³ *See generally id.; id.* at 4.

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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 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.

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.

²⁶ *See* Orders, ECF Nos. 33, 107.

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IV. DISCUSSION

A.

1. Legal Standard²⁷

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 intervention 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.* (“*NOPSP*”), 732 F.2d

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.

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

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.

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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 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

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.

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.

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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, 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

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).

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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 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 intervention will not “significantly contribute to the full

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).

⁴¹ Defs.’ Opp. to Polymer80 3–4, 9, ECF No. 206.

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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 interests 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

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).

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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. However, 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, where district 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)

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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

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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).

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

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).

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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 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

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.

⁵² Defs.’ Reply 2 n.3, ECF No. 204.

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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, 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

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 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.).

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(inaction), they do not lose their right to challenge the Final Rule.⁵⁵ Defendants offer no argument 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)).

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

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 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.

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).

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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.

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.

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).

⁵⁸ Order 5, ECF No. 137.

⁵⁹ See generally Combs Decl., ECF No. 62-4; Orig. Pls.’ Br. 49, ECF No. 144.

* * * *

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 the Final Rule on a host of statutory and constitutional grounds. However, there exists an ordinary rule “that a federal court 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.

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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

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.

begins with “the assumption that the words were meant to express their ordinary meaning.” *United States v. 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.

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

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).

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).

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, dictionaries 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.

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).

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).

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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 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).

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Congress’s definition does not. Again, compare the language in Congress’s primary definition 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 out 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

⁶⁷ Mem. Opinion 10, ECF No. 56.

⁶⁸ Defs.’ Supp. Br. Regarding Count I 10, ECF No. 132.

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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 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

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Nor do Defendants invoke *Auer* deference here.

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

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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* 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.

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.*”).

⁷⁶ *Id.* at 11.

⁷⁷ *Id.*

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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 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.

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.

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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 definition 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 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-

⁸¹ Defs.’ Supp. Br. Regarding Count I 13, ECF No. 132.

⁸² *Id.* at 14.

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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

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

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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 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

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.

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.

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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.

* * * *

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 does not allow for such

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 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.

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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 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

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).

⁸⁸ Defs.’ Reply 53, ECF No. 204 (emphasis added).

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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 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

⁸⁹ Defs.’ Reply 54–55, ECF No. 204.

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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**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

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3. The parties' remaining claims are **DENIED** as moot.¹
4. All other relief not expressly granted herein is denied.

SO ORDERED this **5th day of July, 2023**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

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), 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)).

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

JENNIFER VANDERSTOK, *et al.*,

Plaintiffs,

v.

MERRICK GARLAND, in his
official capacity as Attorney General
of the United States, *et al.*,

Defendants.

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

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,

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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

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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 firearms 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

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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 to as “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 persons¹ 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 to a potential suspect if they are later found at a crime scene.

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 a mental 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 to a 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.

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11. ATF issued the Rule to increase public safety with the goal of ensuring proper marking, recordkeeping, 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

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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

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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

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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

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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").

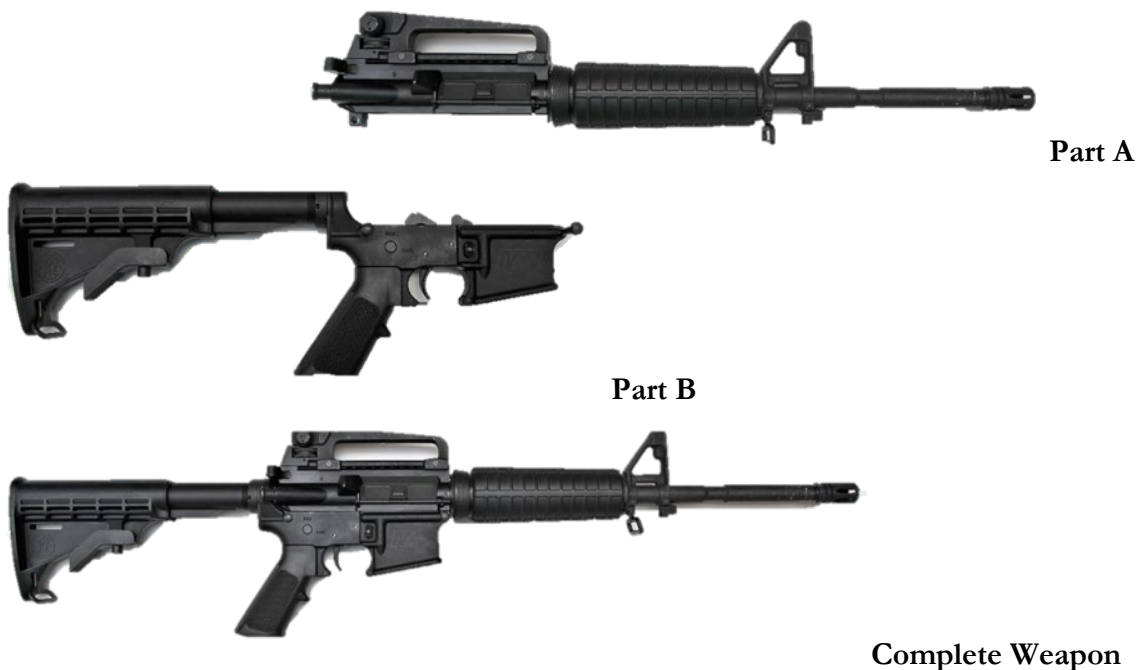
22. The same is true of weapon parts kits. 27 CFR 478.11 ("firearm") ensures that companies that produce and sell weapon parts kits, or aggregations of parts that allow a weapon to readily be completed and assembled to expel a lethal projectile, are subject to the same requirements as all other firearms 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

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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 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.



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).

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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 regulation to accomplish that worthwhile objective.” *Rovold*, 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.

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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

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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

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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

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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.

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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

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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>) dedicated 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.

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

Executed this 14th day of July, 2023.

Matthew P. Varisco
Assistant Director, Enforcement Programs and Services (Regulatory Operations)
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice

20 APR 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 921(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

CHBARTLETT:psc:4-8-78

CODE	INITIATOR	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER
	T.T.F	T.T.F					
SUR-NAME	Beath	Yonover					
DATE	4/17/78	4/19/78					ATF000011



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 forward to your reply.

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

Very truly yours,

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, Tobacco & Firearms
Room B-230
Attn: Chief, Firearms Technical Branch
12 Pennsylvania Ave.
Washington, D.C. 20226

15 March 1978

ATF000012

11 JUN 1980



T:T:F:CIB
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 your 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

CHARLETT:sp1:6-10-80

OO: SMC Office

CODE	INITIALS	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER	REVIEWER
	T.T.F.						
SUR-NAME	Battisti	Owen					
DATE	6/10/80	6/11/80					

ATF FORM 5 (2-78) DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
REPLACES ATFFORM 5 (2-78) WHICH MAY BE USED

Ex D²

ATF000025

- 3 MAY 1983

CiF:TE:CHB
7540CHBARLETT:ddw:4-28-83
cc: SAC Office RRA Office

Mr. Henry A. Roehrich
SGW, Incorporated
824 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 serial 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 20226www.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 converted 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

Acting Director

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



Acting Director

[REDACTED]



[REDACTED]

[REDACTED]

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. #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).

Acting Director

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

Acting Director

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[REDACTED]

[REDACTED]

[REDACTED]

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

Acting Director

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[REDACTED]

[REDACTED]

[REDACTED]

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>.

Acting Director



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

Joel
Roessner

Digitally signed by Joel
Roessner
Date: 2020.12.04
10:45:34 -05'00'

Joel J. Roessner
Chief Counsel

⁸ See Footnote 5 *infra*.

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 Build 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. POLYMER80 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 included a series

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).

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
- 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.

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.

- 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.

53. On the same date, SSA Hamilton received an email titled "Transaction Receipt from POLYMER80 for \$1300.96 (USD)" 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

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.

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, Polymer80, Inc., 134 Lakes Blvd., Dayton NV 89403.

57. Later that day SSA Hamilton opened the package in my presence. The package contained a POLYMER80 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 "POLYMER80 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-

⁵ I understand "BBS" to be an abbreviation for "Buy Build Shoot."

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.



59. The other pistol case was labelled "POLYMER80 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, POLYMER80 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 mis-stamped.

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. §

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).

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. 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 "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. 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: Polymer80 Fulfilment Team, Polymer80, 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 POLYMER80 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 POLYMER80 pistol before. I directed the CI to attempt to assemble a complete handgun using only the components contained in the POLYMER80 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 pliers, 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

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).

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 POLYMER80 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.

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 effectiveness. 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.

TOLLIVER HART, Special Agent
Bureau of Alcohol, Tobacco,
Firearms and Explosives

9/12 WGC

Subscribed and sworn to before me
by reliable electronic means on
this 8th day of December, 2020.

HONORABLE WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE