No. 23A82

IN THE

Supreme Court of the United States

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

Applicants,

v.

JENNIFER VANDERSTOK, ET AL.

Respondents.

TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT IN RESPONSE TO APPLICATION FOR A STAY OF THE JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

RESPONSE TO APPLICATION FOR A STAY OF THE JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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RULE 29.6 STATEMENT

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

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TO THE HONORABLE SAMUEL ALITO, AS CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Respondent BlackHawk Manufacturing Group, Inc. ("BlackHawk") respectfully requests that this Court deny the application for a stay of the judgment issued by the District Court for the Northern District of Texas. Both the District Court and U.S. Court of Appeals for the Fifth Circuit declined to stay. This Court has repeatedly held that a stay is appropriate only when the applicant demonstrates, *inter alia*, a reasonable probability that this Court will grant certiorari and reverse. In addition, this Court stays cases pending in the courts of appeals only upon a showing of "the weightiest considerations." *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) (internal quotation marks omitted). Applicants have failed to meet their "especially heavy burden" to justify a stay in this Court. *Packwood v. Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers).

First, Applicants are unable to show a reasonable probability that this Court will grant certiorari and reverse. The District Court and Fifth Circuit correctly applied the proper legal standard when assessing the merits and in declining to stay the judgment, which granted a remedy of vacatur. Contrary to Applicants' claims that a stay is needed to mitigate an urgent public safety and law enforcement crisis, the practical impact of the vacatur order is the reinstatement of the *status quo* in federal firearms regulations that existed for 54 years from 1968 to 2022. The substantive legal issue presented in this application—straightforward appellate review of a statutory interpretation decision—does not warrant this Court's

intervention outside the ordinary appellate process to relieve Applicants from the interim, practical consequences of an adverse district court order.

Second, Applicants cannot make the required showing they will suffer irreparable harm in the absence of a stay. As noted, a stay correctly reinstates the governmental regulation that existed for the past many decades prior to the improper agency action. And the only concrete injuries Applicants have identified are unspecified costs involved in publishing revised forms, remedial training of an unspecified number of personnel, and the obsolescence of a "robust" website, none of which constitute irreparable injury.

Finally, the equities weigh against a stay. If no stay is granted, Applicants face only the speculative prospect of reverting their regulatory actions to the five-decade status quo that existed until 2022. On the other side of the ledger, a stay will put Respondents, along with millions of Americans, at risk of irreparable harm—including the specter of criminal sanctions—by Applicants' enforcement of regulations that have been judged to be unlawful and outside the scope of Applicants' delegated authority. The equities do not justify depriving Respondents of the district court's judgment in their favor pending appellate proceedings. There is no reason to grant Applicants permission to enforce unlawful regulations during the appellate review process.

This Court should deny the application to stay and allow the appeals process—which already has been expedited by the Fifth Circuit—to take its ordinary course.

STATEMENT

This case involves the promulgation of a superseding Rule that—in a reversal of Applicants' own statutory interpretation held for decades—changed the definition of the terms "frame or receiver" and "firearm" in the Gun Control Act of 1968 ("Act"). Plaintiffs–Respondents filed suit challenging the Rule on multiple grounds and seeking preliminary injunctive relief. The district court found Applicants' interpretative pivot and accompanying arguments to be unpersuasive, and, in orders granting injunctive relief and eventually summary judgment, determined that two provisions of the Rule exceeded Applicants' statutorily delegated authority. As a remedy, the district court ordered the regulation vacated pursuant to the Administrative Procedure Act ("APA"). The Fifth Circuit agreed that Applicants cannot satisfy any of the factors needed to justify a stay. Because there is no weighty and compelling emergency justifying Applicants' extraordinary request or this Court's intervention, the application to stay the district court's judgment should be denied.

I. STATUTORY BACKGROUND

In 1934, Congress enacted the National Firearms Act "[t]o provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof." National Firearms Act of 1934, Ch. 757, 48 Stat. 1236, 1236 (1934) ("NFA"). "Firearms subject to the 1934 Act included shotguns and rifles having barrels less than 18 inches in length, certain firearms

described as 'any other weapons,' machine guns, and firearm mufflers and silencers." *National Firearms Act*, ATF, https://bit.ly/3Y2kzP9 (last visited July 30, 2023).

Four years followed, and Congress enacted the Federal Firearms Act which defined "firearm" more broadly to include "any weapon . . . designed to expel a projectile or projectiles by the action of an explosive . . . *or any part or parts of such weapon*." Federal Firearms Act of 1938, ch. 850, Pub. L. 75-785, 52 Stat. 1250, 1250 (1938) (repealed 1968) ("FFA") (emphasis added).

Three decades later, Congress passed the Gun Control Act of 1968, which amended the NFA, superseded the FFA, and established a new definition of "firearm." *See* 18 U.S.C. § 921, *et seq*. (the "Act"). Congress's new four-part definition of "firearm" as the center of the Act was as follows:

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

18 U.S.C. § 921(a)(3).

Congress's definition of "firearm" in the Act deliberately rejected and supplanted the FFA's 1938 definition which included "any part or parts of such a weapon" because Congress "found that it [was] impractical to have controls over each small part of a firearm. Thus, the revised definition substitute[d] only the major parts of the firearm (that is, frame or receiver) for the words 'any part or parts.'" S. Rep. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2200.

In enacting the Act, Congress delegated to the Attorney General the authority to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter", 18 U.S.C. § 926(a), which authority was in turn delegated to ATF "to administer, enforce, and exercise the functions and powers of the Attorney General." *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 897 (6th Cir. 2021). Violations of the Act, as well as the NFA, carry criminal penalties, including up to five years' imprisonment. 18 U.S.C. § 924(a)(1)(D) ("[W]hoever . . . willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.").

The Act does not define the term "frame or receiver" used in subsection (B) of the 1968 definition of "firearm". In 1978, ATF issued a regulation 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." *Title and Definition Changes*, 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978).

For over four decades, Applicants steadfastly held the position that Congress's 1968 statutory definition of "firearm" and ATF's 1978 regulatory definition of "frame or receiver" set the proscribed limits of ATF's congressionally granted authority to enforce federal firearm regulations. During this time, Applicants recognized that although they could regulate items that "may readily be converted" into a weapon that expels a projectile by the act of an explosion, 18 U.S.C. § 921(a)(3)(A), Applicants had—and still have—no authority to regulate items that "may readily be converted"

into a "frame or receiver," 18 U.S.C. § 921(a)(3)(B). Applicants' position on the interpretation of these definitions remained unchanged until 2022.

In April 2022—after the President directed his U.S. Department of Justice to take action to address a perceived shortcoming in existing federal law[1]—ATF published a 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)) (the "Rule"). 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" in a manner consistent with the 1978 rulemaking, though with updated, more precise technical terminology.[2]

However, the Rule did not stop at merely updating terminology. Rather, ATF decided to regulate *partial* frames and receivers under a new definition introduced in the Rule. That definition states "[t]he terms 'frame' and 'receiver' shall include a

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[1] *Remarks by President Biden on Gun Violence Prevention*, THE WHITE HOUSE (Apr. 8, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/08/remarks-by-president-biden-on-gun-violence-prevention/?utm_source=link (last accessed Aug. 2, 2023).

[22] 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).

partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." *Id*. § 478.12(c). The definition also states "[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*.

The Rule further authorizes the ATF Director to consider a variety of extrinsic, largely subjective factors when determining if an object is a "frame" or "receiver". *Id*. § 478.12(c). 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*.

In an additional departure from ATF's long held position, the Rule also amends ATF's interpretation of "firearm" in the Act to now 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").

II. PROCEDURAL HISTORY

This litigation against Applicants commenced shortly before the Rule took effect in August 2022. The action challenged the Rule on multiple statutory and

constitutional grounds and requesting preliminary injunctive relief, which the district court granted. App. 12a[3]; *see also VanDerStok v. Garland*, 625 F. Supp. 3d 570 (N.D. Tex. 2022). That preliminary relief remained in effect until the district court decided the parties' cross motions for summary judgment, App. 14a, and held that the Rule exceeded ATF's rulemaking authority in the way it defines "frame or receiver" and "firearm". App. 29a. Determining that its decision on statutory grounds was dispositive, the district court declined to address the federal constitutional questions presented in Respondents' remaining claims, *id.* (citing *Hagans v. Lavine*, 415 U.S. 528, 547 (1974), and ordered the Rule vacated. App. 42a–43a. On July 18, 2023, the district court denied Applicants' request for a stay of that decision but granted a 7-day administrative stay to permit Applicants to seek emergency relief from the Fifth Circuit Court of Appeals. App. 5a.

On appeal, Applicants' emergency motion for a stay was denied by the Fifth Circuit in a July 24, 2023 order. That court concluded that "ATF has not demonstrated a strong likelihood of success on the merits, nor irreparable harm in the absence of a stay[.]" App. 3a. The Fifth Circuit likewise denied "[Applicants'] request to stay the vacatur of the two challenged portions of the Rule" and agreed with the district court's determination that vacatur "reestablish[es] the status quo ante … which is the world before the Rule became effective." *Id.* (citing *Defense Distributed v. Platkin*, 55 F.4th 486, 491 (5th Cir. 2022), and noting that vacatur

[3] Citations to "App." are to Applicants' Appendix and citations to "Br." are to Applicants' brief in support of their emergency application.

"effectively maintains, pending appeal, the status quo that existed for 54 years from 1968 to 2022.").

The Fifth Circuit departed from the district court in finding that Applicants had shown a strong likelihood of success in their assertion that the vacatur of the several non-challenged parts of the Rule was overbroad. *Id.* The Fifth Circuit noted that the district court's finding of illegality concerned only two of the Rule's provisions and referenced the Rule's severability clause. *Id.* (citing 87 Fed. Reg. at 24730). The Fifth Circuit observed that severance of unlawful regulatory provisions 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." *Id.* (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) and citing *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only challenged portions of a rule)). The Fifth Circuit's order did not analyze the text of the APA or the caselaw the district court relied on in determining that vacatur was the appropriate remedy.

The Fifth Circuit granted Applicants request for a 10-day administrative stay to permit further proceedings, which resulted in the filing of the instant application, and then *sua sponte* expedited the appeal to the next available oral argument calendar. App. 4a. Briefing is underway and oral argument has been set for September 7, 2023. Notice of Calendaring (5th Cir. July 25, 2023) (ECF No. 94).

ARGUMENT

Applicants' must satisfy an "especially heavy burden" to warrant this Court's granting a stay pending appeal. *Packwood*, 510 U.S. at 1320; *see also Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (an "applicant seeking an overriding stay from this Court bears 'an especially heavy burden'"). Such stays are "rare and exceptional," and are granted only "upon the weightiest considerations." *Fargo Women's Health*, 507 U.S., at 1014 (voting to deny stay despite view that lower court decisions were "inconsistent" with Supreme Court precedent). A stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)).

To be granted a stay pending appeal an applicant must establish (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the applicant would likely suffer irreparable harm absent the stay" and "the equities" otherwise support relief. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*) ("In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.").

Applicants fail to carry the "especially heavy burden" required here. They cannot show that they are likely to prevail on the merits, and their application should be denied for this reason alone. Further, Applicants have failed to show a likelihood

of irreparable harm, nor is the asserted harm sufficient to outweigh the certain injury that the district court found Respondents and the public interest will suffer if the district court's order is stayed.

I. THE COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE

Applicants are unlikely to succeed in obtaining this Court's review. As both the district court and the court of appeals recognized, Applicants lacked authority to regulate weapons *parts* and *potential* frames or receivers, something that Congress considered and declined to do. The judiciary's power and responsibility to set aside improper Executive Branch action and vacate rules that flow from them is likewise clear under the statutory language and grounded in this Court's precedents. Because likelihood of success on the merits is "critical," *Nken*, 556 U.S. at 434, the Court may reject the stay application on this basis alone. Nor do Applicants make a compelling case for why this Court should intervene in a case at this juncture, with the court of appeals having ordered expedited briefing and argument, and why it should conduct its review without the benefit of an appellate decision.

A. THE DISTRICT COURT'S DECISION WAS CORRECT AND CONSISTENT WITH THE ACT AND GOVERNING STATUTORY INTERPRETATION PRINCIPLES

In any statutory interpretation challenge to an agency's action, "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). This Court has consistently held that statutory text must be given its plain meaning as of the time the statute was written. *See Carcieri v. Salazar*, 555

U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the [words], as understood when the [statute] was enacted."). Indeed, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quotation marks and citation omitted).

Here, the ordinary meaning of the word "firearm"—both at the time the Act was passed in 1968 and as consistently interpreted by Applicants thereafter until 2022—does not include weapons *parts* or *potential* frames or receivers. The district court correctly determined that Applicants overstepped a firmly established perimeter of their regulatory authority delegated by Congress. The Fifth Circuit's denial of a stay likewise demonstrates that its appellate review would in all likelihood arrive at the same result. Applicants have offered this Court nothing to indicate this Court will reach a different conclusion. To the contrary, the proceedings below unmistakably show an *ultra vires* rulemaking in disregard of this Court's admonition that "[a]dministrative agencies are creatures of statute [and] accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 664–65 (2022) (*per curiam*) (finding applicants likely to succeed on merits of claim that OSHA Secretary lacked authority to impose mandate).

In fact, this Court's recent formulation in *Biden v. Nebraska* provides an apt distillation of the instant dispute: "The question here is not whether something should be done; it is who has the authority to do it." 143 S. Ct. 2355, 2372 (2023).

Applicants suggest a reading of the Act in which the requirement that regulatory actions be within the scope of an agency's delegated authority can be suspended if an agency is responding to a purported social crisis. But no matter how "important, conspicuous, and controversial the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)). "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

1. The Regulatory Reach Claimed in the Rule's Definition of "Frame or Receiver" Exceeds the Scope of Authority Delegated in the Statutory Definition of "Firearm"

As discussed *supra* at 6–7, the statutory definition found in Section 921(a)(3) consists of two parts pertinent here, with subsection (A) discussing "weapons" which are "designed to" or "may readily be converted" to fire ammunition, and subsection (B) discussing "the frame or receiver of any such weapon." The Rule, however, takes the "may readily be converted" phrase in subsection (A) and imports it into subsection (B)—thereby giving subsection (B) a semantic elasticity that potentially brings, based on ATF's subjective interpretation, any unfinished, incomplete "frame or receiver" within the Act's definition "firearms" upon ATF's determination that a non-frame or

non-receiver crosses the "may readily be converted" threshold. *See* 27 C.F.R. § 478.12(c); *id.* § 478.11.

Nevertheless, Applicants urge this Court to overlook the fact Congress declined to include parts or repeat its use of "readily converted" included in subsection (A) to the defined term "frame or receiver of any such weapon" in subsection (B). By Applicant's view, the Court should read the phrase "readily converted" in subsection (A) as also supplying semantic information critical to definition in subsection (B). But that's not how the law is written, and Applicants have never explained at any point in this litigation what authority might allow this Court, or any court, to undertake the statutory rearranging they advocate.

The district court correctly determined that a plain reading of the Act conclusively demonstrates that Congress included any "weapon" that is "designed to" or "may readily be converted" to fire an explosive projectile in the federal definition of "firearm," and deliberately excluded the expansions of "may readily be converted" and "designed to" out of the regulation of "the frame and receiver of any such weapon." The Rule plainly rewrites and expands the statute by inserting these terms where Congress declined to include them.

To help justify ATF's new interpretation, Applicants argue that the Act's inclusion of items that can "readily be converted" into usable firearms renders a "covered firearm parts kit" to be a "firearm" as a matter of ordinary usage. Br. at 17. Leaving aside the fact that ATF's decades-long contrary position makes any such argument implausible, Applicants attempt to analogize "weapons parts kit" to IKEA's

disassembled home furnishings, and posit that "[i]f a state placed a tax on the sale of tables, chairs, couches, and bookshelves, IKEA surely could not avoid that tax by claiming that it does not sell any of those items and instead sells 'furniture parts kit' that must be assembled by the purchaser." *Id.* at 17–18; *see also id.* at 4. Applicants then suggest "[s]o too with guns: An ordinary speaker of English would recognize that a company in the business of selling kits that can be assembled into firearms in minutes -- and that are designed, marketed, and used for that express purpose -- is in the business of selling firearms." *Id.* at 18.

While Applicants' IKEA analogy seems to make surface-level sense in linguistic isolation, it neglects the essential starting point for an ordinary usage inquiry: *context*. Assuming Applicants' hypothetical "ordinary speaker of English" was subject to the hypothetical state taxation, the relevant inquiry begins with the provisions of the state's tax code covering the sale of "bookshelves", at which point ordinary usage *may* be helpful in interpreting undefined terms.

But a far more instructive analogy emerges if the hypothetical "ordinary speaker of English" learns that the state tax code adopts the position of the Internal Revenue Service which for decades has maintained that Congress deliberately excluded from the "bookshelves" tax the sale of assorted unfinished parts and the tools and instructions for assembling them into bookshelves. In this more fitting scenario, it would be a mistake for the ordinary speaker of English to rely on ordinary usage in reaching conclusions about the state's taxation of "furniture parts kits".

Applicants' IKEA analogy, like many of their arguments, may work in a vacuum, but it does little to advance Applicants' contention that ordinary usage lends support for their new statutory interpretation that contradicts, and functionally disavows, the position that Applicants held over the course of five decades. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022) (*per curiam*) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind[.] … This lack of historical precedent, coupled with the breadth of [newly claimed] authority … is a telling indication that the mandate extends beyond the agency's legitimate reach.") (internal quotation marks omitted).

2. The Rule's Definition of "Weapons Parts Kits" Exceeds the Scope of ATF's Congressionally Delegated Authority

Applicants' attempt to regulate "weapon parts kits" under the Act is equally improper. The 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 Rule expands 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."

The district court concluded that Applicants have no general authority to regulate weapon parts, demonstrated by Congress's enactment in 1968 of a superseding definition of "firearm" that replaced the FFA's 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). App. 9a.

Under the Act's superseding definition, the only firearm parts that come within 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). The Rule, however, expands the regulatory of statutory "firearms" to now include weapon parts kits, or "aggregations of weapon 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. In doing so, the Rule exceeds Congress's definition of "firearms", which 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. The district court's correctly determined that "reading § 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." App. 37a. ("Accepting Defendants' interpretation would be to read the statute as authorizing regulation of (A) weapon parts generally, and (B) two specific weapon parts.").

B. APPLICANTS' RECORD IN LOWER PROCEEDINGS INDICATES A STRONG LIKELIHOOD OF CONTINUED FUTILITY BEFORE THIS COURT

The district court's order demonstrates the methodical application of basic principles of statutory interpretation to reach soundly reasoned conclusions consistent with Congress's careful drafting of the Act and over four decades of Applicants' own interpretative position prior to 2022. Indeed, the district court made no secret of its operating premise in reaching its decision:

> **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)).

App. 29a (emphasis added).

Applicants' express confidence in ultimately prevailing over an order decided on "basic principles of statutory interpretation", but such conviction is not reflected in the substance of Applicants' arguments. Given the nature of Applicant's burden, it is telling the phrase "statutory interpretation" and the word "canon" do not appear anywhere in Applicants' brief, the word "principle" garners only three mentions and those solely in a discussion of vacatur, and the word "construction" is used only once to criticize Respondents' "wooden construction". *See* Br. at 5, 28, 31 (using "principle(s)") and 21 (using "construction"). That Applicants decline to employ the common terms of art and standard jargon of statutory interpretation jurisprudence suggests a recognition that their defense of the Rule is untenable.

Indeed, Applicants avoidance of meaningful engagement with statutory construction principles has proven chronic. In nearly a year of proceedings below, Applicants have repeatedly failed to present *responsive* arguments or controlling legal authority to counter the statutory interpretation challenge to the Rule. Applicants' argument-by-avoidance approach fares no better in this Court and further demonstrates that the Rule's key provisions cannot survive statutory construction scrutiny. Accordingly, Applicants are unable to show any likelihood of success on the merits of their appeal.

* * *

The operative premise of Applicants' statutory interpretation arguments seems to be: Congress encoded in the 1968 Act an overriding, though implicit, policy intent that Applicants exercise an adaptive, expandable authority to redefine "firearm", which power Appellants have always possessed since 1968 but declined to exercise until 2022. But even a generously charitable framing of Applicants' policy-driven defense of the Rule does nothing to reconcile their arguments and the canonical axiom that "the best evidence of Congress's intent is the statutory text." *NFIB v. Sebelius*, 567 U.S. 519, 544 (2012). As aptly observed by the district court, "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." App. 35a.

Further, the proposed–but–failed bills introduced in the House of Representatives and Senate, respectively, make it evident that Congress is not unaware of the specific concerns raised by Applicants but has thus far declined to advance any such proposals. *See, e.g.*, Ghost Guns Are Guns Act, H.R. 1278, 115th Cong. (Mar. 1, 2017) (not enacted); Untraceable Firearms Act of 2018, H.R. 6643, 115th Cong. § 2(a)(36) (July 31, 2018) (not enacted); Untraceable Firearms Act of 2018, S. 3300, 115th Cong. § 2(a)(36) (July 31, 2018) (not enacted); Stopping the Traffic in Overseas Proliferation of Ghost Guns Act, S. 459, 116th Cong. (Feb. 12, 2019) (not enacted).

In sum, the Rule is an instance of "the Executive seizing the power of the Legislature [by ATF's] assertion of administrative authority [which] has 'conveniently enabled [it] to enact a [statutory change]' that Congress has chosen not to enact itself." *Biden v. Nebraska*, 143 S. Ct. at 2373–74 (quoting *West Virginia*, 142 S.Ct., at 2614). Applicants' efforts to defend the Rule have proven unavailing for reasons clearly and soundly set forth in the district court's order. Accordingly, Applicants are unable to show any likelihood of success on the merits of their appeal.

C. VACATUR IS THE APPROPRIATE REMEDY

1. The APA Expressly Authorizes Vacatur of Unlawful Agency Actions

Applicants' argument that federal courts lack the power to vacate a rule fares no better than its argument on the merits. Although Respondent recognizes the argument may be more complicated, such a position appears contrary to the APA's plain language and Congress's purpose in passing it.

> The text of the APA provides that:
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) **hold unlawful and set aside agency action**, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> > (B) contrary to constitutional right, power, privilege, or immunity;
> > (C) **in excess of statutory jurisdiction, authority, or limitations**, or short of statutory right; . . .

5 U.S.C. § 706(2)(C) (emphasis added). In turn, the APA's definition of "agency action" "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §551(13).

Therefore, it seems evident that Congress through the APA provided the federal courts the power to "set aside" "the whole or part of an agency rule," which, of course, is precisely what vacatur does. That Congress did not explicitly use the word "vacate" or "vacatur" does not deprive courts from carrying out exactly what Congress directed courts to do: "The reviewing court shall … hold unlawful and set aside agency action … in excess of statutory … authority". 5 U.S.C. § 706(2)(C); *see West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring) (declaring challenged program unlawful because "under our Constitution, the people's elected representatives in Congress are the decisionmakers here—and they have not clearly granted the agency the authority it claims for itself[.]").

Appellants' promulgated the Rule as the means to a legislative end the Biden Administration was unable to achieve, and, as such, the Rule was always on a collision course with the text of the Act, the Constitution and the inevitable judicial reckoning with the APA. In ordering vacatur, the district court applied the remedy exactly as directed by Congress in enacting the APA.

2. The District Court Properly Applied the APA and Controlling Precedent in Determining Its Findings of Unlawful Agency Action Warranted Vacatur

In addition to following the plain language of the APA, the district court followed circuit precedent and correctly applied the law in determining that "the proper remedy for a finding that an agency has exceeded its statutory jurisdiction is vacatur of the unlawful agency action." App. 40a–41a (citing *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)).

The district court acknowledged circumstances in which a court may remand a rule or decision to the agency to cure procedural defects, but found that "the Fifth Circuit considers vacatur the 'default rule' for agency action otherwise found to be unlawful. *Id*. 41a (quoting *Data Mktg. P'ship*, 45 F.4th at 859–60 and citing *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 by court)). The district court also considered out-of-circuit cases and noted that the D.C. Circuit shares the Fifth Circuit's view regarding vacatur as the appropriate remedy in most cases. *Id*. (citing

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.")).

Applying the analysis summarized above, the district court determined its finding that the ATF has exceeded its statutory authority warranted the remedy of vacatur. App. 41a. The district court considered—but declined to apply— the option of remand, reasoning (correctly) that "an illegitimate agency action is *void ab initio* and therefore cannot be remanded as there is nothing for the agency to justify." *Id.* The district court noted Applicants' tacit concession of this point in contending 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." *Id.*

The district court's order also considered the disruptive impact of vacatur of the unlawful agency action and found it "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." App. 42a (quoting *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022)).

Further, the district court considered Applicants' argument that any vacatur should be limited to the parties in the lower proceedings—a contention Applicants urged "while citing no binding authority in support." *Id.* The district court noted that Applicants' suggested litigant-specific vacatur remedy would be "more akin to an injunction that would prohibit the agencies from enforcing their unlawful Final Rule

against only certain individuals." *Id.* The district court rejected Applicants' targeted-vacatur suggestion with an apt recitation of this Court's guidance as cited by the Fifth Circuit that "[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)).

The court concluded its analysis with the observation that "a vacatur does nothing but re-establish the status quo absent the unlawful agency action [and] neither compels nor restrains further agency decision-making." App. 42a (quoting *Texas v. United States*, at 220). The districts court's decision accounted for all the relevant factors and applied the correct legal analysis in ordering vacatur of the Rule.

3. The Fifth Circuit Agreed with the District Court's Determination that Vacatur Was Warranted and Did Not Address the APA or Applicable Caselaw in Its Finding the Likelihood of Overbreadth

In considering the motion-to-stay factors, the Fifth Circuit recognized that the district court's findings rest on sound footing in concluding that "ATF has not demonstrated a strong likelihood of success on the merits, nor irreparable harm in the absence of a stay[.]" App. 3a. The Fifth Circuit denied Applicants' request to stay the vacatur of the two challenged portions of the Rule and agreed with the district court's assessment that vacatur "reestablish[es] the status quo ante … which is the world before the Rule became effective." *Id.* (citing *Defense Distributed v. Platkin*, 55 F.4th 486, 491 (5th Cir. 2022) and observing that vacatur "effectively maintains, pending appeal, the status quo that existed for 54 years from 1968 to 2022").

The Fifth Circuit did agree, however, with Applicants' assertion that the vacatur of the several non-challenged parts of the Rule was likely overbroad given that the district court's finding of illegality concerned only two of the Rule's provisions. The Fifth Circuit also referenced the Rule's severability clause and the preference for severance in remedying unlawful regulatory provisions 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." *Id.* (quoting *K Mart Corp.*, 486 U.S. at 294 and citing *Sw. Elec. Power Co.*, 920 F.3d at 1033)).[4]

4. This Court Has Previously Acknowledged That Vacatur Is the Default Remedy Authorized by the APA

In prior proceedings in this Court, the role of vacatur as the expressly authorized remedy for APA violations has been recognized as critically important "in administrative law as currently practiced in the lower courts." *United States v. Texas*, 143 S. Ct. 1964, 1996 (2023) (Alito, J., concurring). Further, the suggestion that language elsewhere in the APA may not permit vacatur has been described as "a sea change" in administrative law. *Id.*

Further, the District Court's determination that vacatur is the APA's default remedy is well established in the Appellate Courts see, e.g. *Data Mktg. P'ship*, 45 F.4th at 859 ("The default rule is that vacatur is the appropriate remedy" under the APA); *United Steel v. Mine Safety and Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir.

[4] The Fifth Circuit's order did not address or even mention the text of the APA or the caselaw the district court relied on in determining that vacatur was the appropriate remedy, thus giving little indication as to where its conclusion will land once the issues have been fully briefed, argued and deliberated upon in the appellate review process.

2019) ("The ordinary practice is to vacate unlawful agency action")); *see also id.*, at 1996 n.7 (noting a 2020 decision in which the Court "appears to have assumed that the APA authorizes this common practice [of vacatur]").

D. APPLICANTS ARE NOT ENTITLED TO A WRIT OF CERTIORARI BEFORE JUDGMENT

Nor are Applicant entitled to a writ of certiorari before judgment. There is nothing presented here to demonstrate that this case falls into the category of "extraordinary cases" that this Court has found appropriate for "drastic and extraordinary remedies." *Ex parte Fahey*, 332 U.S. 258, 259 (1947); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."). Certiorari before judgment is extraordinary and equally inappropriate here for two reasons.

First, Applicants have not sufficiently articulated how this case satisfies the "imperative public importance" standard. Sup. Ct. R. 11; Stephen Shapiro, et al., SUPREME COURT PRACTICE 4-60 (11th ed. 2019) (describing certiorari before judgment in cases involving the census, Iran hostage crisis, wartime court martial of enemy saboteurs, nationwide coal strike, and wartime seizure of steel mills); *Fahey*, 332 U.S. at 260 ("[E]xtraordinary remedies … are reserved for really extraordinary causes."). And second, the Fifth Circuit is "proceed[ing] expeditiously to decide this case." *United States v. Clinton*, 524 U.S. 912, 912 (1998) (denying certiorari before judgment). These additional considerations further militate in favor of denying the applicants' request for certiorari before judgment.

II. APPLICANTS HAVE NOT SHOWN IRREPARABLE HARM ABSENT A STAY

Applicants cannot make the required showing they will suffer irreparable harm in the absence of a stay. Applicants provided a declaration with the generalized claim that "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." App. 62a. However, the injuries Applicants identify consist of unspecified costs involved in publishing revised forms, remedial training of an unspecified number of personnel, and the obsolescence of a "robust" website, none of which constitute irreparable, injury. *See* App. 62a–63a.

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WEIGH HEAVILY AGAINST ISSUANCE OF A STAY

The equities do not justify depriving Respondents of the district court's judgment in their favor pending appellate proceedings. "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. The enforcement of the Rule's unlawful provisions put Respondents, along with millions of Americans, at risk of irreparable harm by Applicants' efforts to exercise—by threat of criminal penalties—a regulatory power outside the scope of Applicants' delegated authority.

Respondents do not deny that the public has a strong interest in the enforcement of duly authorized firearms regulations, "[b]ut our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021); *cf.*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 585–86 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization).

"Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

CONCLUSION

Applicants have failed to meet their "especially heavy burden" to justify a stay in this Court. This Court is unlikely to grant certiorari review, and even if it does, Applicants are unlikely to succeed on the merits. Applicants will suffer no irreparable harm in the absence of a stay. And the balance of equities weighs heavily against granting a stay because the public interest in the lawful exercise of agency authority, particularly where constitutional rights and the threat of criminal penalties are implicated, is far greater than any inconvenience Applicants might face by the vacatur's reinstatement the *status quo* in federal firearms regulations of that existed for 54 years prior to 2022. For all these reasons, the Court should deny the application for a stay.

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Respectfully submitted,

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