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 FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF SPORTING GOODS WHOLESALERS IN SUPPORT OF RESPONDENTS

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN
KEVIN WYNOSKY*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

Counsel for Amicus Curiae

August 20, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Regulations

Other Authorities

STATEMENT OF INTEREST[1]

The National Association of Sporting Goods Wholesalers ("NASGW") is the leading organization in the shooting sports industry for product distribution, accounting for approximately 65% of sales. NASGW's members are primarily wholesale businesses (buyers) and manufacturers (sellers) of firearms and other sporting goods. NASGW aims to promote the common interest of the sporting goods industry and to be the indispensable partner for the U.S. shooting sports trade. To that end, NASGW maintains an active liaison with the trade associations of all other segments of the industry (including the National Shooting Sports Foundation, the National Rifle Association, and the Congressional Sportsmen's Foundation), and organizes an annual expo that provides educational, marketing, and communications opportunities for hunting and shooting sports professionals.

INTRODUCTION

This case involves the latest effort by the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") to stretch statutory text beyond its breaking point and impose criminal liability for the possession of items that the agency previously declared to be legal. At issue here are firearm "frames or receivers," which are the primary structural component housing the firing mechanism of handguns or rifles, respectively. For

---

[1] No counsel for any party authored this brief in whole or in part. No party or its counsel made any monetary contribution toward the preparation or submission of this brief. The National Shooting Sports Foundation, Inc., contributed financial support to fund the preparation and submission of this brief.

decades, ATF took the commonsense view that products that are not in fact "frames or receivers," but could be "converted" into a frame or receiver, are not "frames or receivers" within the meaning of the Gun Control Act ("GCA"). Relying on that widely shared understanding that items with the potential to become "frames or receivers" are, by their very nature, not yet frames or receivers, NASGW's members have long sold and purchased such products. And because it was perfectly legal for them to do so, ATF's new position that such products *are already* "frames or receivers" within the meaning of the GCA will have significant—and potentially criminal—ramifications for NASGW's membership. NASGW thus submits this *amicus* brief to provide additional perspective on why the statutory phrase "frame or receiver" is not a license to regulate as "firearms" items that are not yet frames or receivers but might eventually become frames or receivers.

Unfortunately, this is not the first time ATF has tried to expand its powers by blue-penciling criminal statutes. *See, e.g.*, *Mock v. Garland*, 75 F.4th 563, 583-86 (5th Cir. 2023) (finding plaintiffs likely to succeed on APA challenge to ATF rule concerning stabilizing arm braces); *see also Mock v. Garland*, 2024 WL 2982056 (N.D. Tex. June 13, 2024) (granting final judgment vacating arm-brace rule). Indeed, if jettisoning long-settled expectations in service of expanding criminal liability for arms-bearing conduct (while narrowing the right to keep and bear arms, no less) sounds familiar to this Court, that is because this case is a sequel: Just this past Term, ATF tried to change the National Firearm Act's definition of "machinegun" by administrative fiat to cover non-mechanical bump stocks. The Court correctly rejected

that effort, *see Garland v. Cargill*, 602 U.S. 406 (2024), and this agency overreach deserves the same fate.

SUMMARY OF ARGUMENT

Simple logic dictates that if A can be "converted" into B, then A is not B. Hence the need for conversion. And what is true generally is equally true of frames and receivers under the plain text of the Gun Control Act ("GCA"). In fact, ATF said so itself for decades, across administrations of different parties. But it has belatedly done an about-face. According to ATF's new rule, 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), is *already* a "frame or receiver." That novel position brings much into ATF's regulatory domain that has long been outside it, and does so with criminal consequences to boot. Such an expansion of federal power in an area implicating fundamental constitutional rights is a job for Congress treading carefully, not an agency asserting powers long disclaimed. But ATF's rule defies, rather than follows, the statutory text adopted by Congress and basic logic to boot.

Regulating items that can be readily transformed into something else is hardly beyond Congress' ken. Congress knows how to do it, and did not do it here. In the firearms context in particular, Congress has made clear beyond cavil that *some* items capable of conversion *do* count as "firearms" under the GCA and related laws. But Congress did so by using very explicit language that is conspicuously absent from

the "frame or receiver" provision. Congress' decision to use those words elsewhere but not here must be respected. ATF's effort to rewrite a decades-old statute—and, in the process, not only unsettle decades-long expectations, but displace various states' approaches to the issues—eviscerates the separation of powers and tramples over the liberties that our Constitution secures. That ATF has done so in the context of a criminal statute governing constitutionally protected conduct makes its effort that much more beyond the pale, as that is the absolute last context in which an agency should have leeway to stretch the text. Accordingly, even if there were any statutory ambiguity here—and there is not—the rule of lenity and the canon of constitutional avoidance would both militate against blessing ATF's late-breaking maximalist reading of the statute.

Nor can ATF salvage its rule with a thinly veiled resort to purpose couched in the presumption against ineffectiveness. *Cargill* makes clear that public-safety and law-enforcement concerns, however valid, cannot trump statutory text. When new public-policy issues arise, it is for Congress, not administrative agencies, to decide whether and how statutes should be modified to address them—as Congress has not hesitated to recognize when it comes to the GCA. It is troubling enough when *any* agency repeatedly fails to appreciate that core constraint on its powers. That this pattern of overreach is coming from an agency empowered to regulate constitutionally protected conduct makes it all the more essential for this Court to once again confine ATF to its statutorily prescribed role.

For all those reasons and more, the Court should affirm the judgment below.

ARGUMENT

I. ATF's Effort To Redefine Frame Or Receiver Exceeds What The Statutory Text Can Bear.

A. The GCA Empowers ATF to Regulate Frames or Receivers, Not Items That Might Be "Converted" Into Them.

In 1968, Congress passed and President Lyndon Johnson signed the GCA, which defines the term "firearm" as follows:

> (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.

18 U.S.C. §921(a)(3) (emphasis added). The GCA separately defines the terms "firearm muffler or firearm silencer," *see id.* §921(a)(25), and "destructive device," *see id.* §921(a)(4), but it does not define the term "frame or receiver."

In 1978, ATF promulgated a rule defining "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." 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978). And so stood the law across seven administrations, all the way until April

2022, when ATF published the rule at issue here, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, and 479 (2022)). In an abrupt change of course, ATF for the first time declared that "[t]he terms 'frame' and 'receiver' shall 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). According to ATF, that is actually what the statute has meant all along, because the words "frame" and "receiver" purportedly implicitly include not just frames and receivers, but things that can be converted into them.

As the court below correctly explained, "ATF's attempt to stretch the GCA's language to fit" "things that are admittedly not yet frames or receivers" finds no "support" in the "statutory text." *VanDerStok v. Garland*, 86 F.4th 179, 190 (5th Cir. 2023). When Congress wanted the GCA to reach items that can be converted to function as something that is covered by the statutory definition of "firearm," it said so. That is evident from the very first of the four provisions in the definition, which includes "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." 18 U.S.C. §921(a)(3) (emphasis added).

Congress' accompanying definitions of terms in the third and fourth provisions of the GCA's definition of "firearm" likewise explicitly include more than just finished and functional products. Take, for instance, the definition of "firearm muffler or firearm silencer."

There, Congress left no doubt about its intent to cover more than just the finished product:

> The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.*

Id. §921(a)(25) (emphasis added). By including "any combination of parts … intended for use in assembling or fabricating a firearm silencer or firearm muffler," *id.*, Congress made clear that the definition reaches items that could be and are intended to be used to "assembl[e] or fabricat[e]" a firearm silencer or muffler.

So too with destructive devices. In relevant part, Congress defined "destructive device" as

> (A) any explosive, incendiary, or poison gas—
>
> (i) bomb,
>
> (ii) grenade,
>
> (iii) rocket having a propellant charge of more than four ounces,
>
> (iv) missile having an explosive or incendiary charge of more than four ounces,
>
> (v) mine, or

> (vi) device similar to any of the devices described in the preceding clauses;
>
> (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, *or which may be readily converted to*, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
>
> (C) any combination of parts either designed or intended for use *in converting any device into any destructive device* described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

Id. §921(a)(4) (emphases added). Here again, Congress legislated with great precision. Mirroring the lead definition of "firearm" from the immediately preceding subsection—covering "any weapon … which … *may readily be converted to* expel a projectile by the action of an explosive," *id.* §921(a)(3) (emphasis added)—Congress defined "destructive device" to cover "any type of weapon … which *may be readily converted to*[] expel a projectile by the action of an explosive or other propellant," *id.* §921(a)(4) (emphasis added).

As all of those provisions reflect, when Congress wanted to regulate not just a particular item, but also

things capable of being converted into that item, it went out of its way to say so. And for good reason, as common sense dictates that if something must (or can) be converted into X, then it is not yet X. An Anglican may be converted to Catholicism, but he is decidedly not yet a Catholic just because of that potentiality. A change in status—not to mention a number of deliberate acts along the way—would be required. The government itself cites a definition of "convert" from an enactment-era dictionary that captures exactly that commonplace understanding: "to change or turn from one state to another: alter in form, substance, or quality: transform, transmute." US.Br.19 (quoting Webster's Third New International Dictionary of the English Language 499 (1968)). Modern dictionaries agree. *See, e.g.*, Oxford English Dictionary (2023 ed.) ("To turn or change in character, nature, form or function"); Merriam Webster (2023 ed.) ("[T]o alter the physical or chemical nature or properties of especially in manufacturing" or "to change from one form or function to another"). It thus makes perfect sense for Congress to have felt the need to be explicit when it wanted to alter the default rule and treat something that is capable of being converted into X the same way as X.

Yet Congress did not include any such language when it comes to frames and receivers. Indeed, conspicuously absent from the subpart that covers frames and receivers is any similar language or even a hint that the statute covers something that is not a frame or a receiver but one day may be converted into one. ATF's interpretation of the GCA thus violates the bedrock rule that, "[w]here Congress includes particular language in one section of a statute but

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (brackets omitted). Clearly, "when Congress wished to define" subsets of firearms to include items that could be converted into functional firearms within the meaning of the GCA, "it knew how to do so." *United States v. Castleman*, 572 U.S. 157, 166 n.6 (2014). And just as clearly, "it did not do so" when it came to frames and receivers. *Id.*

ATF's reading also runs headlong into the rule that courts should not "adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Republic of Sudan v. Harrison*, 587 U.S. 1, 12 (2019). If, as ATF posits, the phrase "frame or receiver" implicitly encompasses things capable of being converted into frames or receivers, then presumably all the *other* items that qualify as "firearms" under 18 U.S.C. §921(a)(3) also implicitly include things that can be "converted" into those items. But if that is the case, then Congress would have had no need to take such pains to repeatedly define other terms to make explicit what ATF claims is already implicit. ATF's *sub silentio* convertibility principle thus would render superfluous the statutory definitions concerning items that can be converted into "a[] weapon … to expel a projectile by the action of an explosive" or a "destructive device" or "fabricat[ed]" into a silencer.

There is a better reading. Knowing that people ordinarily expect an item's *current* status to be determinative, Congress made clear throughout the

GCA's definitional section when it wanted to override that expectation and regulate something based on what it could be converted into. It did not do that with frames or receivers—likely because frames and receivers are themselves things that can be converted into firearms, so to regulate things that be converted into frames and receivers would be to pile prophylaxis upon prophylaxis. Agencies, like courts, must respect Congress' legislative choices. "In this, as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 765 (2019) (plurality op.).

B. ATF's *Amici* Cannot Salvage Its Rule.

Apparently dissatisfied with ATF's own efforts to defend its rule, a bevy of *amici* advance various alternative statutory interpretation arguments. None of them washes—and even if they did, they still could not save the rule, since "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).[2]

In particular, the statutory interpretation offered by the Gun Violence Prevention Groups goes nowhere.

---

[2] Notably, this is the fifth time some of these *amici* are advancing their alternative interpretations, having already pitched them to the district court, the court of appeals, this Court at the stay stage, and this Court at the certiorari stage. *See, e.g.*, Prevention.Grps.Br.1-2 & nn.2-4. That ATF has never embraced these alternative readings is either a reflection of *Chenery* principles or a telling indication that they are not viable.

According to these groups (at 12-13), "because" §921(a)(3)(A) "encompasses not-yet-complete 'weapon[s],' it necessarily follows that the reference to 'frame or receiver of any *such* weapon' in" §921(a)(3)(B) "includes not-yet-complete frames or receivers, so long as they are 'designed to' be or may 'readily be converted' into the frame or receiver of an operable firearm." That convoluted reading suffers from at least as many flaws as ATF's reading—as ATF itself recognized when it argued *against* this exact position in 2021:

> Importantly, the "designed to" and "readily be converted" language are only present in the first clause of the statutory definition. 18 U.S.C. §921(a)(3)(A). Therefore, an unfinished frame or receiver does not meet the statutory definition of "firearm" simply because it is "designed to" or "can readily be converted into" a frame or receiver. Instead, a device is a firearm either: (1) because it is a frame or receiver or; (2) it is a device that is designed to or can readily be converted into a device that "expel[s] a projectile by the action of an explosive." *Id.* §921(a)(3)(A)-(B).

U.S.Br.4, *Syracuse v. ATF*, No. 1:20-cv-06885 (S.D.N.Y. filed Jan. 29, 2021), Dkt.98; *see also id.* at 26-29 (explaining why "An Unmachined Frame or Receiver Cannot Be Readily Converted Into a Device that Expels a Projectile"). As ATF correctly recognized, only something that "is designed to or may readily be converted to *expel a projectile by the action of an explosive*" falls within §921(a)(3)(B). A frame or receiver, standing alone, plainly does not fit that bill.

Frames and receivers must be paired with *other* parts "to expel a projectile by the action of an explosive"—and that goes double for items that are not even frames or receivers, but can be converted into them.

Courts must "interpret criminal statutes, like other statutes, in a manner consistent with ordinary English usage." *Nichols v. United States*, 578 U.S. 104, 111 (2016). After all, the criminal law must "give ordinary people fair notice of the conduct it punishes." *Johnson v. United States*, 576 U.S. 591, 595 (2015). To interpret the GCA in a manner as twisted as ATF and its *amici* proffer thus not only would defy statutory text and ordinary parlance, but would deprive people of fair notice of what the law demands on pain of imprisonment.

C. Appeals to Statutory Purpose Cannot Salvage the Final Rule.

Sailing against statutory text and constitutional principles, ATF tacks to purpose. In ATF's eyes, Congress enacted the GCA "because it was concerned that felons, juveniles, and those seeking guns for criminal purposes could easily acquire them by mail," US.Br.17, and ATF is just closing a "loophole" in Congress' handiwork. US.Br.41, 44-45.[3] ATF even

[3] *See also, e.g.*, Queens.Cnty.DA.Br.12 ("By clarifying the statutory definition and issuing the Final Rule, the ATF can close existing loopholes and enhance the ability of law enforcement agencies to track and regulate otherwise untraceable firearms."); Blackwell.Br.3 ("The Final Rule is a critical step toward closing the loophole that allowed prohibited purchasers…to acquire guns quickly and easily."); Maj.Cities.Chiefs.Ass'n.Br.7 (describing "the law enforcement blind spot created by the failure to regulate ghost guns"); Local.Gov't.Legal.Ctr.Br.13 ("Ghost guns create a

goes so far as to argue that upholding its rule is the only way to avoid giving the GCA "a self-defeating construction." US.Br.41.

That argument should sound familiar: ATF pressed one very much like it in *Cargill*, insisting that hewing to the plain text of the statutory definition of "machinegun" "would permit … ready evasion" of what it claimed to be Congress' purpose. Pet'rs'.Br.39, No. 22-976 (U.S. Dec. 18, 2023). *Cargill* made quick work of that hyperbole, concluding that "[t]he presumption against ineffectiveness cannot do the work that ATF … ask[s] of it." 602 U.S. at 427. That conclusion applies with at least as much force here, as once again "it is difficult to understand how ATF can plausibly argue" that rejecting its rule would "render the law useless" when ATF itself has "consistent[ly]" maintained the "position" for decades that the phrase "frame or receiver" does *not* contain any implicit convertibility principle. *Id.* at 427-28; *cf. Biden v. Nebraska*, 143 S.Ct. 2355, 2383 (2023) (Barrett, J., concurring) ("A longstanding 'want of assertion of power by those who presumably would be alert to exercise it' may provide some clue that the power was never conferred." (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941))). And "[a] law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest." *Cargill*, 602 U.S. at 427.

In all events, even if there were some unintended "loophole" in the GCA, the "Mr. Fix-it Mentality" is not

---

loophole in the federal gun law scheme that undermines public safety and congressional intent").

more appropriate for agencies than courts. *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting). "It is not the role of" administrative agencies "to identify and plug loopholes." *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 462 (2014) (Scalia, J., dissenting). It is "the role of Congress to eliminate them if it wishes." *Id.* And Congress has proven itself perfectly capable of doing that when it comes to the GCA. As several of ATF's *amici* note, when "tragic circumventions of law" like the Kennedy and King assassinations revealed the easy availability of mail-order guns outside the regulatory system, Congress stepped in. *See, e.g.*, Const.Account.Ctr.Br.21-24. If "the exponential rise of untraceable firearms" really is as pressing a public-policy problem as ATF maintains, US.Br.2, then Congress can and should be expected to do so again here. ATF cannot take matters into its own hands just because it is not satisfied with the regulatory scheme that Congress has enacted. Indeed, the notion that agencies have the power to unilaterally fix issues often takes the wind out of the sails of calls for congressional action, as the facts of *Cargill* illustrate. The best way to ensure that the People's representatives in Congress are actually legislating and reflecting the People's will is to reaffirm the framers' design and make clear that the power to close perceived loopholes does not lie in agency rulemaking.

II. Lenity And Constitutional Avoidance Principles Buttress The Decision Below.

ATF's regulatory overreach is all the more troubling because the GCA not only creates criminal liability, but implicates fundamental constitutional rights. Violating the GCA exposes one to criminal

penalties, 18 U.S.C. §§922, 924, and ATF's rule has significant implications for Second Amendment rights since it directly regulates critical components of protected arms, *see Luis v. United States*, 578 U.S. 5, 26-27 (2016) (Thomas, J., concurring). Accordingly, to the extent this Court finds the statutory text unclear, *but see supra*, both the rule of lenity and the canon of constitutional avoidance counsel against blessing ATF's maximalist reading of "frame or receiver."

"The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden v. United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F.Cas. 202, 204 (C.C. Va. 1812) (No. 93) (Marshall, C.J.)). That time-tested principle both reflects and supports the separation of powers—no small matter, as "[s]tructure is everything." *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2275 (2024) (Thomas, J., concurring) (alteration in original) (quoting Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418 (2008)).

In our constitutional order, only Congress ("[t]he legislative authority of the Union") can "make an act a crime." *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *accord United States v. Davis*, 588 U.S. 445, 451 (2019). As this Court has repeatedly explained, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). And what is true for courts is just as true for executive

agencies: "Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched." *United States v. Standard Brewery*, 251 U.S. 210, 220 (1920). In either case, respecting the exclusively legislative function of determining what conduct should be a federal crime demands enforcing concomitant limits on the other branches' powers.

That the Executive Branch is tasked with enforcing criminal laws does not give it latitude to interpret them. Even when *Chevron* was still the law of the land, this Court was consistent and pellucid that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). In fact, the fear of "hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges" is one of the motivating forces behind the prohibition on vague criminal laws. *Davis*, 588 U.S. at 451. And "making ATF the expositor, executor, *and* interpreter of criminal laws," *Cargill v. Garland*, 57 F.4th 447, 471 (5th Cir. 2023) (en banc), *aff'd sub nom.*, *Cargill*, 602 U.S. 406 (2024), would pose a very real risk of locking up citizens for doing things that the legislature has not actually prohibited. ATF's bald assertion that it has the prerogative to "interpret[] the undefined terms 'frame' and 'receiver,'" US.Br.38, is thus doubly wrong after *Loper Bright*, 144 S.Ct. 2244 (2024).

For all those reasons, the rule of lenity bolsters the decision below, as the court of appeals recognized. *See VanDerStok*, 86 F.4th at 196 n.26. While the plain text of the GCA alone forecloses ATF's power grab, at a bare minimum, the statute is ambiguous on that

point. Indeed, ATF itself took the position for decades that the statute does *not* encompass unfinished frames and receivers—as a still-extant page on ATF's website says to this day. *See* ATF, *Are "80%" or "unfinished" receivers illegal?* (Apr. 6, 2020), https://bit.ly/3OEDgFt. That is powerful evidence that the statute does not clearly mean what ATF now claims. Moreover, whereas the agency's prior position had the benefit of offering relative clarity and a measure of certainty to industry and individuals (in addition to having a firm grounding in statutory text), ATF's new standard offers neither—a problem both illustrated and compounded by the fact that ATF apparently plans to assess whether an otherwise-unformed hunk of metal is "readily" convertible into a frame or receiver based on an eight-factor balancing test. *See* 87 Fed. Reg. at 24,747 (revising 27 C.F.R. §479.11). Such multi-factor balancing tests are out of vogue even in civil contexts for good reason, and they have no place in a regime with criminal consequences. *See Wooden*, 595 U.S. at 385 (Gorsuch, J., concurring) ("Multi-factor balancing tests of this sort, too, have supplied notoriously little guidance in many other contexts, and there is little reason to think one might fare any better here."). The rule of lenity thus counsels strongly against allowing ATF to exploit any potential ambiguity in the statute.

So does the canon of constitutional avoidance. Under that time-tested principle, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018); *see, e.g.*, *Crowell*

v. Benson, 285 U.S. 22, 62 (1932); *Hooper v. California*, 155 U.S. 648, 657 (1895). ATF's interpretation raises just such serious constitutional doubts.

The Second Amendment safeguards "the right of the people to keep and bear Arms," U.S. Const. amend. II, which necessarily encompasses things necessary to make the right to keep and bear arms meaningful. *See, e.g.*, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). And because people cannot obtain arms unless arms are actually available, "the right to keep and bear arms implies a corresponding right to manufacture arms." *Rigby v. Jennings*, 630 F.Supp.3d 602, 615 (D. Del. 2022).

By imposing constraints on the citizenry's ability to acquire materials that by ATF's own theory are virtually indistinguishable from key components of firearms, the final rule burdens constitutionally protected conduct. And given the importance of history to Second Amendment analysis, *see United States v. Rahimi*, 144 S.Ct. 1889, 1898 (2024), it bears emphasis that there is no historical analog for regulations of this type. Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 78 (2023). Accordingly, if the GCA does all that ATF claims, then there is a serious question whether the burdens it imposes on constitutional rights can be squared with "the traditions of the American people." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 26 (2022).

That is precisely the kind of question that the constitutional avoidance canon counsels against answering when another reading of the statute is

available. *See Legal Servs. Corp. v. Velazques*, 531 U.S. 533, 545 (2001) ("[W]hen there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue."). As with the rule of lenity, this canon militates against endorsing ATF's maximalist account of the GCA.

III. The Final Rule Is Part And Parcel Of A Troubling Trend Of Regulatory Overreach By ATF, And Upholding It Would Have Profound Consequences For The Firearms Industry And The People It Serves.

As *Cargill* and other recent cases show, ATF has taken an aggressive approach to the interpretation of the statutory regime governing NASGW's members and others. That underscores the importance of checking the overambitious interpretation propounded by ATF.

Consider, for instance, ATF's recent bump stock rule. "On more than 10 separate occasions over several administrations, ATF consistently concluded that rifles equipped with bump stocks cannot 'automatically' fire more than one shot 'by a single function of the trigger.'" *Cargill*, 602 U.S. at 412. But "ATF abruptly reversed course in response to a mass shooting in Las Vegas, Nevada." *Id.* The law had not changed at any point, but the agency's goals had. And so regulated parties were forced into federal court to stave off the risk of facing criminal penalties based on ATF's novel and aggressive interpretation of the law. As noted, that administrative overreach eliminated any momentum for Congress to address the issue in a more enduring and politically accountable manner.

The same pattern has been on display in *Mock v. Garland*. That case concerns ATF's recent about-face on stabilizing arm braces for pistols. ATF previously expressly determined that stabilizing arm braces could be affixed to pistols without converting them into "rifles" within the meaning of the National Firearms Act, 26 U.S.C. §5845(c), or "short-barreled rifle[s]" under the GCA, 18 U.S.C. §921(a)(7)-(8). *See* 88 Fed. Reg. 6,478, 6,479-80 (Jan. 31, 2023). For almost a decade, manufacturers, sellers, and individuals alike relied on that interpretation as arm braces grew in popularity. *See id.* at 6,479. ATF then abruptly changed its mind, concluding that "millions of Americans were committing a felony the entire time they owned a braced pistol." *Mock*, 75 F.4th at 582. After careful review of the rulemaking process, the Fifth Circuit concluded that ATF's "Final Rule was not a logical outgrowth of the Proposed Rule, and the monumental error was prejudicial." *Id.* at 586.

These sorts of regulatory shifts have profound consequences for the citizenry and members of the firearms industry. NASGW's members are heavily regulated, and everything up to and including criminal liability is possible for violations of the intricate legal regime governing their conduct. In the case of both bump stocks and pistol braces, industry relied on guidance from ATF about the metes and bounds of a statutory regime, and thus engaged in the production and sales of products that had been deemed legal. By repeatedly reversing its position on the legality of products, ATF has repeatedly pulled the rug out from under regulated entities and suddenly created the possibility of prosecution for conduct it has previously blessed.

The same pattern has played out here. As ATF has acknowledged, its new rule seeks to sweep into its regulatory ambit—and create potential criminal liability for—much that did not fall within it before. *See* 87 Fed. Reg. at 24,694 ("[T]he Department will not grandfather ATF determinations that a partially complete, disassembled, or nonfunctional frame or receiver, including a parts kit, was not, or did not include, a firearm 'frame or receiver' as defined prior to this rule, including those where ATF determined that the item or kit had not yet reached a stage of manufacture to be one."). That kind of 180-degree change in regulatory practice not only foists uncertainty and instability on members of the firearms industry—as it would for any industry—but also leaves industry members guessing whether their next popular product will become a font of criminal liability overnight notwithstanding prior and express determinations to the contrary from their regulator. That makes it all the more critical for this Court to continue checking ATF's persistent overreach.

CONCLUSION

The Court should affirm.

Respectfully submitted,

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN
KEVIN WYNOSKY*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

Counsel for Amicus Curiae

August 20, 2024