No. 23-852

# In the Supreme Court of the United States

MERRICK B. GARLAND, ET AL.,
*Petitioners*,
v.
JENNIFER VANDERSTOK, ET AL.,
*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, MONTANA, AND 25 OTHER STATES IN SUPPORT OF RESPONDENTS


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## QUESTIONS PRESENTED

1. Whether "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, is a "firearm" regulated by the Gun Control Act of 1968.

2. Whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," 27 C.F.R. 478.12(c), is a "frame or receiver" regulated by the Act.

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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Bureau of Alcohol, Tobacco, Firearms, and Explosives "is a political briar patch because of its rulemaking authority." Tristan Silva II, *Almost Heaven, West Virginia?: The Country Road to Take Firearm Regulation Back Home to Congress and the States*, 18 J.L. ECON. & POL'Y 404, 405 (2023). Among other things, the agency is responsible for administering and enforcing important but controversial federal gun laws like the Gun Control Act of 1968 and the National Firearms Act of 1934. Its actions often go directly to the heart of Americans' Second Amendment rights. And "the criminal consequences of the ATF's regulations," as well as the informal "method of regulation" it often uses, "can render the agency's decision-making vulnerable" to challenges under the Administrative Procedure Act. Michael D. Faucette & Boyd Garriott, *"Happiness Is A Warm Gun"*, 50 LITIGATION 53, 55 (2024).

Given the sensitivity of this work, one might at least expect ATF to tread carefully before purporting to regulate in unexpected and aggressive new ways. But recently, it hasn't. ATF has instead seemed determined to stretch the words found in statutes like the GCA and NFA to reach conduct never anticipated by the lawmakers who passed them. This case, concerning ATF's efforts to regulate gun kits and other forms of private firearms assembly under the guise of calling them "frames or receivers" subject to the GCA, is just the latest example of that effort. See Definition of "Frame or Receiver" and Identification of Firearms ("Frame Final Rule"), 87 Fed. Reg. 24652-01, 24662 (Apr. 26, 2022). Other examples abound. Indeed, many of the Amici States here have been compelled to step in and sue ATF multiple times over the

past few years just to return the agency to its actual area of authority.

All this leads to a simple conclusion: when the Court encounters another ATF regulation offering a purportedly creative solution to a long-standing problem, it should be wary. And in this brief, Amici States describe some of the specific machinations ATF has used in the past to get to its desired results—erasing ordinary meaning, stripping words from context, ignoring comments, short-circuiting APA requirements, and blinding itself to the real-world consequences of its own actions. Armed with that understanding, the Court can approach the rule at issue here with eyes wide open. And though some might try to excuse a bit of administrative corner-cutting because of the purported interests at stake, that kind of policy-first approach won't work, either. The Court must remain firmly focused on what Congress commanded, not what certain political interest groups might prefer or what ATF might wish for.

The rule here overreaches. But the Court need not follow ATF into the briar patch. It should instead affirm.

## SUMMARY OF ARGUMENT

**I.** ATF has not shown great respect for either the limits of its own authority or the requirements set out in the APA. Time and again, it has pushed rules that offend both. Just a few months ago, the Court told ATF that it had overstepped when it tried to transform bump stocks into machine guns. But ATF has likewise tried to make stabilizing braces into short-barreled shotguns and private owners and traders into commercial firearms dealers. And here, ATF has done more than just ignore the statute's text—it's also played games with the notice-and-comment process, depriving commenters like the

States from having the chance to speak up about the flaws in ATF's thinking. All these issues confirm that the Court should be careful about trusting ATF's work; if anything, the agency's recent history suggests that the Court should approach this case with a skeptical eye.

**II.** Some might suggest that ATF's limits-testing approach is justified because of the stakes. And certainly, in the wrong hands, firearms can be dangerous. But short of constitutional constraints, Congress is the body that gets to decide how to address any risks that might arise from a particular product. Neither the ATF nor this Court can impose naked policy preferences, especially so on hot-button issues like these.

## ARGUMENT

### I. ATF Has A History Of Pushing The Limits, And It's Doing So Again.

ATF has limited statutory authority. The GCA, for example, permits ATF to "prescribe only such rules and regulations as are *necessary* to carry out [its] provisions." 18 U.S.C. § 926 (emphasis added). The NFA likewise gives ATF circumscribed authority because it regulates a narrow set of firearms. See 26 U.S.C. § 5845. And over the years, Congress has made only minor changes to this statutory scheme. See Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921-926, 929, 26 U.S.C. § 5845); see also Bipartisan Safer Communities Act (BSCA), Pub. L. No. 117-159, 136 Stat. 1313 (2022) (codified as amended at 18 U.S.C. §§ 921-924, 34 U.S.C. § 40901).

Even though these statutes have remained essentially static for decades, ATF's role in executing them has somehow grown larger day by day. In ATF's view, it must

create "new definitions" that are "general enough to account for changes" in society. Frame Final Rule, 87 Fed. Reg. at 24668. Not so. ATF misunderstands its own job—and this misconception is statutorily unjustified and constitutionally impermissible. Time and time again, ATF has ventured off into the regulatory wilderness, abandoning the only statutes that give it life in the first instance. In other instances, it has ignored its obligations under the APA to bypass legitimate objections to its regulatory misadventures.

ATF's Frame Final Rule is more of the same. But to understand just why ATF's regulatory work can't really be trusted, it helps to travel through the rabbit hole of its fickle regulatory scheme. It's a dizzying ride.

### A. Bump Stocks

Start where the Court needs little reminder—with bump stocks. "For many years, [ATF] took the position that semiautomatic rifles equipped with bump stocks were not machineguns." *Garland* v. *Cargill*, 602 U.S. 406, 412 (2024). In response to a shooting, though, the agency "abruptly reversed course." *Id.* Although Congress's attempts to outlaw bump stocks had stalled, ATF remained undeterred. *See id.* at 412-13. Under the guise of redefining "machinegun," ATF's new rule accomplished what Congress could not—banning bump stocks and ordering owners of bump stocks to "destroy" or "surrender them"—all under threat of criminal prosecution. *Id.* at 414.

Many of the States here warned years ago that ATF's new rule did "not flow from the governing statute's clear and unambiguous language." See Br. of Amici Curiae States of West Virginia, Montana, et al. at 6, *Aposhian* v. *Garland*, No. 19-4036 (U.S. filed Sept. 3, 2021), 2021 WL

4080669, at *6. Fortunately, this Court took up the question and showed more concern for the statutory text than ATF had. Text is always the starting point. *Cargill*, 602 U.S. at 415. And when "the statutory text is clear," it's also the ending point. *Id.* at 429 (Alito, J., concurring). Ultimately, ATF had impermissibly "abandon[ed] the text" of the statute it claimed to execute. *Id.* at 427.

### B. Stabilizing Braces

Fast forward to June 2021. ATF issued another proposed rulemaking, this one addressing stabilizing braces. Factoring Criteria for Firearms With Attached "Stabilizing Braces" ("Brace Proposed Rule"), 86 Fed. Reg. 30826-01 (June 10, 2021). Stabilizing braces are "orthotic devices that attach to the rear of a firearm" that allow someone "to secure [a] pistol against their forearm." Br. for Plaintiffs at 5, *Firearms Regulatory Accountability Coalition, Inc.* (*FRAC*), v. *Garland*, No. 23-3230, , 2024 WL 3737366 (8th Cir. Aug. 9, 2024). These braces were "designed" to help "people with disabilities or limited strength or mobility" fire pistols "safely and comfortably." Factoring Criteria for Firearms With Attached "Stabilizing Braces" ("Brace Final Rule"), 88 Fed. Reg. 6478-01, 6482 (Jan. 31, 2023). And though they are particularly helpful for people with physical disabilities, stabilizing braces promote safety and accuracy for any user. See Br. for Plaintiffs at 7, *FRAC*, No. 23-3230.

For a great long while, ATF approved of these assistive devices. Indeed, between 2012 and 2018, "ATF issued [seventeen] classifications of 'stabilizing braces.'" 88 Fed. Reg. at 6502 n.84. In every instance, the agency concluded that the brace was not a "firearm" covered by the NFA. *Id.*

ATF's (previously) long-standing approach to stabilizing braces was consistent with the statute. The NFA regulates "firearms," but "'firearms' is a term of art." *Mock* v. *Garland*, 75 F.4th 563, 567 (5th Cir. 2023). As relevant here, "firearms" under the NFA includes two types of long guns: shotguns and rifles. 26 U.S.C. § 5845(a). The definitions for shotguns and rifles have this common thread: they are weapons that are "designed," "made," "and intended to be fired from the shoulder." *Id.* at § 5845(c),(d). The broader "firearm" definition targets shotguns and rifles in two ways each—as produced and as modified. See *id.* at § 5845(a). As to shotguns, the NFA covers shotguns with "[(1)] barrels of less than 18 inches in length" and "[(2)] weapon[s] made from a shotgun" if they have "barrels of less than 18 inches in length" or an "overall length of less than 26 inches." *Id.* The clauses governing rifles follow the same structure: they cover rifles with "[(3)] barrels of less than 16 inches in length" and "[(4)] weapon[s] made from a rifle" if they have "barrels of less than 16 inches in length" or "an overall length of less than 26 inches." *Id.* And "make" (and its derivatives) means "manufacturing" "other than by one qualified to engage in such business." 26 U.S.C. § 5845(i). So "made from" a shotgun or rifle in (a)(2) and (4) means someone, after initial production, shortened or modified a rifle or shotgun. *Id.* § 5845(a). That leaves (a)(1) and (3) to cover shotguns and rifles as produced. *Id.*

But ATF's Brace Proposed Rule abandoned all that. The rule's ostensible purpose was to evaluate whether pistols with stabilizing braces were "shotguns" or "rifles" covered by the NFA. But to do that, the agency created a worksheet out of thin air that purportedly helped determine if a stabilizing brace is a firearm "designed and intended to be fired from the shoulder." Brace Proposed Rule, 86 Fed. Reg. at 30829. The Worksheet established

"a point system assigning a weighted value to various characteristics." *Id.*

A year and half later, ATF released the Brace Final Rule. Considering the two-hundred thousand negative comments, "the Department agree[d] that the proposed Worksheet … and point system did not achieve [its] intended purposes." Brace Final Rule, 88 Fed. Reg. at 6510. So, ATF scratched the Worksheet and adopted something shorter—a six-factor balancing test "based on almost entirely subjective criteria." *Mock*, 75 F.4th at 583. But "nowhere in the Proposed Rule did the ATF give notice that it was considering getting rid of the Worksheet for a vaguer test." *Id.* at 584. And the Rule was predicted to have a gargantuan impact—affecting 99% of all stabilizing braces on the market. Bureau of Alcohol, Tobacco, Firearms & Explosives, Factoring Criteria for Firearms with Attached "Stabilizing Braces": Final Regulatory Impact Analysis and Final Regulatory Flexibility Analysis 21 (2023).

Yet the Brace Final Rule was a building with no foundation, as the statutory text rejects ATF's interpretation. To start, a pistol with a stabilizing brace is not a firearm covered by the NFA. As laid out above, the NFA covers only a narrow subset of firearms. See 26 U.S.C. § 5845. A pistol is not one of them. See *id.* A pistol with an accessory could not be covered by (a)(1) or (3), because those definitions reach only shotguns and rifles, as produced. *Id.* Neither could a pistol with an accessory be covered by (a)(2) or (4) because those reach only "weapon[s] made" from a shotgun or rifle. *Id.* Subsection (e) confirms that pistols are not covered because it explicitly excludes pistols from the broader "firearm" definition. See *id.* At bottom, a pistol with an accessory is

not a rifle or shotgun. ATF's interpretation is precluded by the plain text of the NFA.

ATF's Brace Final Rule also disfigures the statutory definitions of "rifle" and "shotgun." Remember that both rifles and shotguns are defined, in relevant part, as weapons that are "designed," "made," "and intended to be fired from the shoulder." 26 U.S.C. § 5845(c),(d). The Brace Final Rule conflicts with these definitions. Stabilizing braces were designed to assist people with disabilities or limited strength to stabilize non-shouldered fire. And statutorily, that matters. Designed "refers to the design of the manufacturer, not the intent of the retailer or customer." *Vill. of Hoffman Ests.* v. *Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 501 (1982).

The Brace Final Rule likewise reinterprets "intended." 26 U.S.C. § 5845(c),(d). To be a rifle or shotgun covered by the NFA, the weapon must be "intended to be fired from the shoulder." *Id.* According to ATF, though, a manufacturer's "stated intent" is not "dispositive" of whether the weapon is "intended" to be used in shouldered fire. Brace Final Rule, 88 Fed. Reg. at 6479. So, under the Final Rule, whenever "stated intent" apparently falls short, ATF will look to the "likely use of the weapon in the general community." *Id.* at 6480. But analyzing "third parties' actions" to determine a manufacturer's intent is wrong. *Mock*, 75 F.4th at 585. The subjective intent of a purchaser does not change the objective intent of a manufacturer. See *Vill. of Hoffman*, 455 U.S. at 501. By basing its "intent" analysis on the "likely use of the weapon in the general community," Brace Final Rule, 88 Fed. Reg.at 6480, ATF threatens to "hold citizens criminally liable for the actions of others, who are likely unknown, unaffiliated, and uncontrollable by the person being regulated," *Mock*, 75 F.4th at 586.

Yet with the wave of a hand, ATF dismissed every counterargument raised. It described its seventeen previous interpretations that found that a stabilizing brace was *not* covered by the NFA as "past inconsistences and misapplication[s] of the statutory definition," claiming to now "rectify its past classifications." Brace Final Rule, 88 Fed. Reg. at 6503. For the factors in its newly invented test that are ambiguous, ATF "does not believe it is appropriate or necessary to specify a quantifiable metric" to provide clarity. *Id.* at 6529. To the concern that there's no statutory basis for the rule, the agency simply "does not agree." *Id.* at 6500. And oddly, ATF claims "this rule does not impose any new legal obligations on owners of 'stabilizing braces' at all." *Id.* at 6506. "Instead, this rule merely conveys more clearly to the public" what is covered by the statute. *Id.*

It didn't take long for courts to respond to how ATF's Brace Final Rule mangled the NFA. The Fifth Circuit quickly recognized that the rule should be set aside as unlawful and remanded, flagging many of the issues above. *Mock*, 75 F.4th at 586; see also *Mock* v. *Garland*, No. 4:23-CV-00095-O, 2024 WL 2982056, at *6 (N.D. Tex. June 13, 2024) (vacating the rule). And at the behest of many of the States here, the Eighth Circuit just recently reversed the denial of a preliminary injunction, too. See *Firearms Regulatory Accountability Coalition, Inc.* (*FRAC*), v. *Garland*, No. 23-3230, 2024 WL 3737366 at *13 (8th Cir. Aug. 9, 2024). In finding that the Brace Final Rule and certain related actions likely did not comply with the APA, the court sharply condemned "[t]he ATF's act-now-and-justify-later decisionmaking." *Id.* at *12 n.15. And it agreed with the Fifth Circuit that the rule made it "nigh impossible for a regular citizen to determine … whether a specified braced pistol required NFA registration." *Id.* at 11 (cleaned up). So once more,

ATF showed itself an untrustworthy steward of the statutes.

### C. Firearms Dealing

Fast forward once more, this time to September 2023. ATF proposed a rule defining who might qualify as a "dealer" under the GCA. "Definition of "Engaged in the Business" as a Dealer in Firearms ("Dealer Proposed Rule"), 88 Fed. Reg. 61993-01, 61993 (Sept. 8, 2023).

Defining "dealer" has long been a fraught exercise—but one in which Congress has been directly engaged. Initially, the GCA defined "dealer" as "any person engaged in the business of selling firearms or ammunition at wholesale or retail." Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1216 (Oct. 22, 1968). But about fifteen years after GCA's passage, Congress worried about the agency's abusive enforcement of the statute. ATF "[a]gents [were] anxious to generate an impressive arrest and gun confiscation quota," so they "repeatedly enticed gun collectors into making a small number of sales." See *The Right to Keep and Bear Arms,* Rep. of the Subcomm. on the Const., Sen. Jud. Comm., 97th Cong., 2d Sess., at 25 (1982). Then, the agents would "charge[] the collector with having 'engaged in the business'" of dealing firearms under the GCA, even though "each of the sales was completely legal under state and federal law." *Id.* To stop this kind of abuse, Congress passed FOPA. See 100 Stat. at 449. The Act clarified that GCA's purpose was not to "place any undue or unnecessary" burdens on law-abiding citizens who wanted to own firearms. *Id.* To that end, FOPA narrowed the definition of "dealer" by defining what it meant to be "engaged in business." *Id.*

Instead of capturing "*any* person engaged in the business of selling firearms or ammunition at wholesale or

retail," 82 Stat. at 1216 (emphasis added), FOPA clarified that someone was "engaged in business" only if they: "[1] devote[d] time, attention, and labor to dealing in firearms [2] as a regular course of trade or business [3] with the principal objective of livelihood and profit through [4] the repetitive purchase and resale of firearms," 100 Stat. at 450. Note that this narrowed "dealer" in *four* distinct ways. FOPA also specified that "with the principal objective of livelihood and profit" was to mean "that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain." *Id.* And Congress provided some express exclusions for hobbyists or collectors. *Id.* Altogether, Congress could hardly have been clearer: "dealer" is a high bar.

In 2022, Congress made a minor change to this definition. In the BSCA, it modified "engaged in business," by replacing "the principal objective of livelihood and profit" with "to predominantly earn a profit." 136 Stat. at 1324 (codified at 18 U.S.C. § 921(a)(21)(C)). And it defined "predominantly earn a profit" to mean "that the intent underlying the sale . . . is predominantly one of obtaining pecuniary gain." 136 Stat. at 1325 (codified at 18 U.S.C. § 921(a)(22)). These BSCA amendments thus made two small tweaks: swapping "predominantly" for "principal objective," and eliminating "livelihood" from both definitions. See *id.* As with the earlier definition, BSCA maintained that someone purchasing or selling guns for a "personal firearms collection" was not "engaged in business." *Id.* And it added that "proof of profit" was not required when persons are selling "firearms for criminal purposes or terrorism." *Id.*

ATF took BSCA as an invitation to turn the system upside down. Galvanized by this minor statutory adjustment, it proposed a new rule to "clarify" the meaning of terms Congress just defined. Dealer Proposed Rule, 88 Fed. Reg. at 61993. And in April of this year, it finalized that rule. Definition of "Engaged in the Business" as a Dealer in Firearms ("Dealer Final Rule"), 89 Fed. Reg. 28968-01 (Apr. 19, 2024). In it, ATF pledges its allegiance to the "overall sentiment" animating its actions: "we must do what we can to stop gun violence." *Id.* at 28984.

ATF's legislative aspirations are the star of Dealer Final Rule. To be "engaged in the business" of firearms dealing, the Rule says "there is no minimum number of transactions" needed. 89 Fed. Reg. at 29091; 27 C.F.R. § 478.13(b). In fact, "even a single firearm transaction *or* offer to engage in a transaction" may be enough. *Id.* (emphasis added). The Rule also creates out of the void five presumptions, three with multiple subparts, that could be used to show someone is "engaging in the business" of firearms dealing. 27 C.F.R. § 478.13(c). The Rule further declares that one's intent can be "predominantly [to] earn a profit" even if the seller doesn't "actually obtain … pecuniary gain." *Id.* at § 478.13(d)(1). And the Rule excludes firearms obtained for "personal protection" from the definition of "personal collection." *Id.* at § 478.11.

But once more, ATF's rule has a problem: namely, its inconsistency with the statute meant to justify it.

First, the Rule's "engaged in business" definition is incompatible with the statutory one. The GCA emphasizes one must sell multiple—and usually many—firearms to be "engaged in business." 18 U.S.C. § 921(a)(21)(C). The statute refers to a "dealer in

firearms"—plural; it requires someone "deal[] in firearms" (again plural) "as a *regular course* of trade or business"; and it demands someone engage in "the *repetitive* purchase and resale of firearms" to be considered a dealer. *Id.* (emphasis added). And as a matter of commonsense, it's logical that someone must sell at least two guns to be a firearms dealer.

Yet the ATF insists "there is no minimum number of transactions" needed to be considered a "dealer." 89 Fed. Reg. at 29091; 27 C.F.R. § 478.13(b). "[E]ven a single firearm transaction *or* offer to engage in a transaction" may be enough. *Id.* (emphasis added). Worse still are the presumptions. The first one shows it best: someone can be presumed to be "engaged in the business" of firearm dealing if they "(1) [r]esell[] *or* offer[] for resale firearms, and also represent[] to potential buyers *or* otherwise demonstrate[] a willingness and ability to purchase and resell additional firearms." 27 C.F.R. § 478.13(c)(1) (emphasis added). In other words, if someone offers guns for resale once and gives off the sense that they might resell other guns, they are "engaged in the business" of firearms dealing—all while selling *zero* firearms. See *id.*

Second, the Rule is incompatible with the GCA's intent requirement. The GCA says that "predominantly to earn a profit" means that one's intent is "predominantly one of obtaining pecuniary gain." 18 U.S.C. § 921(a)(22). But ATF's Rule guts that. In its view, "predominantly [to] earn a profit" doesn't mean someone "actually [must] obtain pecuniary gain." 89 Fed. Reg. at 29090; 27 C.F.R. § 478.13(d)(1). This definition is at odds with the one in the GCA. And for all ATF's talk of how BSCA changed things, there is one relevant addition—but it cuts against ATF's claims. The BSCA specified that for those selling "firearms for criminal purposes or terrorism," no "proof

of profit" was needed to prove intent. 18 U.S.C. § 921(a)(22). "[T]he negative corollary is obvious: while proof of profit is not required 'for criminal purposes or terrorism,' it *is* required for all other cases." *Texas* v. *ATF*, No. 2:24-CV-89-Z, 2024 WL 2277848, at *6 (N.D. Tex. May 19, 2024).

Third, the Dealer Final Rule improperly subverts GCA's safe-harbor provision. Under the GCA, one who sells or purchases firearms for a "personal collection or for a hobby" is not a "dealer." 18 U.S.C. § 921(a)(21)(C). The Final Rule, though, excludes "firearms accumulated primarily for personal protection" from the definition of "personal collection." 89 Fed. Reg. at 29090; 27 C.F.R. § 478.11. That exclusion has no statutory basis, and it strips the "personal collection" exception of its force. See 18 U.S.C. § 921(a)(21)(C). A natural reading of "personal collection" includes guns owned for personal protection. After all, self-protection is "central to the Second Amendment right." *District of Columbia* v. *Heller*, 554 U.S. 570, 628 (2008).

Aside from the textual conflicts between the GCA and the Dealer Final Rule, there's one more foundational issue: the GCA does not give ATF authority to define terms in the first instance. Remember ATF's circumscribed authority under the GCA: it may "prescribe" only those "rules and regulations [that] are *necessary* to carry out [the GCA's] provisions." 18 U.S.C. § 926(a) (emphasis added). Then, look to the GCA's definition of "collector." *Id.* § 921(a)(13). That definition mentions "curios or relics," and instructs that "the Attorney General shall by regulation define" the term. *Id.* Thus, Congress instructed ATF to create a definition only for one minor phrase in the GCA. An express grant of authority to define one term strongly implies a lack of

authority to define the thirty-six others. See *Bittner* v. *United States*, 598 U.S. 85, 94 (2023) ("[D]ifference[s] in language" "convey a difference in meaning."). That's especially true when you remember ATF has limited authority under the statute to begin with. See 18 U.S.C. § 926. And even if ATF could define a minor term here or there, there is no world in which it is "necessary" for ATF to redefine the statute's most crucial terms, thereby eviscerating the definitions Congress created. 18 U.S.C. § 926.

The impact is enormous. Anyone who qualifies as a "dealer" under the GCA must obtain a federal firearms license. See 18 U.S.C. §§ 922(a)(1), 923(a). And obtaining a license requires undergoing a background check. See *id.* So by making almost everyone a "dealer" under the GCA, ATF sneaks universal background checks in the back door. But universal background checks are a hotly contested political issue. And an agency claiming newfound "sweeping and consequential authority" needs more than delegation "lurking" in the shadows of some statutory corner. *West Virginia* v. *EPA*, 597 U.S. 697, 721, 723 (2022). Thus, ATF's Dealer Final Rule raises serious questions under the major-questions doctrine. See *id.*

But as it did with the Brace Final Rule, ATF insists that all is well. ATF asserts people will "be no more exposed to criminal liability" than they were before the Rule. Dealer Final Rule, 89 Fed. Reg. at 28985. Instead—says ATF—"they will just have much clearer sense of what conduct does and does not fall" in GCA's reach. *Id.* As to universal background checks, ATF seemingly agrees with one of its commenters that "no one is being inconvenienced by doing a background check" anyway. *Id.* And what does ATF say to the tens of thousands of commentors who thought the regulation was vague, overly

complex, or beyond statutory authority? Here, too, they just "disagree." *Id.* at 28991, 29010.

As for statutory authority, ATF leans on a cut-and-paste from the enabling statute and this quote from an older Fourth Circuit case: "Because [the GCA] authorizes the Secretary to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.'" *Nat'l Rifle Ass'n* v. *Brady*, 914 F.2d 475, 479 (4th Cir. 1990). Nothing screams "lacking statutory authority" like necessary doesn't *really* mean necessary. Only one case has ever been fooled into relying on that faulty proposition—the district court's now-repudiated decision in *Cargill*. See *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1186 (W.D. Tex. 2020). And even *NRA* recognized that ATF was not to "stray from the directives of the statute." *Nat'l Rifle Ass'n*, 914 F.2d at 479. No wonder, then, that courts have already recognized the serious flaws in this rule, too. See, *e.g.*, *Kansas* v. *Garland*, No. 24-CV-01086, 2024 WL 3360533, at *7 (D. Kan. July 10, 2024) ("Plaintiffs identified instances where the Final Rule may have effectively attempted to rewrite the statute, which the agency may not do."); *Texas*, 2024 WL 2277848, at *5 ("[T]he Final Rule clashes with the text of the BSCA in at least three ways.").

So the Dealer Rule was a *third* recent example of ATF endeavoring to evade the limits of the very statutes it was purporting to construe.

### D. This Rule

All that brings us to the dispute before the Court now. In trying to squeeze "weapons parts kits" within the meaning of GCA's definition of "firearm," ATF is once more trying to stretch its enabling statutes too far. In

every instance outlined above, "[t]he law hasn't changed, only [the] agency's interpretation of it." *Guedes* v. *ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.). And with each broad-brush expansion of liability, a host of constitutional and other issues arise—be it inconsistency with the major questions doctrine, violations of Second Amendment rights, or new Due Process concerns. So too here. ATF's rule just isn't grounded in the statute, as Respondents well explain. See VanDerStok Br. 18-33; Defense Distributed Br. 13-22.

But here, ATF is also playing fast and loose with its responsibilities under the APA, which only further compounds the problem. The rule at issue turns on the definition of "frame or receiver" in the GCA. And under the proposed rule, a "frame or receiver" embraced any part that could "hold" or "integrate" "one or more fire control components," which was in turn defined as "a component necessary for the firearm to initiate, complete, or continue the firing sequence." Definition of "Frame or Receiver" and Identification of Firearms ("Frame Proposed Rule"), 86 Fed. Reg. 27720, 27741 (May 21, 2021). But that definition would have covered all sorts of firearms parts, which meant modern firearms would then have many different "frames" or "receivers." When commenters flagged that reality, ATF at least agreed its proposed definition was unworkable. Frame Final Rule, 87 Fed. Reg. at 24692. But ATF didn't propose a new definition and invite comment (which might've allowed commenters to flag the problems lurking in any new definition, too). *Id.* Instead, ATF just did its work on the fly; the final rule adopts "new distinct definitions describing a specific housing or structure for one specific type of fire control component." *Id.* at 24693. Specifically, the new definition focused on the "primary energized component designed to hold back the hammer, striker,

bolt, or similar component." *Id.* at 24735. Put differently, ATF shifted from focusing on every discernible component of a firing sequence (and any housing or structure for it) to fixing on just one specific piece. ATF plucked this new formulation from a comment. *Id.* at 24693.

So this case presents a "logical outgrowth" problem—a situation in which the agency "significantly amended the rule between the proposed rule and final versions, making it impossible for people to comment on the rule during the comment period." *Ohio* v. *EPA*, 144 S. Ct. 2040, 2056 (2024) (cleaned up). The APA forecloses that approach. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007) (describing how the courts of appeals have construed 5 U.S.C. § 553(b)(3)). In other words, the APA won't countenance a rulemaking process in which "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (cleaned up). And "[a]n agency ... does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period." *Mock*, 75 F.4th at 584.

It's hard not to draw troubling conclusions from these moves. ATF's approach could well give off the sense that it did not want to be told again why it was employing extra-statutory understandings. Instead, the agency preferred to skip to the end and reach its desired result. This bait-and-switch is yet another reason not to countenance this rule. "Otherwise, agencies could hide their true proposal from public scrutiny by proposing something completely unrelated to what they intend to promulgate as a final

rule." Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 895 (2007). And as should be obvious to this point, ATF's efforts warrant plenty of scrutiny.

* * *

Congress has not outlawed weapons parts kits, stabilizing braces, or bump stocks. Nor has it dubbed every person handling a gun a firearms dealer. ATF can't take these actions in Congress's place. The agency's error, here, provides another peek behind the curtains. And looking backstage, it's clear that ATF is a legislative body poorly disguising itself as an executive one—even going so far as to use procedural maneuvers to avoid scrutiny.

ATF has a history of ignoring statutory text and APA mandates. The Court should keep that history in mind when providing ATF with course correction here. Cf. *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2258 (2024) (explaining how "respect" for administrative determinations was only warranted under early cases when agencies had shown themselves "masters of the subject" who had consistently implemented the statute). Especially when key constitutional rights, *Luis* v. *United States*, 578 U.S. 5, 26-27 (2016) (Thomas, J., concurring), and potential criminal liability, 18 U.S.C. §§ 922, 924, are in play (as they are here), the Court should not blind itself to the ATF's pattern of conduct.

## II. Policy Concerns Can't Trump Statutory Text.

Left with little in the way of textual support, many of ATF's *amici* argue that this Court should depart from the statute's plain meaning because excluding "ghost guns" from the GCA's scope would purportedly have dire

consequences. *See, e.g.*, Br. of Amicus Curiae Global Action on Gun Violence, at 3-4; Br. of Dist. Att'y N.Y. Cnty. et al., as Amici Curiae, at 17 ("home-assembled firearms' … functional equivalence to pre-assembled guns confirms the need for the regulatory oversight provided by the Final Rule"); Br. of Amici Curiae 20 Major Cities et al., at 12 (arguing that vacating ATF's final rule will likely lead to a surge in the use of ghost guns in criminal activity); Br. of Major Cities Chiefs Ass'n et al., as Amici Curiae, at 13-14 (commending ATF's final rule and arguing that it shouldn't be set aside because it helps "keep [ghost guns] out of the hands of criminals" (internal quotation marks omitted)). By focusing less on the law and more on the policy, the *amici* seem to be pursuing the same ends-justify-the-means approach that ATF has pushed in its prior rulemaking efforts. And some of the "ends" seem speculative, as when Petitioners ominously warn about a world in which "juveniles"—that is, children—will start manufacturing their own firearms "in a few minutes." Pets.' Br. 43.

But to resolve this case, the Court need not resolve whether it's likely children will start building their own pistols or whether kits that have been legal for years will suddenly come into vogue, sparking a crime wave. Nor need the Court wrestle with how to draw the line between kits and ordinary "hardware store components," both of which can be fashioned into weapons. See Reuben Dass, *The Assassination of Shinzo Abe in Japan and the Threat from Primitive Homemade Weapons*, JAMESTOWN FOUND. TERRORISM MONITOR (Oct. 7, 2022), https://bit.ly/3WE4krc. In the end, no matter how wise ATF's final rule or how "weighty" Petitioners' policy concerns may be, the final rule exceeds ATF's statutory authority. And that should be the end of the matter. Even more so when the new administrative effort purports to

tackle a closely contested issue by putting an "unprecedented" new spin on a long-existing statute. *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021).

Even if ATF's final rule rested on a so-called "permissible" construction of the GCA that may have warranted deference under *Chevron*, this Court just shut that door. "It … makes no sense," the Court just recognized, "to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best." *Loper Bright*, 144 S. Ct. at 2266. In the business of statutory interpretation, if it is not the best, it is not permissible." *Id.*

And setting *Loper Bright* aside for the moment, our core constitutional commitments foreclose ATF's attempt to bend the GCA to achieve policy goals that Congress has yet to embrace. "[P]olicy concerns cannot trump the best interpretation of the statutory text." *Patel* v. *Garland*, 596 U.S. 328, 346 (2022). "In the face of … unsuccessful legislative efforts … judges may not rewrite the law simply because of their policy views[,] … update the law merely because they think that Congress does not have the votes or fortitude[,] … [or] predictively amend the law[.]" *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 782 (2020) (Kavanaugh, J., dissenting). "No statute pursues a single policy at all costs, and we are not free to rewrite this statute (or any other) as if it did." *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023). And in much the same way that firearms violence cannot justify ignoring the Constitution, *Heller*, 554 U.S. at 636, the same problem cannot justify ignoring congressional statutes, either.

As a practical matter, "executive officials are not, nor are they supposed to be 'wholly impartial'" on policy choices like those reflected in ATF's final rule—indeed,

ATF has "[its] own interests, [its] own constituencies, and [its] own policy goals" that are reflected in the final rule. *Kisor* v. *Wilke*, 588 U.S. 558, 615 (Gorsuch, J., concurring). That bias makes it only more important that this Court not cede its obligation to adopt the fairest and best reading of the statute, even if it differs from ATF's preferred reading. For "[u]nder the Constitution's separation of powers, [the Court's] role as judges is to interpret and follow the law as written, regardless of whether [the judges] like the result." *Bostock*, 590 U.S. at 780-81 (Kavanaugh, J., dissenting) (citing *Texas* v. *Johnson*, 491 U. S. 397, 420-21 (1989) (Kennedy, J., concurring)); *see also* THE FEDERALIST NO. 78, p. 523 (J. Cooke ed. 1961) (federal judges exercise "neither Force nor Will, but merely judgment").

Careful adherence by this Court to the text is not a matter of blind obedience. Rather, it is what it means to be a "[g]overnment of laws, not of men." *Zuni Pub. Sch. Dist. No. 89* v. *Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting). It is, after all, legislated or promulgated text that allows citizens to predictably order their affairs and avoid the "eternal fog of uncertainty" that deference to agency reinterpretations allows. *Loper Bright*, 144 S. Ct. at 2272. And it is what safeguards our right of self-government—the separation of legislative, executive, and judicial powers, enforced not by mere "parchment barriers" but by a judicial branch faithful to say what the law *is*, not what it *should be* (or would be if only the legislators knew better). *See Zuni*, 550 U.S. at 118 ("Why should we suppose that in matters more likely to arouse the judicial libido … a judge in the School of Textual Subversion would not find it convenient (yea, *righteous!*) to assume that Congress *must* have meant, not what it said, but what he knows to be best?"). In contrast, "[i]f judges could … rewrite or update … gun laws based

on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives." *Bostock*, 590 U.S. at 782-83 (Kavanaugh, J., dissenting).

The answer to the concerns raised by Petitioners' *amici*—weighty as they may be—is not to abandon our core constitutional commitments but to reaffirm them. The regulation of parts kits, like sports gambling and many other controversial subjects, requires important policy choices—but the choice is not for agencies or courts to make. Cf. *Murphy* v. *NCAA*, 584 U.S. 453, 486 (2018). The solution to those concerns lies in the halls of Congress, not in the chambers of the Supreme Court. See *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 589 U.S. 178, 188 (2020) ("If policy considerations suggest that the current scheme should be altered, Congress must be the one to do it."); *Cargill*, 602 U.S. at 429 (Alito, J., concurring) ("[A]n event that highlights the need to amend a law does not change its meaning," but there is a "simple remedy": "Congress can amend the law[.]"). So the Fifth Circuit correctly recognized below that "lawmaking power—the ability to transform policy into real world obligations—lies solely with the legislative branch." Pet.App.2a.

## CONCLUSION

This Court should affirm.

Respectfully submitted.

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