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

BRIEF OF RESPONDENTS VANDERSTOK, ANDREN, TACTICAL MACHINING, FIREARMS POLICY COALITION, INC., AND BLACKHAWK MANUFACTURING GROUP, INC.

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QUESTION PRESENTED

Congress has defined a "firearm," as relevant here, as either "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" or "the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3). Since 1968, ATF has consistently treated this definition as encompassing *finished* frames and receivers, but in 2022, in a sweeping rulemaking, it redefined the term to include products it had never before considered "firearms" because, although they were not frames or receivers as such, they were "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver" or were sold as 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" though they lacked a frame or receiver. 27 C.F.R. §§ 478.11, 478.12(c). The questions presented are:

1. Whether an item that is not a functional frame or receiver but merely may be manufactured into one by a purchaser is a "firearm" under federal law.

2. Whether a "weapon parts kit" may be considered a firearm even though Congress expressly excluded from its definition any "weapon parts" other than a frame or receiver and the newly regulated kits lack a frame or receiver.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state that no Respondent party to this brief has a parent company or a publicly held company with a 10 percent or greater ownership interest in it.

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JURISDICTION

The judgment of the court of appeals was entered on November 9, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Respondents agree with the Government on the proper disposition of the Government's petition for a writ of certiorari: this Court should the grant the Government's petition to determine, once and for all,

whether ATF's Rule expanding the definition of "firearm" to include weapon parts kits and items that with additional manufacturing could become frames and receivers is consistent with the definition of "firearm" in the Gun Control Act of 1968. ATF's Rule inflicts irreparable harm on Respondents and other industry members every day that it remains in effect, and Respondents accordingly agree that this Court should determine the validity of the Rule now instead of potentially waiting until after remedial proceedings conclude in the lower courts.

While Respondents agree that certiorari should be granted, that is where their agreement with the Government ends. That is because the challenged provisions of the Rule are fundamentally incompatible with the Gun Control Act's definition of "firearm." The statutory definition focuses on weapons and the frames or receivers of weapons; ATF's Rule expands the definition to include weapon parts kits and items that cannot function as frames or receivers. This expanded definition upsets the delicate balance struck by Congress between the commercial production and sale of firearms and the non-commercial making of firearms by law-abiding citizens, and the Fifth Circuit properly held it to be unlawful.

The key defined term in the Gun Control Act is "firearm," because, in relevant part, the Act's coverage extends only to entities that manufacture firearms within the Act's definition, not entities that manufacture other items. As relevant here, the Act defines "firearm" to mean "(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;" or "(B) the frame or receiver of any such

weapon." 18 U.S.C. 921(a)(3). The Act thus regulates certain types of weapons, along with the frames or receivers of those weapons. The Gun Control Act contemplates that *every* firearm regulated by the Act will include a frame or receiver. This is apparent not only from the definition of "firearm" itself but also from Congress's directive that the frame or receiver is where manufacturers are to place serial numbers: "[l]icensed . . . manufacturers shall identify by means of a serial number engraved or cast *on the receiver or frame of the weapon*, . . . *each* firearm . . . manufactured by such . . . manufacturer." *Id.* § 923(i) (emphases added). Under the statute, there is no such thing as a firearm without a frame or receiver.

From the enactment of the Gun Control Act in 1968 until 2022, ATF's regulatory definition of "firearm" essentially copied the Gun Control Act's definition. In August of 2022, however, ATF expanded the regulatory definition of "firearm" beyond the Gun Control Act's bounds. The target of ATF's new regulation was the industry that had arisen to cater to law-abiding citizens making their own firearms. This industry produced kits of firearm parts and objects that with additional manufacturing could be made into frames and receivers—all items that are not firearms under federal law and therefore outside of ATFs regulation. The expected result of ATF's Rule was not simply to regulate this industry but to destroy it: ATF informed the FBI that the Rule should not be expected significantly impact the background check system because "many parts kit manufacturers and dealers will go out of business." ATF Response to FBI Criminal Justice Information Services comment, Appendix to Defs'. Br. in Opp'n to Pls'. Mot. for Summ. J. at 3,

VanDerStok v. Garland, No. 4:22-cv-00691-O (N.D. Tex. Aug. 29, 2022), ECF No. 41-1.

To achieve its regulatory goals, ATF expanded the regulatory definition of "firearm" in two ways. First, ATF expanded the definition of "firearm" to 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. Second, ATF expanded the definition of "frame or 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[.]" *Id.* § 478.12(c).

As the Fifth Circuit correctly held, these definitions extend beyond what the Gun Control Act allows. With respect to weapon parts kits, the Gun Control Act regulates *weapons*, not *weapon parts kits*. What is more, the *only* marginal difference that can be made by the weapon parts kit definition is to sweep in kits that *do not include a frame or receiver* (however that terms is defined)—because kits that *do* include a frame or receiver would be regulated as firearms for that reason. Yet, as discussed above, a "firearm" without a frame or receiver is foreign to the Gun Control Act, which contemplates that every firearm will have a frame or receiver and have its serial number imprinted in that location. The expanded definition of frame or receiver fails for similar reasons. A frame or receiver simply is an item that can function as a frame or receiver; an item that must be "*converted* to function as a frame or receiver" is not, itself, a frame or receiver in ordinary parlance. Indeed, if there were

any doubt in the matter, one need only look to the Gun Control Act's definition of firearm itself, which expressly includes *weapons* that *readily may be converted* to expel a projectile by the action of an explosive and *the frames or receivers* of such weapons, but not items which *readily may be converted to be frames or receivers* of such weapons. Yet, that is precisely what ATF seeks to include in its definition of frames or receivers.

The definition of "firearm" under federal law is an important issue that was precisely addressed by Congress in the Gun Control Act of 1968. If that definition has become obsolete or unsatisfactory in any way, that is an issue for Congress to address. The Fifth Circuit properly held that ATF overreached by effectively attempting to amend the statute itself. The Court should grant certiorari and affirm.

STATEMENT

I. Statutory and Regulatory Background

Congress enacted the National Firearms Act in 1934 "[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 (June 26, 1934). The National Firearms Act "imposed a tax on the making and transfer of firearms defined by the Act, as well as a special (occupational) tax on persons and entities engaged in the business of importing, manufacturing, and dealing in [National Firearms Act] firearms." *National Firearms Act*, ATF, https://bit.ly/3Y2kzP9 (last visited Mar. 4, 2024).

"Firearms subject to the 1934 Act included [short barreled] shotguns and rifles . . . , certain firearms described as 'any other weapons,' machine guns, and firearm mufflers and silencers." *Id.* Four years later, 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 (June 30, 1938) (repealed 1968).

Thirty years later, Congress enacted the Gun Control Act of 1968, which amended the NFA and established a four-part definition of what constitutes a "firearm." *See* 18 U.S.C. § 921, *et seq*. As defined in the Gun Control Act, and as it has stood since 1968,

> [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). This definition superseded the Federal Firearms Act definition, in which "any part or parts of such a weapon [were] included." S. REP. NO. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2200. Experience had taught 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.' " *Id.*

Congress delegated to the Attorney General the authority to prescribe "such rules and regulations as are necessary to carry out" the Act. 18 U.S.C. § 926(a). But this is no freewheeling delegation. Rather, as amended in 1986, the Act delegates to the Attorney General the authority to "prescribe *only* such rules and regulations as are necessary to carry out" the Act. *Id*. (emphasis added). The 1986 amendments to the Act were intended to

> reaffirm the intent of Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . . for lawful purposes.'

An Act to Amend Chapter 44 (Relating to Firearms) of Title 18, United States Code, and for Other Purposes, Pub. L. No. 99-308, §1(b)(2), 100 Stat. 449 (1986).

The Attorney General has delegated to ATF the power "to administer, enforce, and exercise the functions and powers of the Attorney General" under the Gun Control Act. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 897 (6th Cir. 2021). ATF established a definition for "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." Internal Rev. Serv., Dep't of the Treasury, 33

Fed. Reg. 18,555, 18,558 (Dec. 14, 1968) (to be codified at 26 C.F.R. pt. 178).

The definition promulgated in 1968 prevailed until 2022. In August 2022, however, ATF changed this definition and expanded it 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 . . . receiver[.]" 27 C.F.R. § 478.12(c) (the "Rule"). The new definition excludes "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.* And the new rule requires ATF to consider extrinsic factors when determining if an object is a frame or receiver, including "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.* Finally, the new rule functionally redefined "firearm" under the Gun Control Act to "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." *Id*. § 478.11.

II. Proceedings Below

A. The original plaintiffs in this case are two individuals (Jennifer VanDerStok and Michael Andren), one producer and retailer (Tactical Machining, LLC), and one membership organization (Firearms

Policy Coalition). Pet.App. 74a–75a. After this action was instituted, several producers and retailers intervened (BlackHawk Manufacturing Group, Inc., Defense Distributed, Not an LLC d/b/a JSD Supply, and Polymer80, Inc.), as did another membership organization (Second Amendment Foundation). Pet.App. 75a–76a.

The individual plaintiffs own items implicated by the Rule that they have manufactured and/or intend to manufacture into firearms for personal, lawful use, and they wish to purchase additional products directly online to help facilitate the making of their own firearms. Pet.App. 74a. Under the challenged Rule, all such purchases would have to be channeled through a federal firearms licensee, incurring fees and other expenditures, as well as adding time to the process. *Id.*

Tactical Machining produces and sells items that are subject to regulation under the Rule. *Id.* The sale of newly regulated items constituted more than 90% of Tactical Machining's business. *Id.* Firearms Policy Coalition is a non-profit membership organization dedicated to promoting and defending the constitutionally protected rights of American citizens through public education and legislative and legal advocacy. Pet.App. 74a–75a. In addition to itself owning items that are subject to regulation under the Rule, FPC has members nationwide, including the individual Plaintiffs in this lawsuit. Pet.App. 75a. FPC brings this suit on behalf of itself and its members. *Id.*

B. Plaintiffs filed this suit in August 2022, before the Rule took effect, and sought preliminary injunctive relief, which the district court granted. Pet.App. 75a & n.14; *see also VanDerStok v. Garland*, 625 F.

Supp. 3d 570 (N.D. Tex. 2022). That preliminary relief remained in effect until the district court granted Plaintiffs' motion for summary judgment and held that the Rule exceeded ATF's rulemaking authority in the way it defined "frame or receiver" and "firearm" and vacated the Rule. Pet.App. 114a.

The Government petitioned the district court for a stay pending appeal. The district court denied that motion on July 18, 2023, but granted a 7-day administrative stay to permit the Government to seek emergency relief from the Fifth Circuit. Pet.App. 184a–85a. The Fifth Circuit denied the stay in part and granted it in part. The Fifth Circuit denied the stay as to the vacatur of the "frame or receiver" and "firearm" definitions because it concluded that Plaintiffs were likely to succeed on appeal in showing that those definitions were promulgated in excess of agency authority. Pet.App. 180a–83a. This Court then stayed the judgment in its entirety pending appeal. *Id.* at 179a.

The district court then granted intervenor respondents Defense Distributed and Blackhawk Manufacturing Group an injunction pending appeal, Pet.App. 126a–78a, which was narrowed by the Fifth Circuit, Pet.App. 119a–25a, before this Court vacated the injunction entirely, Pet.App. 118a.

C. The Fifth Circuit affirmed in part and vacated in part the district court's judgment. Pet.App. 1a–66a.

1. The court held that ATF's new definition of "frame or receiver" as including a "partially complete, disassembled, or nonfunctional frame[] or receiver[]" or something that "is designed to or may readily be completed . . . or otherwise converted" into a frame or receiver was an "impermissible extension of the

statutory text," Pet. App. 16a–19a (cleaned up), because although the GCA's definition of "firearm" specifically included weapons that were "designed to or may readily be converted to expel a projectile," 18 U.S.C. § 921(a)(3)(A), "the subsection immediately thereafter, which contains the term 'frame or receiver,' does not include such flexibility," Pet.App. 17a. The court also found "a clear logical flaw in ATF's proposal," that ATF's definition of "frame or receiver" defined items that were, on its own terms *not* frames or receivers but merely could *become* frames or receivers. Pet.App. 17a–18a.

2. The court also held that ATF's new definition of "firearm" to include "a weapon parts kit that is designed to or may readily be completed . . . to expel a projectile by action of an explosive" exceeded the agency's authority. Pet.App. 19a–28a. Given that any kit that contains a "frame or receiver" necessarily is *already* a firearm under the statutory definition, if this rule is to have any effect at all it is to regulate "kits" that do not have a frame or receiver but have other weapon parts. This, the Fifth Circuit held, it cannot do, since "ATF has no authority whatsoever to regulate parts that might be incorporated into a 'firearm' " *other than* a frame or receiver. Pet.App. 20a. The court contrasted the relevant statutory language here with the GCA's definition of a "machinegun" which, unlike "firearm" includes "any part . . . or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled." Pet.App. 22a (quoting 26 U.S.C. § 5845(b)).

The Fifth Circuit rejected the argument that since "firearm" in the GCA includes weapons that may

be "converted" to expel a projectile, ATF is free to regulate a combination of parts that could be made into a firearm, noting that "convert" in the statute was limited to " 'any weapon' that 'may *readily* be converted' into a functional firearm" and that "readily be converted" necessarily excludes a collection of parts that could, if further manufacturing is completed, *become* a weapon. Pet.App. 23a–25a (emphasis in original).

3. Having found these two provisions of the Rule unlawful, the Fifth Circuit vacated the district court's vacatur of the entire Rule and remanded the case "for further consideration of the remedy, considering this Court's holding on the merits." Pet.App. 31a–32a.

4. Judge Oldham concurred "without qualification" and wrote separately "to explore additional problems" with the Rule. Pet.App. 33a.

ARGUMENT

I. The decision below is correct and the Rule is an invalid exercise of agency authority.

A. The items newly regulated by the Rule are not frames or receivers.

The Gun Control Act, in relevant part, defines "firearm" to include "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" and "the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3). While the statute considers "any weapon" that is "designed to" or could "readily be converted to expel a projectile by the action of an explosive" to be a firearm, it conspicuously does not include language defining as firearms items that are designed to be or could be converted to become "the

frame or receiver of any such weapon." *Id.* (emphasis added). Simply put, if an item potentially could be made into a frame or receiver but is not a frame or receiver, that item is not a "firearm" under the Act's plain text.

The Rule considers it sufficient anyway; it sweeps in "partially complete, disassembled, or non-functional frame[s] or receiver[s], 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* . . . receiver." 27 C.F.R. § 478.12(c). The Fifth Circuit below held that, by greatly expanding the universe of items that could be considered a "frame or receiver," the Rule effectuated an "impermissible extension of the statutory text." Pet.App. 17a. "[A] part cannot be both *not yet* a receiver and a receiver at the same time," and although Congress *could have* regulated such items as firearms under the Act, it did not, and ATF is not free to expand the scope of the GCA without Congress's blessing. Pet.App. 18a (quoting the district court at Pet.App. 103a (emphasis both)).

This conclusion is correct. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)); *see also* Pet.App. 17a; *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008). That presumption should be even stronger here where the Fifth Circuit was not comparing different sections of the same statute but two clauses of

the same sentence. Where Congress wanted to include items that could be converted to meet its definition of firearms, it did so explicitly. ATF, in inserting language Congress could have but did not use in the Gun Control Act's definition of "frame" or "receiver," exceeded the scope of its regulatory authority.

The Government argues that "ordinary usage" supports its Rule, suggesting that the new definition captures what is ordinarily understood to be a frame or receiver anyway, and analogizes to bicycles, noting that "[a] bicycle is still a bicycle even if it lacks pedals, a chain, or some other component needed to render it complete." Pet. 21–22. As an initial matter, this is an apples-to-oranges comparison, as the analogy concerns a bicycle itself, not the frame of the bicycle. Furthermore, the proposition that a bicycle that lacks pedals is still a bicycle is doubtful; indeed, Merriam-Webster defines a bicycle to mean "a vehicle with two wheels tandem, handlebars for steering, a saddle seat, *and pedals by which it is propelled*." *Bicycle*, MERRIAM-WEBSTER.COM ONLINE DICTIONARY, https://bit.ly/3YJsrVU (last visited Mar. 4, 2024) (emphasis added); *cf.* 16 C.F.R. § 1512.2(a)(1) (defining "bicycle" as "[a] two-wheeled vehicle having a rear drive wheel that is solely human-powered"). And a person who mounted and attempted to ride a bicycle-like contraption without pedals or a chain would assuredly beg to differ with the Government's assertion that he had at his disposal a bicycle. Instead, the Government is proposing to treat metal tubing, that with manufacturing could become a bicycle frame, as if that metal tubing *was* a bicycle frame. An item that could become a frame or receiver with additional manufacturing is not just a frame or receiver that is missing a

part like a bicycle without pedals; it is not a frame or receiver at all.

The Government's analogy, in addition to failing to advance its case on its own terms, also fails to account for the statutory context in which the terms frame and receiver appear. Though the Government appeals to the "ordinary usage" of the term, Pet. 21, to speak of "ordinary usage" of "frame or receiver" is to miss the point. The key question in this case is: what is a "firearm?" Congress has defined it to be, for these purposes, one of only four things: (1) any weapon that fires a projectile by means of an explosive (the ordinary usage of the term), (2) any weapon that is designed to do so (an expansion of the ordinary usage to cover issues related to disassembled or disabled firearms), (3) any weapon that can be readily converted to do so (sweeping in weapons that operate by a different firing mechanism such as starter guns) or (4) "the frame or receiver" of any weapon in the prior three categories. In ordinary parlance, of course, a frame or receiver would not be understood to be a firearm. Instead, when used to mean "frame or receiver," "firearm" is a term of art, not intended to be understood in its ordinary sense, and appeals to the ordinary understanding of the term are unhelpful when the statutory definition must control. *See Burgess v. United States*, 553 U.S. 124, 129–30 (2008) ("Statutory definitions control the meaning of statutory words in the usual case.") (cleaned up).

The Government attempts to explain away the fact that it has improperly borrowed the "designed" or "readily be converted" language from the first part of the definition of "firearm" and imported it into the second by arguing that such language needed to be

explicit when discussing "weapons" or else the statute would have excluded nonfunctional firearms, whereas since Congress offered no definition of "frame or receiver," it left open the possibility that that language could *still* be applied in the latter definition. The Fifth Circuit correctly rejected this argument. The statute's structure is the proper starting point for interpretation, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), and "courts must presume that a legislature says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). That Congress included these phrases in the first part of the definition of "firearm" but *excluded* them from the second is strong evidence that Congress did not intend those phrases to be used in determining what counts as a frame or receiver.

In any event, it is odd to take the "designed to" and "readily be converted" language from the statute and presume that Congress intended to sweep in firearms that are not yet finished being manufactured. The most natural reading of "designed to" is that it captures nonfunctional *but complete* firearms—firearms that, if they functioned as *designed*, would be capable of expelling a projectile by means of an explosive but which cannot for one reason or another (e.g., malfunctioning or intentionally disabled firearms and those that are temporarily disassembled). This is consistent with how the lower courts have interpreted these words. For instance, in *United States v. Ruiz*, the Fifth Circuit held that a gun that was inoperable because its hammer had been filed down was nonetheless a "firearm" because "the filing down of the gun's hammer did not change the fact that the gun was

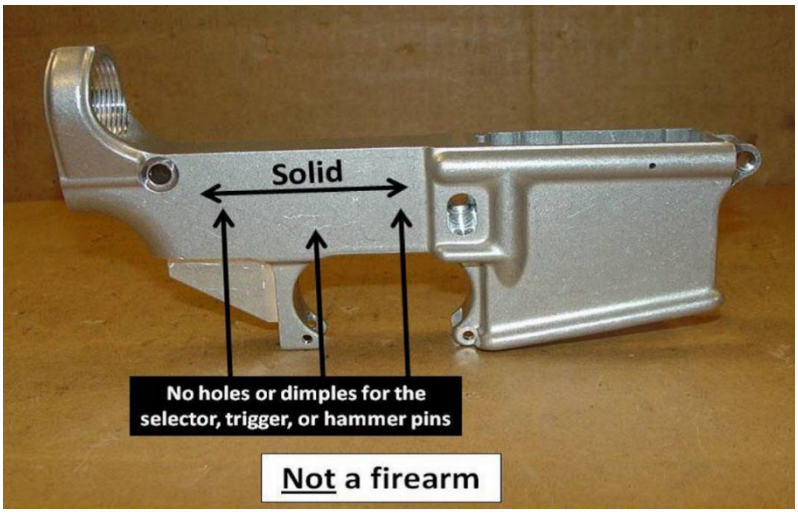
designed to expel a projectile, but rather it merely temporarily altered the gun's capability to accomplish the purpose for which it was designed." 986 F.2d 905, 910 (5th Cir. 1993); *see also United States v. Christmann*, 193 F.3d 1023, 1024 (8th Cir. 1999) ("The definition turns on what the weapon is designed to do, not on whether it is capable of doing its job at the particular moment that the crime was committed."); *United States v. Annis*, 446 F.3d 852, 857–58 (8th Cir. 2006). And "readily be converted" similarly does not mean "could be manufactured into," but points to "weapons" that are *already made* and operate by some mechanism other than "expel[ling] a projectile by the action of an explosive," but could readily be made to do so—like the starter guns that are expressly referenced in the statute. "Convert" *can* refer to manufacturing, but it also indicates an "exchange for an equivalent"—*i.e.*, from one finished product to another—and is best read here as meaning simply "to change from one form or function to another," not to bring to a completely manufactured status. *Convert*, MERRIAM-WEBSTER.COM ONLINE DICTIONARY, https://bit.ly/47FxhYm (last visited Mar. 4, 2024). This reading is buttressed by the fact that the statute provides, as an example of a firearm that is covered by this language, a starter gun which, as designed, is incapable of firing live ammunition but which can be *converted* to do so. *See, e.g.*, Margaret Davis, *Legal blank firing pistols being converted into deadly weapons, police warn*, THE EVENING STANDARD (May 5, 2021), https://bit.ly/3YMM2o9. What is more, the *object* of the verb "converted" is "*any weapon*," not *any item at all*. If Congress had wanted to include items that were not weapons but that could be converted into them, it would have been easy to say so, but the best reading of the statute is that Congress

declined to reach such items entirely (unless of course they contained a "frame or receiver").

In sum, a "frame or receiver" simply is an item that can function as a frame or receiver; not an item that can be converted to do so. The Government disputes this reading, arguing that the Rule merely "defines the point in the manufacturing process at which an item becomes a 'frame or receiver,' " but later in that same paragraph it emphasizes that "the Rule covers" "partially complete frames and receivers." Pet. 27. Even saying such a thing—the Rule treats "partially complete frames and receivers" as "frames or receivers"—proves the logical inconsistency in the Government's position.

The Government repeatedly claims that the Rule is merely delimiting the point at which an item is sufficiently manufactured to be considered a "frame" or "receiver." *See* Pet. 21 (discussing the case of "[a] product that is missing 'a single hole' "), 23–24 (discussing the "blocking tabs" on a P80 product), 24 (There is an "inevitably a question of degree that cannot be reduced to bright-line rules that address every firearm design."). But that is the *old* policy of ATF, and it is not what the Rule, which specifically includes items that *are not* frames or receivers but merely may to become, or able to become, frames or receivers, does. 27 C.F.R. § 478.12(c). This is most notable when the Government attempts to cast the Rule as merely the continuation of a longstanding ATF policy and "consisten[t] with ATF's longstanding regulatory authority." Pet. 28. But that is not true. Until now, ATF has consistently taken the position that these newly regulated items fall outside the scope of the Gun Control Act. *See Are "80%" or "unfinished" receivers illegal?*,

ATF, https://bit.ly/3OEDgFt (last visited Mar. 4, 2024). But now, while it considers those same items not to be firearms if sold alone, they have become firearms if they are "sold, distributed, or marketed with any associated templates jigs, molds, equipment, tools instructions, or guides":



Firearm

U.S. Dep't of Just., ATF, Open Letter to All Federal Firearms Licensees at 3–4, 6 (Sept. 27, 2022),

https://bit.ly/3OQf2H0 ("Open Letter"). Although the same areas of the regulated item are solid and unmachined in both pictures, the latter is classed as a firearm because it is accompanied by a jig and tools.[1]

ATF's briefing of this issue also belies the claim that the Rule "is consistent with ATF's longstanding regulatory approach." Pet. 28. Just months before the Rule was proposed, ATF took the position in litigation that

> the 'designed to' and 'readily be converted' language are only present in the first clause of the statutory definition [of firearm]. 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.'

Fed. Defs'. Mem. of Law in Supp. of Mot. for Summ. J. at 4, *Syracuse v. ATF*, No. 1:20-cv-06885 (S.D.N.Y. Jan. 29, 2021), ECF No. 98 ("*Syracuse* Br.") (citations omitted). The Government's claim that it has "long held that a piece of metal, plastic, or other material becomes a frame or receiver when it has reached a critical stage of manufacture," Pet. 25 (cleaned up), may fit within the historical practice of "focus[ing] on

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[1] A district court recently vacated this provision of the Rule. *See California v. BATFE*, No. 20-cv-06761-EMC, 2024 WL 779604, at *27–28 (N.D. Cal. Feb. 26, 2024).

the degree of machining a device has undergone (and hence its degree of completeness)," *Syracuse* Br. at 7, but is utterly inconsistent with ATF's new policy of asking whether an item is intended to or could become a frame or receiver.

Finally, the Government argues that the Fifth Circuit's decision "thwart[s] the Act's manifest design and invite[s] circumvention through trivialities." Pet. 28. But "vague notions of a statute's basic purpose are . . . inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) (quotation marks omitted); *see also Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."). The Fifth Circuit was correct to dismiss these concerns. Pet.App. 29a.

B. A parts kit is not a "firearm."

The Fifth Circuit also correctly held that the Rule exceeded ATF's statutory authority when it added, to the statutory definition of "firearm," "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. The principal problem with this addition is that, if it has any meaning at all, it operates to regulate firearm parts *other than a frame or receiver*, when the Gun Control Act specifically limited ATF's purview to that *one* part of the weapon. *See* Pet.App. 20a & n.14 (detailing history of Gun Control Act removing authority to regulate "any part or parts" of a firearm

in favor of authority to regulate frames and receivers). "When Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258–59 (2004)); *see also* Pet.App. 20a. The Government's position, which would permit ATF to regulate all manner of parts that are not frames or receivers despite Congress having "found that it is impractical to have controls over each small part of a firearm" and intentionally limited the Act to only the "frame or receiver," S. REP. NO. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2200, is incompatible with this rule of interpretation.

The Government argues that the Fifth Circuit was wrong to compare this with the Gun Control Act's treatment of "destructive device" because that definition only included parts " 'intended for use in *converting* any device into any destructive device,' not just combinations of parts that themselves constitute a destructive device." Pet. 19 (quoting 18 U.S.C. § 921(a)(4)(C)). But this was, at most, a secondary point, meant to underscore the fact that, where Congress wanted to target *parts* instead of just complete firearms (or complete frames and receivers), it knew how to do so. And in any event, the Fifth Circuit also looked in this regard to the definition of "machine gun" which *does* include "any combination of parts from which a machinegun can be assembled." Pet.App. 22a (quoting 26 U.S.C. § 5845(b)).

The Government's position also would make a hash of the statute. Under the Gun Control Act *every* commercially manufactured firearm must have a

serial number placed *on its frame or receiver*. *See* 18 U.S.C. § 923(i). Since the only *marginal* difference made by regulating parts kits is to sweep in kits that *do not* contain a frame or receiver and treat them as firearms, the Rule, together with the statute, requires the serialization of a component in the kits that simply is not there. That would mean that the kit *cannot lawfully enter commerce*. A "firearm" without a frame or receiver is not contemplated by the statute.

The Government defends this provision of the Rule by arguing that it is a reasonable application of the Gun Control Act's definition of firearm to include "any weapon" that "may readily be converted to expel a projectile." Pet. 14 (quoting 18 U.S.C. § 921(a)(3)(A)). But as discussed above, that is incorrect. First, converted modifies "weapon" in the statute—meaning that if an item is not *already a weapon* that can be "converted" into a firearm, if it is merely a "parts kit," then it doesn't matter if it can be "converted." Second, and relatedly, as explained above "convert" is something that one does to change a finished product from one thing into another. So, it should not be read to encompass a collection of items that could, if manufactured in a certain way, *become* a completed firearm, but rather other types of weapons (like starter guns) that could be *converted* to operate as firearms. Third, as just explained, the "design of the Gun Control Act" demonstrates that *every* regulated firearm must include a frame or receiver. A parts kit without a frame or receiver therefore cannot be covered. The "weapon parts kits" definition is ATF's attempt at an end-run around the (previously discussed) requirement that a frame or receiver must be a frame or receiver to be regulated—it targets, for

example, so-called "Buy Build Shoot" kits that include firearm parts alongside an item that, with time, equipment, and experience, can be privately manufactured into a frame or receiver.

The Governments attempt to analogize parts kits to an IKEA bookshelf fails for this same reason: an IKEA bookshelf is shipped with all the completed parts necessary to build a bookshelf, whereas a parts kit requires manufacturing of at least the key component to become a firearm. A better analogy would be a pinewood derby car kit that comes with wheels, nails to affix them, and a block of wood that must be carved and sanded before it becomes a car. No one would call such a kit a car, because the central component must still be manufactured to turn it into a car. So too here, where the key component of any parts kit regulated by the Rule necessarily has yet to be completed.

In support of its reading, the Government points out that the Fifth Circuit below "reaffirmed its precedent holding that a shotgun that had been 'disassembled' into its component parts was still a firearm." Pet. 20 (quoting Pet.App. 25a–26a). It complains that the "only distinction the [Fifth Circuit] drew between that shotgun and the weapons part kits covered by the Rule" was the amount of time it takes to create a firearm from a parts kit. Pet. 20 (citing Pet.App. 26a). But a disassembled firearm—which at one time was a functioning firearm—necessarily has all the components of a finished firearm including, crucially, a frame or receiver.

It may be objected that reading the statute to require that every regulated "firearm" include a frame or receiver would introduce a superfluity problem,

because it would mean that there are no items captured by the definition of Section 921(a)(3)(A) that are not also captured by Section 921(a)(3)(B). Requiring every "firearm" to include a frame or receiver would not, however, make Section 921(a)(3)(A) superfluous, and it is plainly the best reading of the statute's text.

As a reminder, the Gun Control Act defines "firearm," in relevant part, as follows: "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*." 18 U.S.C. § 921(a)(3)(A) & (B) (emphasis added). As the emphasized language makes clear, Part (B) singles out a *component* of weapons identified by Part (A) to be a "firearm"—the frame or receiver—and (through the use of the word "the") confirms that all such weapons will have a frame or receiver. This latter point is confirmed by Section 923(i), which requires commercial manufacturers and importers to put a serial number on the frame or receiver of every firearm they manufacture or import. Far from being superfluous, Part (A) is necessary to determine which frames and receivers are captured by Part (B). Without Part (A), Part (B) would be nonsensical. Putting the textual and contextual evidence together, Part (B) defines as a firearm "the frame or receiver of 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." Part (B) thus singles out one component part of a firearm (the frame or receiver) to be treated as a firearm even when the rest of the component parts are not present.

Caselaw confirms this interpretation of the statute. In *United States v. Martinez*, for example, the Eleventh Circuit analyzed the propriety of the district court enhancing a criminal defendant's sentence based on his possession of a "firearm" in connection with another felony offense, when analyzing the Sentencing Guidelines' analogous definition of "firearm." 964 F.3d 1329 (11th Cir. 2020); *see also United States v. Brown*, 117 F.3d 353, 354–55 (7th Cir. 1997). Martinez had been arrested with a disassembled shotgun in the back seat of his car while possessing, among other things, plastic baggies containing methamphetamine. *Martinez*, 964 F.3d at 1332. The Eleventh Circuit dismissed the argument that the shotgun was not an accessible firearm two ways, noting that "[a] disassembled shotgun is just as much of a firearm as an assembled one under the sentencing guidelines and the felon-in-possession statute," and since that definition includes even just the frame or receiver of a firearm, "[i]t was enough" for the court's purposes, "that the frame and receiver were in the backseat" of the car. *Id.* at 1340. Other courts and litigants have similarly noted that a firearm that qualifies as a firearm because it is disassembled will *also* meet the statutory definition because it contains a "frame" or "receiver," without concern that the two phrases are duplicative. *See, e.g.*, *United States v. Gwyn*, 481 F.3d 849, 855 (D.C. Cir. 2007) (detailing inmate's argument that he had been provided ineffective assistance of counsel when attorney made a "legally untenable" argument that an inoperable firearm was not a "firearm" under the Gun Control Act since the gun introduced into evidence "was, at the very least, a 'frame' of a gun" and noting that "[u]nsurprisingly, the government [does not] contest[] Gwyn's interpretation of the statute").

The legislative history of the Gun Control Act confirms Respondents' interpretation of the statute. The previous definition of a "firearm" as "any weapon, by whatever name known, which is designed to expel a projectile or projectiles by action of an explosive and a firearm muffler or firearm silencer, *or any part or parts of such a weapon*," 15 U.S.C. § 901(3) (1967) (emphasis added), was undeniably duplicative. In *every case*, a firearm that met the first half of that definition would also meet the second half; it would not be possible to possess a firearm without possessing any of its component parts. The legislative history of the Gun Control Act shows that part (B)'s specification of "any frame or receiver" was included specifically as a substitute for the all-encompassing "any part or parts" language. S. REP. NO. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2200.

The ordinary rule that every word in a statute must be given effect is not the be-all and end-all of statutory interpretation—after all, "[s]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176–77 (2012) (emphases in original). For the reasons we have explained, Part (A) is not superfluous under our interpretation, and even if it were, the definition of "firearm" should not be twisted to allow Part (A) of the definition to cover items that would not also be covered by Part (B).

Finally, the Government reiterates its argument that the Rule is necessary to prevent frustrating the

aims of the GCA, but as explained above, alleged statutory intent cannot overcome the clear language of the statute, which is conclusive here.

C. Constitutional avoidance and the rule of lenity support the decision below.

The Fifth Circuit's opinion represents the best interpretation of the statute. To the extent there is any uncertainty on that point, the doctrine of constitutional avoidance and the rule of lenity further bolster its interpretation:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932). The Fifth Circuit's interpretation avoids at least two significant potential constitutional infirmities with the rule. It also properly resolves ambiguity, to the extent it exists, against the Government.

First, the Gun Control Act, as applied through the Rule, creates a substantial question under the Second Amendment to the United States Constitution. The Second Amendment, which protects "the right of the people to keep and bear Arms," U.S. CONST. amend. II, also protects, by necessary implication, the right to *acquire* arms, *see Luis v. United States*, 578 U.S. 5, 26–27 (2016) (Thomas, J., concurring); *see also Rigby v. Jennings*, 630 F. Supp. 3d 602, 615 (D. Del. 2022). One way of acquiring arms is by

making them; indeed, self-manufacture of firearms is an historically common way to acquire them. Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 45–70 (2023); *see* Pet.App. 26a. And although certain restrictions on Second Amendment protected activity are acceptable if they can be shown to be "consistent with this Nation's historical tradition of firearm regulation," *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022), there is no historical tradition of regulating the private making of firearms, Greenlee, *supra*, at 78 ("All such restrictions [on the manufacture of arms for personal use] have been enacted within the last decade."). Instead, Congress has focused (as in the Gun Control Act) on regulating the *commercial* sale of firearms. The Rule breaks with this history and raises serious Second Amendment concerns that the Fifth Circuit's interpretation of the Act avoids.

Second, the Fifth Circuit's interpretation mitigates vagueness concerns. The Gun Control Act is a criminal statute, and "[t]he prohibition of vagueness in criminal statutes . . . is an essential of due process, required by both ordinary notions of fair play and the settled rules of law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (internal quotations marks omitted). The Rule threatens to render the Gun Control Act unconstitutionally vague by making it unclear when an item that with some work could become a frame or receiver crosses the line to become a "frame or receiver" or when a "weapon parts kit" is sufficiently complete to be a "firearm." For example, under the Rule an item may be regulated as a frame or receiver when it is in a state such that it "may readily be completed" to function as a frame or receiver. 27

C.F.R. § 478.12(c). "Readily" is, in turn, determined by reference to eight factors, which are not weighted, and include things like an evaluation of "parts availability" and "feasibility" of completing the manufacturing process. *Id.* § 479.11. The face of the regulation fails to provide clear guidance to law-abiding citizens about which items are or are not firearms under the Act.

The inclusion of "weapon parts kit[s]" within the definition of "firearm" creates similar problems. Such items are regulated when they are "designed to or may readily be completed" to become a firearm, *Id.* § 478.11, and in determining whether an item fits this definition, ATF may consider "any associated templates, jigs, molds, equipment, or tools that are made available by the seller" as well as "any instructions, guides, or marketing materials." *Id.* § 479.102(c). In other words, whether an item or parts kit is a "firearm" and therefore regulated under the Gun Control Act depends in part on the "marketing materials" and "tools" with which it is packaged. The same parts, sold in different contexts, may be regulated in some but not regulated in others. *See* Open Letter, *supra*, at 4, 6. If two companies decide to each sell *half* of a kit, with one selling a receiver blank and the other selling a jig and tools, none of it would be regulated, while if one company sells these items together, all of its contents are regulated together. Such a regulation, with criminal consequences, essentially creates a trap for the unwary.

Third, while the Fifth Circuit's interpretation of the statute is straightforwardly the best interpretation, even if that were not the case the statute would be at best ambiguous. Because the Gun Control Act is a criminal statute, the rule of lenity counsels that any

such ambiguity must be resolved against the Government. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) (plurality op.).

II. Respondents agree that this case warrants review.

Although Respondents firmly believe that the Fifth Circuit correctly resolved the merits of this case and that the same outcome should prevail here, Plaintiffs do not question the importance of the issue raised, nor the need for this Court to finally settle the issue.

A. As the Government correctly notes, the decision below held unlawful a significant federal regulation, a frequent predicate to this Court granting certiorari. Pet. 30. But in this unusual case, while the district court and the court of appeals have both held that the Rule is an unlawful exercise of authority by ATF, the Rule remains in place today, because this Court stayed the district court's (now vacated) vacatur order, Pet.App. 179a, and subsequently stayed injunctive relief the district court awarded to some intervenor plaintiffs pending appeal, Pet.App. 118a. In the August Order, this Court noted that final relief was to remain stayed until this Court disposed of any petition for certiorari, should one be filed. Given that there *is* no current remedial order in this case, and it is clear the district court cannot grant interim injunctive relief, if this Court denies certiorari, Respondents would likely have to re-litigate the remedy in the district court, litigate a likely appeal from any district court decision, and at least wait for the time to file a petition for certiorari to pass (and at most, litigate the

case before this Court again), before they could have effective relief.

In the meantime, the Rule, which ATF itself anticipated would pose a risk of dissolution to affected entities, will continue to have its devastating effect on Respondents' businesses. To avoid the prospect of a pyrrhic victory for Respondents, the Court should review the validity of the Rule now.

B. Furthermore, while there is not yet a circuit split on the validity of the Rule, the lower courts have nonetheless demonstrated confusion about the interplay between the Rule and the Gun Control Act. For instance in a similar, if opposite, challenge to the Rule's definition of "frame or receiver" treating the same objects differently depending on with what else they are sold or how they are marketed, a district court in the Northern District of California recently vacated the portion of the Rule that exempted items that could be made into AR-15 style receivers but that have "critical interior areas [that have not] been indexed, machined, or formed" as long as they were "not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed." *See California*, 2024 WL 779604, at *14, *27 (quoting 27 C.F.R. § 478.12(c)). Although it disagreed with the reasoning of *VanDerStok* for reasons that mirror the Government's arguments here, it *also* held that a portion of Rule was unlawful under the Gun Control Act. *Id.* Unless and until this Court weighs in on the validity of these key provisions of the Rule, such confusion is likely to multiply.

CONCLUSION

For the foregoing reason, the Court should grant the petition for certiorari and affirm the judgment of the Fifth Circuit.

March 7, 2024 Respectfully submitted,

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