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 *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Tennessee Firearms Association, and Virginia Citizens Defense League in Support of Respondents

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Tennessee Firearms Association, and Virginia Citizens Defense League are nonprofit organizations exempt from federal income tax under either Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. *Amici* work to preserve and defend the Second Amendment rights of gun owners. Many of the *amici* have filed *amicus* briefs in numerous cases involving Second Amendment issues in an effort to aid the courts in a principled analysis of the enumerated right to keep and bear arms.

SUMMARY OF ARGUMENT

When the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") promulgated its 2022 "frame or receiver" rule at the President's behest, the agency promised such action would "clarify" federal firearms law. *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (the "Rule"). True to ATF form, the Rule did no such thing. Petitioners now request reversal of a Fifth Circuit

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

decision which correctly held that the Gun Control Act means what it says – that, consistent with ATF's prior position, unfinished precursors of firearms cannot simultaneously be "firearms" themselves. Petitioners' invocation of "text, context, and common sense" therefore demands affirmance, not the statutory revision which they seek. Brief for the Petitioners ("Pet. Br.") at 3.

ATF's unauthorized revision begins with its definition of the statutory term "readily," which adopts an indeterminate multifactorial test whose results are known only to the government officials applying it. The Rule then sweeps unfinished frames and receivers within the Gun Control Act's purview, contravening the statute's command that these items first be "weapons" of like nature to the illustrative "starter gun." The Rule likewise expands the meaning of "convert," cobbling together disparate terms from *other* statutes to draft a statute which ATF prefers but which Congress never enacted. Such action declares parts kits to be "firearms," despite their lack of any predicate "weapon."

Next, Petitioners give the involved machining processes necessary to complete the Rule's banned products short shrift, claiming such firearm precursors are readily convertible. But just a few years ago, ATF agreed with Respondents that these same products were *not* yet "firearms" because certain "critical" physical features had not yet been machined. To accept Petitioners' newfound position would be to tie the scope of a penal statute to the perceived crime rate and the policy preferences of the current executive.

Accordingly, the Rule is just the latest usurpation of congressional power in an ever-expanding administrative state.

Such expansionism will not end here. Indeed, the Rule's logic – bound by no limiting principle that Petitioners could identify – poses a grave risk to the millions of semi-automatic rifles in common use which are just *two* drilled holes away from being "machine guns" – far fewer machining operations than required of the products at issue here. Petitioners likewise fail to dispel the constitutional doubts which permeate the Rule. Such interference with the people's historic right to personal gunsmithing has no basis in Founding-era tradition and therefore fails under the Second Amendment – to say nothing of the First Amendment, which protects the literature ATF now uses to regulate and criminalize firearm precursors.

Ultimately, this Court should view the Rule within the context of the current administration's firearms policy. The Rule is just one step in an unspoken but evident plan to subvert the Firearms Owners' Protection Act and create a registry of all American gun owners. Affirming the Fifth Circuit will protect gun owners from the harms that await under a future administration hostile to the Second Amendment.

ARGUMENT

I. THE STATUTORY TEXT DOES NOT REACH UNFINISHED FRAMES OR RECEIVERS OR WEAPON PARTS KITS.

A. The Rule's Definition of "Readily" Adopts an Unpredictable Standard for a Penal Statute Whose Application the Public Must Be Able to Predict.

The central component of the Rule's expansion of the statutory term "firearm" is its regulatory definition of the term "readily," which the Rule uses to implicate weapon parts kits and "partially complete, disassembled, or nonfunctional frame[s] or receiver[s]." 27 C.F.R. § 478.12(c). Petitioners maintain that the Rule merely adopts "ordinary meaning and relevant precedent," citing dictionary definitions and various "factors" gleaned from case law. But as the Fifth Circuit rightly observed, such subsidiary definition of statutory terms creates nothing more than "a subjective multi-factor test" that would "require regulated parties to divine the agency's interpretations in advance or else be held liable." Pet. App. 24a-25a.

ATF's prior approach to the term – leaving it undefined, with firearm classifications to be determined on a case-by-case basis – presented its own share of difficulties. *See* Pet. App. 24a (collecting cases variously finding items to "readily be converted" in 12 minutes and other items to "be readily restored" in 8 hours, "done in a professional shop, by an individual

with an advanced understanding of metallurgy").[2] But the Rule's new definition only muddies the water.

Adopting almost verbatim the definition and factors from *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 421-22 (6th Cir. 2006), which merely had posed a number of theoretical considerations for ATF to determine whether a purported machine gun could "be readily restored," the Rule simply recites these factors without any guidance as to how they will apply *in practice*.

Accordingly, the Rule defines "readily" to mean:

> A process, action, or physical state that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speediest, or easiest process, action, or physical state. With respect to the classification of firearms, factors relevant in making this determination include the following: (1) Time, *i.e.*, how long it takes to finish the process; (2) Ease, *i.e.*, how difficult it is to do so; (3) Expertise, *i.e.*, what knowledge and skills are required; (4) Equipment, *i.e.*, what tools are required; (5) Parts availability, *i.e.*, whether additional parts are required, and

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[2] As the Fifth Circuit noted, these cases construed the term "readily" across two different statutes with "radically different regulatory scopes" – the National Firearms Act and the Gun Control Act – surmising that, "given their very different scopes, courts have interpreted these texts to reach very different results." Pet. App. 24a.

> how easily they can be obtained; (6) Expense, *i.e.*, how much it costs; (7) Scope, *i.e.*, the extent to which the subject of the process must be changed to finish it; and (8) Feasibility, *i.e.*, whether the process would damage or destroy the subject of the process, or cause it to malfunction. [27 C.F.R. § 478.11.]

Rather than providing clarity, this definition is hopelessly ambiguous, containing all manner of inherently flexible, relative terms[3] that fail to notify the public as to *what* items may be proscribed or *when*. But the Rule also fails to *answer* any of the questions it *asks*. Consequently, (1) "*how* long," (2) "*how* difficult," (3) "*what* knowledge and skills," (4) "*what* tools," (5) "*whether*" and "*how* easily" available, (6) "*how* much," (7) "the *extent*" of change, and (8) "*whether*" a process may be damaging are all left to the unknowable interpretation and discretion of a federal bureaucrat, as is the precise mix of satisfied factors necessary to differentiate a "firearm" from a non-firearm. To make matters worse, the "elements" which the Sixth Circuit originally listed are now just a "nonexclusive list of factors" under the Rule. *7.62 Caliber Rifle*, 441 F.3d at 422; 87 Fed. Reg at 24,699. The Rule therefore departs from and expands upon its original inspiration, listing certain factors that could be (but need not be) considered, before suggesting that other unstated factors may carry the day, behind closed doors.

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[3] *See, e.g.*, 27 C.F.R. § 478.11 ("fairly" (adverb), "reasonably" (adverb), "efficient" (adjective), "quick" (adjective), "easy" (adjective), and "speedy" (adjective)).

The Rule does not establish a definition or test for the term "readily" – it presents the absence of any test, and the reservation of maximal latitude for ATF personnel. Indeed, the Rule denies an individual a reasonable opportunity to know whether one or more non-firearm parts or kits are "readily" transformable into a firearm. As this Court already observed, penal statutes have no room for such imprecision:

> Vague laws may trap the innocent by not providing fair warning. … [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).]

The vagueness of ATF's Rule is unquestionable. The ordinary American cannot comfortably apply the Rule without knowing how individual ATF personnel, in their sole discretion, interpret or apply the Rule with respect to a specific item or collection of items.

B. The Statute Cannot Reach Unfinished Frames and Receivers Because They Are Not "Weapons."

Next, Petitioners interpret the "frame or receiver" of a "firearm," 18 U.S.C. § 921(a)(3)(B), 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). Citing dictionary definitions for "frame" and "receiver," Petitioners posit that these items do not lose their structural nature when missing "a single hole necessary to install the applicable fire control component" or when "a small piece of plastic … can easily be removed." Pet. Br. at 32. The Fifth Circuit agreed that "the ordinary meaning of the words control," Pet. App. 15a, but concluded that Petitioners' reading departed from what the statute actually states. The Fifth Circuit was correct.

The statute defines a "firearm," *inter alia*, as "*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," as well as "the frame or receiver of any such *weapon*." 18 U.S.C. § 921(a)(3) (emphases added). Petitioners' first error was beginning with the wrong words to define, running headlong into "frame or receiver" without considering that these terms modify the word *weapon*.

At the time the Gun Control Act of 1968 was enacted, the public understood "weapon" to mean "an instrument of any kind used for fighting," Webster's New World Dictionary of the American Language (College ed. 1960), and "an instrument of offensive or defensive combat : something to fight with : something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy." Webster's Third New International Dictionary of the English

Language Unabridged (1966). Accordingly, only "instrument[s] of any kind used for fighting" or for "offensive or defensive combat" are capable – statutorily – of "readily be[ing] converted" into a firearm.

A "starter gun" is one example of a "weapon" already provided in the statute that may be a "firearm," so long as it can "readily be converted" from its blank-firing state "to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). Of course, the statute's use of the term "including" is presumed to be nonexclusive, and the statute may reach beyond starter guns. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012) ("The verb *to include* introduces examples, not an exhaustive list."). But whatever else Petitioners wish to "includ[e]" alongside starter guns must share common features with them. Indeed, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Starter guns therefore *illustrate* the sorts of weapons that may "readily be converted" into a "firearm."

Even so, Petitioners demur that "[a] 'starter gun,' for example, does not *function as a weapon*," and that some starter guns fall under the statute only "because they may 'readily be converted' to *function as weapons*." Pet. Br. at 29 (emphases added). But that is not what the statute says, and that is not what ordinary usage would suggest. Rather, some starter guns fall under the statute because they may "readily

be converted" to *function as firearms* by "expel[ling] a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). All the while, starter guns certainly *function as weapons*, being instruments "of offensive or defensive combat." Webster's Third New International Dictionary, *supra*. Indeed, as Respondents note, prior to "enacting the GCA Congress was informed that [starter guns] still can be used as weapons, as in the case of 'stickup artists' who brandished unmodified starter pistols 'in the perpetration of crimes of robbery and assaults.'" VanDerStok Br. at 34. If a handheld instrument used to threaten immediate violence in the commission of robberies and assaults does not "function" as a "weapon," it is difficult to imagine what does. Yet, even if the item meets the definition of a "weapon" (*e.g.*, a starter gun or knife), there is a second characteristic that must be met under the statutory definition – the "weapon" must be "readily … convert[ible] to expel a projectile by the action of an explosive," which is a characteristic that certainly not all starter guns – and few knives – even possess. 18 U.S.C. § 921(a)(3)(A).

An unfinished frame or receiver is not a "weapon," unless used as Cain ostensibly used a rock to bludgeon Abel. But a rock is not of like kind to the statute's illustrative starter gun. An unfinished frame or receiver likewise fails the first statutory requirement which is that the item, in its existing condition, be a "weapon."

C. The Rule Waters Down the Term "Convert" and Impermissibly Reaches "Weapon Parts Kits" Which Do Not Contain Any "Weapons."

In order to explain the Rule's novel regulation of weapon parts kits, Petitioners begin by inventively construing the statutory term "convert." Pet. Br. at 19. At first, Petitioners stick to the term's "ordinary meaning" to include such terminology as "transform, transmute." *Id.* But then, claiming "[c]onsisten[cy] with that plain-text reading," Petitioners add the terms "completed," "assembled," and "restored" in front of "convert," citing no other authority besides their opinion that the terms "all fit comfortably." *Id.* at 20. The Fifth Circuit rightly noted that these "listed verbs – 'completed, assembled, restored' – … contemplate[] less drastic measures than the full transformation actually required," and "[t]he Government's attempt to use the word 'convert' to justify its unprecedented expansion of the GCA thus collapses upon a cursory reading of the text." Pet. App. 25a.

Indeed, the Rule's expansion of *conversion* to include mere *completion*, *assembly*, and *restoration* departs from the text and incorporates language from *other* statutes – namely the National Firearms Act's definition of a "machinegun" at 26 U.S.C. § 5845(b) (including that which "shoots, is designed to shoot, or can be readily restored to shoot" and "any combination of parts from which a machinegun can be assembled") and perhaps even 18 U.S.C. § 921(a)(30)'s definition of "handgun" (including "any combination of parts from which a [handgun] can be assembled"). In other

words, the Rule incorporates concepts that Congress applied to other circumstances but which Congress omitted from 18 U.S.C. § 921(a)(3). No matter the source, these concepts simply are not part of 18 U.S.C. § 921(a)(3), the statute which the Rule purports to "clarify," and "[n]othing is to be added to what the text states or reasonably implies.... That is, a matter not covered is to be treated as not covered." Scalia & Garner, *supra*, at 93.

Next, the Rule expands 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. This definition simply fails the statute's text. Indeed, the statute only applies to a "weapon" and then only to a weapon 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)(A). In contrast, the Rule applies to a "kit," even if it is not a "weapon," on the basis that it "may readily be completed, assembled, restored." 27 C.F.R. § 478.11. This atextual expansion of the statute therefore includes items that are *not* weapons by virtue of the insertion of terminology foreign to the clause the Rule purports to interpret.

Yet under 18 U.S.C. § 921(a)(3)(B), there is only one step that must be taken to turn an item into a firearm "frame or receiver" – manufacture of the unfinished frame or receiver into a functioning frame or receiver governed by the statute. In other words, an unfinished frame or receiver becomes an 18 U.S.C. § 921(a)(3)(B) "frame or receiver" long before it ever

becomes an 18 U.S.C. § 921(a)(3)(A) "weapon." Thus, the addition of parts, jigs, instructions, or any other such items has no bearing on when the frame or receiver precursor actually becomes a firearm.

II. PETITIONERS MISSTATE THE EASE WITH WHICH ONE MAY COMPLETE A FUNCTIONAL "80%" FIREARM.

Throughout their briefing, Petitioners have taken the position that one may build a working firearm from products like the Polymer80 PF940C with tremendous ease, describing the process as requiring the mere removal of some "plastic tabs" and the drilling of "a few holes," which can take just "minutes." Pet. Br. at 35. But Petitioners never engage with the specifics of building such a firearm. Upon closer examination, the process often takes far longer and involves effort greater than Petitioners' optimistic, theoretical description would suggest.

Using the Polymer80 PF940-series products as an example – arguably the most popular of the products targeted by the Rule and the representative prop the President used during his April 2022 press conference[4] – the process of building one such "80%" firearm begins with *six separate* machining operations. J.A. 174. These operations involve the drilling of holes through each side of a frame precursor to accommodate three pins that respectively will hold the handgun's trigger, the "Locking Block Rail System"

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[4] ABC News, "Biden Cracks Down on 'Ghost Guns,'" *YouTube* (Apr. 11, 2022).

(the metal component which interfaces with the barrel and provides front rails for the slide), and also the "Rear Rail Module" (the metal component which surrounds the trigger mechanism and provides rear rails for the slide). J.A. 173.

As the product's manual warns, one cannot reduce these six operations into three simply by drilling one hole through to the other side of the frame precursor, so as to create two holes in one operation. Such shortcutting risks misaligning the pin holes on the opposite side of the frame precursor, rendering subsequent installation of components impossible. *See* J.A. 174, 172. And, in order to ensure accurate placement of these pin holes in the first place, one must immobilize the frame precursor in a "jig," taking care to apply constant pressure against the frame precursor to ensure it does not shift within during drilling. J.A. 171. To that end, the manual recommends wrapping the jig with tape. *Id.*

Once the trigger and rail-related pin holes have been drilled separately, one must complete an additional *five separate* machining operations to create a *possibly* functional frame out of its "80%" precursor. Four operations involve the removal of material from the top of the frame precursor which otherwise prevents installation of a slide. J.A. 166. And the fifth operation involves removal of a U-shaped obstruction (the "barrel block") within the frame precursor which otherwise prevents installation of the barrel's recoil spring assembly necessary to operate the handgun. J.A. 171.

But once these 11 separate and precise operations are completed, a functional handgun is no guarantee. Indeed, assembly often requires "hand fitting and polishing" due to "variances in slide and barrel tolerances." J.A. 183. For example, individuals often report an inability to install the Rear Rail Module without some modification, such as methodical, trial-and-error removal of metal from the module in order to align its pin holes with those of the frame. *See* J.A. 184.[5] The same is true for the internal barrel block; if one removes too little material from the frame precursor's internal channel, the coils of the recoil spring assembly will bind against the channel and either cause malfunctions or prevent the slide from moving altogether.[6] Finally, the manual recommends a break-in period of "several hundred rounds … to allow the system to work smoothly together." J.A. 185. User experience confirms this necessity, as malfunctions are common until new components and surfaces wear enough to ensure reliable operation.[7]

Amici do not highlight these pragmatic concerns to suggest that finishing one of the Rule's banned products is some sort of a Herculean task. Nor do they dispute that in a best-case scenario, an experienced builder can create a firearm in the timeframe

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[5] *See also* "r/Polymer80," *Reddit* (last visited Aug. 20, 2024) (internet forum collecting user reports of frequently necessary modifications).

[6] *See* r/Polymer80, *supra* note 5.

[7] *See* r/Polymer80, *supra* note 5.

Petitioners cite. J.A. 183. But for most individuals, the process can take hours to complete and even days to finally produce a broken-in handgun that works each time one pulls the trigger. The notion of reliably on-demand, ready-for-crime handguns is nothing more than alarmism.

III. PETITIONERS DOWNPLAY THE RULE'S EXPANSION OF CRIMINAL LAW BY INCORRECTLY SUGGESTING THE RULE MERELY CODIFIED PAST PRACTICE.

A. The Rule Is a Direct Reversal of Past Practice.

Read in isolation, Petitioners' briefing would suggest the Rule simply formalized decades of consistent agency interpretation, and that the Rule's application to so-called "ghost gun" precursors should have come as no surprise. Indeed, Petitioners already said so, in so many words. *See, e.g.*, Pet. Br. at 2 (claiming the Rule is "consistent with ATF's longstanding interpretation and implementation of the Gun Control Act"); *id.* at 6 ("[ATF's] approach is reflected in dozens of classification letters issued over the past half century."); *id.* at 16 ("The challenged provisions of the Rule follow directly from the Act's plain text."); *id.* at 24 (positing that the "Rule broke no new ground"). Thus, Petitioners describe the Rule as a mere response to recent "technological advances" that enabled "[s]ome manufacturers" of new "kits and parts" to "assert[] that they were not 'firearms' regulated by the Act" and sell these kits and parts "without complying with the Act's requirements." Pet.

Br. at 7. In other words, Petitioners argue such agency action "simply clarifies" that these rogue manufacturers never were in compliance in the first place, and ATF certainly never gave these kits and parts its blessing. *Id.* at 11.

But Petitioners leave out one crucial detail – that among the items that ATF historically has "concluded … are *not* sufficiently complete to be regulated as a frame or receiver" (Pet. Br. at 6-7) *was the very Polymer80 PF940C frame precursor* that the Rule now deems a "firearm." Indeed, in a letter dated January 18, 2017, ATF held that, because the evaluated sample lacked (1) a drilled or indexed trigger pin hole, (2) a drilled or indexed trigger mechanism pin hole (*i.e.*, the Rear Rail Module pin hole, *supra*), (3) a drilled or indexed locking block pin hole (*i.e.*, the Locking Block Rail System pin hole, *supra*), (4) front and rear frame rails (*i.e.*, incapable of accepting a slide), (5) a barrel seat (*i.e.*, the Locking Block Rail System, *supra*), and (6) a Glock locking block (*i.e.*, the Locking Block Rail System, *supra*), the sample was "not sufficiently complete to be classified as the frame or receiver of a firearm and thus [wa]s not a 'firearm' as defined in the GCA. Consequently, the aforementioned items [we]re therefore not subject to GCA provisions and implementing regulations." J.A. 104.

Thus, what was once a *non*-frame, *non*-firearm that had *not* yet "reached a 'critical stage of manufacture'" so as to become regulated suddenly now *is* a "frame" and a "firearm" – the only intervening changes being one in presidential administration and

the issuance of a new directive.[8] Pet. Br. at 36 (cleaned up). Indeed, Petitioners cite no new insights or reassessments explaining ATF's change in legal position other than an apparent increase in crime guns lacking serial numbers.[9] How the crime rate affects statutory interpretation, Petitioners do not say, nor do they explain why their latest interpretation is the "best" one in light of ATF's prior approvals. Certainly, Petitioners cite no authority – from Congress or otherwise – which enables an agency tasked with enforcement of criminal laws to broaden their scope in

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[8] Petitioners' invocation of the "anti-circumvention principle" is therefore quite puzzling. Pet. Br. at 41. If, as Petitioners claim, the Fifth Circuit's interpretation would "entirely circumvent[] the Act's background-check requirement," *id.*, then ATF is guilty of precisely the same circumvention from 2017 to 2022, when it permitted designs like the Polymer80 PF940C to enter the stream of commerce. But "[a] law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest." *Garland v. Cargill*, 602 U.S. 406, 427 (2024).

[9] But while Petitioners cite some "45,240 unserialized firearms submitted for tracing between 2016 and 2021" as evidence of "an explosion of crimes involving ghost guns," Pet. Br. at 8, another 48,601 firearms between 2017 and 2021 could not be traced due to a "partial, incomplete, or obliterated" serial number – *i.e.*, factory-serialized firearms which subsequently were defaced to frustrate tracing efforts. "National Firearms Commerce and Trafficking Assessment Volume II, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories" at 4, *ATF* (Mar. 27, 2024). In other words, it would seem that more than half of the firearms described using the "ghost gun" pejorative are not even the privately made firearms ("PMFs") targeted by the Rule, and forced serialization of these PMFs would do nothing to stop the obliteration of serial numbers generally or the subsequent obliteration of PMF serial numbers specifically.

response to their violation. Accordingly, this Court should treat ATF's politically ordered reversal of past practice with the same degree of skepticism afforded ATF's prior bump stock rule. The similarities are numerous. *Cf. Garland v. Cargill*, 602 U.S. 406, 412 (2024) ("For many years, [ATF] took the position that semiautomatic rifles equipped with bump stocks were not machineguns under the statute. … ATF abruptly reversed course in response to a mass shooting in Las Vegas, Nevada."); *id.* at 413 ("[ATF] proposed a rule that would amend its regulations to 'clarify' that bump stocks are machineguns."); *id.* at 414 ("The final Rule also repudiated ATF's previous guidance that bump stocks did not qualify as 'machineguns'....").

But ATF's reversal of past practice did not stop with Polymer80. Rather, the Rule explicitly overruled *all* prior classification letters on "80%" frames and receivers – including associated parts kits – across all manufacturers. *See* 87 Fed. Reg. at 24,654 ("It does not grandfather partially complete, disassembled, or nonfunctional frames or receivers, including weapon or frame or receiver parts kits, that ATF did not classify as firearm 'frames or receivers' as previously defined."). ATF's only justification for this mass reversal was that "ATF may not have been provided with, or did not examine, a full and complete parts kit containing those items along with any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that were made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit." *Id.* at 24,724-25.

But in many cases, ATF *had* considered these items alongside various tools, components, and accessories. And in each case, ATF determined that such items did not move the needle towards classifying a frame or receiver precursor as a "firearm," as ATF's consistent focus was on the *physical completeness* of the product – *i.e.*, the specific machining operations that had been performed versus those that remained.[10]

For example, in 2014, ATF's Firearms Technology Branch examined a "[s]uspected AR-15 type firearm receiver, material removal guide, three drill bits, and an end mill," determining that this combination "d[id] not constitute a firearm frame or receiver" because the ostensible receiver was "completely solid in the fire-control area, and d[id] not incorporate indexing characteristics, such as locating features for the hammer and trigger pins."[11] ATF employed the same methodology as to parts kits throughout the years, focusing on whether and which "critical machining operations" remained to be completed. In one 2006 letter, the Firearms Technology Branch noted that an "incomplete receiver was previously examined by this Branch and was classified as a non-firearm. Selling this item as a 'kit' with blueprints, parts, etc., will not

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[10] *See* Amended Complaint for Declaratory and Injunctive Relief ¶¶ 231, 235, 237-40, *Morehouse Enters., L.L.C. v. BATFE*, No. 3:22-cv-00116-PDW-ARS (D.N.D. July 27, 2022), ECF No. 22 (collecting as exhibits various determination letters from the 1990s and later which focused on the machining completeness of samples submitted for classification).

[11] Complaint Exhibit 45, *Morehouse Enters., L.L.C. v. BATFE*, No. 3:22-cv-00116-PDW-ARS (D.N.D. July 5, 2022), ECF No. 1-45.

change this classification."[12] Consequently, just *one year* before the Final Rule's promulgation, ATF correctly represented to a court that "ATF has consistently adopted a standard whereby the *degree of machining to the frame or receiver determined* whether the device constituted a firearm," reiterating once more that "the *degree of machining to the frame or receiver* (and thus its degree of completeness) *determines* whether a device is a firearm."[13] But now, Petitioners insist that ATF's tectonic shift is the mere codification of "consistent practice" for clarity's sake. Pet. Br. at 17. That cannot be.

B. The Rule Thus Usurps Congress' Power to Define New Crimes.

At bottom, the proper forum to expand the criminal law is Congress, as this Court recently reiterated in *Cargill*. Yet when faced with the opportunity to codify the President's preferred interpretation of "firearm" when drafting the Bipartisan Safer Communities Act of 2022, Congress declined to do so. The alternative approach taken here – bypassing Congress to expand criminal liability through executive fiat – is precisely the reason why the current number of federal crimes is unknowable.

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[12] Complaint Exhibit 26, *Morehouse Enters., L.L.C. v. BATFE*, No. 3:22-cv-00116-PDW-ARS (D.N.D. July 5, 2022), ECF No. 1-26.

[13] Memorandum of Law in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 30, *City of Syracuse v. BATFE*, No. 1:20-cv-06885-GHW (S.D.N.Y. Jan. 29, 2021), ECF No. 98 (emphases added).

Indeed, speaking with Tucker Carlson in a recent interview, Senator Mike Lee recalled requesting the Congressional Research Service to ascertain the then-current total number of federal crimes on the books. CRS responded that the answer is "unknown and unknowable, but it's at least 300,000."[14]

Perhaps the most telling example of the Rule's astronomical complication of this penal statute is its attempt to "clarify" the definition of "firearm." Beginning at the text, the statute defines a "firearm" to include a "frame or receiver." 18 U.S.C. § 921(a)(3)(B). The Rule goes further and defines "frame or receiver" to include a "partially complete, disassembled, or nonfunctional frame or receiver." 27 C.F.R. § 478.12(c). Having just inserted three new qualifiers into the statutory definition, the Rule then defines a "partially complete, disassembled, or nonfunctional frame or receiver" to be one that is "clearly identifiable as an unfinished component part of a weapon." *Id.* Then, in order to explain what "clearly identifiable" means, the Rule provides explanatory text (that appears in no regulatory definition) that an item is not "clearly identifiable" if it is an "article[] only in a primordial state." 87 Fed. Reg. at 24,663. Finally, in order to explain what "primordial state" means, the Rule adopts a dictionary definition "in footnote 49 of [its] preamble." *Id.* at 24,691. In other words, ATF has created an *informal definition, within another informal definition, within a regulatory definition, within another regulatory*

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[14] T. Carlson, "The Tucker Carlson Show" at 40:00, *X* (July 30, 2024).

definition, within a statutory definition of a statutory term. Yet, when Congress has specifically defined a term, agency efforts to alter or expand the term, particularly when following a political agenda, are not within the agency's constitutional authority, as that power remains solely with Congress. *Cargill*, 602 U.S. at 415.

Discussing yet *another* aspect of the Rule, the Fifth Circuit rightly observed that the Rule simply "stretches the words too far." Pet. App. 23a. Indeed, "ATF must operate within the statutory text's existing limits. The Final Rule impermissibly exceeds those limits, such that ATF has essentially rewritten the law." Pet. App. 32a.

IV. A RULING IN FAVOR OF PETITIONERS WILL SANCTION WIDESPREAD CRIMINALIZATION OF SEMI-AUTOMATIC RIFLES AS "READILY CONVERTIBLE" MACHINE GUNS.

Petitioners' argument is concerning for another reason beyond its departure from the statutory text. By impermissibly equating the terms "completed," "assembled," and "restored" with "converted,"[15] ATF has set the stage for future 'clarification' that AR-15-style rifles – "the most widely owned,"[16] "commonly

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[15] *See* I(C), *supra.*

[16] *Harrel v. Raoul*, 144 S. Ct. 2491, 2493 (2024) (statement of Thomas, J.).

available,"[17] and "popular"[18] semi-automatic rifles in America – are *actually* unregistered machine guns by virtue of the minimal remaining machining operations or other changes necessary for their lower receivers to accommodate an auto sear and enable fully automatic fire. This Court's affirmance of the decision below is therefore necessary to prevent such a "virus that may spread if not promptly eliminated." *Coal. for T.J. v. Fairfax Cnty. Sch. Bd.*, 218 L. Ed. 2d 71, 75 (2024) (Alito, J., dissenting from denial of certiorari).

Such extension of Petitioners' argument beyond the facts of this case requires little imagination. Petitioners insist that the Rule "correctly clarifies that 'frame[s]' and 'receiver[s],' 18 U.S.C. 921(a)(3)(B), include '*partially complete*, disassembled, or nonfunctional' frames and receivers that '*may readily be completed, assembled, restored, or otherwise converted* to function as' frames or receivers, 27 C.F.R. 478.12(c) – by, for example, *drilling a few holes*...." Pet. Br. at 17 (emphases added). This simplification is a seeming deliberate yet fundamental understatement of the truth.

If "drilling a few holes" is all it takes for Petitioners to consider Item A to *actually* be Item B, then the AR-15 is at risk. *See* Pet. App. 45a (Oldham, J., concurring) ("For example, a semi-automatic rifle like an AR-15 can be 'converted' to function as a fully automatic machine gun. Such conversions can be

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[17] *Cargill*, 602 U.S. at 430 (Sotomayor, J., dissenting).

[18] 87 Fed. Reg. at 24,652.

accomplished by filing away internal parts of a semi-automatic firearm."). Indeed, one would only need to drill *two holes* to convert a semi-automatic AR-15 lower receiver into a machine gun[19] – *far fewer machining operations* than it takes to create a firearm from a Polymer80 frame precursor, *supra*. Thus, applying Petitioners' logic, whether the semi-automatic AR-15 lower receiver is a "'partially complete' … receiver[] that 'may readily be completed, assembled, [or] restored" into a machine gun would be in the eye of the beholder. Pet. Br. at 17; *see also id.* at 9 (noting that, under the Rule, "'factors relevant in making this determination include' '[t]ime,' '[e]ase,' '[e]xpertise,' '[e]quipment,' '[p]arts availability,' '[e]xpense,' '[s]cope,' and '[f]easibility'").

Federal law defines a machine gun as, *inter alia*, "any weapon which … *can be readily restored* to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the *frame or receiver of any such weapon* … and any *combination of parts from which a machinegun can be assembled* if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b) (emphases added). Of course, as Judge Oldham noted in concurrence below, "ATF's counsel

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[19] M. Searson, "Turning Your AR-15 into an M16," *Recoil* (Feb. 13, 2024) ("Most lower receivers need to be modified by drilling a third hole to fit the auto sear."); *see also* Complaint Exhibit 6, *Morehouse Enters., L.L.C. v. BATFE*, No. 3:22-cv-00116-PDW-ARS (D.N.D. July 5, 2022), ECF No. 1-6 (March 1, 1971 ATF-predecessor IRS memorandum determining the lower receiver of the M16 to be the "receiver" and therefore a "machine gun" under 26 U.S.C. § 5845(b)).

conceded the agency took the word 'restored' from the [National Firearms Act] and inserted it into a [Gun Control Act] regulation." Pet. App. 44a. However, "Congress chose to use the word 'restored' *only* in the NFA and not in the GCA." Pet. App. 43a.

But accepting Petitioners' argument here effectively would synonymize *restoration* with *conversion*. Despite denying such criticisms later (Pet. Br. at 28), Petitioners simultaneously insist that the "terms 'completed,' 'assembled,' and 'restored' *fit comfortably* within the ordinary meaning of the statutory term 'converted,'" *id.* at 16 (emphasis added), and that such redefinition is an "equivalent phrase." *Id.* at 21. However, the complete reversal of an agency's prior rulings and/or its obvious objective of massively altering the scope of a word selected by Congress should not turn on whether the agency is 'comfortable' that a list of words omitted by Congress nonetheless was intended by Congress. This is particularly so where, as here, the first three words – "completed," "assembled," and "restored" – indicate finalizing or re-finalizing an item's original form while the last – "converted" – necessarily implies a change from the original.

Even if ATF were to treat restoration and conversion differently outside of this Rule, the Rule's logical risks to the AR-15 remain. Indeed, the Rule's definition of "firearm" turns on the concurrent possession of "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." Pet. Br. at 11a (emphases added). Because federal law separately regulates as machine guns "any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person," 26 U.S.C. § 5845(b), one must ask whether a drill bit owned in tandem with an AR-15 will, in ATF's view, constitute a machine gun. Petitioners certainly offer no limiting principle to their latest attempt at statutory revisionism.

V. PETITIONERS FAIL TO DISPEL CONSTITUTIONAL DOUBTS.

The Rule also violates the constitutional-doubt canon, which provides that, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also* Scalia & Garner, *supra*, at 247 ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."). Purporting to rely on their earlier statutory-interpretation argument, Petitioners tersely dismiss the Rule's constitutional defects, relying on their incorrect and conclusory statement that "the Act is not 'genuinely susceptible to two constructions,' so the canon is inapplicable." Pet. Br. at 46 (citation omitted). Of course, there *is* more than one construction here, as demonstrated by the established history of ATF's interpretation, discussed *supra*, and the practical impact of these constructions

– one which deprives the people of a popular and previously unregulated avenue of firearm acquisition, and one which does not.

Petitioners' dismissal of Second Amendment concerns is similarly unavailing. Petitioners rely on this Court's prior assumption in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008), that certain unidentified, "longstanding … laws imposing conditions and qualifications on the commercial sale of arms" would survive the textual and historical methodology employed in *Heller* and reiterated in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), "if and when" challenges to those laws came before the Court. *Heller*, 554 U.S. at 635; Pet. Br. at 46. But as this Court already recognized in *United States v. Biswell*, 406 U.S. 311 (1972), "[f]ederal regulation of the interstate traffic in firearms is *not as deeply rooted in history* as is governmental control of the liquor industry," for example. *Id.* at 315 (emphasis added). Thus, under this Court's precedents, a dearth of similar Founding-era regulation would be dispositive in a Second Amendment challenge. *Bruen*, 597 U.S. at 36 (noting that "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text"); *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (anchoring analysis of "laws at the founding").

Finally, the Rule raises yet another constitutional doubt to join those already discussed here and in Respondents' briefing. By redefining "frame or receiver" to include "a partially complete,

disassembled, or nonfunctional frame or receiver" when possessed alongside "any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials" evidencing the incomplete frame or receiver's ostensible ready convertibility, the Rule also raises serious First Amendment concerns. Pet. Br. at 9, 10. Indeed, under the Rule, whether a person possesses a "firearm" (subject to any number of individual or locational prohibitions) may turn on the concurrent possession of an instruction manual or marketing material – *literature* which the Rule effectively criminalizes and the First Amendment quintessentially protects. Consider the absurdity of criminal liability attaching to the possession of an unfinished frame within 1,000 feet of a "public, parochial or private school" (18 U.S.C. §§ 921(a)(26)(B), 922(q)(2)(A)), but only if the possessor is discovered to be holding a paper pamphlet providing instructions on the frame's completion. If the Rule is allowed to remain, such absurdity – and the convoluted factual inquiries it invites – very well may become reality.

VI. THE RULE IS JUST ONE STEP IN THE ADMINISTRATION'S BROADER SCHEME TO CREATE A FORBIDDEN REGISTRY OF GUN OWNERS SUSCEPTIBLE TO FUTURE CONFISCATION.

While Petitioners invoke "text, context, and common sense" as ostensible support for their novel reading of the statute, Pet. Br. at 3, all three demand affirmance for the reasons already stated above and in Respondents' briefing. But while statutory context clarifies the Rule's invalidity, the "Biden-Harris"

administration's broader *regulatory* context clarifies that the Rule is just one step towards a larger goal – a *de facto* universal registry of American gun owners that subverts and circumvents the Firearms Owners' Protection Act.

This registry is something of an open secret, and has been for decades.[20] And now, by forcing as many people as possible to become federally licensed dealers subject to recordkeeping requirements,[21] "mov[ing] as close to universal background checks as possible"[22] by routing every firearm transaction through licensed dealers,[23] requiring these dealers to preserve transaction records indefinitely and ultimately hand

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[20] *See, e.g.*, Red Dawn (Valkyrie Films 1984) (depicting one invading Russian soldier instructing another to "[g]o to the sporting goods store" and "[f]rom the files, obtain form 4473," which "will contain descriptions of weapons and lists of private ownership").

[21] Definition of "Engaged in the Business" as a Dealer in Firearms, 89 Fed. Reg. 28,968 (presuming all manner of private sales constitute "engaging in the business" of dealing firearms without a license).

[22] "FACT SHEET: Biden-Harris Administration Takes Another Life-Saving Step to Keep Guns Out of Dangerous Hands," *White House* (Aug. 31, 2023).

[23] 89 Fed. Reg. 28,968 (pushing private transactions through dealers); Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (requiring serialization, dealer transfer, and recordkeeping of firearm precursors).

them over to ATF,[24] and subsequently forcing as many dealers out of business as possible[25] in order to expedite the receipt of their records and bottleneck firearm commerce,[26] this administration's actions point overwhelmingly to the creation of a digitized, searchable federal database of almost all gun owners nationwide.[27] Indeed, despite previously having denied such capability,[28] ATF was able to search

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[24] 87 Fed. Reg. at 24,746 ("Licensees shall retain each Form 4473 until business or licensed activity is discontinued...."); 27 C.F.R. § 478.127 ("Where discontinuance of the business is absolute, the records shall be delivered within 30 days … to the ATF Out-of-Business Records Center....").

[25] "Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety," *White House* (June 23, 2021) (establishing "zero tolerance" for various inadvertent dealer errors); Complaint for Declaratory and Injunctive Relief, *Morehouse Enters., L.L.C. v. BATFE*, No. 3:23-cv-00129-PDW-ARS (D.N.D. July 11, 2023), ECF No. 1 (detailing ATF's weaponization of this "zero tolerance" revocation policy in retaliation against one dealer that had sued ATF to enjoin enforcement of the Rule at issue here).

[26] *See* 27 C.F.R. § 478.127.

[27] H. Keene, "Texas Congressman Introduces Anti-Gun Registry Bill as ATF Cracks Down on Gun Stores," *Fox News* (Mar. 1, 2023) (reporting on *Amicus* GOA's discovery that "ATF had processed and digitized over 50,000,000 'out of business' records of gun dealers in FY 2021" and that "ATF has reached a point where it has converted nearly one billion records … into a single, centralized, and searchable national gun registry").

[28] D. Funke, "Fact Check: Claim that ATF Has 'Gun Registry' with 1 Billion Records Is Missing Context," *USA Today* (Feb. 9, 2022)

digitized records to determine the identity of former President Trump's would-be assassin *within 30 minutes*:

> They were able to do so in about 30 minutes, federal law enforcement officials said in a statement. … [A] West Virginia employee searched the serial number in the ATF computer system, which found the licensed dealer that sold that firearm. The weapon was purchased at a now-closed gun store by a man who lived in Bethel Park, Pa. – about an hour from the rally site. Because the business was no longer operating, ATF's West Virginia facility had the federal form the buyer completed.[29]

This administration's hostility to gun owners and the constitutional provision that protects them is manifest. In 2020, President Biden campaigned on amending the National Firearms Act to criminalize the ubiquitous AR-15 and the millions of so-called "high-capacity" magazines currently in circulation.[30] Thereafter, the President threatened gun owners with "F-15s and … nuclear weapons" before falsely claiming that the Founders had restricted military arms such

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(claiming "those records are not stored in a searchable database or a format consistent with a registry").

[29] P. Stein, "ATF Traced Trump Rally Shooter's Gun Using Records Opposed by Some in GOP," *Wash. Post* (July 21, 2024).

[30] "The Biden Plan to End Our Gun Violence Epidemic," *Biden Harris* (2022).

that early Americans "couldn't buy a cannon."[31] And, during a time of already limited supply and high demand, the President banned "roughly 40 percent of the ammunition sold in the U.S." via Russian sanctions.[32] It is difficult to believe that this administration views the Second Amendment as a limitation on its power, and its regulatory actions therefore should be viewed with the greatest of skepticism in the courts.

CONCLUSION

This Court should affirm the judgment of the Fifth Circuit.

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[31] L. Casiano, "Biden Takes Swipe at Second Amendment Supporters: 'You Need F-15s' to Take on the Federal Government," *Fox News* (Jan. 16, 2023); "No, the Second Amendment Did Not Prohibit Cannon Ownership in the Early Republic," *Jonathan Turley* (Apr. 12, 2022); F. Leiner, "Yes, Privateers Mattered," *U.S. Naval Inst.* (Mar. 2014).

[32] "Russian Ammo Imports Halted, May Send Demand, Prices and Shortages to New Levels," *Guns & Ammo* (Aug. 21, 2021).

Respectfully submitted,

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