No. 23-852

In the Supreme Court of the United States

Merrick B. Garland, Attorney General, *et al.*,
Petitioners,
v.
Jennifer VanDerStok, *et al.*,
Respondents,

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS DEFENSE DISTRIBUTED, POLYMER80, INC., NOT AN L.L.C. (DOING BUSINESS AS JSD SUPPLY), AND THE SECOND AMENDMENT FOUNDATION, INC.

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Questions Presented

The Gun Control Act of 1968 was "not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. 90-618, Title I, § 101. So Congress defined its keystone term "firearm" to cover an *actual* firearm and its *actual* frame or receiver, but *not* a mere part or kit of parts that might be made into one. 18 U.S.C. §921(a)(3). It covers full-fledged commercial firearms without criminalizing private gunmaking. A 2022 rule by the Bureau of Alcohol, Tobacco, Firearms, and Explosives redefines "firearm" for GCA purposes. 87 Fed. Reg. 24,652 (Apr. 26, 2022). The new "firearm" definition covers much more than an *actual* firearm and its *actual* frame or receiver, reaching far beyond any fair concept of full-fledged commercial firearms so as to effectively criminalize private gunmaking. The questions presented are:

1. Whether the GCA term "firearm" defined by 18 U.S.C. §921(a)(3) includes "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" under the new ATF rule, *see* 27 C.F.R. 478.11.

2. Whether the GCA term "firearm" defined by 18 U.S.C. §921(a)(3) includes "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver" under the new ATF rule, *see* 27 C.F.R. 478.12(c).

Corporate Disclosure Statement

No Respondent party to this brief has a parent company or a publicly held company with a ten percent or greater ownership interest in it.

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Statement

The decision below correctly stated the case's background and procedural posture. Pet. App. 3a-12a.

I. Legal Background.

Americans have always had the constitutional right to make personal firearms without Presidential permission. The Second Amendment both stems from and protects this right, which has utmost support in the nation's history and tradition. *See* Pet. App. 7a-8a. "In fact, there were no restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries." *Id.* (quoting Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 66 (2023)). There is no historical tradition of regulating, let alone criminalizing, the self-manufacture of firearms.

Relatively recently, Congress used the Commerce Clause to enact a variety of criminal laws concerning commercial "firearm" transactions. Pet. App. 5a n.5; *see* 18 U.S.C. ch. 44. Under this regime, it is a crime for many Americans to *possess* a commercial "firearm," 18 U.S.C. § 922(g), to *transport* a commercial "firearm," 18 U.S.C. §§ 923(a)(1)(A), 923(a)(3), to *manufacture* a commercial "firearm" at all, or to do so without a serial number, 18 U.S.C. §§ 923(a)(1)(A), 923(i). *See* Pet. App. 4a-5a. "Should a person commit these or any of the other unlawful acts found in the twenty-six subsections of section 922,

section 924 authorizes various penalties, including fines, imprisonment, or both." Pet. App. 5a.

"Firearm" is therefore one of criminal law's most impactful statutory keystones. Pet. App. 4a-5a. In what is now 18 U.S.C. § 921, the Gun Control Act of 1968 supplied this keystone "firearm" definition:

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

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

The Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has certain administrative authority over the GCA and issued rules redefining its keystone "firearm" term on several occasions. *See* Pet. App.6a. ATF issued a 1968 rule redefining "firearm" that prevailed until ATF's 2022 rule promulgated the redefinition at issue here. *Id.*

A. The old "firearm" definition.

In 1968, ATF issued a rule redefining the GCA's "firearm" term by redefining the constituent phrase "frame or receiver." *Internal Rev. Serv., Dep't of the Treasury*, 33 Fed. Reg. 18,555 (Dec. 14, 1968) (formerly codified at 27 C.F.R. § 478.11 (2020)). It defined "frame or receiver" to mean the "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." *Id.*

Under the 1968 Rule, ATF took the position that parts like so-called "receiver blanks" were *not* GCA "firearms." ATF's position was that "a hunk of metal became a federally regulated 'frame or receiver' only after it was 80% complete." Pet. App. 34a. According to this view, "items such as receiver blanks, 'castings' or 'machined bodies' in which the fire-control cavity area is completely solid and un-machined have *not* reached the 'stage of manufacture' which would result in the classification of a firearm according to the GCA." R.2332 (emphasis added).

B. The new "firearm" definition.

In 2022, ATF promulgated *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24,652 (Apr. 26, 2022). *See* Pet. App. 3a. The Rule overhauls ATF's "firearm" definition with respect to the two contexts at issue here: (1) weapon part kits and (2) incomplete firearm frames and receivers.

27 C.F.R. 478.11 codifies ATF's new definitional position about weapon parts kits. Pet. App. 9a. According to this part of the Rule, the GCA term "firearm" now covers "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.

27 C.F.R. 478.12 codifies ATF's new position about incomplete frames and receivers. Pet. App. 9a. According to this part of the Rule, the GCA's "firearm" term *does* cover "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," but does *not* cover an "article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon." 27 C.F.R. 478.12(c).

The Rule's definitional changes carry huge legal consequences. They "place[] substantial limits on the well-known and previously unregulated right to 'the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pet. App. 26a (quoting the GCA, Pub. L. 90-618, Title I, § 101, 82 Stat. 1213, 1213 (Oct. 22, 1968)).

"Take, for example, an individual who buys a weapon parts kit containing several unfinished parts he later intends to build and adapt into a functional firearm for his personal use." Pet. App. 26a. "Section 922 of the GCA, which uses the term 'firearm' to describe many of the 'unlawful acts' contained therein,

may place additional burdens on this individual now that ATF has included aggregations of parts in the definition of 'firearm.'" Pet. App. 26a-27a. "Parts contained in the kit, which were previously unregulated, could now fall into the Final Rule's new definitions, such that the individual cannot sell, transport to another state, or, in some instances, possess the parts at all." *Id.* (footnotes omitted). "And key determinations, like which parts are regulated, what stage of manufacture they must be in, and how many together constitute an actual 'firearm,' are exceedingly unclear under the Final Rule, such that the individual must guess at what he is and is not allowed to do." *Id.*

The Rule's "firearm" definition is unprecedented. It criminalizes for the first time ever wide swaths of traditional gunmaking activities. Pet. App. 26a-27a. "By expanding the types of items that are considered 'firearms,' ATF has cast a wider net than Congress intended: under the Final Rule, the GCA will catch individuals who manufacture or possess not just functional weapons, but even minute weapon parts that might later be manufactured into functional weapons." *Id.* "The Final Rule purports to criminalize such conduct and impose fines, imprisonment, and social stigma on persons who, until the Final Rule's promulgation, were law-abiding citizens." *Id.*

Judge Oldham's concurring opinion below sees the Rule's true danger. "ATF's overarching goal in the Final Rule is to replace a clear, bright-line rule with a vague, indeterminate, multi-factor balancing test." Pet. App. 33a "ATF's rationale: The new uncertainty

will act like a Sword of Damocles hanging over the heads of American gun owners." *Id.* Hence this action.

II. Procedural History.

1. Respondents here are intervening plaintiffs below: Defense Distributed, Polymer 80, Inc., Not An LLC, LLC, doing business as JSD Supply ("JSD"), and the Second Amendment Foundation, Inc. ("SAF"). Pet. App. 10a. Before the Rule took effect, each dealt substantially with the kits and/or incomplete frames and receivers at issue—those deemed GCA "firearms" by the Rule but not by the statute itself or ATF's prior interpretation. Pet. App. 75a-77a, 93a-95a.

Defense Distributed, Polymer 80, and JSD are national leaders on the business side of this industry. Pet. App. 75a-77a, 129a. SAF members are their customers and end users. Pet. App. 93a-95a.

Defense Distributed is the first private defense contractor in service of the general public. Dkt. 164-1. Since 2012's Wiki Weapon project, Defense Distributed has defined the state of the art in small scale personal gunsmithing technology. *Id.* It both manufactures and distributes products deemed GCA "firearms" solely by the Rule—not by the statute and not by ATF's prior interpretation. Pet. App. 75a-77a, 93a-95a; Dkt. 143 at 4; Dkt. 164-1; Dkt. 227 at 8.

Polymer 80 is another private business that designs, manufactures, and distributes a variety of firearms and non-firearm products, including both

kits and incomplete frames and receivers deemed GCA "firearms" by the Rule but not the statute or prior ATF interpretations. Pet. App. 75a-77a, 93a-95a. Defense Distributed sold some of these items. Dkt. 184 at 7.

JSD is another business subject to the Rule. It too earned most of its revenue through sales of products now subject to the Rule. Dkt. 227 at 8.

SAF is a non-profit membership organization that promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution's right to privately own and possess firearms and the consequences of gun control. Dkt. 143 at 4; Dkt. 164-2. SAF members are subject to the Rule in their efforts to manufacture firearms with products made by firms like Defense Distributed. Dkt. 164-2; Dkt. 227 at 22.

These Respondents and others sued under the APA to challenge ATF's definitional reclassification of both weapon parts kits and incomplete frames and receivers. Pet. App. 10a, 13a. They seek a judgment holding both parts of the Rule unlawful and setting it aside. *Id.*

Judge Oldham's concurring opinion below set the stage correctly. "The "central dispute in this case is how far back ATF can reach to regulate the *A* that can be converted to *B*." Pet. App. 47a. "Everyone agrees ATF can regulate the gun itself, *B*." *Id.* "But how far back in the manufacturing process of the gun *B* can ATF reach to regulate things *A* that can be *theoretically converted* into guns?" *Id.* "ATF concedes

that it cannot reach all the way back to 'unformed blocks of metal' or metal in its 'primoradial state.'" *Id.* (quoting the Rule)." *Id.* "So primordial ooze is not A." *Id.* "But anything more refined than that is subject to the Final Rule's multi-factor balancing tests and eye-of-the-beholder standards." *Id.*

2. The district court resolved the case on summary judgment. Pet. App. 67a-114a. It entered a final judgment in July 2023, granting full relief. Pet. App. 115a-116a.

As to the merits, the district court held that the Rule contradicts the statute in both challenged respects and was therefore issued "in excess of ATF's statutory jurisdiction." Pet. App. 95a-111a. So the judgment deemed the Rule unlawful on that basis. Pet. App. 115a-116a. It denied as moot the case's other claims of unlawfulness. Pet. App. 116a.

As to remedies, the district court held that the Rule's two key illegalities warranted full vacatur. Pet. App. 111a-114a. So the judgment vacated the entire Rule. Pet. App. 116a. It denied as moot the requests for other remedies. *Id.* ATF appealed.

3. The Fifth Circuit held both challenged aspects of the Rule unlawful. It addressed remedies separately.

On the merits, the Fifth Circuit held that the Rule contradicted the GCA as to both (1) ATF's proposed definition of "frame or receiver" including incomplete frames and receivers; and (2) ATF's proposed definition of "firearm" including weapon parts kits.

Pet. App. 3a, 30a-32a. It affirmed that aspect of the district court's decision, which remains in force today.

As to remedy, the Fifth Circuit did not decide whether the district court correctly opted for vacatur. Instead, the Fifth Circuit vacated the remedial aspect of the district court's decision and remanded the case for further consideration of the remedy in light of the merits holding. Pet. App. 31a-32a.[1]

The Fifth Circuit decision below was unanimous. Pet. App. 2a-32a. The court's opinion was authored by Judge Engelhardt and joined by Judges Willett and Oldham. Judge Oldham joined the court's opinion in full and authored a concurring opinion supplying additional reasons to deem the Rule unlawful. Pet. App. 33a-66a.

4. During most of those proceedings, Respondents were protected from ATF's enforcement of the Rule's expansive new "firearm" definition by a patchwork of preliminary injunctions, the district court's initial vacatur of the Rule, and personalized injunctions pending appeal. But in light of orders issued by this Court in August 2023 and October 2023, no such protections exist. The district court has stayed the case to await this Court's disposition of this matter. Dkt. 279.

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[1] Though Respondents do not agree with the Fifth Circuit's disposition of the remedy question (the correct judgment would have affirmed the district court's vacatur of the Rule), they do not here seek relief from that aspect of the Fifth Circuit's decision.

5. Meanwhile a legal crisis is at hand. Judge Oldham's concurring opinion below saw it coming. "Private gunmaking is steeped in history and tradition, dating back to long before the Founding." Pet. App. 33a. Millions of law-abiding Americans work on gun frames and receivers every year." *Id.* "In those pursuits, law-abiding Americans (and the law-abiding gun companies that serve them) rely on longstanding regulatory certainty to avoid falling afoul of federal gun laws." *Id.* "But if ATF can destroy that certainty, it hopes law-abiding Americans will abandon tradition rather than risk the ruinous felony prosecutions that come with violating the new, nebulous, impossible to-predict Final Rule." *Id.* Now all of those fears are indeed coming to pass.

Because ATF is being allowed to enforce the Rule's new "firearm" definition while this action is pending, Respondents and the rest of the nation are suffering immense irreparable harms. Soon the Rule will succeed in destroying an entire field of traditionally lawful Second Amendment business activity that ATF has no right to regulate—not to mention the constitutional rights of the law-abiding individuals these businesses serve. For everyone being wrongly governed by this Rule's severe criminal consequences, time is of the essence.

For these reasons, Respondents requested that the Court grant the petition and affirm the Fifth Circuit's decision to hold that the Rule's challenged provisions violate 5 U.S.C. § 706(2)(C).

Summary of the Argument

The Fifth Circuit's decision is correct. The Rule is unlawful because ATF's expansive "firearm" definition exceeds the "firearm" definition that Congress set.

I. First, the Fifth Circuit correctly held that the Rule's new "firearm" definition plainly contradicts the GCA and is thus "in excess of statutory jurisdiction." 5 U.S.C. § 706(2)(C). Pet. App. 13a-31a. Text, context, and history all point to the same conclusion about what the GCA's "firearm" term means.

The plain textual analysis of § 921(a)(3) controls. This statute covers only an *actual* firearm and its *actual* frame or receiver. § 921 (a)(3). It does not cover mere parts or parts kits that might be manufactured into one. Yet the Rule ignores Congress's evident decision to cover only full-fledged *commercial* weapons without criminalizing *personal* gunmaking. "Because Congress has neither authorized the expansion of firearm regulation nor permitted the criminalization of previously lawful conduct, the proposed rule constitutes unlawful agency action, in direct contravention of the legislature's will." Pet. App.3a.

Context confirms that this statute covers only an *actual* firearm and its *actual* frame or receiver—not anything short of that. Congress knows how to write the statute ATF now wishes for. It did just that in other parts of the GCA and elsewhere. But Congress used no such express terms here, probably because constituents would never stand for it. In any event, these contextual disparities must be respected.

ATF's purposive arguments attempt to carry out the GCA's "manifest design." But all that really means is doing by rule what the statute's text does not allow. The purposive analysis errs on its own terms and, more importantly, runs headlong into the Court's many reasons for rejecting unmoored purpose-based methods altogether. *See, e.g.*, *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) ("All this seems to us quite a lot of speculation."). Congress drew the line at *actual* firearms and their *actual* frames and receivers. ATF can't move it by rule no matter how supposedly laudable its purpose is.

II. The Fifth Circuit correctly held in the alternative that, even if the Rule's new "firearm" definition does not clearly contradict the GCA, the rule of lenity would apply and resolve any definitional ambiguities in favor of the narrower "firearm" definition. Pet. App. 30a-31a & n.26. It correctly held that, "should the GCA's text be at all unclear, we err on the side of those citizens who now face unforeseen criminal liability under ATF's new definitions." *Id.*

III. The Fifth Circuit's decision about the merits is also correct for reasons that, though not passed on below, were fully presented and compel the same result here. Even if the GCA does not plainly foreclose the Rule's new "firearm" definition, the canon of constitutional avoidance requires that same conclusion because ATF's view produces serious doubts about the scheme's compliance with the Due Process Clause and Second Amendment. Those two distinct constitutional infirmities are not just suspected. They are manifest.

Argument

I. The Rule clearly contradicts the statute.

The Fifth Circuit first deemed the Rule "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), by holding that both challenged aspects of ATF's new "firearm" definition plainly contradict the GCA. That holding is correct for the reasons given below and more. The Rule's two expansions of the "firearm" definition clearly contradict the GCA.

A. The Rule violates 18 U.S.C. § 921.

The Rule does not faithfully administer the GCA. It contradicts the statute's "firearm" definition in both of the challenged respects, illegally criminalizing by regulation conduct that Congress never criminalized.

18 U.S.C. § 921(a)(3) gives the "firearm" definition that ATF must respect. There Congress defined "firearm" to include (A) a shooting "weapon" (B) "the frame or receiver of any such weapon":

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

18 U.S.C. § 921(a)(3).

Both challenged aspects of the Rule exceed this statute's limits. Simple textualism begins and ends the analysis. The contradictions are so patent that secondary means of construction need not be used. The "best course, as always, is to stick with the ordinary meaning of the text that actually applies." *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 144 S. Ct. 2440, 2454 (2024).

1. Kits are not their products.

Congress's "firearm" definition clearly forecloses the Rule's coverage of part kits. The Rule defines "firearm" extraordinarily to include *both* an actual shooting "weapon" *and* "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; *see* 27 C.F.R. § 478.12 ("The terms 'frame' and 'receiver' shall include . . . a frame or receiver parts kit . . . ."). But the GCA defines "firearm" in its ordinary sense to mean only an *actual* "firearm" and its *actual* "frame" or "receiver." § 921(a)(3). It does not let "firearm" mean a non-weapon parts kit that may or may not be later used to produce a weapon or its frame or receiver. In this respect, the Rule clearly violates the statute.

Ordinary American usage compels this conclusion. By definition, parts kits are not their end products. That is, a parts kit and the product that it may someday help compose are not one and the same. The

parts kit and its end product are distinct not just in time but in identity. The means are means, not ends.

Plenty of apt analogies show this linguistic reality. An Olympic hopeful is not an Olympian. A law student is not a JD. A caterpillar is not a butterfly. Groceries are not the dish. An investment is not the return. A draft opinion is not a decision. So too here, a parts kit is clearly not itself the finished product that it may or may not someday help compose. The Fifth Circuit rightly held this. Pet. App.19a-28a.

The Rule's treatment of kits also contradicts the statute by covering items that lack a frame or receiver. The statute says that every § 921(a)(3)(A) "firearm" either contains or constitutes a § 921(a)(3)(B) "frame or receiver." In other words, as Judge Oldham rightly recognized below, "Section 921(a)(3) does not contemplate a weapon covered by (A) that does not have a frame or receiver covered by (B)." Pet. App. 56a-58a. So "a weapon parts kit that does not include a frame or receiver cannot be regulated under § 921(a)(3)." *Id.* Yet that is precisely what the Rule does, creating a class of receiver-less and frame-less "firearms" that Congress never contemplated.

2. First steps are not the end.

Likewise, Congress's "firearm" definition clearly forecloses the Rule's coverage of frame and receiver precursors. The Rule defines "frame" and "receiver" to include both an actual "frame" or "receiver" *and also* "a partially complete, disassembled, or nonfunctional frame or receiver." 27 C.F.R. § 478.12(c). But the GCA

defines "frame" and "receiver" in the ordinary sense to mean only an *actual* "frame" or "receiver." § 921(a)(3). It does not let "frame" mean an "unfinished" *non-frame* part that may become a frame if and only if additional manufacturing processes alter its constitution; and it does not let "receiver" mean an "unfinished" *non-receiver* part that may become a receiver if and only if additional manufacturing processes alter its constitution. In this respect as well, the Rule clearly violates the statute.

Ordinary American usage compels this conclusion too. By definition, a "partially complete" product is not really the product. It is a mere first step—a precursor item that lacks the end product's identity. To call a product "partially complete" is to say that it is "almost" or "not quite" the product—close but no cigar.

Plenty of apt analogies show this reality as well. The grapes aren't the wine. A few chords aren't the song. The batter isn't the cake. And a "car" buyer that gets no assembled engine has been wronged. So too here, a "partially complete" frame or receiver is not an actual frame or receiver within the meaning of § 921. The Fifth Circuit rightly held this. Pet. App.15a-19a.

B. ATF's "readily be converted" point contradicts the statute even more.

ATF's "readily be converted" point is the keystone of its textual analysis. But the "readily be converted" point is wrong for two reasons, crumbling the façade that ATF banks the entire position on.

1. First and most importantly, ATF's "readily be converted" point is wrong in all of its applications because it ignores the predicate need for "weapon" status. The statute's "readily be converted" clause does not apply to *anything* that can be "readily be converted" to a shooting weapon. It applies only to convertible items *that already constitute a shooting "weapon."* 18 U.S.C. § 921(a)(3)(A). If the item did not already constitute a "weapon" in the first place, the fact that it may be "readily be converted" into one matters not. *Id.* Part kits are not already "weapons," and neither are incomplete frames and receivers. So whether or not these non-weapons can be "readily converted" into weapons is irrelevant.

The Fifth Circuit below correctly recognized this critical fault in ATF's most important argument, Pet. App. 17a, and Judge Oldham rightly took ATF to task on this point as well, Pet. App. 44a-46a.

2. ATF's "readily be converted" argument is especially wrong as applied to the 27 C.F.R. § 478.12(c) provision regarding frame and receiver precursors. Whereas the statute contains a "readily be converted" phrase in the provision that supposedly covers kits, § 921 (a)(3)(A), it does *not* contain a "readily be converted" phrase in the provision that supposedly covers frame and receiver precursors, § 921(a)(3)(B). The "readily be converted" phrase therefore cannot do any work whatsoever on the latter. The Fifth Circuit below correctly recognized this. Pet. App. 17a.

C. Context defeats the Rule.

Congress knows how to write statutes that cover what ATF wants this statute to cover. But it opted not to do so—a decision that must be respected. *See, e.g.*, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 93 (2020) ("Congress knows how to write sweeping . . . statutes. But it did not do so here.").

1. As to parts kits, Congress knows how to write statutes covering what ATF wants to reach. When Congress wants to address both an item *and kits of parts used to make that item*, it says so expressly. But no such express terms covering kits exist here.

Many statutes speak expressly to both a product *and* kits of parts used to make that item. At several other places in the GCA, Congress addressed parts kits expressly by saying "combination of parts." 28 U.S.C. § 921(a)(4)(C): 28 U.S.C. § 5845(b). In other statutes, Congress addressed parts kits expressly by saying "kit" or "package." 15 U.S.C.A. § 5402 ("assembly kit"); 19 U.S.C. § 1683b ("Trusses and truss kits"; "Pallets and pallet kits"; "Box-spring frame kits"; "home package or kit"; "home kits"); 21 USCA § 360eee ("devices . . . in kit form"); 42 U.S.C.A. § 6295 ("fan light kits"); 42 U.S.C.A. § 7549 ("conversion kits"); 49 U.S.C.A. § 44737 ("retrofit kits").

Congress wrote no such express provision into the GCA's "firearm" definition. Section 921(a)(3) never mentions a "kit" or a "package" or a "combination of parts." That omission is to be given effect.

This use of statutory context is well-established. "When words have several plausible definitions, context differentiates among them." *United States v. Hansen*, 599 U.S. 762, 775 (2023). "That is just as true when the choice is between ordinary and specialized meanings, as it is when a court must choose among multiple ordinary meanings." *Id.* (citation omitted). *See also Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("After all, the meaning of a word depends on the circumstances in which it is used."); *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2285 (2024) (Gorsuch, J., concurring) (noting that "textualism . . . constrains judges to a lawfinding rather than lawmaking role by focusing their work on the statutory text, its linguistic context, and various canons of construction" to serve "as an essential guardian of the due process promise of fair notice.").

The decision below rightly recognized this. Pet. App. 24a-25a. "The point is a simple one: If Congress wanted to regulate aggregations of weapon parts with respect to 'firearms,' it could have." Pet. App. 22a. "Congress, however, chose not to do so, and ATF may not alter that decision on its own initiative." *Id.* "ATF cannot legislate." *Id.*

2. As to frame and receiver precursors as well, Congress knows how to write statutes covering what ATF wants to reach. When Congress wants to address both an item *and its precursor parts*, it does so expressly by using terms like "completion" and "production" and "manufacturing." But Congress did not use any such dynamic terms here, confirming that

the GCA defines "frame" and "receiver" to mean only an *actual* "frame" and "receiver."

Contrasting statutes define items at a wide variety of production stages by saying so expressly. When Congress means to cover an item *and* item "assembly," it says so expressly; and when Congress means to cover both an item *and* item "completion," "production," or "manufacturing," it says so expressly as well. *See* 19 U.S.C. § 2703 (regulating item "production, manufacture, or assembly"); 10 U.S.C. § 7543 (regulating an item's "manufacturer, assembler, developer, or other concern"); 19 U.S.C. § 1677j (regulating items that are "completed or assembled"); 19 U.S.C. § 3203 (regulating "production, manufacture, or assembly"); 19 U.S.C. § 3721 (regulating "manufacture, production, or sale").

The GCA speaks to the "frame or receiver of any such weapon" without using terms like "assembly" or "completion" or "production" or "manufacturing" that Congress uses elsewhere. § 921(a)(3)(B).[2] Hence, the phrase "frame or receiver of any such weapon" cannot be understood to cover parts that need to be "produced" or "manufactured" or "completed" into one.

3. Despite Congress's purposeful use of narrow terms in the GCA, and despite Congress's omission of expressly expansive terms that it often uses elsewhere, the Rule sweeps in all of the above

[2] Other parts of the GCA used "assembled," § 921(a)(4(C), § 921(a)(25), § 921(a)(30)(B), but not in the controlling "frame or receiver of any such weapon" provision of § 921(a)(3)(B).

indiscriminately. It treats every frame and receiver precursor as though "firearm" status is just an "assembly" away. But in the reality Congress spoke to, most frame and receiver precursors do not become a real firearm without substantial additional "producing," "manufacturing," and/or "completing." ATF's conflation of Congress's careful terminology is precisely what APA review should thwart.

4. Purposive arguments ATF gives (at 17) about the GCA's "manifest design" wrongly assume an aim of stamping out all personal gunmaking no matter what. But ATF's view is "not better just because it would go further." *Pulsifer v. United States*, 601 U.S. 124, 152 (2024).

Purpose-based policymaking so unmoored from the statute's carefully-defined textual realities has no role to play here. The Court has "often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos v. United States*, 547 U.S. 715, 752 (2006). "For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead "that [the] legislature says ... what it means and means ... what it says." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).

D. Exercising constitutional rights does not "circumvent" anything.

Law-abiding citizens who make and maintain their own firearms at home aren't "circumventing" any law, as ATF says (at 17). They are responsibly exercising their individual Second Amendment right to keep and bear Arms, which necessarily entails the right to make Arms. Inasmuch as the GCA cabins the country's well-established tradition of personal gunmaking at home, there is nothing wrong with citizens exercising their Second Amendment rights right up to that line.

When the speed limit is 65, it breaks no law to go 62, 63, 64, or 65. So too here. Since the GCA provisions at issue apply only to full-fledged firearms and their frames and receivers, it breaks no law for law-abiding citizens to deal freely in non-firearm, non-frame, and non-receiver materials that Congress did not and could not regulate.

"In the end, reasonable people can disagree with how Congress balanced the various social costs and benefits in this area." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 90 (2017). "After all, it's hardly unknown for new business models to emerge in response to regulation, and for regulation in turn to address new business models." *Id.* "Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world." *Id.* "But neither should the proper role of the judiciary in that process—to apply, not amend, the work of the People's representatives." *Id.*

II. Alternatively, the rule of lenity makes the statute defeat the Rule.

The Fifth Circuit's other basis for decision deemed the Rule "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), by holding that, even if ATF's new "firearm" definition does not plainly contradict the GCA, the rule of lenity makes it so. Pet. App. 30a-31a & n.26. That holding is correct for the uncomplicated reasons given below: "we construe ambiguous statutes against imposing criminal liability—precisely what ATF has done here." *Id.* (invoking *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992)).

The rule of lenity is especially apt in this case, since the "the rule exists in part to protect the Due Process Utilize a smart apostrophe promise that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner v. United States*, 598 U.S. 85, 102, 143 (2023) (Gorsuch, J.) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

III. Alternatively, the canon of constitutional avoidance makes the statute beat the Rule.

The decision below is also correct because, even if the GCA does not clearly foreclose ATF's new "firearm" definition, the canon of constitutional avoidance applies to make it so. Under this rule, the Court should "shun an interpretation that raises

serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). *See also West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring) (requiring a "clear statement" to avoid deciding whether there is an unconstitutional delegation of authority). The Rule's GCA construction gives rise to multiple serious constitutional doubts under the Due Process Clause and the Second Amendment, all militating against TF's strained construction of the statute.

A. ATF's position entails serious Due Process Clause problems.

The Fifth Amendment's vagueness doctrine is violated by criminal laws that either deny defendants fair notice of what is punishable or invite arbitrary enforcement by lack of standards. *E.g.*, *Johnson v. United States*, 576 U.S. 591 (2015). On ATF's view of the GCA, this constitutional violation is not just seriously raised but fully evident in three respects.

1. Initially, ATF's new "firearm" definition violates the Due Process Clause's vagueness prohibition by defining "frame" and "receiver" to include a "partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." 27 C.F.R. § 478.12(c). Those amorphous terms—especially "readily," even as defined by 27 C.F.R. § 478.11—present an unconstitutional level of

vagueness that denies citizens fair notice of what is punishable.

The Rule does not say, and no reasonable person can reliably infer, the point of evolution at which a piece of metal or plastic crosses the "readily" barrier to become a "frame or receiver." Vacuous metrics like this are invalid. *See Tripoli Rocketry v. ATF*, 437 F.3d 75, 81 (D.C. Cir. 2006.). Objectified, specific measurements would be needed to cure this kind of shortcoming, *see United States v. Lim*, 444 F.3d 910, 916 (7th Cir. 2006), and the Rule has none.

In this respect, Judge Oldham's concurring opinion below correctly analyzes the vagueness problem and rightly concludes that this aspect of the Rule is "fatally vague." Pet. app. 47a-53a. "With its nonexclusive list of eight factors and lack of concrete examples, the Final Rule produces 'more unpredictability and arbitrariness than the Due Process Clause tolerates." Pet. App. 54a (quoting *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018).

2. ATF's new "firearm" definition also violates the Due Process Clause's vagueness prohibition by defining "frame" and "receiver" to sometimes include "a forging, casting, printing, extrusion, unmachined body, or similar article," depending on whether or not it has "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)." 27 C.F.R. § 478.12(c). Here too, inherently amorphous terms like "clearly identifiable" present an unconstitutional

level of vagueness that denies citizens fair notice of what is punishable. Much like the vagueness problem regarding "readily," the Rule does not say, and no reasonable person can reliably infer, what point of evolution defines the "clearly identifiable" threshold.

3. Last but not least, ATF's new "firearm" definition violates the Due Process Clause's vagueness prohibition by providing that, "[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 the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit." 27 C.F.R. § 478.12(c). Those terms violate the vagueness doctrine by inviting arbitrary enforcement. Once more, the Rule does not say, and no reasonable person can reliably infer, exactly what set of materials ATF thinks are relevant to this inquiry—let alone how the bureaucrats will construe them to make the critical determination.

Judge Oldham's concurrence correctly emphasizes a key aspect of ATF's failure here. Pet. App. 55a. "As important as the Fifth Amendment's guarantee of fair notice to individuals is the Amendment's prohibition against 'arbitrary enforcement' by government officials." *Id.* "It is thus of no use for ATF to say that it will tell ordinary people what they can do." *Id.* "The law exists to tell *both* the people *and government officials* what they can do," *id.* (emphasis added), and this Rule does neither.

d. Crimes cannot be defined by government imagination. So held *Johnson v. United States*, 576 U.S. 591 (2015), which deemed the law at issue unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real world facts or statutory elements." *Id.* The Rule here is just as bad, in that it ties the definition of all "firearm" based crimes to an administratively imagined notion of what a complete and operable "firearm" really is, based on little more than a bureaucrat's ipse dixit. "It is one thing to apply an imprecise . . . standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* ATF's imagined abstraction of when a "firearm" becomes a "firearm" is no better.

It is no answer for the government to say that some cases make for easy application of the Rule. The controlling holdings—both *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)—"squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602. Just as in *Johnson* and *Sessions*, the Rule produces "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Sessions*, 138 S. Ct. at 1215.

"Each of the uncertainties in the [Rule] may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guesswork." *Id.* (quoting *United States v. Evans*, 333 U.S. 483, 495 (1948)). "Invoking so shapeless a provision to

condemn someone to prison . . . does not comport with the Constitution's guarantee of due process." *Id.*

B. ATF's position entails serious Second Amendment problems.

The Rule's interpretation of the GCA also raises a serious constitutional problem regarding the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). At issue is the individual right to make Arms, which is part and parcel of the Second Amendment's right to keep and bear Arms. Indeed, America's historical tradition of personal gunmaking is well-established and free from any general federal regulation at all. Because ATF's "firearm" definition would cause the GCA to trample that right, it ought not be adopted.

1. Self-manufactured firearms in America have a long and, until just recently, unregulated history. *See* Joseph G.S. Greenlee, *The American Tradition of Self Made Arms*, 54 St. Mary's L.J. 35, 66 (2023). The unregulated self-manufacture of firearms was common in the American colonies, beginning with gunsmiths who made and repaired militia and hunting weapons and were "extremely important and highly valued in their communities." *Id.* at 9.

Colonists possessed both the express right to import whole firearms *and the parts necessary to make their own firearms*. *Id.* at 9-10 (citing Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming

the United States of America 3787–88 (Francis Newton Thorpe ed., 1909)). While "[i]n the large gunsmith shops of the cities it is probable that many minds were given to the making of a gun . . . in the smaller shops which formed the great majority—mere cabins on the outskirts of the wilderness—one man with or without an apprentice did every part of the work." Charles Winthrop Sawyer, Firearms in American History 145 (1910); *see also* James B. Whisker, The Gunsmith's Trade 5 (1992).

During the Revolutionary War, when the British attempted to prevent the Americans from acquiring firearms and ammunition, Americans were forced to manufacture their own firearms and gunpowder to survive. *See Greenlee*, *supra*, at 12–15 (citing M.L. Brown, Firearms in Colonial America: The Impact on History and Technology 1492-1792 127 (1980)). Due to the circumstances of the war, "[n]early every able-bodied male between 16 and 60 . . . [had] to provide his own arms" and some men "built their arms themselves." *Id.* at 25. "When the colonies faced major arms shortages throughout the war, domestic arms manufacturing filled the void." *Id.* at 16. Indeed, the colonies themselves solicited firearm manufacturers, including those engaged in private manufacture and others outside of the firearms industry, to increase domestic production. *Id.* at 18–23.

Thomas Jefferson understood the right very well. Describing the landscape of firearms in early America in 1793, he wrote that "[o]ur citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them." *Letter*

from Secretary of State Thomas Jefferson to British Ambassador to the United States George Hammond, May 15, 1793, *in* 7 The Writings of Thomas Jefferson 325–26 (Paul Ford ed., 1904).

After the Revolutionary War, "gunsmithing was a universal need in early America" and "many early Americans who were professionals in other occupations engaged in gunsmithing as an additional occupation or hobby." Greenlee, *supra*, at 29. This tradition extended to pioneers, mountain men, and explorers whose need to make and repair firearms was a survival necessity. *Id.* at 32.

ATF's supposedly modern notion of firearm "precursor parts" is not modern at all. Although some early riflemakers forged their firearm parts from scratch, "there were gunsmiths who did not forge out their barrel blanks, but purchased them in bulk from some factory like that of Eliphalet Remington." John G.W. Dillin, The Kentucky Rifle 96 (1975). These riflemakers then fitted their barrels "to hand-made stocks with American factory or English locks." *Id.*

This tradition of personal gunmaking—free from any major federal regulation whatsoever—continued into the nineteenth and twentieth centuries, when "[m]any of the most important innovations in firearms technology began not in a federal armory or major firearms manufactory, but in private homes and workshops." Greenlee, *supra*, at 35. Such innovations include "[t]he most popular rifle in America today . . . the AR-15, owned in the tens of millions . . . [whose] roots are in homebuilding." *Id.* at 39.

During all of these foundational time periods, anyone with the requisite skill had an essentially unfettered right to build their own firearms; "[o]ne need not have had a wealthy patron or sponsor, or work for king and nobility, to make guns." Greenlee, *supra*, at 41 (internal citation omitted); Whisker, *supra*, at 6 ("Even those apprentices who had never completed an apprenticeship might enter the trade. No guild, union or government agency attempted to regulate the gun making business….He need not take any examination. He need not present one of his guns to any examining board."); *id.* at 90 ("Gunsmiths considered it to be their right to make guns without regulation or interference.").

Deviations from this historical tradition are decidedly few and modern. No restrictions were placed on the self-manufacture of firearms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries. *See* Greenlee, *supra*, at 40. Rather, "[a]ll such restrictions have been enacted within the last decade." *Id.* At the state level, it was not until 2016 that a small minority of states began to regulate the manufacture of arms for personal use. *Id.* at 42.

2. Hence, there is no American historical tradition of regulating the self-manufacture of firearms—let alone prohibiting it with harsh criminal penalties. Yet that is precisely what ATF's extraordinary reading of the GCA makes it do. Because that construction likely yields a violation of the Second Amendment, *see N.Y. State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111

(2022), it should not be adopted, especially where there is no clear statement supporting the government's reading of the statute. *West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring).

Keep your Arms? Yes. Bear your Arms? Yes. Make your Arms? Yes. All that is guaranteed. But to now be jailed for having a part or kit that isn't really a gun but might be one? Congress never made that the law and ATF cannot do so by regulation, even if it disguises the threat to protected Second Amendment conduct as a hyper-technical "firearm" definition.

Conclusion

The Court should hold the Rule unlawful and affirm the Fifth Circuit decision below.

Respectfully submitted,

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