STATE OF MICHIGAN

IN THE 22nd JUDICIAL CIRCUIT FOR THE COUNTY OF WASHTENAW

GUY BOYD,

Plaintiff,

v.

Case No. 24-000304-NP
Hon. Julia B. Owdziej

NOT AN LLC d/b/a JSD SUPPLY and
KYLE THUEME,

Defendant.

CIVIL-CRIMINAL LITIGATION CLINIC By: David Santacroce (P61367) Attorney for Plaintiff 863 Legal Research Building 801 Monroe Street Ann Arbor, MI 48109-1215 (734) 763-4319	PENTIUK, COUVREUR & KOBILJAK, P.C. By: Kerry L. Morgan (P32645) And: Randall A. Pentiuk (P32556) Attorneys for Defendant Not an LLC d/b/a JSD Supply, Only 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100 kmorgan@pck-law.com rpentiuk@pck-law.com

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DEFENDANT NOT AN LLC d/b/a JSD SUPPLY'S MCR 2.116(C)(8) MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, NOT AN LLC doing business as JSD Supply ("JSD"), by and through its Attorneys, Pentiuk, Couvreur & Kobiljak, P.C., and moves this Court for Summary Disposition of Plaintiff Guy Boyd's Complaint pursuant to MCR 2.116(C)(8) for following reasons and pursuant to the accompanying Brief:

1. This case arises out of Defendant Kyle Thueme's ("Thueme") decision to deliberately load and aim a handgun at Plaintiff Guy Boyd's ("Boyd") face and pull the trigger, which Thueme "hoped" was empty, while the two of them were admittedly drunk and high as a result of their illegal consumption of drugs.

2. Boyd now seeks to hold JSD liable for Thueme's unforeseeable, criminal conduct because JSD allegedly sold unfinished, inoperable gun parts to Thueme, which he ultimately gun smithed and finished, then assembled into a working firearm, then obtained ammunition and ammunition magazines from third-parties, then loaded the firearm, and, finally, shot Boyd while intoxicated.

3. Boyd has asserted negligence, negligence *per se*, and negligent entrustment claims against JSD.

4. JSD was not legally required to hold a Federal Firearms License from the federal government (FFL), or required to verify Thueme's age or other eligibility before selling the Kits (as alleged in the complaint) to him because the Kits did not constitute, and JSD did not sell, a "firearm", "pistol" or "handgun" to Thueme, as defined by either state or federal law at the time. Rather, JSD sold inoperable gun parts, together with an unfinished, incomplete, and inoperable frame, which could not be assembled into a firearm in the unfinished condition in which the parts were sold. 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978).

5. Boyd's own lawyers are also confused, first alleging the kits can be purchased without a background check (Compl. ¶16), then alleging the kits are a firearm by themselves without further work (Compl. ¶32), then alleging "Thueme … assembled a pistol" (Compl. ¶110), then Defendant sold a complete firearm (Compl. ¶111). Yet, counsel elsewhere admits such kits are not "firearms." "[In]ATF's view, **these are essentially unregulated pieces of metal—which also means many sellers are not subject to ATF regulation and oversight**." (emphasis added). https://www.everytown.org/why-doesnt-the-atf-consider-ghost-guns-to-be-a-firearm/

6. Neither federal nor state law required JSD to verify Thueme's age or eligibility prior to selling him the unfinished Kits. 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978). Accordingly, Boyd's negligence, negligence *per se*, and negligent entrustment claims fail because JSD's alleged sale of the inoperable Kits to Thueme without verifying his age was perfectly lawful under both federal and state law. 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978). JSD is no more liable than Home Depot would be if it sold an unregulated hammer or hammer parts to a minor, who later got drunk and high, and used the hammer to hit his friend in the face.

7. Boyd's claims also fail because "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Here, Thueme committed a misdemeanor by illegally consuming drugs and then handling a firearm, which chain of events led to him shooting Boyd in the face. *See* MCL §750.237. JSD did not have any duty to protect Boyd from Thueme's criminal act of possessing and brandishing a loaded firearm while he was drunk and high. MCL §750.237. Thueme also failed to register the illegal pistol he manufactured as required by MCL §28.422 which prohibits possession without first having obtained a License to Purchase.

8. Moreover, Thueme appears to have engaged in at least three federal felonies. As a juvenile (under 18 years old), federal law prohibits him from possessing a handgun. It also prohibits possession of ammunition that is suitable for use only in a handgun. 18 USC § 922(x)(2). While possession of unregulated firearm parts and an unfinished, inoperable, and unregulated frame is not prohibited, federal law does prohibit Thueme from manufacturing those parts and frame into a handgun and possessing ammunition for that firearm. Federal law also prohibits

possession of a firearm by an "unlawful user of or addicted to any controlled substance" which currently includes marijuana under federal law. 18 USC § 922(g)(3).

JSD did not have a duty to protect Boyd from Thueme's numerous unforeseeable criminal acts under state and federal law.

9. Nor was there a continuous, unbroken chain of proximate causation from JSD's alleged sale of the unfinished frame and gun parts to Thueme. First, Boyd has not alleged Thueme correctly finished the kits including any safety devices. Second, Thueme's parents' failure to properly supervise their own son, when they in fact knew he was a drug user attempting to procure a handgun (Compl. ¶65), representing yet another break in the causal chain. Third, Thueme's act of obtaining a pistol magazine and ammunition from third parties breaks the chain. Fourth, Thueme's intentional and deliberate decision to become illegally impaired on drugs, aim a loaded firearm at his best friend's face and pull the trigger is the most immediate, direct proximate cause of Boyd's injuries. *Auto Owners Ins Co v Olympia Entm't, Inc*, 310 Mich App 132, 162; 871 NW2d 530 (2015) (intentional criminal acts are a superseding, intervening cause to break proximate cause chain).

10. Boyd's negligent entrustment claim fails as a matter of law, because he cannot possibly allege or prove that JSD knew or should have known of the unreasonable risk propensities of the entrustee (*i.e.* Thueme). *Fredericks v General Motors Corp*, 411 Mich. 712 (1981). JSD's representatives never personally met Thueme, nor was there any pre-existing relationship between them. Moreover, it was perfectly legal for JSD to sell the inoperable Kit package and an unfinished frame to Thueme without verifying his age. Indeed, it was perfectly legal for Thueme to own the items he purchased by JSD – only manufacturing them into a firearm was unlawful. Therefore, his status as a minor, which was unknown to JSD, cannot be the basis for negligent entrustment.

18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978). To again use the Home Depot analogy, if JSD is liable for selling unregulated parts and pieces that *can be used to construct* a firearm, then Home Depot would be liable for selling a metal tube, barrel bolt, and related parts that *can be used to construct* a firearm.

11. Finally, Boyd's Michigan Consumer Protection Act claim fails because JSD's sale of inoperable gun parts without verifying Thueme's age was specifically authorized by the Bureau of Alcohol, Tobacco and Firearms (ATF); there was never any "transaction" between JSD and Plaintiff Boyd because Boyd never purchased any products from JSD, and JSD never made any representations or statements to Boyd.

WHEREFORE, Defendant, Not an LLC d/b/a JSD Supply, respectfully requests that this Court grant its Motion for Summary Disposition, dismiss all claims against it and award it any other relief to which it is entitled.

Respectfully submitted,
PENTIUK, COUVREUR & KOBILJAK, P.C.

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Dated: May 8, 2024

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BRIEF IN SUPPORT OF DEFENDANT NOT AN LLC d/b/a JSD SUPPLY'S MCR 2.116(C)(8) MOTION FOR SUMMARY DISPOSITION

I. Introduction and Statement of Facts

This case arises out of Defendant Kyle Thueme's ("Thueme") decision to deliberately aim a home manufactured loaded handgun at Guy Boyd's ("Boyd") face and pull the trigger, which Thueme "hoped" was empty, while the two of them were admittedly drunk and high as a result of their illegal consumption of drugs. The following facts are derived from Boyd's Complaint for purposes of this Motion. Boyd alleges JSD is a Pennsylvania limited liability company, which sells various products, including gun parts and gun kits. (Complaint, ¶22 and 25). Boyd further alleges JSD is not a federal firearm licensee under 18 U.S.C. §§922(a), 923. *Id* at ¶23.

A. Thueme's Purchase of the Inoperable Parts and an Unfinished Frame.

Boyd alleges Thueme purchased two kits from JSD, the first being a Polymer 80 PF940c Completion Kit (which included a Polymer80 frame and a jig) [1] and the second being a "PF940c Full Build Kit – Minus Frame" (which included a slide, a barrel, a "Complete Lower Parts Kit" and a "Complete Slide Parts Kit", collectively "the Kits")[2]. Boyd alleges the "two companion Kits contained all the necessary components to quickly and easily build an operable pistol", the Kits can '"readily be converted to expel a projectile by the action of an explosive' and therefore constituted a firearm under federal law", and JSD offered the Kits for sale through its website. (Complaint, ¶41-44). No ammunition was sold by JSD.

Next, Boyd alleges Thueme first purchased the Kits online from JSD on April 9, 2021, for $464.97 that were shipped to his parents' house in Ypsilanti, Michigan. *Id* at ¶63. Boyd then alleges Thueme "assembled" a pistol from the Kits, but that Thueme's mother discovered it and took the pistol away from him. *Id.* at ¶65. Thueme placed another order from JSD's website on

[1] Boyd alleges the "frame" is the central component of the pistol and the "jig" is a tool used to guide the drilling necessary to complete assembly of the pistol. Boyd further alleges the "Completion Kit" included drill bits, a rear slide rail and a custom locking block with slide rail.

April 27, 2021 and paid $474.97 to have the more parts delivered to his parents' house a second time. *Id* at ¶67. Boyd alleges JSD did not verify Thueme's age or perform a background check on Thueme. *Id.* at ¶68-72.[3] Boyd also alleges Thueme purchased ammunition from an online seller named Outdoor Limited despite the fact that Thueme was a minor at the time because Outdoor Limited allegedly "did not require any meaningful age verification". *Id* at ¶82-84.[4]

B. Thueme Intentionally Points a Self-manufactured Pistol at Boyd and Shoots Him in the Face While Both are Drunk and High Due to Their Illegal Consumption of Alcohol and Marijuana.

Boyd and Thueme, who were best friends, were getting high and drunk in an RV parked in the driveway of Boyd's girlfriend's parents' home when Thueme pointed a pistol he loaded at Boyd's face and pulled the trigger, "hoping it was empty". *Id.* at ¶85-92. Both were minors at the time and therefore their consumption of alcohol and marijuana was illegal. *Id*. Boyd then alleges he suffered serious injuries as a result of Thueme shooting him. *Id* at ¶94-104.

II. Standard of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

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[3] Boyd acknowledged that by making a purchase on JSD's website, Thueme certified he was a permanent resident or US citizen, he was never convicted of a felony, a crime punishable by more than one year in prison or domestic violence misdemeanor, that he was not committed to a mental institution and that he was not under a court order restraining him from stalking, threatening or harassing a child or intimate partner. *Id* at ¶74.

[4] It is unclear why Boyd did not name Outdoor Limited as a defendant in this lawsuit given Boyd's allegation that Outdoor Limited should not have sold him ammunition. However, JSD assumes Boyd elected not to sue Outdoor Limited because Boyd may believe Outdoor Limited has immunity under 15 USC §7901 *et seq* ("PLCAA").

III. Argument

A. JSD Did Not Sell a "Firearm" to Thueme.

At the outset, it is critically important to clarify that JSD did not sell a "firearm", "pistol" or "handgun" to Thueme. Rather, JSD sold inoperable, incomplete, and unregulated gun parts, which required tools, machining and gunsmithing to finish into a pistol. The 80 percent frame was not complete when sold. It was not a firearm under state or federal law at the time it was sold. It is an *unfinished frame*. Nor can a Kit be physically "assembled" into a firearm as sold, without use of tools to manufacture and gunsmith.

The right to bear arms is, of course, enshrined in the Second Amendment of the United States Constitution. The tradition of at-home gun making predates the United States' founding and continues today. Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's Law Journal, 35 at 66 (2023). Considering this long-standing tradition, "[t]he federal government has never required a license to build a firearm for personal use". *Id* at 80.[5] In 1968, Congress passed the Gun Control Act (the "GCA"). Whether a particular transaction requires a Federal Firearms License (FFL) to sell, age verification and/or a background check is largely governed by the GCA's definition of the term "firearm" and state law. The GCA defines the term "firearm" as "any weapon…which will or is designed to or may be readily converted to expel a projectile by the action of an explosive" and "the frame or receiver of any such weapon", among other things. *See* 18 USC §921(a)(3)(c).

Because the GCA itself does not further define the terms "frame" or "receiver", the ATF defined those terms to mean "that part of a firearm which provides the housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to

[5] https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use ("a license is not required to make a firearm solely for personal use").

receive the barrel". *See* Title and Definition Changes, 43 Fed. Reg. 13531, 13537 (March 31, 1978).[6] For many decades, the ATF opined that *unfinished frames* and receivers did not qualify as "firearms", even if they only required a minimal amount of drilling or milling to "finish" them.

This is evidenced by numerous, official letter rulings issued by the ATF regarding the exact unfinished frame sold here. "Classification Letters" issued to Polymer80 by the ATF determined that Polymer80 pistol frame or receiver blanks are not "firearm[s]" under the meaning of the Gun Control Act. See **Exhibit A,** Classification Letter, ATF (Nov. 2, 2015) (determining that Polymer80's Glock-type GC9 pistol frame blank and Polymer80's Warrhogg receiver blank are not firearms); **Exhibit B**, Classification Letter, ATF (Jan. 18, 2017) (determining that Polymer80's PF940C pistol blank frame is not a firearm). [7]. S*ee also California v ATF,* 2024 WL 779604, at *17 (N.D. Cal. Feb. 26, 2024) (**Exhibit C**)("a partially complete AR-type receiver cannot fairly be characterized as a weapon" and "language from the GCA underscores that a receiver is not a weapon in of itself but rather is *part* of a weapon); *Vanderstok v Garland,* 86 F4th 179, 188 (5th Cir, 2023), cert. granted, No. 23-852, 2024 WL 1706014 (U.S. Apr. 22, 2024) (**Exhibit** D)(the ATF has itself has argued an unfinished frame or receiver does not meet the statutory definition of a 'firearm' simply because it is 'designed to' or 'can readily be converted into' a frame or receiver)*;* *United States v Rowold*, 429 F Supp 3d 469 (6th Cir 2019)(granting motion to dismiss where defendants possessed lower receiver because that unfinished receiver did not fall within the ATF's definition of receiver contained in 27 CFR§ 478.11).[8]

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[6] This definition remained unchanged for over forty years until the ATF issued a Final Rule in 2022. *Vanderstok* involved the validity of that new ATF regulation, however, such regulations do not apply retroactively and the 2022 rule is inapplicable to the transactions at issue here, which occurred in 2021. *See Criger v Becton*, 902 F2d 1348 (8th Cir Mo 1990); *Hem v Maurer*, 458 F3d 1185 (10th Cir Colo, 2006).

[7] The unfinished frame Thueme allegedly purchased from JSD in this case is an exact copy of the Polymer80 unfinished frame the ATF has determined, time and time again, is not a "firearm" within the meaning of the GCA.

[8] *See* Are "80%" or "unfinished" receivers illegal? https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal

For decades, Congress, federal courts and the ATF have consistently declared that the sale of unfinished receivers and/or frames and inoperable gun parts (like those at issue here) are in fact "parts" and does not constitute the sale of "firearms". Therefore, sellers of these items are not required to perform age verifications or background checks**.** *See* 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed. Reg. 13531, 13537 (March 31, 1978) and *Rowold, Id.* Thus, Boyd's allegations that JSD allegedly sold Thueme a "firearm", "pistol" or "handgun" are demonstrably false as a matter of law.

Nor could JSD have become federally licensed to sell non-firearms, as Boyd desires, because licensure is reserved only for those "engage[d] in the business of importing, manufacturing, or dealing in *firearms*." 18 U.S.C. Section 923 (emphasis added). Nor, even if JSD had been licensed, could it lawfully have run a background check on Thueme. *See* 28 CFR § 25.6(a) ("FFLs may initiate a NICS background check *only* in connection with a proposed *firearm transfer* as required by the Brady Act. FFLs are *strictly prohibited* from initiating a NICS background check for any other purpose.") (Emphasis added). The alleged deficiencies that Thueme identifies in JSD's business practices are, in reality, legal impossibilities.

B. <u>Boyd's Negligence Claim Fails Because JSD Did Not Owe Boyd a Duty as Alleged, JSD Did Not Violate Any Laws, Thueme's Misuse of the Kits and Illegal Possession of a Completed Handgun While Using Illegal Drugs Was Not Foreseeable, and Thueme (Not JSD) Was The Proximate Cause of Any Injury to Boyd.</u>

Boyd's negligence claim against JSD fails and should be dismissed for the following reasons. First, JSD did not owe Plaintiff Boyd any duty of care as alleged in the Complaint[9]. Specifically,

[9] To establish a *prima facie* case of negligence, a plaintiff must show (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff injuries, and (4) that the plaintiff suffered damages. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). "Duty" is defined as the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). "In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Hakari v Ski Brule Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998). There can be no actionable negligence if no duty exists. *Id*. The threshold issue of whether

Boyd alleges JSD's sale of inoperable and incomplete gun parts "without verifying his age in any way deviated from the standard of care". (Complaint at ¶107). Boyd further alleges "JSD also had a duty to keep children under 18 from purchasing or possessing handguns and pistols in order to prevent foreseeable harm". *Id.* at ¶109. Of course, JSD never sold a handgun or pistol.

This common law negligence theory fails as a matter of law. First, it was perfectly legal for JSD to sell the unfinished and inoperable Kits to Thueme without verifying his age because the Kits were not "firearms." *See* 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978)[10], *California v ATF*, *Vanderstok* and *Rowold, Id.* JSD's business operated within the confines of federal and state law and pursuant to express, official instruction from the ATF itself. *Id*. JSD did not owe Boyd a duty to verify Thueme's age because Congress, federal courts and the ATF consistently determined that the Kits are not "firearms" and therefore sellers are not required to hold FFLs or perform age verifications. *Id*. Second, Boyd's allegation that JSD owed Boyd a duty to refrain from selling "handguns" or "pistols" to children under 18 is a red herring because Boyd (and his lawyers) know JSD did not sell Thueme a "handgun", "pistol" or a "firearm". Similarly, Michigan does not regulate the sale of such parts in any way.[11]

In addition to pleading common law negligence, Boyd also attempts to assert a negligence *per se* claim by falsely alleging JSD violated numerous laws. Sometimes the applicable standard of care is supplied by a statute or legal regulation. See e.g. *Holmes v Merson*, 285 Mich 136, 139; 280 NW 139 (1938)("the generally accepted view is that violation of a statutory duty constitutes

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a duty exists is determined by the court as a matter of law. *Graves v Warner Bros,* 253 Mich App 486, 492; 656 NW2d 195 (2002).

[10]The following link contains a complete copy of the CFR/rule in effect at the time Thueme allegedly purchased the Kits from JSD. https://www.govinfo.gov/content/pkg/FR-1978-03-31/pdf/FR-1978-03-31.pdf

[11] Indeed, even according to Boyd's own lawyers, Michigan does not regulate (or prohibit) the sale of Kits like those at issue here in any way. https://everytownresearch.org/rankings/law/ghost-guns-regulated/

negligence *per se*.").[12] Boyd's negligence *per se* claim is contained in paragraph 111 of his Complaint in which he alleges "JSD's sale of the Kits to Defendant Thueme also violated numerous laws, including MCL §28.422, by not filling out a license form after selling or otherwise providing Defendant Thueme **a pistol**", the "Youth Handgun Safety Act of 1993, 18 USC §922(x) by selling, delivering, or otherwise transferring **a handgun** to a juvenile"; and the Federal Gun Control Act of 1968, 18 USC §922(a)(1)(A) by engaging in the business of dealing in **firearms** by selling the Kits". (Emphasis added). None of these laws states a private right of action. Plaintiff's conclusionary pleading puts the cart before the horse. Neither Federal nor Michigan law require a License to Purchase firearm *parts or unfinished frames*.

Indeed, the foregoing statements are not well grounded in fact nor warranted by existing law (or a good faith argument for extension of law) because Boyd and his counsel know (or should know) that the inoperable gun parts Thueme allegedly purchased from JSD are **not** included within the definition of a "firearm". *See* 18 USC §921(a)(3)(c).[13] Thus, the statutes referenced by Boyd are inapplicable to the transactions at issue and cannot give rise to a negligence *per se* claim.

Boyd cannot cite any Michigan case law (or any statute) that imposed a duty on JSD to verify Thueme's age prior to selling him inoperable gun parts because no such law exists. Moreover, even if Thueme did create a firearm from the Kits (and failed to register it), Boyd conveniently ignores the fact that a minor may possess a firearm under certain circumstances, including under an adult's supervision and for hunting and target shooting. *See* MCL §750.234f and 18 USC

[12] Restatement Torts, 2d, § 285, p 20 ("The standard of conduct of a reasonable man may be . . . established by a legislative enactment or administrative regulation which so provides[.]"). In such cases, the statute "establishes the standard of care" and "its breach establishes the first two elements of negligence: duty and breach of duty." 1 Modern Tort Law: Liability and Litigation (May 2022 update), § 3:79. The violation of such a statute thus establishes negligence *per se*, i.e., that the defendant acted negligently. *See also Westover v Grand Rapids R Co*, 180 Mich 373, 378; 147 NW 630 (1914) (noting that "a violation of a statute imposed under the police power of the State is negligence *per se*.").

[13] In fact, Boyd's lawyers admit the Kits are not firearms. https://www.everytown.org/why-doesnt-the-atf-consider-ghost-guns-to-be-a-firearm/

§922(x)(3). Boyd may not like the fact that JSD was not required to perform any age verifications or background checks under either federal or state law and that Thueme, even as a minor, could lawfully possess a fully functional firearm under certain circumstances. However, this Court is required to enforce laws as they are written, not as Boyd wishes they were written.[14]

Next, Boyd's negligence claim fails because Thueme's criminal conduct was not foreseeable. There is no legal duty obligating one person to aid or protect another and, in particular, "an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." Footnote 8, *Graves, supra* at 493. This is because "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Here, Thueme was illegally consuming drugs while handling a firearm, which resulted in him shooting Boyd in the face. *See* MCL 750.237.[15] He also violated federal law by possessing the handgun he had previously manufactured. *See* 18 USC § 922(x)(2); 18 USC § 922(g)(3). JSD simply had no legal duty to protect Boyd from Thueme's criminal acts of possessing a firearm and also possessing it while he was drunk and high. MCL 750.237, *Graves* and *Papadimas, Id.* Indeed, if Thueme's criminal act of pointing a loaded firearm at Boyd's face and pulling the trigger while he was drunk and high was actually foreseeable, Boyd obviously would not have put himself in that position. Such criminal conduct was not foreseeable as to JSD. *Papadimas, Id.*

[14] Boyd's negligence *per se* claim should also be dismissed because even if the statutes he references were applicable to the inoperable gun products Thueme purchased (which they are not), such statutes were not meant to protect a particular class of people, let alone Boyd. Courts routinely dismiss negligence *per se* claims based upon alleged violations of such laws. *See Hicksville Water Dist v Philips Elecs*, No 21-cv-4442 (ED NY, March 29, 2018); *Bd of Cnty Commrs v Brown Group,* 598 F Supp 2d 1185(D. Colo. 2009); *Reg'l Airport Auth of Louisville v LFG*, 255 F Supp 2d 688, 693 (WD Ky, 2003).

[15] "An individual shall not carry, have in possession or under control, or use in any manner or discharge a firearm under any of the following circumstances: (a) The individual is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance".

Nor was JSD's sale of the Kits to Thueme the proximate cause of Boyd's alleged injuries: "The proximate cause of an injury has been defined as that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which such injury would not have occurred", *Weissert v Escanaba*, 298 Mich 443, 452; 299 NW 139 (1941); *Taylor v Wyeth Laboratories, Inc,* 139 Mich App 389; 362 NW2d 293 (1984).

Here, there is no "natural and continuous sequence" between JSD's sale and Boyd being shot in the face. First, Boyd has not, and cannot, allege Thueme correctly finished or even properly assembled the Kits. Second, Thueme's parents' failure to properly supervise their own son, when they in fact knew he was a drug user attempting to procure another handgun, is yet another break in the causal chain. Third, he purchased ammunition and loaded his illegally possessed firearm, all separate acts unrelated to the sale. Fourth, Thueme's intentional and deliberate decision to become illegally impaired on drugs, aim a loaded firearm at his best friend's face and pull the trigger is the most immediate, direct proximate cause of Boyd's injuries. *Auto Owners Ins Co v Olympia Entm't, Inc*, 310 Mich App 132, 162; 871 NW2d 530 (2015)(intentional criminal acts are a superseding, intervening cause to break proximate cause chain).[16] Here, taking the allegations of Boyd's Complaint as true means Thueme committed multiple, unforeseeable criminal acts.

C. Boyd's Negligent Entrustment Claim Should Be Dismissed Because JSD Did Not Know, nor Should It Have Known, Thueme Would Misuse the Inoperable Gun Parts after He Illegally Consumed Drugs.

Boyd's negligent entrustment theory fails because JSD did not know Thueme would misuse the Kits while he was drunk and high, nor should JSD have known Thueme would illegally misuse the Kits while under the influence of drugs. In *Fredericks v General Motors*, 411 Mich 712, 719;

[16] An intervening cause, one which actively operates to produce the harm after the negligence of the defendant, can relieve a defendant from liability. *Poe v Detroit*, 179 Mich App 564, 577; 446 NW2d 523 (1989).

311 NW2d 725 (1981), the Michigan Supreme Court defined the applicable standard of care for negligent entrustment as follows:

> To sustain a cause of action for negligent entrustment **a plaintiff must prove that defendant knew or should have known of the unreasonable risk propensities of the entrustee.** To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated (emphasis added).

The doctrine was further refined in *Buschlen v Ford Motor Co (On Remand)*, 121 Mich App 113, 117; 328 NW2d 592 (1982), where the court held that in order to prove negligent entrustment, "Plaintiffs must show either that defendant knew the entrustee was not to be entrusted or that defendant '**had special knowledge of (the entrustee) which would put defendant on notice**.'" (Emphasis added). The *Buschlen* court further recognized that:

> **The *Fredericks* court did not recognize an affirmative duty to inquire on the part of the entrustor**, to ensure that the chattel being entrusted was being used in a safe manner. Instead, the entrustor must first have special notice of the peculiarities of the entrustee sufficient to put the entrustor on notice before the entrustor is under any further duty to ensure an entrusted chattel's safe use. *Buschlen, supra*, p 118 (emphasis added).

Boyd has failed to allege any facts that would have placed JSD on notice of any "peculiarities of" Thueme. Thueme's age was not legally required to be disclosed any more than his drug use; nor was JSD required to inquire about either. No "special knowledge" is either alleged or present. Additionally, an essential element of negligent entrustment involving "inherently dangerous materials" involves "the failure of the principal to see that all appropriate precautions are taken to insure that the inherently dangerous activity will be properly performed." *Beck v Westphal*, 141 Mich App 136, 145; 366 NW2d 217(1984).[17]

[17] As discussed throughout, the Kits themselves are not inherently dangerous as they cannot perform any function, including but not limited to firing a projectile by means of an explosion, without further machining and assembly. Neither federal nor state law imposed any age verification on the sale of such Kits at the time of transactions at issue.

Boyd's negligent entrustment claim is a non-starter because he cannot prove JSD knew or should have known that Thueme would illegally misuse the products he purchased from JSD in an unsafe manner while under the influence of drugs. *Fredericks, Id*. The plaintiff in *Fredericks* was employed by Manistee when he lost his left hand while operating an unguarded power press. The plaintiff sued GM for negligent entrustment because GM supplied (i.e. entrusted) the equipment to Manistee that injured the plaintiff. The plaintiff's entrustment claim failed, because:

> In this instance plaintiff needed to prove that General Motors knew or should have known that Manistee Drop Forge would use the dies in such a manner as to create the risk of amputation. *Id* at 719.

As shown below, Boyd cannot allege or prove JSD knew or should have known that Thueme would misuse the Kits (manufacturing them into firearms and then using them "in an unsafe manner") after illegally consuming drugs and alcohol.

i. Boyd Cannot Allege or Prove JSD Had Actual Knowledge Thueme Would Illegally Misuse The Kits In An Unsafe Manner While Using Drugs.

Boyd cannot allege or prove JSD "in fact knew" that Thueme would misuse the Kits in an unsafe manner while he was illegally consuming drugs. First, JSD's representatives never personally met Thueme, nor was there any pre-existing relationship between them[18]. (*See* Complaint, *generally*). Second, not only did JSD lack any "actual" knowledge that Thueme would misuse the Kits, JSD also did not know (and could not know) Thueme would misuse those products after he illegally consumed alcohol and marijuana. Boyd has failed to allege or prove JSD had "actual" knowledge Thueme would point a loaded firearm at Boyd's face and pull the trigger after

[18] Of course, Boyd cannot plausibly allege JSD negligently entrusted its products to Thueme merely by offering them for sale over the internet because **doing so was perfectly legal at the time of the transactions at issue according to the GCA, federal case law and official guidance from the ATF**. 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978). Moreover, to hold otherwise would mean any internet seller of knives, pepper spray, mace or even common tools like hammers and screwdrivers or any other product sold at Home Depot for instance, that could be misused by someone under the influence of illegal drugs would be subject to liability under a negligent entrustment theory. This obviously is not, and cannot, be the case under binding, Michigan precedent.

he illegally consumed drugs. *Fredericks* and *Buschlen, Id; see also Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994) (speculation, conjecture, and probabilities, alone, are insufficient to withstand summary disposition).

ii. Boyd Cannot Allege or Prove JSD Should Have Known That Thueme Would Use The Kits In An Unsafe Manner.

Boyd cannot establish that JSD **should have known** Thueme would misuse the products he purchased from JSD after illegally using drugs. This is the second (and only other way) for Boyd to prevail on a negligent entrustment theory. *Fredericks* and *Buschlen, Id.* JSD must have "had special knowledge of [Thueme] which would put [JSD] on notice" that Thueme was likely to point a loaded firearm at Boyd's face after illegally consuming drugs. *Id*. In other words, Boyd must allege (and prove) JSD had actual notice that Thueme had "peculiarities" (i.e. drug abuse) that made it likely for Thueme to illegally misuse the products he purchased. *Id.* Thueme's status as a minor, which was not known to JSD, cannot be a "peculiarity" because JSD was not legally required to verify his age prior to selling the Kits to him; rather, those transactions were lawful in spite of Thueme's age. There is no law against selling unregulated firearm *parts* to a minor.

However, JSD did not (and could not) have any "specific knowledge" regarding any "peculiarities" Thueme may have had because Thueme purchased products over the internet, not in person. (*See* Complaint, *generally*). Boyd does not allege Thueme purchased the Kits from a retail location, that he ever introduced himself "face to face" or met with any representatives from JSD, or that he provided any indication to anyone of his age. *Id.* Instead of alleging any specific facts establishing that JSD had actual notice of Thueme's "peculiarities" (as Boyd is legally required to do), Boyd generically alleges "guns are especially dangerous in the hands of children" and JSD "**was willfully blind** to the fact, **and therefore knew, or reasonably should have known**,

that…Thueme, a 17-year-old, was not of sufficient age to legally possess, receive or purchase **a pistol**". (Complaint, ¶ 51 and ¶ 138, emphasis added).

These allegations of "willful blindness" are insufficient to state a claim as a matter of law under binding, Michigan Supreme Court precedent. *Fredericks and Buschlen, Id.*[19] Either JSD had actual, prior knowledge that Thueme would point a loaded firearm at Boyd's face after illegally consuming drugs and alcohol or, alternatively, JSD should have known Thueme would perform such an act based upon JSD's actual, prior knowledge of Thueme's "peculiarities." *Id.* As the complaint alleges JSD was "willfully blind," this is actually *an admission by Boyd* that JSD had no actual knowledge. The negligent entrustment analysis should end here because Boyd must allege (and prove) either one of these fact patterns which he has not and cannot do.[20]

Instead of alleging the requisite elements of a negligent entrustment claim, Boyd alleges JSD was *generally aware* of the general potential risk that minors could purchase its products, and this general knowledge is therefore sufficient to plead a negligent entrustment claim. However, the Michigan Supreme Court has held exactly the opposite: Boyd **cannot** establish negligent entrustment by alleging JSD was generally aware minors could purchase its products and potentially misuse them. (*See* Complaint, ¶51-58, including Boyd's inflammatory allegation regarding "JSD's potential sale of ghost gun kits to prohibited persons, including minors"). Boyd fails to allege JSD had any **specific, actual knowledge regarding Thueme** (as opposed to general

[19] Not only is Boyd's "willful blindness" theory a non-starter under binding precedent, his attempt to equate that with "actual knowledge" fails as well. "Willfull blindness" is an admission by Boyd that JSD in fact *did not* have actual knowledge as required by *Fredericks* and *Buschlen*.

[20] *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996)(judicial admissions are not really "evidence" at all rather, they are formal concessions in the pleadings by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact).*See Mowinski v Bishop*, 13 Mich App 140; 144, 163 N.W.2d 655 (1968)(negligent entrustment claim dismissed even where entrustor had actual, prior knowledge that specific driver entrusted with vehicle had two prior speeding tickets where excessive speed caused subsequent accident). Here, JSD did not have actual notice of any of Thueme's "peculiarities", i.e. his propensity to illegally use a firearm while intoxicated.

awareness of a hypothetical minor) which is absolutely required to plead a viable negligent entrustment claim under Michigan law.[21] *Fredericks and Buschlen, Id.*

Alleging "willful blindness" is insufficient as a matter law. *Fredericks and Buschlen, Id*. Furthermore, JSD did not have "an affirmative duty to inquire" whether Thueme would use the Kits "in a safe manner".[22] Boyd may not agree with the Michigan Supreme Court, but trial courts cannot "legislate from the bench" or create policy, rather, they are duty bound to follow binding precedent. *Pellegrino v AMPCO System Parking,* 486 Mich 330, 354 n 17; 785 NW2d 45 (2010)(lower courts are bound to follow the precedent of the Michigan Supreme Court).

iii. JSD Did Not Negligently Entrust a "Firearm" or "Pistol" To Thueme.

Lastly, Boyd's negligent entrustment claim also fails for yet another basic reason. Boyd must allege (and prove) JSD was negligent in entrusting the Kits to Boyd in the first place. *See Allstate Ins Co v Freeman*, 160 Mich App 349, 357; 408 NW2d 153 (1987)(the entrustor must be negligent in entrusting the instrumentality to the entrustee).[23] Boyd's choice of words is telling and perhaps

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[21] Although the plaintiff in *Fredericks* (like Boyd here) admitted he could not prove GM had actual notice of any "peculiarities" its supplier may have had, he instead tried to prove GM should have known its supplier would have used the equipment in an unsafe manner because it was generally known that the industry had poor safety conditions. *Fredericks* at 720. This is precisely what Boyd attempts to do here. He alleges "at the time JSD sold and delivered the Kits to Defendant Thueme, it was willfully blind to the fact, and therefore knew, or reasonably should have known, that Defendant Thueme, a 17-year-old, was not of sufficient age to legally possess, receive or purchase **a pistol**". (Compl, ¶138). This sleight of hand ignores the legal standard for negligent entrustment claims. Although Boyd's Complaint may express what he wishes the law were in Michigan, i.e. that "willful blindness" is sufficient, the actual, binding law is the exact opposite.

[22] *Buschlen, Id.* at 118 "We have failed to find any evidence that Ford knew Sebewaing Industries was not to be entrusted with Ford's dies or that Ford in fact had special knowledge of peculiarities of Sebewaing Industries which would have put Ford on notice that Sebewaing Industries was likely to use the dies in an unsafe manner . . . The Supreme Court's decision in *Fredericks*, however**, did not recognize a duty on the part of an entrustor to inquire to ensure that an entrusted chattel is being used in a safe manner**. Rather, the entrustor must first have special notice of the peculiarities of the entrustee sufficient to put the entrustor on notice **before** the entrustor is under any further duty to ensure an entrusted chattel's safe use."

[23] Specifically, Boyd alleges JSD negligently entrusted the Kits to Thueme by "violat[ing]…the foregoing laws [which] creates a presumption that it negligently entrusted a pistol to a minor" (Complaint, ¶135); "indeed, a pistol entrusted to a minor poses an unreasonable risk of physical harm" (*Id.* at ¶136); "state law recognizes a general duty to prevent minors from possessing firearms" (*Id.* at ¶137); "at the time Defendant JSD sold and delivered the Kits to Defendant Thueme, it was willfully blind to the fact, and therefore knew, or reasonably should have known, that Defendant Thueme, a 17-year-old, was not of sufficient age to legally possess, receive, or purchase a pistol" *Id.* at ¶138 (emphasis added)); and "Defendant Thueme negligently misused the firearm that was negligently entrusted to

the most legally significant aspect of this entire lawsuit because, of course, the terms "Kits", "firearm" and "pistol" are **completely different things under the law and are not interchangeable**. To be clear, JSD did not sell a "firearm", "handgun" or a "pistol" to Thueme. Rather, JSD allegedly sold Thueme various unregulated gun parts and an unfinished frame. The sale of those parts was not subject to any minimum age requirements, nor are such parts regulated in any way by the laws cited in Boyd's Complaint.[24] Boyd is deliberately attempting to confuse this Court by improperly conflating the statutorily defined terms "firearm" and "pistol" interchangeably with the "Kits" consisting of inoperable gun parts and an unfinished frame sold by JSD.[25] It is not a mere matter of "assembly" as Plaintiff alleges.

The only "negligent" conduct Boyd alleges is that JSD should have verified Thueme's age. Case law establishes JSD had no duty to inquire, nor does any federal or state law impose any verification obligation. JSD's sale was perfectly legal without verifying Thueme's age**.** *Id*. Moreover, contrary to Boyd's assertion, it may also be legal for Thueme, even as a 17-year-old, to lawfully possess a firearm under certain circumstances. *See* MCL §750.234f[26] and 18 USC

him by Defendant JSD" *Id.* at ¶140 (emphasis added)). Of course, no pistol or firearm was sold as matter of law and thus none of these acts create a presumption.

[24] *See* MCL §28.422, MCL §445.903 and 18 USC §922(x). All of these statutes are triggered off the definition of a "firearm" and the Kits were specifically excluded from that definition. *See* 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978).

[25] *See* Complaint, ¶14 "a homemade gun that is assembled from commercially available building blocks" (emphasis added); ¶15 "the components of a ghost gun…"; "[the] Completion Kit…contains a frame of a pistol that was designed to be and in fact could be readily converted to the fully functional frame."

[26] For example, Thueme could "possess a firearm without a hunting license while at, or going to or from, a recognized target range or trap or skeet shooting ground if, while going to or from the range or ground, the firearm is enclosed and securely fastened in a case or locked in the trunk of a motor vehicle". *Id*. Thueme could also lawfully possess a firearm in public if he was under the supervision of any individual over 18, including but not limited to one of his friends. If Thueme's girlfriend was 18, he could lawfully possess a firearm in Boyd's presence while that group was "hanging out" in an RV in a driveway (assuming, of course, that neither Thueme nor his girlfriend were unlawfully consuming drugs). Federal law even specifically contemplates allowing minors to lawfully possess handguns. *See* 18 USC §922(x)(3)(listing exceptions to prohibition against minor possessing a handgun, which include allowing a minor to possess a handgun with parents' written permission, for ranching or farming and as provided by state or local law).

§922(x)(3). Accordingly, JSD was not "negligent" in "entrusting" the Kits to Thueme because JSD was not required to verify Thueme's age.

D. Boyd's MCPA Claim Fails Because the Sale of Gun Part Kits Was Specifically Authorized by Federal Law, There Was No Transaction Between Boyd and JSD, and JSD Did Not Communicate Any Representations to Boyd.

Boyd's Michigan Consumer Protection Act Claim ("MCPA") fails because JSD's sale of the Kits without verifying Thueme's age was authorized (and perfectly legal) under the Second Amendment of the United States Constitution, federal law and official guidance from the ATF. *See* 43 Fed Reg 13531, 13537 (March 31, 1978), and **Exhibits A and B**. The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." *Zine v Chrysler Corp*, 236 Mich App 261, 275; 600 NW2d 384 (1999), citing MCL §445.903(1).

i. JSD is Exempt From the MCPA Because the Sale of Inoperable Gun Parts and an Unfinished Non-gun Frame, was Specifically Authorized Under Laws Administered by a Regulatory Board, i.e. the ATF.

A party cannot bring an action under the MCPA with respect to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a) (emphasis added). Under this exemption, the relevant inquiry is whether the **general transaction** is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 210; 732 NW2d 514 (2007).

Here, the general transaction at issue, JSD's sale of the Kits, was "specifically authorized by . . . laws administered by a regulatory board [*i.e.* the ATF]". See 43 Fed Reg 13531, 13537 (March 31, 1978). Congress, federal courts and the ATF have, for decades, consistently declared that the sale of unfinished receivers and/or frames and associated inoperable gun parts (collectively

described by Boyd as the "Kits") is lawful. *See* 18 USC §921(a)(3)(c), Title and Definition Changes, 43 Fed Reg 13531, 13537 (March 31, 1978).[27]

Moreover, official "Classification Letters" issued by the ATF determined that a Polymer80 pistol frame or receiver blanks are not "firearm[s]" under the meaning of the Gun Control Act. (See **Exhibits A and B**). Thus, because Boyd alleges that JSD's April 9 and April 27, 2021 sales to Thueme were specifically authorized by law (*i.e.* by Congress' definition of "firearm" in the GCA and the federal courts' interpretations of that statute) and a regulatory agency (the ATF), and as JSD has observed, the ATF has issued classification letters (**Exhibits A and B**) regarding the unfinished frames in the Kit, the "transaction or conduct" is "specifically authorized" under the MCPA. These Exhibits establish the "authorized by law" component of the MCPA. The ATF authorized the sale of these Kits as non-gun items.

Boyd's MCPA claim therefore fails and should be dismissed. *See also Peter v Stryker Orthopaedics, Inc*, 581 F Supp. 2d 813 (2008)(seller of medical device not subject to MCPA due to FDA regulation); *Mills v. Equicredit Corp*, 294 F Supp 2d 903 (2003)(loan transactions were generally authorized under laws administered by Commissioner of the Office of Financial Services and Insurance, as a result the subject transactions were exempt from the Michigan Consumer Protection Act); *McEntee v Incredible Techs, Inc.,* No. 263818, 2006 WL 659347, at *2 (Mich. Ct. App. Mar. 16, 2006) **Exhibit E** (to the extent Golden Tee videogames are played for money, the games and suppliers of the games are subject to the exclusive regulatory authority of the Michigan Gaming Control Board therefore defendant is exempt from plaintiffs' MCPA claims).

[27] https://www.atf.gov/firearms/privately-made-firearms ("not all PMFs are illegal and not all firearms are required to have a serial number").

ii. There was Never any "Transaction" Between Boyd and JSD Because Boyd Never Purchased Anything From JSD.

Boyd's MCPA claim also fails for other reasons. Boyd seems to be pursuing a "derivative" or "once removed" type claim under the MCPA since he obviously did not purchase anything from JSD. However, this is a "bridge too far". The intent of the MCPA is "to protect consumers **in their purchases** of goods which are primarily used for personal, family or household purposes." *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 367; 395 NW2d 322 (1986)(emphasis added). In this case, Boyd admittedly did not purchase anything from JSD at any time and his claim under the MCPA is a non-starter because there was never any sale/purchase transaction between Boyd and JSD. *See Diehl v R L Coolsaet Constr Co*, 2005 WL 3179624, at *2 (Mich. Ct. App. Nov. 29, 2005) **Exhibit F** ("contrary to plaintiff's assertions, he was not a "party to the transaction" under MCL 445.903(1)(n) and (1)(y), so these sections do not apply to him").

iii. JSD Never Made any "Representations" to Boyd Regarding the Inoperable Gun Parts it Allegedly Sold to Thueme.

Additionally, Boyd's MCPA claim is fatally flawed because JSD never made any representations to Boyd. Indeed, this critical fact is actually highlighted in paragraph 149 of Boyd's Complaint in which he alleges "JSD caused a probability of confusion or misunderstanding as to the legal rights of the **parties to the transaction,**" meaning Thueme not Boyd. (Emphasis added). This is a recurring theme in Count IV of Boyd's Complaint. (*See* ¶150 "The MCPA also prohibits sellers" which necessarily requires a "buyer", which Boyd was not; ¶151 "Defendant JSD represented"…to whom? Certainly not Boyd; and ¶153 "the MCPA also prohibits sellers from 'failing to reveal facts that are material to **the transaction**'" (emphasis added) but Boyd was never a party to any transaction with JSD).

Boyd's misguided attempt to assert a claim under the MCPA, despite having never actually been a party to any transaction with JSD, is not only contrary to law, but also bizarre. Indeed, although Boyd is obviously adverse to Thueme since he named him as a defendant, Boyd is simultaneously trying to "step into Thueme's shoes" and unlawfully usurp his status as a "consumer" or purchaser of goods from JSD. Even if JSD were a proper defendant under the MCPA (which it is not because the ATF specifically authorized the sale of inoperable gun parts and unfinished frames without any age verification), Boyd is not a proper MCPA plaintiff in any event because he never purchased anything from JSD; he was never a "party" to any "transaction" with JSD and JSD never made any statements or representations to him.

Conclusion and Relief Requested

Based upon the foregoing, Defendant, Not an LLC d/b/a JSD Supply, respectfully requests that this Court grant its Motion for Summary Disposition, enter an order dismissing all claims against it with prejudice and award it any other relief to which it is entitled.

Respectfully submitted,
PENTIUK, COUVREUR & KOBILJAK, P.C.

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Dated: May 8, 2024

EXHIBIT A

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, WV 25405

www.atf.gov

907010:WJS
3311/303738

NOV 02 2015

Mr. Jason Davis
The Law Offices of Davis & Associates
41593 Winchester Road, Suite 200
Temecula, California 92590

Mr. Davis:

This is in reference to your correspondence, with enclosed samples, to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Firearms Technology Industry Services Branch (FTISB). In your letter, you asked for a classification of an AR10-type item identified by you as a "WARRHOGG BLANK" as well as a Glock-type "GC9 Blank" on behalf of your client, Polymer 80, Incorporated (see enclosed photos). Specifically, you wish to know if these items would be classified as a "firearm" under the Gun Control Act of 1968 (GCA).

You state the submitted **WARRHOGG BLANK** incorporates the following design features:

- *Magazine well.*
- *Magazine catch.*
- *Receiver extension/buffer tube.*
- *Pistol grip area.*
- *Pistol-grip screw hole.*
- *Pistol grip upper receiver tension hole.*
- *Pistol grip tension screw hole.*
- *Bolt catch.*
- *Front pivot-pin takedown hole.*
- *Rear pivot-pin takedown hole.*

As a part of your correspondence, you describe design features and the manufacturing process of the submitted "WARRHOGG Blank" to include the following statements:

- *The submitted WarrHogg .308 blank lower receiver blank is a solid core unibody design made out of a single casting without any core strengthening inserts. Moreover, it is void of any indicators that designate or provide guidance in the completion of the firearm. This submitted item incorporates a solid fire control cavity area, and was cast in a homogenous manner using a "single shot of molten material."*

For your reference in this matter, the amended Gun Control Act of 1968 (GCA), 18 U.S.C. § 921(a)(3), defines the term "**firearm**" *to include any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive...[and]...**the frame or receiver of any such weapon**...*

Also, 27 CFR § 478.11 defines "**firearm frame or receiver.**" *That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.*

Also, the AECA, 27 CFR § 447.11, defines "**defense articles**" as—

...Any item designated in § 447.21 or § 447.22. This includes models, mockups, and other such items which reveal technical data directly relating to § 447.21 or § 447.22.

The USMIL § 447.22, **FORGINGS, CASTINGS, and MACHINED BODIES** states:

Articles on the U.S. Munitions Import List include articles in a partially completed state (such as forgings, castings, extrusions, and machined bodies) which have reached a stage in manufacture where they are clearly identifiable as defense articles. If the end-item is an article on the U.S. Munitions Import List, (including components, accessories, attachments and parts) then the particular forging, casting, extrusion, machined body, etc., is considered a defense article subject to the controls of this part, except for such items as are in normal commercial use.

During the examination of your sample, FTISB personnel found that the following machining operations or design features present or completed:

1. Front and rear pivot/take down pin holes.
2. Front and rear pivot/ take down detent retainer holes.
3. Front and rear pivot/take down lug clearance areas.
4. Selector-retainer hole.
5. Magazine-release and catch slots.
6. Trigger-guard formed.
7. Rear of receiver present and threaded to accept buffer tube.
8. Buffer-retainer hole.
9. Pistol-grip mounting area faced off and drilled, but not threaded.
10. Magazine well.
11. Receiver end-plate recess.

Machining operations or design features not yet present or completed:

1. Complete removal of material from the fire-control cavity area.
2. Machining or indexing of selector-lever hole.
3. Machining or indexing of trigger slot.
4. Machining or indexing of trigger-pin hole.
5. Machining or indexing of hammer-pin hole.

As a part of this evaluation, FTISB personnel noted the following markings:

Left Side

- **308**
- **POLYMER80**

FTISB has determined that an AR-10 type receiver blank could have all other machining operations performed, including front receiver pivot-pin and rear take down pin hole and clearance for the front receiver lug and rear take down pin lug clearance area (not to exceed 1.60 inches), but must be completely solid and un-machined in the fire-control recess area. The rear take down pin lug clearance area must be no longer than 1.60 inches, measured from immediately forward of the front of the buffer-retainer hole.

The FTISB examination of your submitted item, found that the most forward portion of the rear take down pin lug clearance area measures approximately 1.32 inches in length, less the maximum allowable 1.60 inch threshold. As a result, the submitted item is not sufficiently complete to be classified as the frame or receiver of a firearm; and thus, is not a "firearm" as defined in the GCA. Consequently, the aforementioned item is therefore not subject to GCA provisions and implementing regulations.

To reiterate the conclusion of FTISB's evaluation, our Branch has determined that the submitted Polymer 80, Incorporated AR10-type receiver blank incorporating the aforementioned design features is not classified as the frame or receiver of a weapon designed to expel a projectile by the action of an explosive; and thus, it is not a "firearm" as defined in (GCA), 18 U.S.C. § 921(a)(3)(B).

As a part of your correspondence, you describe design features and the manufacturing process of the submitted "**CG** or **CG9**" to include the following statement:

- *The submitted GC9 blank is a solid core unibody design made out of a single casting without any core strengthening inserts. Moreover, it is void of any indicators that designate or provide guidance in the completion of the firearm.*

Please note, while not indicated in the accompanying correspondence, the submitted CG or CG9 appears to have been made utilizing additive manufacturing or 3-D printing technology and not "made out of a single casting."

During the examination of your sample **"CG or CG9,"** FTISB personnel found that the following machining operations or design features present or completed:

1. Slide lock lever location indexed.
2. Upper portion of slide lock spring recess.
3. Trigger slot.
4. Capable of accepting Glock 17 trigger mechanism housing.
5. Capable of accepting Glock 17 trigger bar.
6. Capable of accepting Glock 17 locking block.
7. Magazine well.
8. Magazine catch.
9. Accessory rail.
10. Slide-stop lever recess.
11. Magazine catch spring recess.

Machining operations or design features not yet present or completed:

1. Trigger-pin hole machined or indexed.
2. Locking block-pin hole machined or indexed.
3. Devoid of front or rear frame rails.
4. Barrel seat machined or formed.

As a result, the submitted "CG or CG9" is not sufficiently complete to be classified as the frame or receiver of a firearm; and thus, is not a "firearm" as defined in the GCA. Consequently, the aforementioned item is therefore not subject to GCA provisions and implementing regulations.

To reiterate the conclusion of FTISB's evaluation, our Branch has determined that the submitted Polymer 80, Incorporated Glock-type receiver blank incorporating the aforementioned design features is not classified as the frame or receiver of a weapon designed to expel a projectile by the action of an explosive, thus it is not a "firearm" as defined in (GCA), 18 U.S.C. § 921(a)(3)(B).

Please be aware, while not classified as a "firearm"; the submitted items are each classified as a "defense article" as defined in 27 CFR § 447.11. The U.S. Department of State (USDS) regulates all exports from, and particular imports into, the United States. Firearms, parts, and accessories for firearms are all grouped as "defense articles" by the USDS and overseen by their Directorate of Defense Trade Controls. Information regarding import/export of defense articles can be found on their web site at www.pmddtc.state.gov.

In conclusion, correspondence from our Branch is dependent upon the particular facts, designs, characteristics or scenarios presented. Please be aware that although other cases (submissions to our Branch) may appear to present identical issues, this correspondence pertains to a particular

issue or item. We caution applying this guidance in this correspondence to other cases, because complex legal or technical issues may exist that differentiate this scenario or finding from others that only appear to be the same.

Also, this determination is relevant to the items as submitted. If the design, dimensions, configuration, method of operation, or utilized materials or processes such as changing from additive manufacturing to injection molding, this classification would be subject to review and require a submission to FTISB of an exemplar utilizing the new manufacturing process.

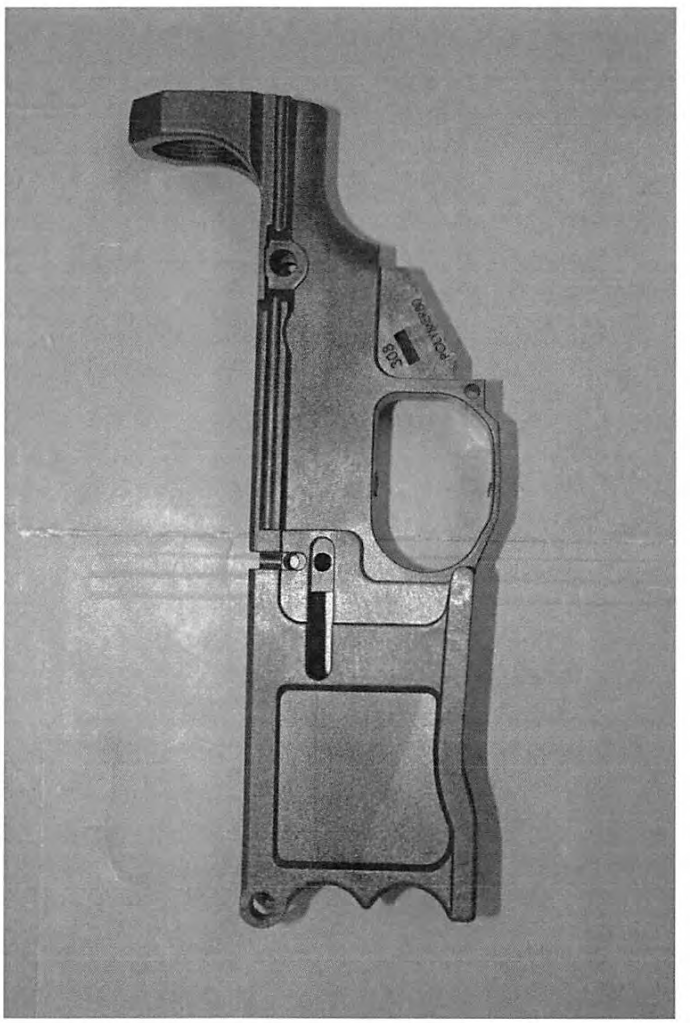
We thank you for your inquiry and trust the foregoing has been responsive to your evaluation request. Please do not hesitate to contact us if additional information is needed.

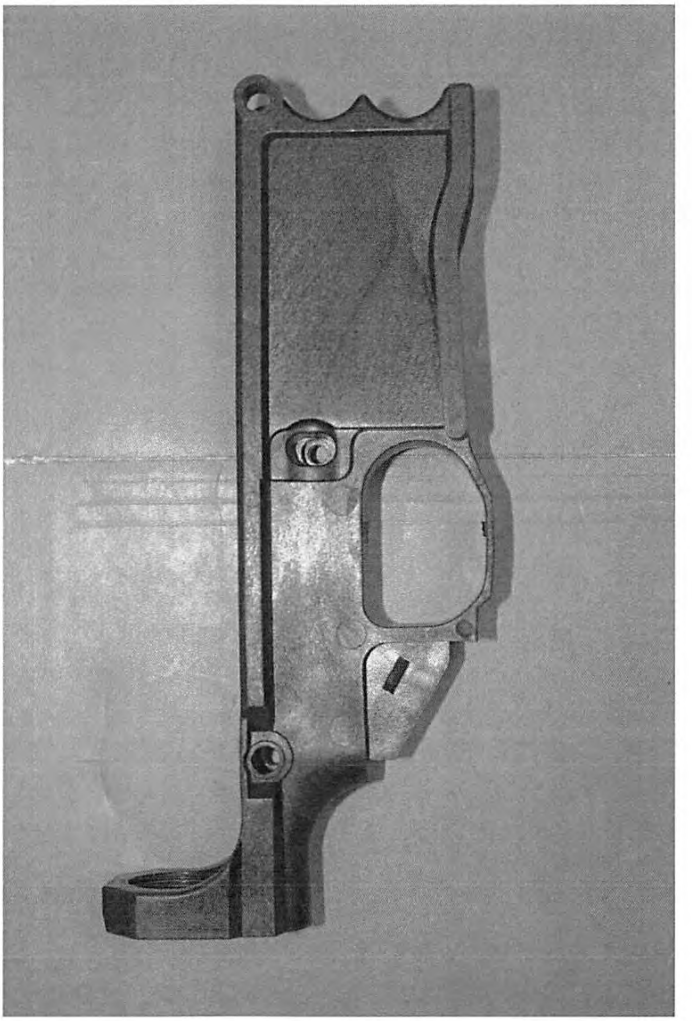
Sincerely yours,

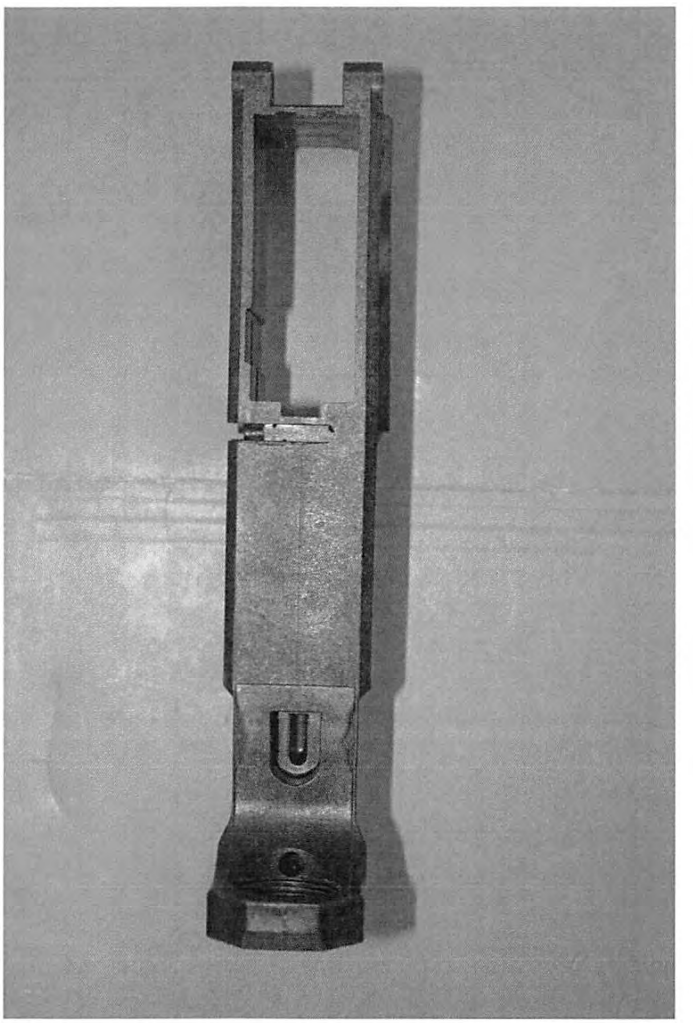
Michael R. Curtis
Chief, Firearms Technology Industry Services Branch

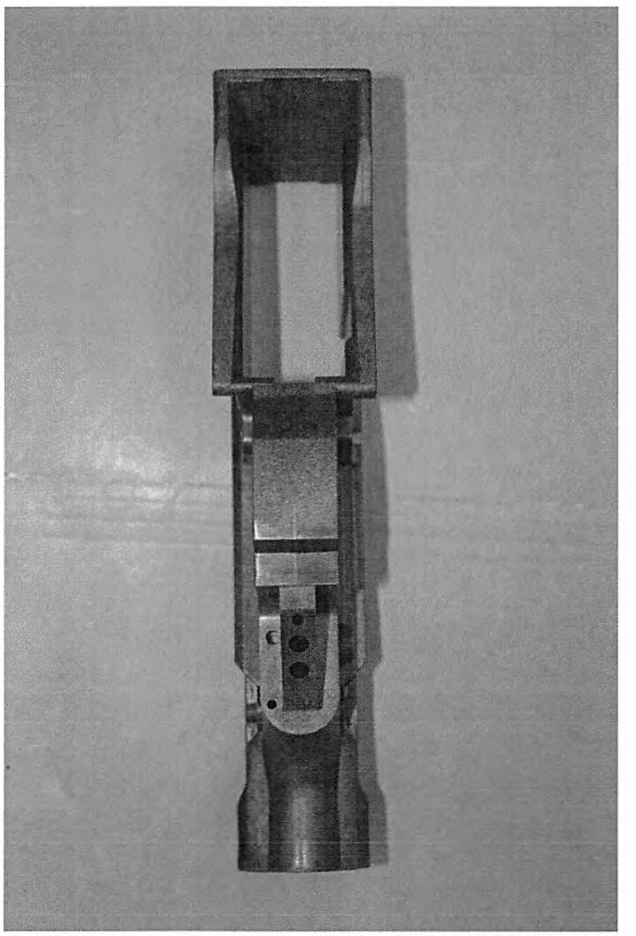
Enclosures

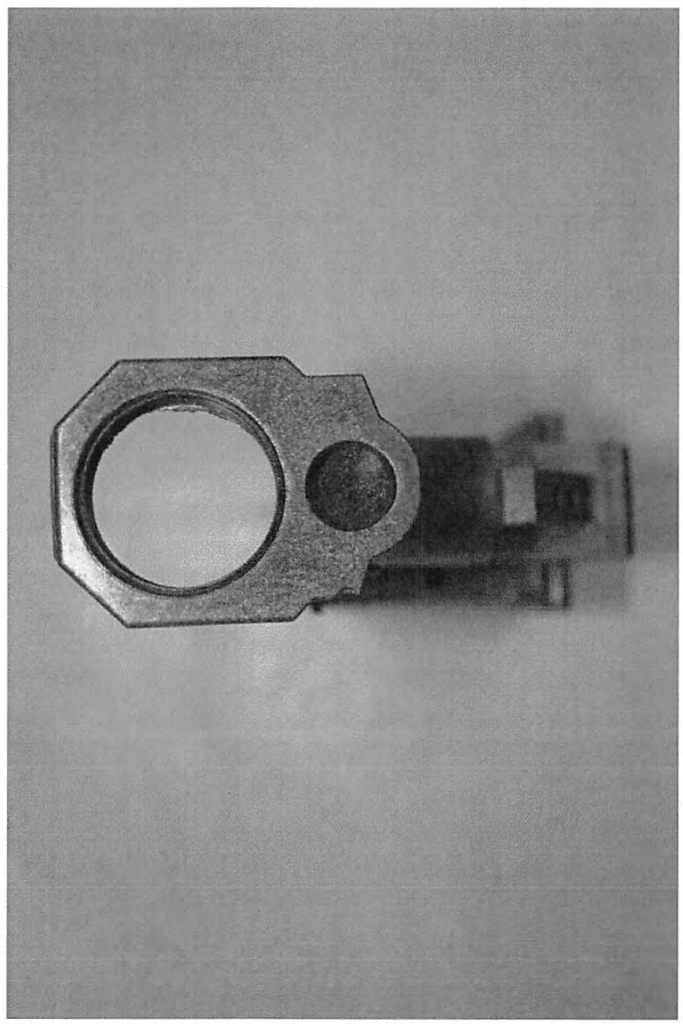
Polymer 80, Inc. WARRHOGG Receiver Blank



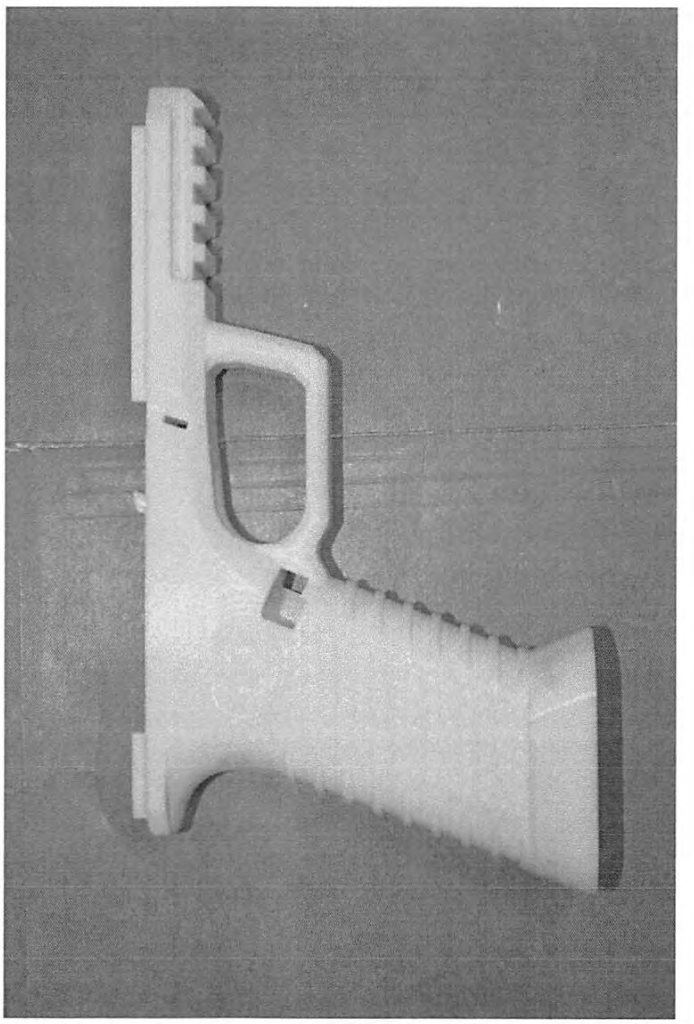


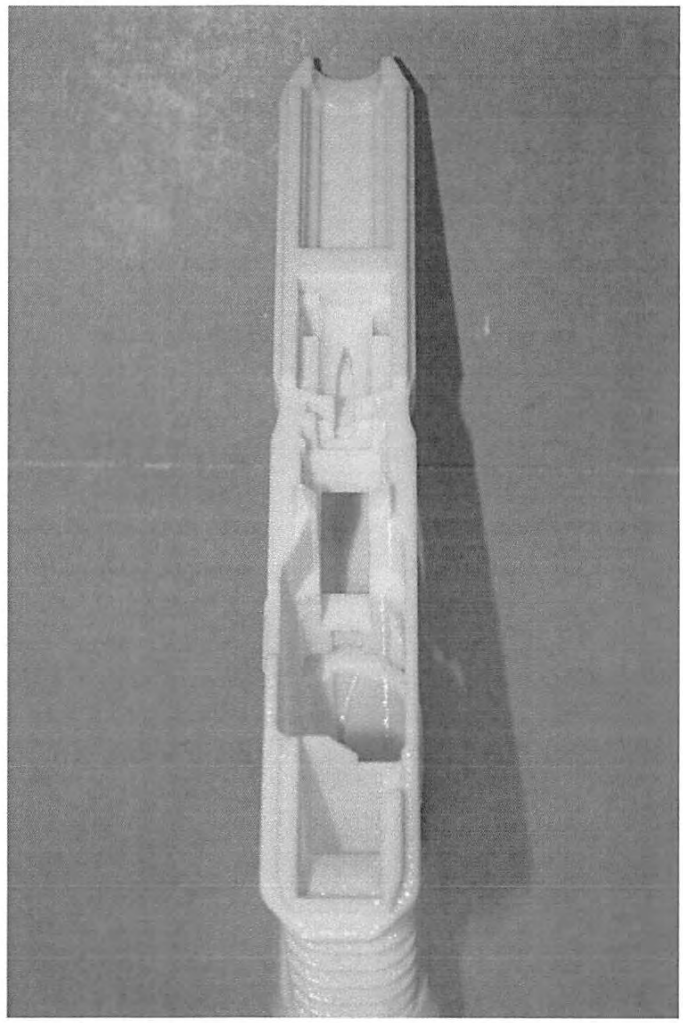


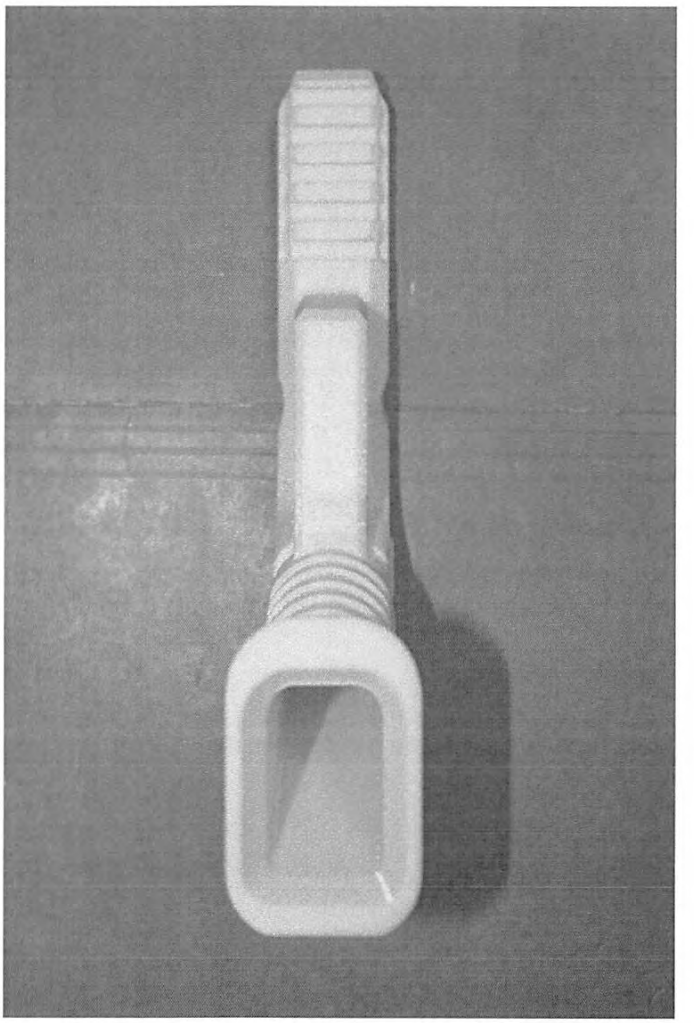




Polymer 80, Inc; GC or CG9 Receiver Blank

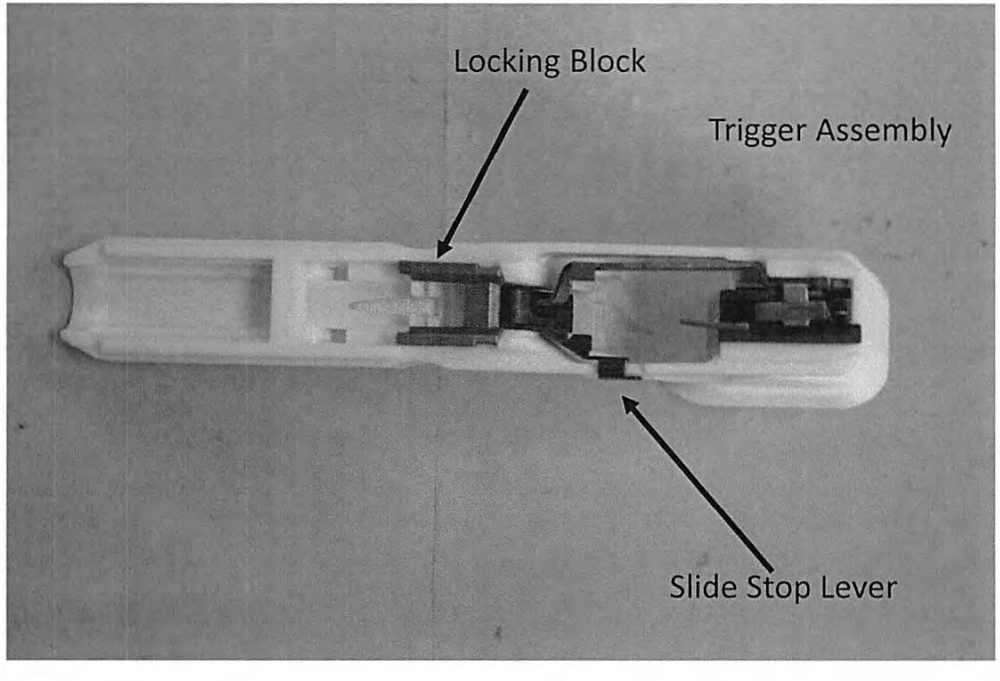




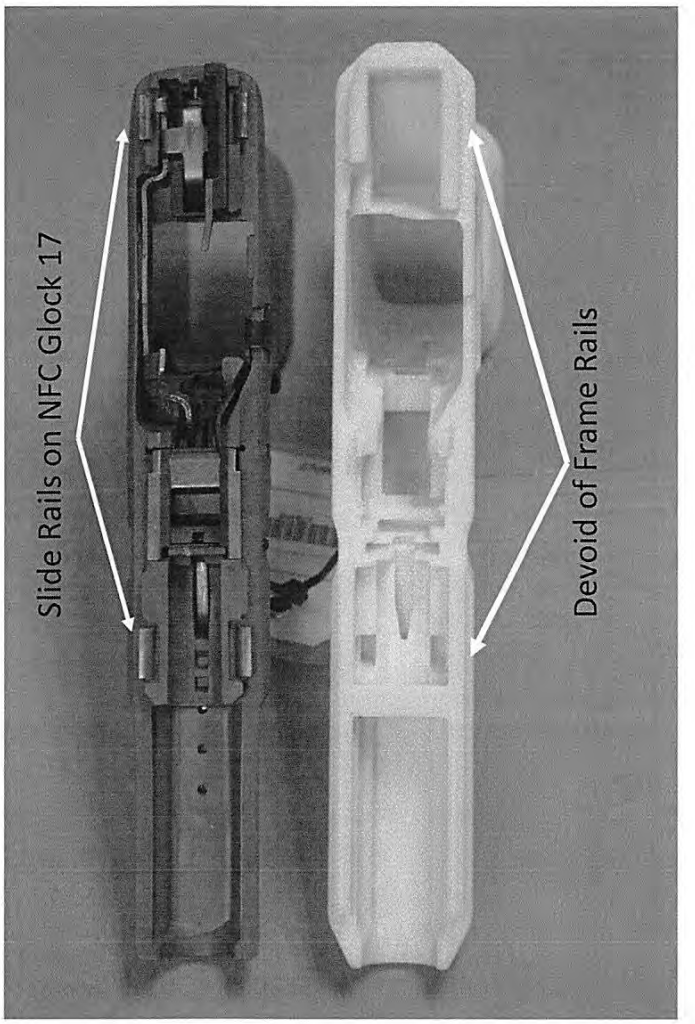


Capable of Accepting Glock 17 Trigger Mechanism and Trigger Bar Assemblies

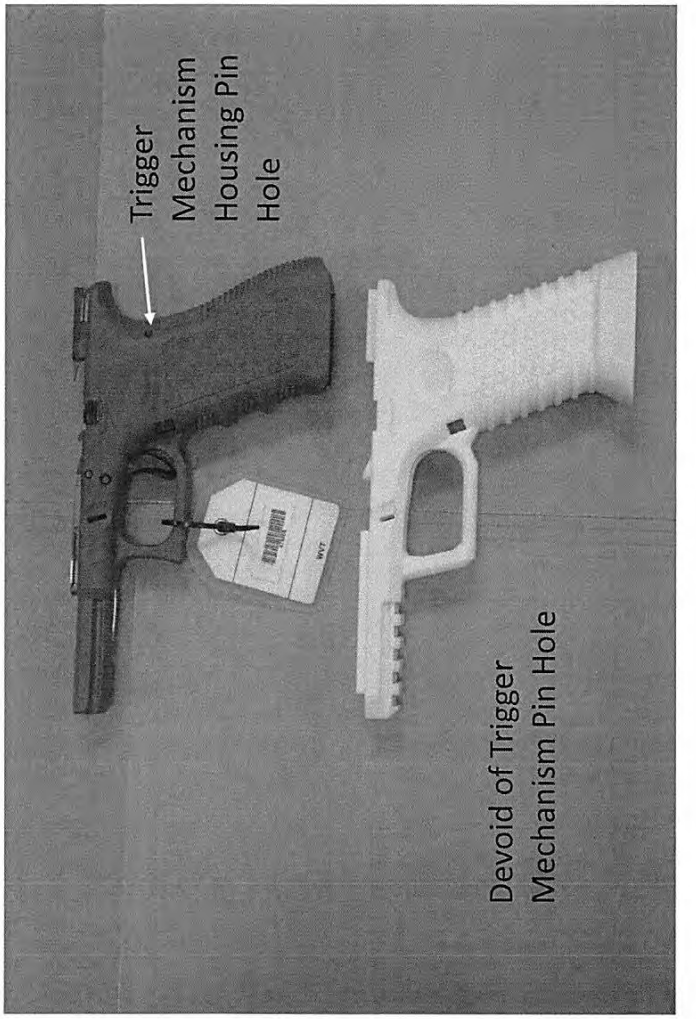
Capable of Accepting Glock 17 Locking Block, Trigger Assembly and Slide Stop Lever



Internal Frame Comparison to NFC Glock 17



Frame Comparison to NFC Glock 17



Frame Comparison to NFC Glock 17

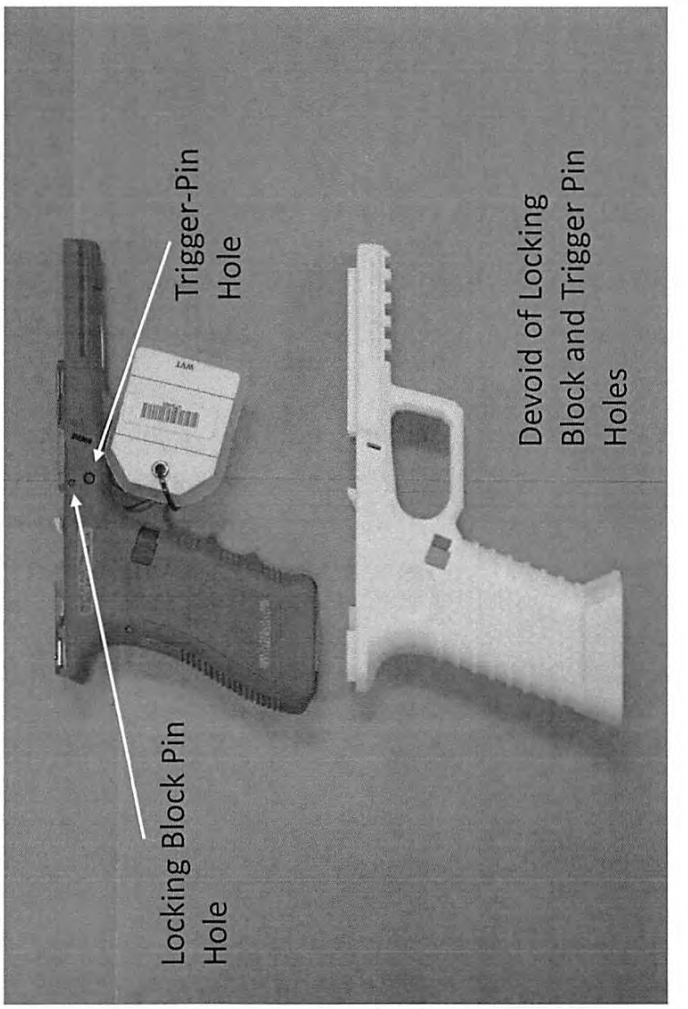


EXHIBIT B

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, WV 25405

www.atf.gov

JAN 1 8 2017

907010:WJS
3311/305402

Mr. Jason Davis
The Law Offices of Davis & Associates
27201 Puerta Real, Suite 300
Temecula, California 92691

Mr. Davis:

This is in reference to your correspondence, with enclosed samples, to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Firearms Technology Industry Services Branch (FTISB). In your letter, you asked for a classification of two Glock-type "PF940C Blank" on behalf of your client, Polymer 80 Incorporated (see enclosed photos). Specifically, you wish to know if each of these items would be classified as a "firearm" under the Gun Control Act of 1968 (GCA).

You state the submitted **PF940C** has critical machining operations not yet "implanted" as follows:

- *Drilling of the locking left and right block pin holes.*
- *Drilling of the left and right trigger pin holes.*
- *Drilling of the left and right trigger housing pin holes.*
- *Cutting of the left and right rail slots to allow for slide installation.*
- *Machining of the side walls that block slide installation.*
- *Machining of the cross walls that block barrel and recoil spring installation.*

As a part of your correspondence, you describe design features and the manufacturing process of the submitted "**PF940C**" to include the following statement:

• *The submitted PF940C blank is a solid core unibody design made out of a single casting without any core strengthening inserts. Moreover, it is void of any indicators that designate or provide guidance in the completion of the firearm.*

For your reference in this matter, the amended Gun Control Act of 1968 (GCA), 18 U.S.C. § 921(a)(3), defines the term "**firearm**" *to include any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive...[and]...**the frame or receiver of any such weapon**...*

Also, 27 CFR Section 478.11 defines "**firearm frame or receiver**". *That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.*

Also, the AECA, 27 CFR Section 447.11, defines "**defense articles**" as—

...Any item designated in § 447.21 or § 447.22. This includes models, mockups, and other such items which reveal technical data directly relating to § 447.21 or § 447.22.

The USMIL, Section 447.22, **FORGINGS, CASTINGS, and MACHINED BODIES** states:

Articles on the U.S. Munitions Import List include articles in a partially completed state (such as forgings, castings, extrusions, and machined bodies) which have reached a stage in manufacture where they are clearly identifiable as defense articles. If the end-item is an article on the U.S. Munitions Import List, (including components, accessories, attachments and parts) then the particular forging, casting, extrusion, machined body, etc., is considered a defense article subject to the controls of this part, except for such items as are in normal commercial use.

During the examination of your sample "**PF940C**", FTISB personnel found that the following machining operations or design features present or completed:

1. Trigger slot.
2. Capable of accepting Glock 17 trigger mechanism housing.
3. Capable of accepting Glock 17 trigger bar.
4. Magazine well.
5. Magazine catch.
6. Accessory rail.
7. Slide-stop lever recess.
8. Magazine catch spring recess.

Machining operations or design features <u>not</u> yet present or completed:

1. Trigger-pin hole machined or indexed.
2. Trigger mechanism housing pin machined or indexed.
3. Locking block-pin hole machined or indexed.
4. Devoid of front or rear frame rails.
5. Barrel seat machined or formed.
6. Incapable of accepting Glock locking-block.

Note: *The dust cover, top of the barrel seat area and locking-block recess area became damaged during this evaluation.*

As a result of this FTISB evaluation, the submitted "**PF940C**" is not sufficiently complete to be classified as the frame or receiver of a firearm and thus is not a "firearm" as defined in the GCA. Consequently, the aforementioned items are therefore not subject to GCA provisions and implementing regulations.

To reiterate the conclusion of FTISB's evaluation, our Branch has determined that the submitted Polymer 80, Incorporated Glock-type receiver blanks incorporating the aforementioned design features are not classified as the frame or receiver of a weapon designed to expel a projectile by the action of an explosive, thus each of these items are not a "firearm" as defined in GCA, 18 U.S.C. § 921(a)(3)(B).

Please be aware, while not classified as a "firearm"; the submitted items are each classified as a "defense article" as defined in 27 CFR Section 447.11. The U.S. Department of State (USDS) regulates all exports from, and particular imports into, the United States. Firearms, parts, and accessories for firearms are all grouped as "defense articles" by the USDS and overseen by their Directorate of Defense Trade Controls. Information regarding import/export of defense articles can be found on their web site at www.pmddtc.state.gov.

Correspondence from our Branch is dependent upon the particular facts, designs, characteristics or scenarios presented. Please be aware that although other cases (submissions to our Branch) may appear to present identical issues, this correspondence pertains to a particular issue or item. We caution applying this guidance in this correspondence to other cases, because complex legal or technical issues may exist that differentiate this scenario or finding from others that only appear to be the same.

Please be aware, this determination is relevant to the item as submitted. If the design, dimensions, configuration, method of operation, processes or utilized materials, this classification would be subject to review and would require a submission to FTISB of a complete functioning exemplar.

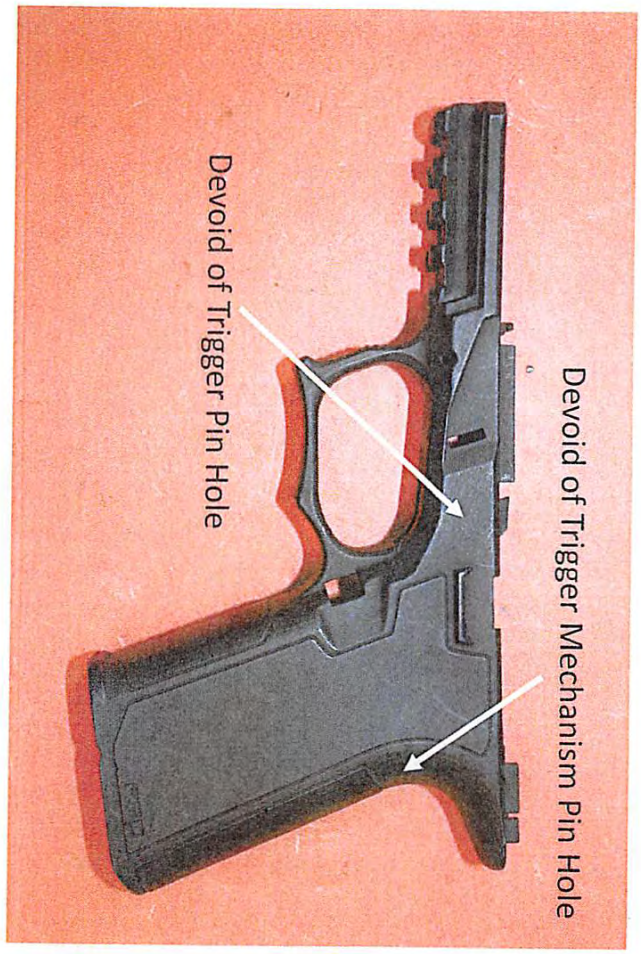
We thank you for your inquiry and trust the foregoing has been responsive to your evaluation request.

Sincerely yours,

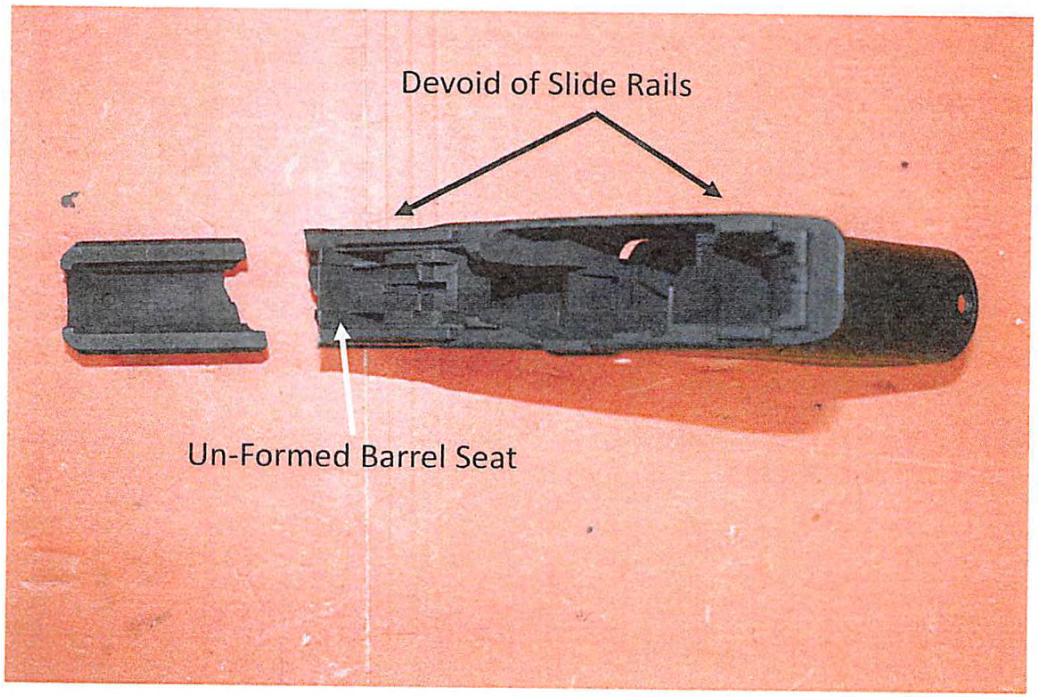
Michael R. Curtis
Chief, Firearms Technology Industry Services Branch

Enclosure

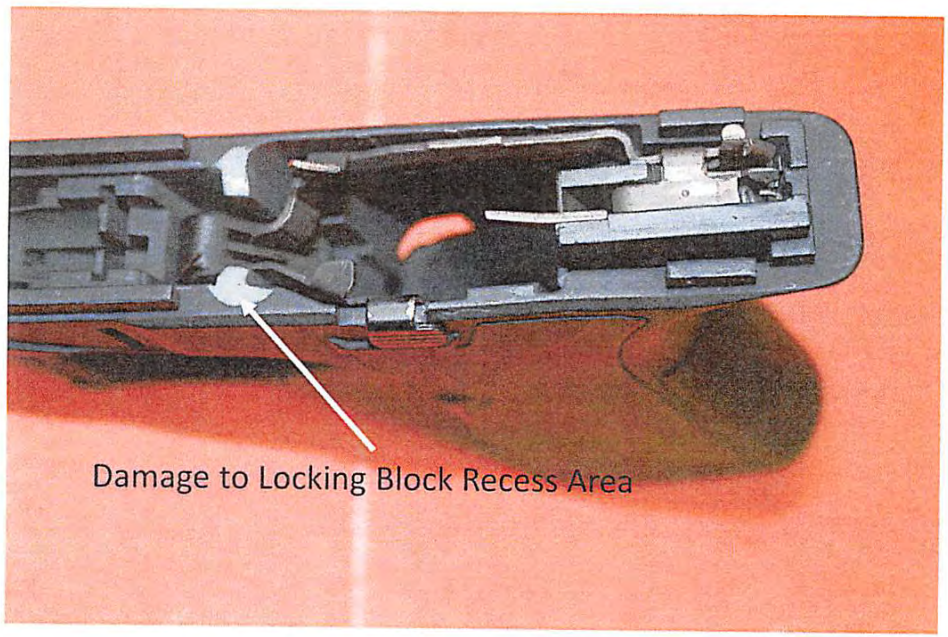
PF940C Blank, Submitted 10/6/16



PF940C Blank, Dust Cover Area Damaged



PF940C Blank, With Trigger Mechanism Housing and Slide Stop Lever



PF940C Blank, Incapable of Accepting Glock Locking Block

EXHIBIT C

2024 WL 779604
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

State of CALIFORNIA, et al., Plaintiffs,
v.
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, et al., Defendants.

Case No. 20-cv-06761-EMC
|
Signed February 26, 2024

Synopsis

Background: State of California and advocacy organization filed suit, under the Administrative Procedure Act (APA), against the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Department of Justice (DOJ), and several federal employees in their official capacities, seeking to challenge ATF's determination that the regulatory provisions of the Gun Control Act (GCA) applied to certain parts used to assemble a fully functioning firearm under some circumstances but not others. The parties cross-moved for summary judgment.

Holdings: The District Court, Edward M. Chen, J., held that:

[1] California suffered injury in fact from alleged shortcomings in ATF's final rule regulating unregistered ghost guns;

[2] ATF did not fail to comply with its own regulation in determining that certain partially-completed receivers for semi-automatic rifles were not designed to function as receivers subject to regulation;

[3] ATF acted arbitrarily and capriciously in failing to conduct full analysis of regulatory factors relevant to whether partially-completed receivers could be readily converted into functional receivers;

[4] ATF had rational basis for determining that drilling or milling takedown-pin lug clearance area of .800-inches or less prevented partially-completed receivers from being readily converted into functional receivers;

[5] ATF acted arbitrarily and capriciously in failing to address impact of easily available tools from sources other than sellers or distributors of receivers; and

[6] remand with partial vacatur was appropriate remedy.

Motions granted in part and denied in part.

Procedural Posture(s): Review of Administrative Decision; Motion for Summary Judgment.

West Headnotes (20)

[1] **Federal Civil Procedure** In general; injury or interest
Federal Civil Procedure Causation; redressability

To have standing, plaintiffs must establish (1) that they have suffered an injury in fact, (2) that their injury is fairly traceable to a defendant's conduct, and (3) that their injury would likely be redressed by a favorable decision.

[2] **Federal Civil Procedure** Pleading

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to establish standing.

[3] **Federal Civil Procedure** In general; injury or interest

In a multi-plaintiff suit, only one plaintiff need have standing in order for the case to proceed.

[4] **Weapons**Violation of other rights or provisions
WeaponsAutomatic or semi-automatic weapons

State of **California** suffered injury in fact from alleged shortcomings in final rule by Bureau of Alcohol, Tobacco, Firearms, and Explosives (**ATF**) that regulated unregistered "ghost guns" assembled from parts by end users, as required for **California** to have standing to bring suit under Administrative Procedure Act (APA) to challenge **ATF's** determination that certain partially-complete receivers for semi-automatic rifles did not constitute firearms subject to regulation under Gun Control Act (GCA); ghost guns were used in increasing number of crimes in **California**, notable percentage of ghost guns recovered in **California** were semi-automatic rifles, and tools necessary to convert partially-complete receivers for semi-automatic rifles into fully operable firearms were easily obtainable from open market and could be purchased separately from receivers. 5 U.S.C.A. § 706(2); 18 U.S.C.A. § 921(a)(3); 27 C.F.R. § 478.12(c).

[5] **Administrative Law and Procedure**Review for arbitrary, capricious, unreasonable, or illegal actions in general

Agency action is not in accordance with the law, and is subject to invalidation on judicial review under the Administrative Procedure Act (APA), when it is in conflict with the language of the statute relied upon by the agency. 5 U.S.C.A. § 706(2)(A).

[6] **Administrative Law and Procedure**Review for arbitrary, capricious, unreasonable, or illegal actions in general
Administrative Law and Procedure Wisdom, judgment, or opinion in general

In an Administrative Procedure Act (APA) case, review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency. 5 U.S.C.A. § 706(2)(A).

[7] **Administrative Law and Procedure**Availability and suitability; summary judgment as mechanism on review

In an Administrative Procedure Act (APA) case, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did. 5 U.S.C.A. § 551 et seq.

[8] **Administrative Law and Procedure**Standards and grounds for summary judgment or disposition; evidence

On motion for summary judgment in an Administrative Procedure Act (APA) case, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.

[9] **Weapons**Automatic or semi-automatic weapons

Partially-complete receivers for semi-automatic rifles do not constitute weapons designed to expel projectiles that qualify as "firearms" subject to regulation under Gun Control Act (GCA). 18 U.S.C.A. § 921(a)(3)(A).

[10] **Weapons**Automatic or semi-automatic weapons

Partially-complete receivers for semi-automatic rifles do not constitute weapons that may be readily converted to expel projectiles that qualify as "firearms" subject to regulation under Gun Control Act (GCA). 18 U.S.C.A. § 921(a)(3)(A).

[11] **Statutes**Express mention and implied exclusion; expressio unius est exclusio alterius

When interpreting a statute, because silence may signal permission rather than proscription, the fact that Congress spoke in one place but remained silent in another rarely if ever suffices for the direct answer to the question of what Congress intended.

[12] **Statutes**Presumptions, inferences, and burden of proof

In respect to Congress's intent, courts interpreting a statute should not presume that the legislature intended absurd results that might obtain upon a given interpretation of the law.

[13] **Weapons**Violation of other rights or provisions
WeaponsAutomatic or semi-automatic weapons

Bureau of Alcohol, Tobacco, Firearms, and Explosives (**ATF**) did not fail to comply with its own regulation, which regulation specified that receivers qualifying as firearms under Gun Control Act (GCA) included partially-completed receivers designed to function as receivers, in determining that certain partially-completed receivers for semi-automatic rifles were not designed to function as receivers subject to regulation under Act, and thus **ATF's** conduct in making such determination did not violate Administrative Procedure Act (APA) by failing to act in accordance with law or acting arbitrarily and capriciously; partially-completed receivers for semi-automatic rifles were not designed for immediate purpose of functioning as receiver, but rather were designed to be converted into receivers. 5 U.S.C.A. § 706(2)(A); 18 U.S.C.A. § 921(a)(3)(B); 27 C.F.R. § 478.12(c).

[14] **Administrative Law and Procedure**Review for arbitrary, capricious, unreasonable, or illegal actions in general

An agency's action can only survive arbitrary-or-capricious review under the Administrative Procedure Act (APA) where it has articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A).

[15] **Weapons**Violation of other rights or provisions
WeaponsAutomatic or semi-automatic weapons

Bureau of Alcohol, Tobacco, Firearms, and Explosives (**ATF**) acted arbitrarily and capriciously in failing to conduct full analysis of regulatory factors relevant to whether certain partially-completed receivers for semi-automatic rifles could be readily converted into functional receivers that qualified as firearms under Gun Control Act (GCA), where **ATF's** determinations did not reflect time required to

convert such partially-completed receivers into functional ones, and there was no indication that ATF actually considered complexity of object at issue in assessing how to factor time in connection with what could be readily converted. 5 U.S.C.A. § 706(2)(A); 27 C.F.R. §§ 478.11, 478.12(c).

[16] **Weapons**Violation of other rights or provisions
WeaponsAutomatic or semi-automatic weapons

Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) had rational basis for determining that drilling or milling takedown-pin lug clearance area of .800-inches or less for partially-completed receivers for semi-automatic rifles prevented such partially-completed receivers from being readily converted into functional receivers that qualified as firearms under Gun Control Act (GCA); ATF came up with .800-inch measurement limitation to distinguish between fire control cavity and takedown-pin lug clearance area, fire control cavity was critical internal area that housed semi-automatic rifle's firing components, and machining beyond .800-inch measurement would have constituted machining of fire control cavity. 5 U.S.C.A. § 706(2)(A); 18 U.S.C.A. § 921(a)(3)(B); 27 C.F.R. § 478.12(c).

[17] **Weapons**Violation of other rights or provisions
WeaponsAutomatic or semi-automatic weapons

Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) acted arbitrarily and capriciously in failing to address impact of easily available tools from sources other than sellers or distributors of receivers when it determined that certain partially-completed receivers for semi-automatic rifles sold separately from kits or tools were not readily convertible into functional receivers that qualified as firearms under Gun Control Act (GCA), even if ATF intended to address tools from separate sources through application of criminal law; ATF did not clearly identify criminal law as solution to separate source issue or provide explanation for its solution at time it made determination, and criminal prosecution of conspiring suppliers would not have addressed purchases from nonconspiring suppliers. 5 U.S.C.A. § 706(2)(A); 18 U.S.C.A. § 921(a)(3)(B); 27 C.F.R. § 478.12(c).

[18] **Administrative Law and Procedure**Statutory basis and limitation
Administrative Law and Procedure Effect on agency

To be valid under the Administrative Procedure Act (APA), any line drawing done by an agency must be consistent with the statute/regulation at issue. 5 U.S.C.A. § 706(2)(A).

[19] **Weapons**Judicial review

Remand with vacatur of portion of final rule determining that certain partially-completed receivers for semi-automatic rifles were not functional receivers that qualified as firearms under Gun Control Act (GCA) was appropriate remedy for Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) arbitrary and capricious actions in failing to consider all regulatory factors related to whether partially-completed receivers were readily-convertible to functional receivers and in failing to address impact of easily available tools from sources other than sellers or distributors of such receivers; it was questionable whether deficiencies in ATF's analysis could be redressed on remand, and vacatur of such rule portion left in place rule's core guiding

principle. 5 U.S.C.A. § 706(2)(A); 18 U.S.C.A. § 921(a)(3)(B); 27 C.F.R. §§ 478.11, 478.12(c).

[20] Administrative Law and Procedure Annulment, Vacatur, or Setting Aside of Administrative Decision

Whether agency action should be vacated under the Administrative Procedure Act (APA) depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed. 5 U.S.C.A. § 706(2).

West Codenotes

Held Invalid

27 C.F.R. § 478.12(c)

Attorneys and Law Firms

R. Matthew Wise, Office of the Attorney General Department of Justice, Sacramento, CA, Sean Clinton Woods, Office of the Attorney General **California** Department of Justice, San Francisco, CA, Scott Alan Edelman, Gibson Dunn & Crutcher LLP, Los Angeles, CA, for Plaintiff State of **California**.

Avi Weitzman, Pro Hac Vice, Paul Hastings LLP, New York, NY, Lee Crain, Pro Hac Vice, Liesel Schapira, Erica Payne, Pro Hac Vice, Gibson Dunn and Crutcher LLP, New York, NY, David M. Pucino, Giffords Law Center to Prevent Gun Violence, New York, NY, Jillian Nicole London, Scott Alan Edelman, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Plaintiffs Bryan Muehlberger, Giffords Law Center to Prevent Gun Violence.

Avi Weitzman, Pro Hac Vice, Paul Hastings LLP, New York, NY, Lee Crain, Pro Hac Vice, Liesel Schapira, Erica Payne, Pro Hac Vice, Gibson Dunn and Crutcher LLP, New York, NY, Jillian Nicole London, Scott Alan Edelman, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Plaintiff Frank Blackwell.

George M. Lee, Seiler Epstein LLP, San Francisco, CA, Cody James Wisniewski, FPC Action FoundationLas Vegas, NV, Erin M. Erhardt, Pro Hac Vice, National Rifle Association, Fairfax, VA, for Intervenors Zachary Fort, Frederick Barton, BlackHawk Manufacturing Group, Inc., Firearms Policy Coalition, Inc.

Germain Labat, Los Angeles, CA, James J. McGuire, Pro Hac Vice, Mark Berube, Barton LLP, New York, NY, for Intervenor Polymer80, Inc.

Jeremy S. B. Newman, Martin Tomlinson, DOJ-Civ, Civil Division, Federal Programs Branch, Washington, DC, Bradley Craigmyle, Office of General Counsel, Civil Division, Washington, DC, Daniel Martin Riess, U.S. Department of Justice, Civil Division, Washington, DC, for Defendant Bureau of Alcohol, Tobacco, Firearms, and Explosives.

Eric Joseph Soskin, U.S. Dept. of Justice, Office of the Assistant Attorney General, Civil Division, Washington, DC, Jeremy S. B. Newman, Martin Tomlinson, DOJ-Civ, Civil Division, Federal Programs Branch, Washington, DC, Bradley Craigmyle, Office of General Counsel, Civil Division, Washington, DC, Daniel Martin Riess, U.S. Department of Justice, Civil Division, Washington, DC, for Defendant United States Department of Justice.

Jeremy S. B. Newman, Martin Tomlinson, DOJ-Civ, Civil Division, Federal Programs Branch, Washington, DC, Daniel Martin Riess, U.S. Department of Justice, Civil Division, Washington, DC, for Defendants Merrick Garland, Steven Dettelbach.

Jeremy S. B. Newman, Martin Tomlinson, DOJ-Civ, Civil Division, Federal Programs Branch, Washington, DC, for Defendant Daniel Hoffman.

Alacoque Hinga Nevitt, Office of the Attorney General for the District of Columbia, Washington, DC, for Amicus District of Columbia.

Kathleen R. Hartnett, Cooley LLP, San Francisco, CA, for Amicus Everytown for Gun Safety Support Fund.

ORDER GRANTING IN PART AND DENYING IN

PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND GRANTING IN PAT AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Docket Nos. 182, 184

EDWARD M. CHEN, United States District Judge

***1** The dangers of "ghost guns" – guns that are assembled from parts, that are unregistered, and that are therefore untraceable – are without doubt real and substantial. The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("**ATF**") has responded with regulations addressing, *inter alia*, ghost guns and their components. The instant case concerns those regulations. The issue in the case at bar, however, is narrow – though important and potentially consequential. It does not concern the general merits or constitutionality of gun control legislation. Rather, the question before this Court concerns the legality of two specific aspects of **ATF's** technical regulations and rulings addressing ghost guns. **ATF** has ruled that the regulatory provisions of the Gun Control Act ("GCA") apply to certain parts used to assemble a fully functioning firearm under some circumstances but not others. Plaintiffs challenge the lines drawn by the **ATF** in this regard. Mindful of the deference generally afforded to agency regulations implementing a statute, the Court, for the reasons stated below, upholds one part of the challenged regulations/rulings but finds another portion invalid.

Plaintiffs are the State of **California** and the organization Giffords Law Center to Prevent Gun Violence ("GLC"). They have filed suit against **ATF** as well as the Department of Justice ("DOJ") and several federal employees (all in their official capacities). In April 2022, **ATF** issued a new final rule that addressed, *inter alia*, ghost guns. *See* 87 Fed. Reg. 24,652 (2022). According to Plaintiffs, certain of **ATF's** determinations related to ghost guns, as codified in the final rule and as reflected in, *e.g.*, Open Letters and Classification Letters applying the final rule, violate the Administrative Procedure Act ("APA").

Currently pending before the Court are the parties' cross-motions for summary judgment. An amicus brief has also been submitted in support of Plaintiffs' motion. The issues pending before the Court are: (1) whether Plaintiffs have standing to pursue this case and (2) whether **ATF's** determinations related to certain AR-type partially complete receivers violate the APA, either because the determinations are contrary to the plain text of the GCA or because they are arbitrary and capricious. Having considered the parties' briefs and accompanying submissions, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' motion and **GRANTS** in part and **DENIES** in part Plaintiffs' motion. The Court finds that there is no genuine dispute of material fact that Plaintiffs have standing. The Court further finds that **ATF** acted arbitrarily and capriciously with respect to its categorical determinations that AR-type partially complete receivers that are not indexed or machined and not sold with, *e.g.*, a jig or tools are not firearms for purposes of the GCA. In other respects, the Court finds that the regulations are not arbitrary and capricious.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Supplemental First Amended Complaint

***2** In the operative pleading (*i.e.*, the supplemental first amended complaint), Plaintiffs allege as follows.

The GCA imposes restrictions on the purchase and sale of firearms in the United States. *See* Supp. FAC ¶ 1. The statute defines "firearm," in relevant part, as follows: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [or] (B) the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3); *see also* 27 C.F.R. § 478.11.

With respect to the definition in (B), Congress has never defined the terms "frame" and "receiver." Thus, **ATF** has enacted regulations that define those terms. In essence, the receiver (for a long gun) or a frame (for a handgun) is the part of the weapon that "houses the hammer, bolt, or breechblock, as well as the firing mechanism." Supp. FAC ¶ 3.[1] It is a significant piece of a firearm, as reflected by the fact that "the GCA expressly provides that a 'frame or receiver' *is* a 'firearm.' " Supp. FAC ¶ 3 (emphasis in original).

Included among the GCA's restrictions on the purchase and sale of firearms are requirements that any firearm sold or imported in the United States "must have a unique serial number"[2] and that "licensed gun dealers must maintain identifying records, including the serial numbers of guns they sell and the identity of the buyer. These requirements allow law enforcement to trace guns recovered at crime scenes to their first retail purchaser."

Supp. FAC ¶ 1; *see also* Supp. FAC ¶ 37 ("Identifying [the] initial purchaser is critical to law enforcement's ability to investigate and solve crimes committed with the recovered firearm."). In addition, "licensed gun dealers [must] conduct criminal background checks on would-be gun purchasers," which "ensur[es] that weapons do not fall into the wrong hands." Supp. FAC ¶ 1. Furthermore, certain categories of people are prohibited from purchasing firearms, including minors as well as individuals with disqualifying criminal convictions (*i.e.*, "those who pose the greatest threat of violence"). Supp. FAC ¶ 1.

***3** Ghost guns are weapons that evade the restrictions imposed by the GCA. *See* Supp. FAC ¶ 44. They are weapons that anyone can build at home to be fully operable firearms – and "within minutes."[3] Supp. FAC ¶ 2. Ghost guns are " 'ghosts' because, lacking serial numbers, they are not traceable by law enforcement when they are used in a crime." Supp. FAC ¶ 2; *see also* Proposed Rule, 86 Fed. Reg. at 27,722 & 27,724. Today, ghost guns

> can be purchased by anyone with an internet connection and a credit card or other form of online payment (as well as at gun shows and from brick-and-mortar gun stores) – including people convicted of felonies or domestic violence, people addicted to drugs, minors, and individuals with serious mental illnesses, despite the fact that all of them are prohibited by federal law from purchasing and possessing firearms.

Supp. FAC ¶ 44.

In recent years, the ghost gun market has expanded, with "ghost gun retailers widely report[ing] substantially increased demand." Supp. FAC ¶ 10. And in recent years, there has been an increase in the use of ghost guns to commit crimes, which is unsurprising given that ghost guns bear no serial numbers and therefore cannot be traced. "Law enforcement agencies [have] connected at least 2,513 ghost guns to criminal activity between 2010 and April 2020," and, "[o]f that number, more than half ... were used or sold by criminal enterprises to facilitate crimes including gun trafficking, robbery, drug trafficking, terrorism, and murder." Supp. FAC ¶ 56. In May 2020, *60 Minutes* reported that "[g]host guns were linked to criminal cases in at least 38 states between late 2018 and May 2020," Supp. FAC ¶ 56, and that "ghost guns were used in 'at least four mass shootings, violent police shootouts ... and cases involving terrorism and white supremacists.' " Supp. FAC ¶ 11; *see also* Supp. FAC ¶¶ 51-53, 55 (describing multiple incidents in which ghost guns were used in crimes, including mass shootings).

The federal government has expressly acknowledged that "the number of crimes committed with ghost guns is 'increasing significantly and rapidly.' " Supp. FAC ¶ 12. In fact,

> [t]he number of ghost guns recovered in connection with criminal activity is growing each year. [For instance,] [i]n 2017, the District of Columbia recovered only three ghost guns. But by 2019, law enforcement recovered 116 ghost guns in one year, before recovering another 106 ghost guns in just the first five months of 2020. According to information from the District of Columbia's Department of Forensic Sciences, of the 250 ghost guns recovered in Washington D.C. between 2017 and May 29, 2020, at least 208, or 83.2%, were manufactured by a single company, Polymer80.

Supp. FAC ¶ 57.

The situation in **California** is similar.

> According to **California** law enforcement agencies, during 2020 and 2021, ghost guns "accounted for 25 to 50 percent of firearms recovered at crime scenes." The "vast majority" of these weapons were wielded by individuals prohibited from owning a firearm. In Los Angeles, the number of ghost guns recovered increased by 144% from 2015 to 2019. In San Francisco, no ghost guns were recovered in 2015, but beginning in 2016, ghost gun recoveries began to sharply rise – increasing by 1517% from 2016 to 2019.

***4** Supp. FAC ¶ 58.

The problem is nationwide. "From 2016 to 2021,

'approximately 45,240 suspected PMFs' were reported to have been recovered by law enforcement agencies[:] 1,758 in 2016, 2,552 in 2017, 3,960 in 2018, 7,517 in 2019, 10,109 in 2020, and 19,344 in 2021." Supp. FAC ¶ 59. Notably, these statistics likely underreport the problem "because they rely on instances where ghost guns are [actually] recovered by law enforcement." Supp. FAC ¶ 60.

In 2020, Plaintiffs initiated their lawsuit challenging **ATF's** approach toward ghost guns. Specifically, they challenged **ATF's** determinations that certain products known in the industry as 80% receivers and frames were not firearms for purposes of the GCA.[4] As noted above, a receiver (for a long gun) or a frame (for a handgun) is the part of the weapon that "houses the hammer, bolt, or breechblock, as well as the firing mechanism." Supp. FAC ¶ 3. The GCA expressly provides that a receiver or a frame *is* a firearm. An 80% frame or receiver is an unfinished frame or receiver – *i.e.*, a partially complete one. *See* Supp. FAC ¶ 3. According to Plaintiffs,

> [g]host gun manufacturers have ... developed tools that make it easier than ever to convert 80 percent receivers and frames into fully operable firearms in as little as ***15 minutes***. These tools include jig kits (a collection of tools, measurements, and physical guides designed to quickly make unfinished or 80 percent receivers functional), milling machines (a pre-programmed "mill" that automatically turns 80 percent receivers into functioning weapons) and even free, easy to use printable blueprints for building ghost guns. Even without these products however, anyone with internet access can easily find detailed instructions for completing their frame or receiver with common household tools.

Supp. FAC ¶ 5 (emphasis in original).

Subsequently, litigation in this case was put on hold because, in 2021, following several mass shootings in Boulder, Colorado, and Atlanta, Georgia, "the White House announced that it intended to 'issue a proposed rule to help stop the proliferation of "ghost guns." ' " Supp. FAC ¶ 89. In May 2021, **ATF** issued a proposed rule, and, in April 2022, the final rule (which is currently the subject of this lawsuit). *See* Supp. FAC ¶¶ 89-90.

In the final rule, "**ATF** stated that the goals of the Rule were to 'provide a more comprehensive definition of "frame" or "receiver" so that these terms more accurately reflect how most modern-day firearms are produced and function' *and* to 'reduce unserialized "ghost guns." ' " Supp. FAC ¶ 89 (emphasis added). Regarding the latter, the final rule provides that it is possible for a partially complete frame or receiver to be deemed a frame or receiver, and therefore a firearm, for purposes of the GCA. The final rule provides in relevant part as follows:

> ***5** The terms "frame" and "receiver" shall include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver .... [But] [t]he terms shall not include a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon (e.g., unformed block of metal, liquid polymer, or other raw material). When issuing a classification, the Director may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit.

27 C.F.R. § 478.12(c).

The term "readily" is defined as follows:

> 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 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.

Id. § 478.11.

The final rule also gives examples of what is and what is not a receiver/frame:

> Example 1 to paragraph (c) – Frame or receiver: A frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template **is** a frame or receiver, as a person with online instructions and common hand tools may readily complete or assemble the frame or receiver parts to function as a frame or receiver.
>
> ....
>
> Example 4 to paragraph (c) – **Not** a receiver: A billet or blank of an AR-15 variant[5] receiver without critical interior areas having been indexed, machined, or formed that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver.

Id. § 478.12(c) (emphasis added).

As reflected by the parties' briefs, the parties' current dispute essentially boils down to Example 4 and related determinations (including **ATF's** decision to disregard, *e.g.*, jigs and tools sold by third parties in the open market in determining when a partially complete receiver is readily convertible to a fully functional one). *See, e.g.*, Opp'n at 14-15 (noting that **ATF** *repeated* its determination in Example 4 "in multiple final agency actions that followed the Final Rule, including the 23 Challenged Classification Letters, the September 2022 Open Letter, and **ATF's** slide deck and YouTube video"); *see also* Opp'n at 2 (arguing that, even though "**ATF** will consider at least certain categories of partially complete frames and receivers to be 'firearms,' even if they are sold standalone[,] ... **ATF** is still not fully complying with federal law" because it has "unlawfully determined that many partially complete AR-style receivers – the fundamental component of deadly AR-style assault rifles – are not 'firearms' under the GCA").

6** Because Example 4 is now the focus, it bears repeating what the parameters of Example 4 are. Example 4 specifies that, if a partially complete AR-15 type receiver is not machined or indexed in critical interior areas ***and is not sold with, *e.g.*, a jig or tools, then it is not a receiver (and therefore not a firearm for purposes of the GCA). This is true even if jigs and tools may be purchased easily from sources other than the seller of the partially complete receiver. However, if a partially complete AR-15 type receiver is machined or indexed in critical interior areas, then it ***is*** a receiver (and therefore a firearm for purposes of the GCA). *See, e.g.*, 27 C.F.R. § 478.12(c) ("Example 2 to paragraph (c) – Frame or receiver: A partially complete billet or blank of a frame or receiver with one or more template holes drilled or indexed in the correct location is a frame or receiver, as a person with common hand tools may readily complete the billet or blank to function as a frame or receiver."). As for a partially complete AR-15 type receiver that is not machined in critical areas but is sold with, *e.g.*, a jig or tools, that ***may*** be a receiver (and therefore a firearm for purposes of the GCA). *See, e.g.*, **ATF** Supp. 240 (Classification Letter) ("[E]ven when a sample is not classified as a "**receiver**," or "**firearm**," that determination can change if it is sold, distributed, marketed, possessed, or otherwise made available with any associated templates, jigs, molds, equipment, tools, instructions, or guides, such as within a receiver parts kit.") (all emphasis in original).

Plaintiffs make various legal arguments challenging Example 4 but underlying those arguments is their position that a partially complete AR-type receiver[6] that is not machined or indexed in critical areas and is not sold with, *e.g.*, a jig or tools should still be deemed a receiver (and therefore a firearm) because jigs, tools, and so forth are easy to obtain or purchase from open sources other than the seller/distributor of the receiver, and, with these

items, it does not take much time or effort to make the partially complete receiver a fully functional one – *i.e.*, it may be readily converted. Plaintiffs maintain:

> As a result of **ATF's** decisions, no background check is required to buy 80 percent receivers and frames, no records of the buyers' identities must be kept, and no 80 percent receiver or frame has to carry federal serial numbers or other markings that clearly identify the product's manufacturer, importer, make, model, or caliber. Thus, while a person cannot purchase an assembled gun at a gun store without passing a background check to ensure that he is not a prohibited person under the GCA, a prohibited person can purchase an 80 percent frame or receiver from the very same gun store without any background check or any questions asked. With an 80 percent receiver or frame in hand, that prohibited person can then purchase all ancillary products needed to complete the firearm (like jigs and templates), either in a different contemporaneous transaction or from a different seller, and quickly and easily assemble a firearm functionally indistinguishable from the firearm he would have been ... barred from buying after a background check.

Supp. FAC ¶ 44.

B. Record Evidence

In terms of record evidence, there is both the original administrative record that Defendants filed, *see* Docket No. 144 (notice of administrative record), and the supplemental administrative record. *See* Docket No. 179 (notice of certified supplement administrative record). The supplemental administrative record contains the main evidence relevant to the pending dispute. It includes, *inter alia*, the final rule (Ex. 1), an Open Letter that **ATF** issued in September 2022 (Ex. 6), and the classification letters challenged by Plaintiffs (Exs. 9, 12-13, 18, 27-30, 33-34, 36-37, 40-42, 45, 51-54, 57, 62-63). The September 2022 Open Letter (Ex. 6) is significant because it addresses partially complete AR-type receivers specifically. *See* **ATF** Supp. 199 *et seq.* An exemplar classification letter that addresses a partially complete AR-type receiver is Classification Letter #313696 (Ex. 9). *See* **ATF** Supp. 221 *et seq.*

C. Extra-Record Evidence

***7** Although APA cases are typically resolved based on the administrative record, both parties have submitted declarations.

1. Declarations Submitted by Plaintiffs

Plaintiffs have submitted three declarations. Defendants agree that two of the declarations (the Gonzalez and Cutilletta Declarations) may be considered, even though this is an APA case, because they are relevant to standing. *See* Gonzalez Decl. (focusing on the standing of **California**); Cutilletta Decl. (focusing on the standing of GLC).

Defendants, however, do object to the third declaration (the Yurgealitis Declaration) on the basis that it is relevant only to the merits and therefore is impermissible extra-record evidence. Mr. Yurgealitis is a former **ATF** employee. *See* Yurgealitis Decl. ¶ 1.

It is appropriate to consider parts of the Yurgealitis Declaration, specifically, so that the Court has an understanding of the technical aspects of AR-type receivers. *See* *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (noting that, "[g]enerally judicial review of agency action is limited to review of the administrative record" but "certain circumstances may justify expanding review beyond the record or permitting discovery – *e.g.*, "if supplementation of the record is necessary to explain technical terms or complex subject matter involved in the agency action"). In this regard, the Court takes into account the following testimony from the Yurgealitis Declaration.

- "AR-15 type firearms are semiautomatic rifles ...." Yurgealitis Decl. ¶ 9; *see also* Yurgealitis Decl. ¶¶ 18-19 (providing similar testimony).

• Semiautomatic "means that the rifle fires one round per each pull of the trigger. After the cartridge is fired, the rifle automatically extracts and ejects the spent cartridge case and loads another cartridge into the chamber. This is different than a full-automatic firearm (or machine gun) which will fire continuously with a single pull of the trigger until it is released or the supply of ammunition is exhausted." Yurgealitis Decl. ¶ 19.

• "AR-15 type rifles ... have little recoil as compared to larger caliber rifles, which facilitates rapid and accurate firing." Yurgealitis Decl. ¶ 21.

• "The original design [of an AR-15] features a two piece receiver assembly. The upper receiver is the portion which houses the bolt and is attached to the barrel. The lower receiver (which is the serialized portion and considered the 'firearm' under the GCA) is the part which houses the fire control components and the attachment point for the magazine." Yurgealitis Decl. ¶ 18 & Fig. 1 (example of two-piece receiver assembly). For purposes of the pending motions, the parties use – and the Court uses – the term "receiver" to mean the lower receiver since that is the piece that is considered a firearm for purposes of the GCA.

• "The 'fire control cavity' in an AR-15 type receiver is the area behind the magazine well and above the trigger guard where the trigger mechanism, or 'fire control' mechanism, is located." Yurgealitis Decl. ¶ 31.

Figure 4: Description of the control cavity and where pin holes should be drilled

• The "main steps" to convert a partially complete receiver for an AR-15 rifle into a fully functional receiver are: "removing excess material (either aluminum or polymer depending on the product purchased) and drilling a small number of holes for various pins." Yurgealitis Decl. ¶ 27; *see also* Yurgealitis Decl. ¶ 28 (referring to "metal roll pins installed horizontally across the receiver to support or provide pivot points for trigger mechanism components").

***8** Yurgealitis Decl. ¶ 35, Fig. 4.
Plaintiffs, however, maintain that the Yurgealitis Declaration should also be considered for the merits of the case – *e.g.*, he addresses "which factors **ATF** failed to consider and how it failed to properly explain its decisions classifying partially complete AR-style receivers." Opp'n at 15 n.9. Plaintiffs note that

> exceptions exist to the rule that review of agency action is limited to the administrative record. A court may consider evidence outside the administrative record as necessary to explain agency action. *Asarco, Inc. v. United States Environmental Protection Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980). *See also Arizona Past & Future Foundation v. Lewis*, 722 F.2d [1423] at 1426 n.5 [(9th Cir. 1983)]. When there is "such a failure to explain administrative action as to frustrate effective judicial review," the court may "obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency

> decision as may prove necessary." *Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982), *quoting*, *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L. Ed. 2d 106 (1973) (per curiam). The purpose of the court's enquiry should be to ascertain whether the agency considered all relevant factors or fully explicated its course of conduct or grounds of decision.

Friends of Earth v. Hintz, 800 F.2d 822, 829 (9th Cir. 1986). As indicated below, the Court does not rely on the Yurgealitis Declaration to determine whether **ATF** failed to consider relevant factors or failed to provide an explanation for its determinations.

2. Declaration Submitted by Defendants

Defendants have submitted a single declaration (the Hoffman Declaration). Mr. Hoffman is a firearms enforcement officer at **ATF** and the Chief of the Firearms Technology Industry Services Branch. Since 2016, he has worked in the Firearms & Ammunition Technology Division. "The Division is the federal technical authority relating to firearms and ammunition and their classification under federal laws and regulations." Hoffman Decl. ¶ 1.

Defendants take the position that the Court does not need to consider the Hoffman Declaration unless it decides to consider the Yurgealitis Declaration (implicitly, on the merits). Plaintiffs argue that Defendants are improperly trying to use the Hoffman Declaration as a post-hoc rationalization of **ATF's** determinations on partially complete AR-type receivers. Because the Court is not considering the Yurgealitis Declaration for the merits, it does not consider the Hoffman Declaration for the merits.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides that a "court shall grant summary judgment [to a moving party] if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of fact is genuine only if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id.* at 252, 106 S.Ct. 2505. At the summary judgment stage, evidence must be viewed in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in the nonmovant's favor. *See* *id.* at 255, 106 S.Ct. 2505.

***9** In the case at bar, Defendants are moving for summary judgment on two grounds: (1) because Plaintiffs lack standing and (2) because Plaintiffs have failed to show a violation of the APA, *i.e.*, that **ATF** failed to act in accordance with the law or otherwise acted arbitrarily and capriciously (*i.e.*, with respect to Example 4).

In turn, Plaintiffs move for summary judgment on the merits only – *i.e.*, contending that **ATF** did in fact fail to act in accordance with the law and further acted arbitrarily and capriciously.

III. STANDING

[1] [2]A party may move to dismiss for lack of subject matter jurisdiction, including lack of standing, under Federal Rule of Civil Procedure 12(b)(1).

> To have standing, plaintiffs must establish (1) that they have suffered an injury in fact, (2) that their injury is fairly traceable to a defendant's conduct, and (3) that their injury would likely be redressed by a favorable decision.... At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice."

Mecinas v. Hobbs, 30 F.4th 890, 896-97 (9th Cir. 2022).

[3]In a multi-plaintiff suit, only one plaintiff need have standing in order for the case to proceed. *Cf.* *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.").

A. Prior Order on Standing

Previously, the Court denied Defendants' *facial* challenge to Plaintiffs' standing. *See* Docket No. 135 (Order at 7). Now, at summary judgment, Defendants launch another attack on standing, but one *factual* in nature. Only Defendants move for summary judgment on standing; Plaintiffs do not.

Although Defendants' current challenge is a factual attack on standing, the Court reviews its prior order on standing as it is informs how the Court evaluates the current challenge. In its prior order, the Court held that Defendants' facial attack on standing lacked merit as to the state of **California** and GLC. For both Plaintiffs, the issue was whether they had adequately alleged an injury in fact.

As to **California**, the Court held that the state had sufficiently alleged an injury in fact based on (1) increased cost of policing and law enforcement and (2) the enactment and implementation of state legislation.

With respect to (1), Defendants argued that **California** had failed to allege that there were crimes that involved receivers/frames not deemed firearms under the final rule. The Court rejected the argument:

> As an initial matter, the Court notes that the final rule was not issued until April 2022 and, thereafter, a period of time passed during which **ATF's** interpretation of the final rule was being clarified (*e.g.*, through its September 2022 Open Letter). Thus, the fact that **California** has not yet pointed to a specific instance in which an 80 percent frame/receiver was sold standalone and then used in a crime is not dispositive. Moreover, **California** fairly contends that its ability to point to a specific instance has been hampered by the very fact of the final rule. In other words, the final rule leaves 80 percent receivers/frames when sold standalone unregulated, which means that they are not serialized, which is then an obstacle to **California** to tracking down their sale.

***10** Docket No. 135 (Order at 9).

The Court then stated that, "when all reasonable inferences are made in **California's** favor – including the predictable effects of government action or inaction on third parties – there is a 'substantial risk' that **California** will be harmed by the final rule which leaves 80 percent receivers/frames sold standalone unregulated." Docket No. 135 (Order at 10 & n.5) (with respect to predictable effects, citing *Dep't of Commerce v. N.Y.*, —— U.S. ——, 139 S. Ct. 2551, 204 L.Ed.2d 978 (2019), where the Supreme Court recognized that a citizenship question on the census questionnaire would provoke a predictable reaction from certain third parties).

> • "First, it is predictable that 80 percent receivers/frames will be sold standalone. Indeed, in the FAC, Plaintiffs allege that ghost gun manufacturers have already advised consumers to purchase such receivers/frames standalone to avoid regulation under the final rule – *i.e.*, buying the 80 percent receiver/frame separate from the other tools or components needed to build a functional weapon." Docket No. 135 (Order at 10).
>
> • "Second, it is predictable that at least some of the 80 percent receivers/frames sold standalone will be used in crimes. The entire point of buying an 80 percent receiver/frame standalone is to avoid regulation, which requires, *inter alia*, serialization which enables law enforcement to track sales." Docket No. 135 (Order at 11). "**California's** basic contention is that the final rule contains a loophole/exception which enables people to avoid regulation. *If that loophole/exception is substantial*, it is entirely predictable that crimes involving such guns will occur and thereby injure the state. **California** has alleged that the size of the loophole/exception is substantial: to wit, there is an easy way to avoid regulation by making a purchase of an 80 percent receiver/frame standalone without, *e.g.*, an accompanying kit." Docket No. 135 (Order at 11) (emphasis added).

As for the injury identified in (2), *i.e.*, the enactment and implementation of state legislation, the Court noted that "standing may be based on 'reasonably incur[red] costs to mitigate or avoid' harm or a " 'substantial risk' " of harm. That is the gist of **California's** position here – *i.e.*, it has had to incur costs to regulate because **ATF** is not regulating, which has led to the proliferation of ghost guns." Docket No. 135 (Order at 14).

For **GLC**, the Court found that there were sufficient

allegations supporting an injury in fact because the organized had alleged that (1) "the rule frustrates its 'core mission [of] sav[ing] lives from gun violence,' " and (2) "the rule has forced the organization to divert its resources to focus on ghost guns." Docket No. 135 (Order at 19). With respect to (2), the Court noted that, as alleged,

> **ATF's** actions on ghost guns [*i.e.*, not regulating them] have required [GLC] to expend more resources and staff time because **ATF's** regulatory approach undermines every other firearm policy that [GLC] advocates for. This includes the organization's core policy platform of supporting background check and licensing laws at the federal and state level," for all firearms *in general.* FAC ¶ 136 (adding that "[b]ackground check laws and other efforts to ensure firearms are legally and responsibly possessed are impeded and undermined by **ATF**"). GLC has shifted resources to activity related to ghost guns *in particular* and away from activity related to other firearms.

***11** Docket No. 135 (Order at 23) (emphasis added).

B. Factual Challenge to Standing

[4]Defendants mount a factual challenge to Plaintiffs' standing. At summary judgment, Defendants make the same basic argument that they did in their prior motion challenging standing. To wit:

> Plaintiffs have submitted no evidence to establish that their expenditures would decrease if **ATF** regulated any products that the Rule does *not* treat as firearms. Relatedly, Plaintiffs also have failed to submit evidence that their purported injuries are caused by any of the particular products that **ATF** has classified as *not* firearms ....

Mot. at 8 (emphasis added). Defendants underscore that their argument has even more bite now because the size of the alleged loophole/exception has narrowed – *i.e.*, Plaintiffs are contesting the validity of **ATF's** actions with respect to partially complete AR-type receivers only (Example 4). This is a subset of the partially complete frames/receivers in the market.

As an initial matter, the Court bears in mind that it is only Defendants who are moving for summary judgment on standing. Plaintiffs have submitted unrebutted evidence that they have suffered an injury in fact and thus Defendants are not entitled to summary judgment.

California has submitted the Gonzalez Declaration to support its claim of injury (*i.e.*, increased cost of policing and law enforcement and the enactment and implementation of state legislation). *See* Gonzalez Decl. ¶ 2 (testifying that he is "a Special Agent Supervisor for the **California** Department of Justice ('CA DOJ'), Division of Law Enforcement, Bureau of Firearms ('BOF')"). In his declaration, Mr. Gonzalez discusses injury resulting from ghost guns generally. The question is what in his declaration addresses AR-type ghost guns specifically, as only AR-type receivers are allegedly underregulated. Below is the portion of his declaration that mentions AR-type ghost guns.

> 13. As reflected in the AFS chart [at Exhibit E[7]], the number of ghost guns recovered by **California** state and local LEAs [*i.e.*, law enforcement agencies] has increased dramatically since 2016. For example, in July 2016, LEAs recovered 2,106 guns in Los Angeles County, but only two were ghost guns without serial numbers. By July 2020, that number exploded to 82 ghost guns in Los Angeles County, accounting for nearly 6% of all weapons recovered. July 2021 saw another dramatic increase, with 321 ghost guns recovered in Los Angeles County, accounting for over 9% of all recovered firearms. In 2022 through January 2023, the percentage of ghost guns recovered in Los Angeles County remained high, accounting for approximately 5 to 8% of firearms recovered each month.
>
> 14. Other counties saw a similar increase in both the raw numbers of ghost guns recovered and ghost guns as a percentage of overall firearms recovered. For example, Alameda County recovered just four ghost guns in the entire second half of 2016, but recovered 50 ghost guns in October 2021 alone. And while there were only eight ghost guns recovered in San Bernardino County from July to December 2016, by 2022 ghost guns accounted for over 10% of the over 1,000 guns recovered per month in that jurisdiction. Based on my knowledge and experience, the vast majority of these ghost guns were assembled using commercially-available firearm precursor parts known colloquially as "80% frames" or "80% receivers," or other precursor part variants. **Moreover, since 2018 approximately 15-20% of**

the ghost guns recovered statewide were made with AR-style receivers.

***12** Gonzalez Decl. ¶¶ 13-14 (emphasis added); *see also* Yurgealitis Decl. ¶ 24 noting that ("the Santa Monica mass shooter who killed five people in the summer of 2013 used an AR-15-style 'ghost gun' "); *cf.* Yurgealitis Decl., Ex. F (NPR article, "How AR-15-style rifles write the tragic history of America's mass shootings," dated 5/2023) (at page 4, noting that "an AR-15-style weapon was used in [multiple] mass shooting[s]," including in San Bernardino, **California**, in 2015).[8]

In addition to the Gonzalez Declaration, the Cutilletta Declaration submitted by GLC takes note that, "[i]n 2021, ... the *New York Times* published an article in which **California** law enforcement officials estimated that ghost guns [generally] accounted for 25 to 50 percent of all firearms recovered at crime scenes over the previous 18 months." Cutilletta Decl. ¶ 6.

Based on the Gonzalez and Cutilletta Declarations, it is predictable that crimes will be committed in **California** with AR-type ghost guns because ghost guns are commonly used in crimes and a notable percentage of the ghost guns recovered in the state are AR-type ghost guns.

To be sure, the issue in this case focuses on the alleged loophole in the new **ATF** final rule which regulates some ghost guns but leaves untouched those that can be readily converted by use of easily available jigs or tools not sold with the receiver blanks. Hence, the question is whether this alleged shortcoming in the final rule gives rise to **California's** injuries. In this regard, it is also predictable that a significant portion of the AR-type ghost guns used in crimes will have been assembled using partially complete AR-type receivers that are not deemed firearms because they were not sold with jigs or tools – *i.e.*, the partially complete AR-type receivers described in Example 4. This likelihood is supported by the supplemental administrative record which reflects that more than twenty Classification Letters were issued by **ATF**, each concluding that a partially complete AR-type receiver was not a firearm because it was not indexed or machined and not sold with, *e.g.*, a jig or tools. It is further substantiated by the Cutilletta Declaration which notes that a company known as Juggernaut Tactical "continues to offer an 'AR-15 80% Lower Receiver' for sale on its webpage" which states as follows: "If you would like to finish your AR-15 80% Lower Receiver at home, we offer AR-15 jig kits here. Because 80% Lower Receivers are not considered firearms by **ATF**, we can ship them right to your front door with no FFL [federal firearms license] required." Cutilletta Decl. ¶ 8 & Ex. A (Juggernaut Tactical webpage). The Court acknowledges Defendants' point that "[t]he [Final] Rule makes clear that sellers or distributors may not undermine the Rule's requirements 'by working with others or structuring transactions to avoid the appearance that they are not commercially manufacturing and distributing firearms.' " Mot. at 30. Nevertheless, the Juggernaut Tactical webpage demonstrates that an end run is simple: jigs and tools are easily obtainable and can be purchased separately from the partially complete receiver. Defendants also do not dispute that jigs and tools can be purchased from the open market with relative ease; there is no evidence to the contrary.

***13** Furthermore, a reasonable jury could infer that, because **California** has not dismantled or otherwise walked back its regulatory scheme put in place to fill in the gap left by the final rule, the gap is still significant. In other words, one would not expect the state to spend sums on a problem of little to no significance.

Finally, Plaintiffs make a fair point that, "[e]ven if **ATF** were to regulate all ghost gun products other than partially complete AR-style receivers, the ' "predictable effect of [**ATF's**] action[s]" is increased demand for and use of those partially complete AR-style receivers.' " Sur-Reply at 21. The resulting increase in the demand for the unregulated partially complete receivers increases the chances of ghost guns with such receivers being used in crimes.

As for **GLC**, the same evidence above also supports that it has sustained an injury in fact, even if the only concern at this point is partially complete AR-type receivers. That is, the alleged loophole/exception left by the final rule is big enough that the organization will continue to have to divert resources to addressing ghost guns instead of other kinds of firearms.

At bottom, the fact of, and not the precise magnitude of, the harms alleged by Plaintiffs is what counts for standing. Defendants have thus failed to show either Plaintiff lacks standing to proceed with this suit; the record evidence of injuries to the Plaintiffs establishes standing. Defendants' motion based on standing is thus denied.

IV. APA

The Court now turns to the merits of the case where both parties have moved for summary judgment. As noted above, Plaintiffs assert that Defendants have violated the APA because **ATF** has determined that certain partially

complete AR-type receivers are not firearms.

[5] [6]Under the APA, an agency's decision should not be overturned unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). " 'Agency action is "not in accordance with the law" when it is in conflict with the language of the statute' " relied upon by the agency. *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008). As for the arbitrary and capricious standard,

> [a] decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise."

O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))..... "[R]eview under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency." *Id.* (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)); *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1160 (9th Cir. 1998) (citations omitted).

United States v. Snoring Relief Labs., Inc., 210 F.3d 1081, 1085 (9th Cir. 2000); *see also Kalispel Tribe of Indians v. United States DOI*, 999 F.3d 683, 688 (9th Cir. 2021).

***14** [7] [8]In an APA case, " 'summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.' " *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997). That is, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Engineering Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985).

A. AR-Type Receivers

As noted above, the basic dispute between the parties is over Example 4 as provided for in the relevant regulation.

> Example 4 to paragraph (c) – **Not** a receiver: A billet or blank of an AR-15 variant receiver without critical interior areas having been indexed, machined, or formed that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver.

27 C.F.R. § 478.12(c) (emphasis added). Plaintiffs contend that this determination by **ATF** violates the APA because it is not in accordance with the law (*i.e.*, the GCA) and further is arbitrary and capricious.[9]

Example 4 is expanded upon in other **ATF** determinations, including, most notably, the September 2022 Open Letter and certain Classification Letters.

1. September 2022 Open Letter

"**ATF** periodically publishes Open Letters to the industries it regulates in order to remind or assist licensees with understanding their regulatory compliance responsibilities under the laws and regulations administered by **ATF**." **ATF** Supp. 173 (**ATF** website).

A copy of the September 2022 Open Letter (issued after the final rule) can be found in the supplemental administrative record. *See* **ATF** Supp. 199 *et seq.* The letter addresses AR-type weapons specifically and states in relevant part as follows:

> In an AR-15 variant weapon, the "fire control cavity is the critical area of the receiver because this area "provides housing for the trigger mechanism and hammer." 27 CFR 478.12(f)(1)(i). To be a "functional" receiver, an AR-type receiver must include a cavity sufficient to house the relevant internal parts, including a hole for a selector and 2 pin holes (trigger pin and hammer pin) in precise locations. Removing or indexing any material in this critical area, or completing or indexing any of these holes, is

therefore a crucial step in producing a functional receiver.

Thus, in order not to be considered "**readily**" completed to function, **ATF** has determined that a partially complete AR-type receiver must have no indexing or machining of any kind performed in the area of the trigger/hammer (fire control) cavity. A partially complete AR-type receiver with no indexing or machining of any kind performed in the area of the fire control cavity is not classified as a "**receiver**," or "**firearm**," if not sold, distributed, or marketed with any associated templates, jigs, molds, equipment, tools, instructions, or guides, such as within a receiver parts kit.

***15** [Photos omitted.]

Because the front of the takedown-pin lug clearance area merges with the back of the fire control cavity in a functional AR-type receiver, it was necessary for **ATF** to determine the point at which the takedown-pin lug clearance area stops, and the fire control cavity begins. AFT has determined that drilling or milling a standard 0.800-inch takedown-pin area, measured from immediately forward of the front of the buffer retainer hole next to the fire control cavity, does not impact the ability of the fire control cavity to house the trigger mechanism and hammer. Provided this length is not exceeded, the fire control cavity remains "*without critical interior areas having been indexed, machined, or formed*" as stated in 27 CFR 478.12(c), Example 4.

The following illustration demonstrates the fire control cavity of an AR-type receiver.

September 2022 Open Letter, **ATF** Supp. 201-02 (all emphasis in original).[10]
The letter further states:

> It is important that persons engaged in the business of manufacturing, importing, or dealing in these items do not take any steps to avoid [the requirements of the GCA] by selling or shipping the parts or parts kits in more than one box or shipment to the same person, or by conspiring with others to do so (18 U.S.C. §§ 2, 371).

September 2022 Open Letter, **ATF** Supp. 205 (emphasis in original).

2. Exemplar Classification Letter

ATF issues not only Open Letters but also Classification Letters. As alleged in the complaint,

> [i]n [Classification] [L]etters, **ATF** responds to questions that manufacturers, distributors, and others submit to **ATF** to adjudicate, such as whether the product they are proposing to sell is subject to the GCA's requirements, including background checks and serialization. According to the **ATF** Handbook, **ATF** encourages firearms manufacturers to "seek an **ATF** classification of its product prior to manufacture" in order to "avoid an unintended classification and violations of the law." The **ATF** Handbook further explains that such Classification Letters "may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms law."

FAC ¶ 34.

The Classification Letters that Plaintiffs are challenging relate to AR-type weapons. An exemplar letter is Classification Letter #315916 which can be found in the supplemental administrative record as Exhibit 12. *See* **ATF** Supp. 238 *et seq.*; *see also* Supp. FAC ¶ 109.

***16** The content of the Classification Letter is similar to that in the September 2022 Open Letter. For example, the Classification Letter states:

> FTISB has determined that the submitted sample[ ] may not "readily be completed, assembled, restored or otherwise converted to function as a frame or receiver." Therefore, taken alone, the submitted partially complete AR-type receiver is not a "**firearm**" as

> defined in the GCA, 18 U.S.C. § 291(a)(3)....
>
> ....
>
> ... **ATF** conducts its classification review of the submitted sample, precisely as submitted. Based on the statutory and regulatory definitions above, a partially complete AR-type receiver alone, with no indexing or machining of any kind performed in the area of the fire control cavity (except the .800 inch takedown pin area, explained below) will be examined to ascertain if it can "readily be completed, assembled, restored or otherwise concerted to function as a frame or receiver." We note that even when a sample is not classified as a "**receiver**," or "**firearm**," that determination can change if it is sold, distributed, marketed, possessed, or otherwise made available with any associated templates, jigs molds, equipment, tools, instructions, or guides, such as within a receiver parts kit.
>
> ....
>
> The forward edge of the takedown pin lug clearance area of this sample item does not measure more than .800 inch immediately forward of the front of the buffer retainer hole. Additionally, the trigger/hammer recess of your submitted sample is sold with exception of the previously noted takedown pin clearance lug, and there are no index detents machined for the safety lever or the trigger/hammer pins.

ATF Supp. 240-41 (all emphasis in original).

The Classification Letter also states:

> It is important that persons engaged in the business of manufacturing, importing, or dealing in firearms do not take any steps to avoid [the requirements of the GCA] by selling or shipping the parts or parts kits in more than one box or shipment to the same person, or by conspiring with others to do so (18 U.S.C. §§ 2, 371).

ATF Supp. 242.

It is apparent from Example 4, the Open Letter, and the Classification Letters that if a receiver blank without indexing or machining is not sold with any associated templates, jigs molds, equipment, tools, instructions, or guides, it categorically will not be deemed a "receiver" or "firearm" irrespective of the availability of such ancillary tools from other sources.

B. Not in Accordance with Law

The APA provides that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." 5 U.S.C. § 706(2)(A). According to Plaintiffs, **ATF's** determinations above (*e.g.*, Example 4, the September 2022 Open Letter, and the exemplar Classification Letter) are not in accordance with law because they do not comply with the GCA. Plaintiffs underscore: "Agency action is not in accordance with the law *when it is in conflict with the language of the statute.*" *Northwest Envtl. Advocates*, 537 F.3d at 1014 (internal quotation marks omitted; emphasis added); *see also* Opp'n at 22 (arguing that the Court need not defer to the **ATF's** construction of the GCA because its interpretation is " 'manifestly contrary to the statute' " and " 'the statute is unambiguous' ").

***17** The relevant provision of the GCA is 18 U.S.C. § 921(a)(3). This provision defines "firearm" in relevant part as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" or "(B) the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3). Below the Court addresses § 921(a)(3)(A) and § 921(a)(3)(B) separately.

1. Section 921(a)(3)(A)

Under § 921(a)(3)(A), a "firearm" for purposes of the GCA includes "any weapon (including a starter gun) which will or is designed to *or* may readily be converted to expel a projectile by the action of an explosive." *Id.* § 921(a)(3)(A) (emphasis added). According to Plaintiffs, a partially complete AR-type receiver that is not machined or indexed in critical interior areas and not sold with, *e.g.*, a jig or tools, is still a weapon "designed" to expel a projectile or "may readily be converted to expel a projectile." *Id.*

a. Designed

Plaintiffs argue that a partially complete AR-type receiver is a firearm under § 921(a)(3)(A), even if it is not machined or indexed and not sold with a jig or tools, because it is "designed for a single purpose: to become an operable gun. Unlike a raw block of metal, [such a partially complete receiver is] too far along in the manufacturing process to be turned into anything but a firearm." Opp'n at 17. Plaintiffs assert: "A bicycle is 'designed to' operate as a bicycle before it gets its pedals, seat, or handlebar." Opp'n at 17. They also note: "**ATF's** Final Rule and implementing guidance never mention, let alone evaluate, the design purpose of these AR-style receivers." Opp'n at 17.

[9]Although Plaintiffs' position has some appeal, the Court rejects it. The problem for Plaintiffs is that they have strayed from the language of the GCA. Section 921(a)(3)(A) provides that a "firearm" for purposes of the GCA includes "any *weapon* (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A) (emphasis added). A partially complete AR-type receiver cannot fairly be characterized as a weapon.

First, the ordinary meaning of weapon is "something (such as a club, knife, or gun) used to injure, defeat, or destroy." https://www.merriam-webster.com/dictionary/weapon?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited on 1/10/**2024**); *see also* Webster's **3d** New Int'l Dictionary (1966) (defining "weapon" as "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"). A partially complete receiver does not satisfy that definition.

Second, additional text from the GCA indicates that a partially complete receiver cannot be deemed a weapon. Section 921(a)(3)(B) provides that a "firearm" also includes "the frame or receiver *of any such weapon.*" 18 U.S.C. § 921(a)(3)(B) (emphasis added). This language from the GCA underscores that a receiver is not a weapon in and of itself but rather is *part* of a weapon.

b. May Readily be Converted

Plaintiffs argue that, even if a partially complete AR-type receiver that is not machined or indexed and not sold with a jig or tools is not "designed" to expel a projectile, it still is a firearm under the GCA because it "may readily be converted to expel a projectile." 21 U.S.C. § 921(a)(3)(A) (defining a firearm as, *inter alia*, "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"). In support, Plaintiffs look to the National Firearms Act ("NFA") which governs machineguns. The NFA provides in relevant part: "The term 'machinegun' means any weapon which shoots, or is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 28 U.S.C. § 5845(b). Plaintiffs cite NFA cases holding that a weapon is a machinegun because it can be restored to shoot automatically in two hours using ordinarily tools (Ninth Circuit) or even in six to eight hours using particular machinery (Sixth and Eighth Circuits). *See* Opp'n at 19-20.

***18** [10]The problem for Plaintiffs is, once again, that their position runs up against the text of § 921(a)(3)(A). Section 921(a)(3)(A) requires that the item be a *weapon* that may readily be converted to expel a projectile. As discussed above, a partially complete AR-type receiver is not a weapon but rather is a part of a weapon.

2. Section 921(a)(3)(B)

Section 921(a)(3)*(B)* of the GCA provides that a "firearm" also includes "the frame or receiver of any such weapon [*i.e.*, a weapon which will or is designed to or may readily be converted to expel a projectile]." 21 U.S.C. § 921(a)(3)(B). According to Plaintiffs, a partially complete AR-type receiver that is not machined or indexed and not sold with a jig or tool is still a receiver within the meaning of § 921(a)(3)(B). Plaintiffs assert:

> Defendants concede that a receiver need not be finished or ready to use in order to qualify as a "receiver" under the GCA. **ATF** has affirmatively argued – here and in other cases – that the term "receiver" includes a partially complete receiver that is "designed to or may readily be converted to function as a ... receiver."

Opp'n at 21.

[11] [12]**ATF's** concession – *i.e.*, that a receiver includes a partially complete receiver that is designed to or may readily be converted to function as a receiver – comes from **ATF's** own regulation (as promulgated with the

final rule):

> The terms "frame" and "receiver" shall include a **partially complete**, disassembled, or nonfunctional frame or **receiver**, including a frame or receiver parts kit, **that is designed to or may readily be** completed, assembled, restored, or otherwise **converted to function as a frame or receiver** .... [But] [t]he terms shall not include a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon (e.g., unformed block of metal, liquid polymer, or other raw material). When issuing a classification, the Director may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit.

27 C.F.R. § 478.12(c) (emphasis added). Thus, Plaintiffs are not really arguing that ATF has failed to act in accordance with the *GCA* but rather has failed to properly implement one of its regulations.[11]

***19** Some "courts have concluded that an agency's failure to comply with its own regulations is 'not in accordance with law' " for purposes of the APA. *Am. Stewards of Liberty v. DOI*, 370 F. Supp. 3d 711, 728 (W.D. Tex. 2019). Other courts have held that, when an agency fails to comply with its own regulations, it has acted arbitrarily and capriciously for purposes of the APA. *See* *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("[A]n agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own regulations.' "); *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) ("The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct. The courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself."). For purposes of the instant action, precisely which standard technically applies is not significant; the analysis is largely the same.

a. Designed

[13]In their papers, Defendants disagree that they are not adhering to their own final rule/regulation. Defendants contend:

> The disputed receiver blanks are not designed to "function as a frame or receiver." Rather, they are designed *to be converted into* a functional receiver through a complex set of machining operations. They are far from being *able* to function as a receiver because the fire control cavity is solid and unmachined. *See* Sept. Open Letter at 3-4....
>
> .... [Plaintiffs] ignore[ ] the distinction between being designed to perform a function and being designed to be converted into something that will perform a function. *See* [*United States v.*] *Gravel*, 645 F.3d [549,] 551 [(2d Cir. 2011)] ("designed" refers to what a product "was conceived of and designed for, and not to any modifications made afterwards"). Therefore, unserviceable or damaged receivers may, depending on the factual circumstances, be designed to function as a receiver under the Rule. Defs.' MSJ at 10 n.5; [Final Rule,] 87 Fed. Reg. at 24,685-86 & nn.99-100, 105. But the disputed receiver blanks, which were designed to have a solid fire control cavity that cannot be used to house fire control components, plainly are not designed to function as a receiver in their present state.

Reply at 9-10 (emphasis added).

In response, Plaintiffs argue that Defendants have lost sight of the ordinary meaning of "design": "to create, fashion, execute, or construct according to a plan"; "to conceive and plan out in mind"; "to have as a purpose: INTEND"; or "to devise for a specific function or end." https://www.merriam-webster.com/dictionary/designed (last visited 2/23/2024); *see also* *United v. Thomas*, No. 17-194 (RDM), 2019 WL 4095569, at *4, 2019 U.S. Dist. LEXIS 147264, at *12 (D.D.C. Aug. 29, 2019) (providing the same first definition for "design," as that term is used in § 921(a)(3)); *cf.* *United States v. Gravel*, 645 F.3d 549, 551 (2d Cir. 2011) (in considering "designed" as used in 26 U.S.C. § 5845(b), which regulates

machineguns, finding a similar ordinary meaning for "design"; adding that "[t]he 'ordinary, contemporary, common meaning' of design must consider what was contemplated at the time the weapon was being conceived and devised"). According to Plaintiffs, under the ordinary meaning of "design," a partially complete receiver *is* designed to function as a receiver, and Defendants improperly conflate the "designed" prong of the regulation with the "may readily be converted" prong. *See* Sur-Reply at 4 (arguing that "[t]he relevant question for the purposes of the 'designed to' prong is not, as Defendants suggest, whether the item can 'readily' be converted into a receiver ..., but whether the item was manufactured *for the purpose of becoming* a receiver") (emphasis in original).

Plaintiffs' position is not unreasonable. "Designed" and "may readily be converted" are distinct concepts. The problem for Plaintiffs, however, is that Defendants have articulated a position that is not unreasonable, one that does not conflate the two concepts – in essence, that "designed" evaluates what an item's *immediate* purpose is, and not what its purpose *may be* if later converted. *Cf. United States v. Gravel*, 645 F.3d 549, 551-52 (2d Cir. 2011) ("find[ing] that the word 'designed,' when applied to a manufactured object such as a firearm, refers to what the gun was conceived and designed for, and not to any modifications made afterwards").[12] Such an interpretation makes particular sense given that the phrase used in the regulation (§ 478.12(c)) is "designed ... *to function*," and not, *e.g.*, "designed *to become*." Defendants have also made a fair argument that, under Plaintiffs' position, there is no real difference between the "designed" and "may readily be converted" prongs of the regulation, which is contrary to the use of the disjunctive "or" in the regulation. Finally, under Plaintiffs' position, the regulation would have an internal inconsistency: a partially complete receiver would always be a receiver (and therefore a firearm) under the "designed" prong which would then conflict with Example 4 – which, as noted above, provides that a partially complete receiver is not a receiver (and therefore a firearm) so long as it is not machined or indexed and is not sold with a jig or tools. Presumably, **ATF** did not intend for there to be an internal inconsistency in its own regulation, and therefore, the regulation should be construed in a way to reconcile any potential internal inconsistency if it can reasonably be so construed. *Cf. Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008) ("Where an appellate court can construe two statutes so that they conflict, or so that they can be reconciled and both can be applied, it is obliged to reconcile them."). Defendants' interpretation of "designed" – taking a narrower view compared to Plaintiffs' view – reconciles any potential inconsistency with Example 4.

***20** Accordingly, the Court finds that Defendants did not fail to comply with their own regulations, and therefore they did not fail to act in accordance with the law, nor did they act arbitrarily and capriciously. There is thus no APA violation here. *See Davis v. Latschar*, 83 **F**. **Supp**. 2d 1, 5 (D.D.C. 1998) ("[P]rovided it does not violate the Constitution or a federal statute, an agency's interpretation of its own regulations 'will prevail unless it is "plainly erroneous or inconsistent" with the plain terms of the disputed regulations.' "); *see also Stinson v. United States*, 508 U.S. 36, 45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).

b. May Readily be Converted

Plaintiffs argue that, under the final rule/regulation, a partially complete receiver must be deemed a receiver (regardless of what it is "designed" to do) if it "may readily be converted" to function as receiver.

This argument overlaps with that below – *i.e.*, as to how **ATF** has acted arbitrarily and capriciously in construing and applying the "readily be converted" test – and is therefore addressed below.

C. Arbitrary and Capricious

[14]"[A]n agency's action can only survive arbitrary or capricious review where it has articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Alliance for the Wild Rockies v. Petrick*, 68 F.4th 475, 493 (9th Cir. 2023) (internal quotation marks omitted).

> A decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise."

O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d

443 (1983)) .... "[R]eview under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency." *Id.* (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)); *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1160 (9th Cir. 1998) (citations omitted).

Snoring Relief, 210 F.3d at 1085.

In their papers, Plaintiffs have three main theories as to how **ATF** has acted arbitrarily and capriciously in failing to find that partially complete receivers without machining or indexing and not being sold with jigs or tools are not firearms:

(1) **ATF** has ignored the "GCA's [c]lear [s]tatutory [c]ommands." Opp'n at 23;

(2) **ATF** has ignored data demonstrating that such a partially complete receiver may readily be converted into a receiver, taking into account the definition of "readily" in 27 C.F.R. § 478.11 which includes multiple factors for consideration, including "[t]ime, i.e., how long it takes to finish the process," "[e]ase, i.e., how difficult it is to do so," "[e]xpertise, i.e., what knowledge and skills are required," etc. 27 C.F.R. § 478.11; and

(3) **ATF** has failed to sufficiently explain (a) why such a partially complete AR-15 type receiver with machining of *more* than 0.800 inch in the area near the fire control cavity (known as the takedown-pin lug clearance area) is a firearm but not one with machining of 0.800 inch or less, *see* Opp'n at 23; *see also* Opp'n at 30 (arguing that there must be data to support an agency's line drawing); Sur-Reply at 16-17 (arguing that line drawing must be consistent with the statute and relate to the underlying regulatory problem), and (b) why such a partially complete receiver is not a receiver given that jigs and tools are so easy to obtain even if sold separately from the partially complete receiver. *See* Opp'n at 28 (noting that "[t]emplates and instructions are easy to locate online, sometimes for free, and jigs are both inexpensive and readily available for purchase (either from a different retailer or in a different transaction from the same retailer)").

1. Theory No. 1: Ignoring GCA's Clear Statutory Commands

***21** In their first theory, Plaintiffs argue that **ATF** acted arbitrarily and capriciously because it ignored the GCA's clear text by not deeming the partially complete receivers described in, *e.g.*, Example 4 firearms (*i.e.*, partially complete receivers with no machining or indexing and not sold with jigs or tools). Plaintiffs emphasize that **ATF** never even considered whether such partially complete receivers were designed to expel a projectile.

Plaintiffs' first theory is based on § 921(a)(3)*(A)* of the GCA. For the reasons discussed above, Plaintiffs' arguments based on § 921(a)(3)(A) fail because that subsection uses the word "weapon" and a partially complete receiver is not in and of itself a weapon but rather a part of a weapon.

2. Theory No. 2: Ignoring Relevant Data

[15]In their second theory, Plaintiffs criticize **ATF** on the basis that the challenged determinations (including Example 4, the September 2022 Open Letter, and the exemplary Classification Letter) were made without taking into account all relevant data, including the factors listed in 27 C.F.R. § 478.11 which defines "readily" as follows:

> 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 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. Of particular note, **ATF's** determinations do not reflect how long it takes to convert the contested partially complete receivers into functional ones. For example, the September 2022 Open Letter and the exemplary Classification Letter both focus on machining/indexing of the fire control cavity and do not make any mention of time. Similarly, the final rule – though it does refer to the factor of time in some instances – never does so in discussing Example 4. *See, e.g.*, Final Rule, 87 Fed. Reg. at 24,663 (discussing the definition of "readily" in § 478.11, of which one factor is time); *id.* at 24,699 (taking note that "[n]umerous commenters focused on the factor of 'time' under the proposed definition of 'readily,' arguing that it is not an adequate factor, without more specificity, by which to measure if a ... partially completed frame or receiver may be readily convertible or assembled into a firearm"); *id.* at 24,700 (rejecting suggestion that "[the] factors should incorporate minimum time limits, percentages of completion, or levels of expertise, or otherwise create thresholds to determine when weapon or frame or receiver parts are 'readily' converted"). Plaintiffs contend with the assistance of available tools (which may be obtained from the open market), it can take just a few hours to convert a partially completed receiver into a fully functional one.[13]

***22** In response, Defendants argue that "the machining operations necessary for [a receiver's] completion are highly relevant to [*e.g.*] the time and ease with which it can be rendered functional." Reply at 16; *see also* Mot. at 13 (asserting that "**ATF** does consider the machining operations ... but it considers [them] in order to *apply* the Rule's 'designed to or may readily be ... converted to function' test, not to *repudiate* it"; "the machining operations ... are highly relevant to most, if not all, of [the eight] factors" listed in § 478.11) (emphasis in original). But that machining operations are relevant to, *e.g.*, time does not establish that **ATF** considered the actual time it takes to convert the kind of partially complete receiver at issue into a functional one, including when jigs and tools are available.

The agency's failure to address time is particularly troubling given that time is clearly one of the most important factors in assessing "readily." It is the first factor identified in 27 C.F.R. § 478.11. It is also a factor highlighted in case law addressing the similar issue of whether a weapon should be considered a "machinegun" as defined in 26 U.S.C. § 5845(b) (which is part of the NFA). *See* 26 U.S.C. § 5845(b) (providing that "[t]he term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger"). *See, e.g., United States v. TRW Rifle 7.62x51mm Caliber*, 447 F.3d 686, 692 (9th Cir. 2006) (stating as follows: "A **two-hour** restoration process using ordinary tools, including a stick weld, is within the ordinary meaning of 'readily restored.' As to the temporal component, two hours, while not an insignificant amount of time, is still within a range that may properly be considered 'with fairly quick efficiency,' 'without needless loss of time,' or 'reasonably fast.' As to the means of restoration, requiring the use of ordinary tools and a stick weld, even by a skilled worker, is likewise within what may properly be considered 'with a fair degree of ease,' 'without much difficulty,' or 'with facility.' ") (emphasis added).

Moreover, any evaluation of time should take into account the object at issue. For instance, in *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416 (6th Cir. 2006), the Sixth Circuit addressed whether a weapon could be "readily restored" to shoot automatically, in which case it would be deemed a "machinegun" for purposes of the National Firearms Act. The court noted that the phrase "readily restored" "must not be construed as an abstract phrase, but rather its contours should be determined in the context of what it means to be able to 'readily restore[ ]' a machinegun as opposed to some other object." *Id.* "The sort of object being restored, primarily its complexity, helps to determine whether a given amount of time, money, expertise, and skill required to restore it is considered a 'ready' restoration" – *e.g.*, "a car that could be restored in ten hours for $500 would likely be considered 'readily restored,' whereas a skateboard that required the same inputs likely would not be considered 'readily restored.' " *Id.* The record in the case at bar does not reflect that the complexity of the object at issue (an AR-15) was actually considered by **ATF** in assessing how to factor time in connection with what "may readily be converted."

To the extent Defendants argue that **ATF** did in fact consider factors such as time, that position is based on the Hoffman Declaration – which Defendants admit the Court should not consider if it does not consider the Yurgealitis Declaration submitted by Plaintiffs. Moreover, Plaintiffs make a fair argument that the Hoffman Declaration largely provides a post-hoc explanation for **ATF's** determinations.[14] *See, e.g.*, Hoffman Decl. ¶ 28 (testifying that, "[t]o help implement the Final Rule, FTISB also developed a standard procedure to assist FEOs in

evaluating the tracked ... factors under the 'readily' definition" – *i.e.*, it "developed a 'Readily' Assembled Firearm Completion Form for this purpose"; the form has several fields including "Time needed to complete build").

3. Theory No. 3: Some Machining/Indexing and Jigs/Tools Sold Separately

***23** In their third theory, Plaintiffs argue that **ATF** has acted arbitrarily and capriciously with respect to partially complete receivers that are not machined or indexed and not sold with jigs or tools by the seller or distributor of the receiver because **ATF** has failed to sufficiently explain:

> (a) why such a partially complete AR-15 type receiver with machining of *more* than 0.800 inch in the area near the fire control cavity (known as the takedown-pin lug clearance area) is a firearm but not one with machining of 0.800 inch or less, *see* Opp'n at 23; *see also* Opp'n at 30 (arguing that there must be data to support an agency's line drawing); Sur-Reply at 16-17 (arguing that line drawing must be consistent with the statute and relate to the underlying regulatory problem), and
>
> (b) why such a partially complete receiver is not a receiver when jigs and tools are easy to obtain from the open market, even if sold separately from the partially complete receiver. *See* Opp'n at 28 (noting that "[t]emplates and instructions are easy to locate online, sometimes for free, and jigs are both inexpensive and readily available for purchase (either from a different retailer or in a different transaction from the same retailer)").

Each sub-theory is addressed below.

a. 0.800-Inch Measurement

[16]Plaintiffs' first subtheory lacks merit. In their papers, Defendants address the 0.800-inch measurement as follows.

> In an AR-15 variant weapon, the area known as the "fire control cavity" is critical because it "provides housing for the trigger mechanism and hammer." **ATF** has determined that to be a "functional" receiver, an AR-type receiver must include a cavity large enough to house the relevant internal parts, including holes for certain of these parts. Removing or indexing any material in this critical area, or completing or indexing any of these holes, is thus a crucial step in producing a functional receiver.

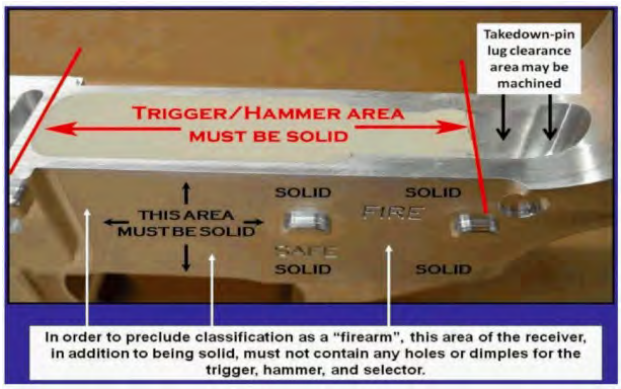
Reply at 17. Defendants continue: "[B]ecause another cavity within the receiver – the takedown-pin lug clearance area – merges with the fire control cavity in a functional AR-type receiver, it was necessary for **ATF** to determine the point at which the former area ends and the fire control cavity begins." Reply at 17-18. Drilling or milling greater than 0.800 inch "would breach the fire control cavity." Reply at 18.

The above explanation that Defendants give in their papers is consistent with the explanation given in the September 2022 Open Letter:

> In an AR-15 variant weapon, the "fire control cavity is the critical area of the receiver because this area "provides housing for the trigger mechanism and hammer." 27 CFR 478.12(f)(1)(i). To be a "functional" receiver, an AR-type receiver must include a cavity sufficient to house the relevant internal parts, including a hole for a selector and 2 pin holes (trigger pin and hammer pin) in precise locations. Removing or indexing any material in this critical area, or completing or indexing any of these holes, is therefore a crucial step in producing a functional receiver.
>
> Thus, in order not to be considered "**readily**" completed to function, **ATF** has determined that a partially complete AR-type receiver must have no indexing or machining of any kind performed in the area of the trigger/hammer (fire control) cavity. A partially complete AR-type receiver with no indexing or machining of any kind performed in the area of the fire control cavity is not classified as a "**receiver**," or "**firearm**," if not sold, distributed, or marketed with any associated templates, jigs, molds, equipment, tools, instructions, or guides, such as within a receiver parts kit.
>
> ***24** [Photos omitted.]
>
> Because the front of the takedown-pin lug clearance area merges with the back of the fire control cavity in a functional AR-type receiver, it was necessary for **ATF** to determine the point at which the takedown-pin lug clearance area stops, and the fire control cavity begins. AFT has determined that drilling or milling a standard 0.800-inch takedown-pin area, measured from immediately forward of the front of the buffer retainer hole next to the fire control cavity, does not impact the

ability of the fire control cavity to house the trigger mechanism and hammer. Provided this length is not exceeded, the fire control cavity remains "*without critical interior areas having been indexed, machined, or formed*" as stated in 27 CFR 478.12(c), Example 4.

The following illustration demonstrates the fire control cavity of an AR-type receiver.



September 2022 Open Letter, **ATF** Supp. 201-02 (all emphasis in original).

Based on the above, **ATF** has given an explanation as to why it sees the fire control cavity as being critical – *i.e.*, because it houses the firing components. *See also* Hoffman Decl. ¶ 22 ("In an AR-type firearm, the fire control cavity provides housing or a structure for the trigger mechanism and hammer. The trigger initiates the firing cycle and releases the hammer. Once released, the hammer strikes an explosive primer at the rear of the ammunition cartridge to ignite propellant powder and expel a projectile (bullet) through the barrel.").[15] It has also explained why it came up with the 0.800-inch measurement – *i.e.*, to distinguish between the fire control cavity and the takedown-pin lug clearance area. Machining beyond this measurement is implicitly condemned because it would constitute machining of the fire control cavity. Thus, Plaintiffs' challenge comes down to two points: (1) it is not clear why a partially complete AR-15 type receiver that has a measurement of 0.800 inches or less cannot readily be converted into a functional receiver, *see* Sur-Reply at 14, and (2) 0.800 inch is an arbitrary number.

With respect to (1), that essentially replicates the argument that Plaintiffs made in Theory No. 2 (discussed above in Part IV.C.2). As for (2), some line drawing needed to be done and it does not appear that **ATF** picked the 0.800-inch number arbitrarily but rather based on the physical structure of an AR-15 type receiver. Therefore, the **ATF's** interpretation is not arbitrary or capricious; it has a rational basis.

b. Jigs or Tools Not Sold with Partially Complete Receiver

[17]Although Plaintiffs' first sub-theory is problematic, Plaintiffs' second sub-theory has merit. Essentially, Plaintiffs contend that it makes no sense to say that a partially complete receiver that is not machined or indexed and is not sold with a jig or tools is not a firearm even where jigs and tools are easy to obtain (*i.e.*, can easily be purchased separately). In response, Defendants do not dispute that jigs and tools may be purchased separately from sources other than the seller or distributor of the receiver with ease. Indeed, Defendants contend that **ATF** *did* "consider that partially complete frames and receivers may be purchased separately from an assembly kit or from templates, jigs, and other similar equipment." Mot. at 30. But **ATF's** solution, Defendants explain, was to address that problem through the application of criminal law.

> ***25** The Rule makes clear that sellers or distributors may not undermine the Rule's requirements "by working with others or structuring transactions to avoid the appearance that they are not commercially manufacturing and distributing firearms." Sellers thus may not make an end run around the Rule's requirements by structuring sales transactions, for example, by shipping a partially complete receiver to a buyer in one transaction and then shipping the jigs, tools, or written materials allowing the partially complete receiver to be readily concerted into a functional receiver in a separate package or at a different time. Nor may sellers conspire with other sellers to evade the Rule's requirements by agreeing that they will separately sell to a buyer a partially complete frame and tools allowing for its ready conversion into a functional frame. **ATF** thus did consider that partially complete frames and receivers may be sold separately from kits, jigs, or similar items, but decided to address this problem through well-established criminal law: conspiracy, aiding and abetting, and structuring of transactions.

Mot. at 30 (quoting Final Rule, 87 Fed. Reg. at 24,713); *see also* Reply at 21 (asserting that, "[t]o the extent that Plaintiffs raise concerns about licensees evading the Rule through improper structuring of transactions or entities, those concerns may be ameliorated by the application of ordinary criminal principles like conspiracy and aiding

and abetting liability to any unlawful conduct").

The first problem with Defendants' position is that ATF itself never clearly identified criminal law as the solution to the specific problem pinpointed by Plaintiffs. Nor did ATF ever explain why that was the appropriate solution. Defendants cite a D.C. Circuit case for the proposition that "[i]t does no violence to *Chenery* or *Kansas City* principles[16] for an agency to advance a legal argument in support of its administrative position which *bolsters* rather than duplicates the consistent position upon which its decision was made below." *America's Community Bankers v. FDIC*, 200 F.3d 822, 836 (D.C. Cir. 2000) (emphasis added). But the D.C. Circuit case is of little support because ATF's solution here was lacking in *any* explanation at the time it enacted the final rule – *i.e.*, this is not a situation where Defendants are now, in litigation, simply *expanding* on ATF's explanation that was given during the rulemaking below.

Furthermore, even if the Court were to consider the "solution" now framed by Defendants, that solution is patently incomplete. Even if criminal law could be used against, *e.g.*, a supplier who sold a partially complete receiver and a jig/tools in two separate transactions to the same consumer, that would *not* address the problem of a consumer buying a partially complete receiver and a jig/tools from two different, nonconspiring suppliers – the situation most likely to be encountered in the marketplace.

More fundamentally, criminal prohibitions and the existence of some deterrence against circumventing the regulations are issues *separate from* whether a receiver blank can be "readily converted" to a functioning receiver – the central point of the regulations implementing the GCA. The regulation defining "readily convertible" does not list as a factor the role of criminal law deterrence. *See* Sur-Reply at 16; *cf.* *Snoring Relief*, 210 F.3d at 1085 (indicating that a decision is arbitrary and capricious if the agency " 'has relied on factors which Congress has not intended it to consider' "). In short, whether criminal law may deter certain behavior is not material to whether a partially complete receiver may be "readily converted" to a fully functioning one. ATF's citation to criminal law enforcement against some forms of circumvention does not address the basic problem that renders this aspect of the ATF's regulation and rulings arbitrary and capricious – the ATF his simply disregarded the ease by which tools/jigs are available (from whatever source) which would render a receiver blank "readily convertible" to a completed receiver.

***26** [18]For similar reasons, the Court is troubled by several of ATF's post-hoc explanations as to why it decided to rely on criminal law as the solution. *See* Reply at 19 (asserting that, "[b]ased on ATF's expertise in enforcing federal firearm laws, the agency drew this line where it did, because of such factors as the difficulty of enforcing a rule of broader scope and the costs to manufacturers of a broader rule").[17] To be valid, any line drawing done by an agency must be consistent with the statute/regulation at issue. *Compare* *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992) (finding that EPA's decision not to regulate construction sites smaller than five acres was arbitrary when EPA provided no data to justify the five-acre threshold and admitted that unregulated sites could have significant impact on water quality), *with* *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (stating that "the FCC has provided a reasonable explanation for the line it has drawn, and demonstrated that line's relationship to the underlying regulatory problem addressed by the finder's preference program[;] [i]t is also a line that is consistent with the Commission's statutory obligation to 'manage the spectrum to be made available for use by the private land mobile services' in a manner that will 'improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users' "). *See also* *Mass. v. EPA*, 549 U.S. 497, 527, 532-33, 535, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (acknowledging that "any agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities" and this "discretion as at its height when the agency decides not to bring an enforcement action"; but still finding agency's rationale for inaction problematic because it "rest[ed] on reasoning divorced from the statutory text" – "EPA must ground its reasons for action or inaction in the statute")[18]; *Prometheus Radio Proj. v. FCC*, 373 F.3d 372, 420 (3d Cir. 2004) (stating that "[t]he deference with which we review the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not 'patently unreasonable' ").

Likewise, the Court is troubled by ATF's argument that it is permissible for an agency to undertake reform one step at a time. While that may be true as a general matter, ATF cannot properly be said to be engaged in "reform one step at a time" when it rules that partially complete receivers not machined or indexed and not sold with jigs/tools are *not* firearms regardless of the availability of such jigs/tools in the open – it has enacted a *categorical* bar. This is not, *e.g.*, a situation where ATF has chosen to first focus on regulation of a particular kind of firearm over another (*i.e.*, made an enforcement decision).

D. Remedy

***27** For the reasons stated above, Plaintiffs have several meritorious arguments:

> (1) **ATF's** determinations regarding partially complete receivers that are not machined or indexed and not sold with jigs or tools (*e.g.*, in Example 4, the September 2022 Open Letter, and the exemplary Classification Letter) were made without taking into account all relevant data, including the factors listed in 27 C.F.R. § 478.11 (which defines "readily" for purposes of "readily converted"); and
>
> (2) **ATF** has failed to explain why it is not regulating such partially complete receivers given that jigs and tools are easily obtainable.

The Court now turns to the issue of remedies. The remedies sought by Plaintiffs are as follows:

> (1) declare one subsection of the Final Rule (Example 4) and related agency actions to be unlawful and enjoin Defendants from enforcing them; (2) vacate one subsection of the Final Rule (Example 4) and related agency actions; and (3) remand to **ATF** for further proceedings consistent with the Court's opinion.

Sur-Reply at 17; *see also* Pls.' Prop. Order (Docket No. 184-1).

[19]Defendants argue that the Court should simply remand to the agency *without* any vacatur of any part of the final rule/regulation. They contend, for example, that "set aside" as used in the APA simply means to disregard, not to vacate. *See* 5 U.S.C. § 706(2) (providing that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be – [*e.g.*] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). They also argue that, even if vacatur is permitted under the APA, *universal* vacatur is not a remedy that should be awarded lightly because it comes with many of the same problems as a universal injunction. Again, Defendants suggest that there should simply be a remand to **ATF** without any vacatur.[19]

[20]The Ninth Circuit, however, has held that "vacatur is the presumptive remedy under the APA, and [w]e order remand without vacatur only in limited circumstances. Whether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *350 Mont. v. Haaland*, 29 F.4th 1158, 1177 (9th Cir. 2022) (internal quotation marks omitted); *cf. Am. Pub. Gas Ass'n v. United States DOE*, 72 F.4th 1324, 1342 (D.C. Cir. 2023) ("The decision to vacate depends on two factors: the likelihood that deficiencies in an order can be redressed on remand, even if the agency reaches the same result, and the disruptive consequences of vacatur.") (internal quotation marks omitted). Given this authority, the Court rejects Defendants' arguments. It is questionable whether the deficiencies identified by the Court can be redressed on remand, particularly given that many of **ATF's** post-hoc explanations are problematic. Furthermore, vacatur will not be substantially disruptive given that the Court is, in effect, simply setting aside Example 4 and adjudicating on the margins of the **ATF's** regulatory domain; the order leaves in place the core guiding principle in § 478.12(c) that a partially complete receiver is still deemed a receiver if it is designed to or may readily be converted to function as a receiver. The vast corpus of **ATF's** regulation of ghost guns and constituent parts remains untouched.

V. CONCLUSION

***28** For the foregoing reasons, the Court hereby grants in part and denies in part Defendants' motion for summary judgment and grants in part and denies in part Plaintiffs' motion for summary judgment. The Court rejects Plaintiffs' challenge to **ATF's** use of the 0.800 inch measurement with respect to the fire control cavity. However, the Court agrees with Plaintiffs that **ATF's** actions related to Example 4 are arbitrary in capricious in failing to take into account all eight factors related to the "readily" assessment (in particular, time) and in failing to address the impact of easy availability of, *e.g.*, jigs and tools from sources other than the seller or distributor of the incomplete receiver.

The Court therefore: (1) declares one subsection of the final rule (Example 4) and related agency actions to be unlawful and enjoins Defendants from enforcing them; (2) vacates one subsection of the final rule (Example 4) and related agency actions; and (3) remands to **ATF** for

further proceedings consistent with the Court's opinion.

This order disposes of Docket Nos. 182 and 184.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2024 WL 779604

Footnotes

1 The current definitions for "frame" and "receiver" can be found in 27 C.F.R. § 478.12. *See* 27 C.F.R. § 478.12(a)(1) (providing that a firearm frame is the part of a handgun that "provides housing or a structure for the component (i.e., sear or equivalent) designed to hold back the hammer, striker, bolt or similar primary energized component prior to initiation of the firing sequence"); *id.* § 478.12(a)(2) (providing that a firearm receiver is the part of a long gun that "provides housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence (i.e., bolt, breechblock, or equivalent)").

2 It is the frame or receiver that must bear a serial number. *See* 18 U.S.C. § 923(i) ("Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.").

3 Because ghost guns can be built at home, they are also called privately made firearms, or "PMFs." See Proposed Rule, 86 Fed. Reg. 27,720, at 27,722 (2021).

4 As Defendants note, the GCA and implementing regulations do not use the term "80% frame" or "80% receiver." "80%" is an industry term – *i.e.*, a term that the ghost gun industry uses to market certain products. *See* Mot. at 4-5, 15-16; *see also* Final Rule, 87 Fed. Reg. at 24,663 n.47 ("The term '80% receiver' is a term used by some industry members, the public, and the media to describe a frame or receiver that has not yet reached a stage of manufacture to be classified as a 'frame or receiver' under Federal law. However, that term is neither found in Federal law nor accepted by **ATF**.").

5 "The terms 'variant' and 'variants thereof' mean a weapon utilizing a similar frame or receiver design irrespective of new or different model designations or configurations, characteristics, features, components, accessories, or attachments." 27 C.F.R. § 478.12(a)(3).

6 Example 4 focuses on partially complete AR-15 type receivers. However, Plaintiffs' challenge is not limited to partially complete AR-15 type receivers but expands more broadly to other partially complete AR-type receivers (*e.g.*, partially complete AR-10 receivers).

7 "**California** law requires all recovered firearms to be recorded in the statewide Automated Firearm System

(AFS)." Gonzalez Decl. ¶ 12.

8 The Court considers these parts of the Yurgealitis Declaration as they bear on standing (*i.e.*, the Court is not restricted to the administrative record).

9 Again, Plaintiffs' challenge implicates partially complete AR-type receivers generally, and not just partially complete AR-*15* type receivers specifically. *See* note 7, *supra.* However, the parties have often focused on partially complete AR-15 type receivers since that is the specific example (Example 4) given in the regulation.

10 As indicated above, for purposes of the pending motions, the Court often focuses on partially complete AR-15 type receivers. However, Plaintiffs have also challenged **ATF's** determinations related to partially complete AR-10 type receivers on similar grounds. *See* Opp'n at 10 n.6 (noting that "**ATF's** analysis of partially complete AR-10 receivers is identical to its analysis of partially complete AR-15 receivers, except that **ATF** considers whether the forward edge of the takedown pin lug clearance area measures more than 1.600 inch (instead of 0.800 inch)").

11 The Fifth Circuit has held that **ATF's** definition of "frame" or "receiver" as including partially complete frames or receivers is invalid on the basis that it is "an impermissible extension of the statutory text [of the GCA] approved by Congress." *Vanderstok v. Garland*, 86 F.4th 179, 189 (5th Cir. 2023). The Fifth Circuit reasoned as follows:

> In the GCA's definition of "firearm," the first subsection includes flexible language such as "designed to or may readily be converted to expel a projectile by the action of an explosive." *See* 18 U.S.C. § 921(a)(3)**(A)**. But the subsection immediately thereafter [§ 921(a)(3)**(B)**], which contains the term "frame or receiver," does not include such flexibility [*i.e.*, does not contain the language "designed to" or "may readily be converted"]. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, —— U.S. ——, 141 S. Ct. 1761, 1782, 210 L. Ed. 2d 432 (2021) (citation omitted)....
>
> There is also a clear logical flaw in **ATF's** proposal. As written, the Final Rule states that the phrase "frame or receiver" includes things that are admittedly not yet frames or receivers but that can easily become frames or receivers – in other words: parts. [ ] As the district court put it, under the Final Rule, "**ATF** may properly regulate a component as a 'frame or receiver' even after **ATF** determines that the component in question is *not* a frame or receiver." *VanDerStok* [*v. Garland*], —— F.Supp.3d ——, 2023 WL 4539591, 2023 U.S. Dist. LEXIS 115474 [(N.D.Tex. June 30, 2023)] (emphasis in original). Such a proposition defies logic: "a part cannot be both *not yet* a receiver and a receiver at the same time."

Id. at 189-90 (italics in original; bold added).

Respectfully, the analysis above is problematic for several reasons. Although *Collins* states that a presumption may obtain from silence, case law also makes clear that any such presumption is simply a canon of construction that is not, on its own, necessarily dispositive. *Cf.* *United States v. Vonn*, 535 U.S. 55, 65, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002) ("[T]he canon that expressing one item of a commonly

associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives.").

Indeed, a contrary inference may be drawn: "because silence 'may signal permission rather than proscription,' the fact 'that Congress spoke in one place but remained silent in another ... rarely if ever suffices for the direct answer' to the question of what Congress intended. *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1260 (11th Cir. 2020); *see also* *Catawba Cnty. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (stating that, "[w]hen interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion' "); *cf.* *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009) (Scalia, J.) (stating, in case under consideration, that "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree"). In assessing whether an agency has exceeded its statutory authority, a court must " 'ascertain whether Congress had a specific intent on the precise question before [it],' " and, if the statute is ambiguous on the point, [the court] assume[s] that Congress delegated to the agency the authority to reasonably answer the question." *Gateway Radiology Consultants*, 983 F.3d at 1256. Hence, Congress's silence with respect to "frame" or "receiver" does not compel the conclusion that the definition of these terms is beyond interpretation by the **ATF**; it could support the inference that it affords ATP the authority to render and interpretation of the statute.

In respect to Congress's intent, courts should not presume that the legislature intended absurd results that might obtain upon a given interpretation of the law. *See* *United States v. Thomsen*, 830 F.3d 1049, 1058 (9th Cir. 2016) ("Notwithstanding the importance of the text [of a statute], we must avoid a literal interpretation of the statute that produces an absurd result.") (internal quotation marks omitted). Here, it makes no sense that something less than a fully functional receiver could never be a receiver regardless of the circumstances. For example, if a receiver were partially complete because it was missing only one pinhole or dimple which could easily be drilled, it would make little sense to hew to the position that the partially complete receiver still is not a receiver for purposes of the GCA, as the Fifth Circuit's logic suggests. This is particularly true given that the GCA was enacted to strengthen its predecessor statute (the Federal Firearms Act ("FFA")), not dilute it, as indicated by, *e.g.*, the fact that § 921(a)(3)(A) was revised to make the definition of firearm more inclusive.

> The definition of the term "firearm" in paragraph (3) is a restatement and revision of the provisions of existing law (15 U.S.C. 901(3)) [i.e., the FFA]. The revised definition has been extended to include any weapon by whatsoever name known "which will," or "which may be readily converted to," expel a projectile or projectiles by the action of an explosive. This represents a much needed clarification and strengthening of existing law designed to prevent circumvention of the purposes of the act. As under existing law, the definition also includes weapons "designed to" expel a projectile or projectiles by the action of an explosive, and firearm mufflers and firearm silencers.

111 Cong. Rec. 5520, 5527 (Mar. 22, 1965) (Sen. Dodd, introducing the bill). It is highly unlikely that Congress intended the perverse result that no matter how close to completion a partially complete receiver may be, it is categorically exempt from regulation under § 921(a)(3) of the GCA.

It is true that the GCA's predecessor statute "had specific language that authorized regulation of 'any part or parts of' a firearm," but that "Congress removed this language when it enacted the GCA, replacing 'any part or parts' with just 'the frame or receiver of any such weapon.' " *Vanderstok*, 86 F.4th at 191. However, the legislative history for the GCA reflects that the "parts" language was dropped because of impracticality. As Senator Dodd noted: "The present definition of this term [in the FFA] includes 'any part or parts' of a firearm. It has been impractical to treat *each small part* of a firearm as if it were a weapon [i.e., firearm]. The revised definition substitutes the words 'frame or receiver' for the words 'any part or parts.' "

Id. That it was not practical to treat each small part of a firearm as a firearm does not mean there was an intent to regulate less.

12 *Gravel* was a criminal case. The defendant had stolen a weapon that "originally was manufactured to fire automatically, but was later modified to shoot semi-automatically." *Gravel*, 645 F.3d at 550. The modification "did not change the fundamental design of the weapon or ... 'redesign' the weapon into something other than an automatic fire weapon." *Id.* at 552. Rather, "[t]he evidence indicated that simply replacing the auto sear [which had been removed] would reenable the gun's automatic fire capabilities." *Id.* On appeal, the issue was whether the district court properly applied a six-level enhancement based on its finding that the weapon was a "machinegun" as defined in 26 U.S.C. § 5845(b) (which is part of the National Firearms Act). Under that statute, a machinegun is a weapon that " 'is designed to shoot ... automatically more than one shot.' " *Id.* at 550.

> Gravel [the defendant] argues that the M-16A1 was "re-designed" into a semi-automatic weapon, and that because Section 5845 uses the present tense "is designed," we may consider only the state of the weapon as it existed at the time of his crime. The government argues that under the plain meaning of the statute, "designed" refers to what the weapon was originally designed to do, not to post-manufacture modifications.

Id.

The Second Circuit ultimately sided with the government:

> We find that the word "designed," when applied to a manufactured object such as a firearm, refers to what the gun was conceived and designed for, and not to any modifications made afterwards. This is consistent with the statutory language further defining "machinegun" as a weapon readily restorable to automatic fire. There would be no need to include a definition taking future modifications into account if the word "design" encompassed post-manufacture modifications.

Id. at 551-52.

13 The Court notes that the parties do not appear to be disagree on this point. *Compare* Yurgealitis Decl. ¶ 27 (testifying that the "conversion process can take one to three hours, depending on the available tools, the quality of the partially complete frame or receiver, the demarcations on the frame or receiver designed to guide swift conversion, and the mechanical aptitude of the individual completing the receiver"), *with* Hoffman Decl. ¶ 38 (testifying that it took him 4.5 hours to do his first conversion, although "the completed receiver build quality was substandard, with the fire control cavity not being cut to exact specifications"); Hoffman Decl. ¶ 27 (testifying that, prior to the September 2022 Open Letter, "FEOs in FTISB completed or attempted to complete numerous partially complete AR-type receivers with a fixture/jig" and "[t]hese builds averaged 1.5-3 hours to complete depending on the quality of the fixtures/jigs and the tools used and the experience of the FEO"). Though these declarations are not admitted for consideration for the reasons stated above, they are cited here simply to show the parties do not dispute this particular fact. Ultimately, on remand, the time needed to convert and its implications will need to be considered by the agency.

14 *See generally* *DOC v. New York*, —— U.S. ——, 139 S. Ct. 2551, 2573, 204 L.Ed.2d 978 (2019) (noting that, "in order to permit meaningful judicial review, an agency must 'disclose the basis' of its action" and, "in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record"); *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 690

(N.D. Cal. 2020) (stating that an "explanation ... not publicly advanced by the agency at the time it reached its determination ... constitutes an impermissible post hoc rationalization").

15 Plaintiffs have expressly stated that they do not object to, *inter alia*, ¶ 22 of the Hoffman declaration since it "can assist the Court in understanding technical terms." Sur-Reply at 8 n.4.

16 In *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), the Supreme Court held that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Id.* at 87, 63 S.Ct. 454. In *City of Kansas City v. Department of Housing & Urban Development*, 923 F.2d 188 (D.C. Cir. 1991), the D.C. Circuit held: "In whatever context we defer to agencies, we do so with the understanding that the object of our deference is the result of agency decisionmaking, and not some *post hoc* rationale developed as part of a litigation strategy." *Id.* at 192.

17 Defendants maintain that these are not post-hoc explanations because the Final Rule references all or many of these concerns. *See* Reply at 22. *See, e.g.*, Final Rule, 87 Fed. Reg. at 24,697 ("Commenters opposed to inclusion of partially complete frames or receivers in the proposed definition of frame or receiver stated that the proposed rule would be difficult, if not impossible, to enforce. They opined that there is no purpose in trying to "ban 80%" receivers or regulate partially complete receivers because the rule is easily undercut by 3D-printing technology and the availability of online tutorials, which will only become more available and affordable for the public over time."); *id.* ("Manufacturers also raised concerns because they purchase partially machined raw materials or receiver shells without drilled fire control holes from domestic and foreign sources that are not current licensees. The manufacturers were concerned that the proposed rule would subsequently require their suppliers to obtain an FFL license, apply the markings, and keep A&D records, which would be very costly and disruptive."); *id.* at 24,699 ("Commenters asserted that no one can predict what 'instructions, guides, templates, [and] jigs' the ATF Director will rely on in any given case.").

While at least some of these concerns were raised by commenters responding to the Proposed Rule, ATF did not expressly assert that these concerns were the basis for its line-drawing that Plaintiffs are now challenging (*e.g.*, to justify Example 4). And as noted *infra*, in any event, these consideration are not clearly sanctioned by the GCA and do not fall within the ambit of the ATF regulation on "readily convertible."

18 Defendants argue that *Massachusetts v. EPA* is distinguishable: "The case involved an agency's determination not to regulate at all despite a congressional command to regulate whenever the agency made certain findings. Because Congress has not dictated that ATF regulate under certain prescribed circumstances, the case is inapposite." Reply at 15 n.9. But that argument is problematic because Congress has dictated that ATF regulate firearms, *see* 18 U.S.C. § 926 (providing that "[t]he Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter"), and Plaintiffs are asserting that certain partially complete receivers *are* firearms.

19 Many of Defendants' arguments are the same as points made by Justice Gorsuch in his concurrence in *United States v. Texas*, 599 U.S. 670, 143 S. Ct. 1964, 1978-85, 216 L.Ed.2d 624 (2023) (Gorsuch, J., concurring). Justice Gorsuch did note, however, that there were "[t]houghtful arguments and scholarship ...

on both side of the debate," and that he did not "mean to equate vacatur of agency action with universal injunctions .... But the questions here are serious ones. And given the volume of litigation under the APA, this Court will have to address them sooner or later. Until then, we would greatly benefit from the considered views of our lower court colleagues." *Id.*

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EXHIBIT D

KeyCite Yellow Flag - Negative Treatment
Certiorari Granted by Garland v. Vanderstok, U.S., April 22, 2024

86 F.4th 179
United States Court of Appeals, **Fifth Circuit**.

Jennifer **VANDERSTOK**; Michael G. Andren; Tactical Machining, L.L.C., a limited liability company; Firearms Policy Coalition, Incorporated, a nonprofit corporation, Plaintiffs—Appellees,
Blackhawk Manufacturing Group, Incorporated, doing business as 80 Percent Arms; Defense Distributed; Second Amendment Foundation, Incorporated; Not an L.L.C., doing business as JSD Supply; Polymer80, Incorporated, Intervenor Plaintiffs—Appellees,
v.
Merrick **GARLAND**, U.S. Attorney General; United States Department of Justice; Steven Dettelbach, in his official capacity as Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; Bureau of Alcohol, Tobacco, Firearms, and Explosives, Defendants—Appellants.

No. 23-10718
|
FILED November 9, **2023**

Synopsis
Background: Firearms manufacturers and distributors, advocacy organization, and individual gun owners brought action challenging validity of Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) final rule defining terms "firearm" and "frame or receiver" as including partially complete, disassembled, or nonfunctional frames or receivers and weapon parts kits. The United States District Court for the Northern District of Texas, Reed O'Connor, J., **2023** WL 4539591, entered summary judgment in plaintiffs' favor, and government appealed.

Holdings: The Court of Appeals, Engelhardt, Circuit Judge, held that:

[1] ATF's definition of "frame" and "receiver" exceeded its statutory authority, and

[2] ATF's definition of "firearm" as including "weapon parts kit" exceeded its statutory authority.

Affirmed in part, vacated in part, and remanded.

Oldham, Circuit Judge, concurred and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (14)

[1] Federal Courts Summary judgment
Federal Courts Summary judgment

Court of Appeals reviews grant of summary judgment de novo, viewing all evidence in light most favorable to nonmoving party and drawing all reasonable inferences in that party's favor. Fed. R. Civ. P. 56(a).

[2] Administrative Law and Procedure Statutory limitation

Administrative agency's power to promulgate legislative regulations is limited to authority delegated by Congress.

1 Case that cites this headnote

[3] Administrative Law and Procedure Consistency with statute, statutory scheme, or legislative intent

Core inquiry in determining whether agency rule falls within scope of authority delegated to agency by Congress is whether proposed rule is lawful extension of statute under which agency purports to act, or whether agency has indeed exceeded its statutory jurisdiction, authority, or limitations. 5 U.S.C.A. § 706(2)(C).

2 Cases that cite this headnote

[4] **Statutes**Plain Language; Plain, Ordinary, or Common Meaning
StatutesDesign, structure, or scheme

In statutory interpretation disputes, court's proper starting point lies in careful examination of ordinary meaning and structure of law itself.

1 Case that cites this headnote

[5] **Administrative Law and Procedure**Effect of agency's authority or lack thereof

Only where statutory text shows that agency has clear congressional authorization to enact regulation can such regulation withstand judicial scrutiny. 5 U.S.C.A. § 706(2)(C).

[6] **Statutes**Plain Language; Plain, Ordinary, or Common Meaning

Court normally interprets statute in accord with ordinary public meaning of its terms at time of its enactment.

[7] **Weapons**Validity

Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) final rule defining terms "frame" and "receiver" of weapon, as used in Gun Control Act (GCA), to include "partially complete, disassembled, or nonfunctional frame or receiver" exceeded its statutory authority, even though ATF had historically regulated parts that were not yet frames or receivers as frames or receivers; ATF's definition materially deviated from past definitions to encompass items that were not originally understood to fall within GCA's ambit. 5 U.S.C.A. § 706(2)(C); 18 U.S.C.A. § 921(a)(3)(C); 27 C.F.R. § 478.12(c).

2 Cases that cite this headnote

[8] **Statutes**Express mention and implied exclusion; expressio unius est exclusio alterius

When Congress includes particular language in one section of statute but omits it in another section of same act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.

1 Case that cites this headnote

[9] **Statutes**Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

Historical practice does not dictate interpretation of unambiguous statutory terms.

[10] **Weapons**Validity

Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) final rule defining term "firearm" as including "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" exceeded its statutory authority, even though GCA included weapon "designed to or may readily be converted to" expel projectile by action of explosive in its definition of "firearm"; GCA's predecessor statute had specific language that authorized regulation of "any part or parts of" firearm, but Congress removed that language when it enacted GCA, and phrase "may readily be converted" could be read to include any objects that could, if manufacture was

completed, become functional at some ill-defined point in future. 5 U.S.C.A. § 706(2)(C); 18 U.S.C.A. § 921(a)(3); 27 C.F.R. § 478.11.

3 Cases that cite this headnote

[11] **Administrative Law and Procedure** Statutory basis and limitation

Fact that later-arising circumstances cause statute not to function as Congress intended does not expand congressionally mandated, narrow scope of agency's power.

[12] **Administrative Law and Procedure** Statutory basis and limitation

Administrative agency's power to regulate in public interest must always be grounded in valid grant of authority from Congress.

[13] **Constitutional Law** Encroachment on legislature

While agencies may enact regulations under penal statute that result in criminal liability, agencies must always look to statutory authority to sanction their actions; only Congress can actually criminalize behavior.

[14] **Criminal Law** Liberal or strict construction; rule of lenity

Rule of lenity is time-honored interpretive guideline used to construe ambiguous statutes against imposing criminal liability.

West Codenotes

Held Invalid
27 C.F.R. §§ 478.11, 478.12(c)

***181** Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:22-CV-691, Reed Charles O'Connor, U.S. District Judge

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Before Willett, Engelhardt, and Oldham, Circuit Judges.

Opinion

Kurt D. Engelhardt, Circuit Judge:

***182** It has long been said—correctly—that the law is the expression of *legislative* will.[1] As such, the best evidence of the legislature's intent is the carefully chosen words placed purposefully into the text of a statute by our duly-elected representatives. Critically, then, law-making power—the ability to transform policy into real-world obligations—lies solely with the legislative branch.[2] Where an executive agency engages in what is, for all intents and purposes, "law-making," the legislature is deprived of its primary function under our Constitution, and our citizens are robbed of their right to fair representation in government. This is especially true when the executive rule-turned-law criminalizes conduct without the say of the people who are subject to its penalties.

The agency rule at issue here flouts clear statutory text and exceeds the legislatively-imposed limits on agency authority in the name of public policy. Because Congress has neither authorized the expansion of firearm regulation nor permitted the criminalization of previously lawful conduct, the proposed rule constitutes unlawful agency action, in direct contravention of the legislature's will. Accordingly, for the reasons set forth below, we AFFIRM IN PART and VACATE AND REMAND IN PART the judgment of the district court.

I. Statutory and Regulatory Background

In April of 2022, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") issued a Final Rule in which the ***183** terms "firearm" and "frame or receiver," among others, were given "an updated, more comprehensive definition." Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) (the "Final Rule"). The Final Rule was almost immediately the subject of litigation claiming that ATF had exceeded its statutory authority. It is that Final Rule that is before this Court now.

First, a brief history of the regulatory agency under fire here. ATF was created in 1972 as an independent bureau of the U.S. Department of the Treasury.[3] The Homeland Security Act of 2002 later transferred ATF to the U.S. Department of Justice, where it remains active today. *See* 6 U.S.C. § 531. Upon its creation, ATF obtained jurisdiction to act under earlier legislation, including the Gun Control Act of 1968 ("GCA"),[4] which permits the regulation and taxation of certain "firearms." Under the GCA, Congress granted to the Attorney General the power to prescribe rules and regulations necessary to carry out the GCA's provisions. *See* 18 U.S.C. § 926. The Attorney General thereafter delegated this authority to ATF, to "[i]nvestigate, administer, and enforce the laws related to alcohol, tobacco, firearms, explosives, and arson, and perform other duties as assigned by the Attorney General." 28 C.F.R. § 0.130. Pursuant to this authority, ATF proposed the Final Rule as an extension of the GCA's regulation of firearms.

The GCA requires all manufacturers and dealers of firearms to have a federal firearms license; manufacturers and dealers are thus known as "Federal Firearms Licensees" or "FFLs." When those FFLs sell or transfer "firearms," they must conduct background checks in most cases, record the firearm transfer, and serialize the firearm. *See* 18 U.S.C. §§ 922(t), 923(a), 923(g)(1)(A), 923(i).

The primary method by which the GCA ensures that the manufacture and sale of firearms are regulated as intended is through the imposition of criminal penalties.[5] As one example, the GCA generally ***184** prohibits "any person" who is not "a licensed importer, licensed manufacturer, or

licensed dealer" (i.e., an FFL) from "importing, manufacturing, or dealing in firearms" and from "ship[ping] or transport[ing] in interstate or foreign commerce any firearm to any person." *Id.* at § 922(a). As another example, the GCA prohibits a large class of persons from not only shipping or transporting firearms, but from possessing them at all. *Id.* at § 922(g). Should a person commit these or any of the other unlawful acts found in the twenty-six subsections of section 922, section 924 authorizes various penalties, including fines, imprisonment, or both. *Id.* at § 924.

The bedrock of the GCA and its plethora of requirements and restrictions is the word "firearm." The GCA defines a "firearm" as: "(A) any weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." *Id.* at § 921(a)(3)(C). As no definition for "frame or receiver" is given in the GCA, ATF previously defined a "frame or receiver" in 1978 as: "That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." Title and Definition Changes, 43 Fed. Reg. 13531, 13537 (Mar. 31, 1978). This definition remained unchanged for over forty years, until ATF issued the Final Rule in 2022.

ATF's 1978 regulatory definition sufficiently captured most firearms of the era. Modern firearms, however, have developed such that many firearms no longer fall within the definition. In the Final Rule, ATF states that "the majority of firearms in the United States" no longer have a clear "frame" or "receiver" that includes all three elements of the prior definition (that is, a hammer, bolt or breechblock, and firing mechanism). 87 Fed. Reg. at 24655. ATF uses the example of an AR-15,[6] which does not have a single housing for the bolt (which is part of the "upper assembly") and the hammer and trigger (which is part of the "lower assembly"). *Id.* Thus, as several district courts have recently recognized, the lower assembly of the AR-15, taken alone, is likely not covered by federal regulations. *See, e.g., United States v. Rowold*, 429 F. Supp. 3d 469, 475–76 (N.D. Ohio 2019) ("The language of the regulatory definition in § 478.11 lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit that holds three, not two, components: 1) the hammer, 2) the bolt or breechblock, and 3) the firing mechanism."). Likewise, weapons such as Glock semiautomatic pistols, which use a "striker" rather than a "hammer" as a firing mechanism, and the Sig Sauer P320 pistol, which has no one unit containing those three parts, seemingly may not be regulated under the prior GCA-related definitions. 87 Fed. Reg. at 24655.

The Final Rule was also concerned with the rise of privately made firearms ("PMFs").[7] These PMFs, also known colloquially ***185** as "ghost guns," are often made from readily purchasable "firearm parts kits, standalone frame or receiver parts, and easy-to-complete frames or receivers." *Id.* at 24652. Because the kits and standalone parts were not themselves considered "firearms" under any interpretation of the GCA and ATF's related definitions, manufacturers of such kits are neither subject to licensing requirements nor required to conduct background checks on purchasers. *Id.* Further, when made for personal use, PMFs "are not required by the GCA to have a serial number placed on the frame or receiver." *Id.* These facts, ATF contends, make PMFs attractive to criminal actors and "pose a challenge to law enforcement's ability to investigate crimes." *Id.* at 24658.

Notably, the PMFs that play a central role in the Final Rule were not unknown at the time of the GCA's—or, for that matter, its predecessors'—enactment. "Because gunsmithing was a universal need in early America, many early Americans who were professionals in other occupations engaged in gunsmithing as an additional occupation or hobby." Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 66 (**2023**). The tradition of at-home gun-making predates this nation's founding, extends through the revolution, and reaches modern times. *See id.* at 48 ("During the Revolutionary War, when the British attempted to prevent the Americans from acquiring firearms and ammunition, the Americans needed to build their own arms to survive."). Considering this long tradition, "[t]he federal government has never required a license to build a firearm for personal use." *Id.* at 80. "In fact, there were *no* restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries." *Id.* at 78 (emphasis added). And in perfect accord with the historic tradition of at-home gun-making, Congress made it exceedingly clear when enacting the GCA that "this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. 90-618, Title I, § 101, 82 Stat. 1213, 1213 (Oct. 22, 1968). ATF's Final Rule alters this understanding by adding significant requirements for those engaged in private gun-making activities.

In response to the observed changes in modern firearm construction, the Final Rule provides (in part) that "[t]he

terms 'frame' and 'receiver' shall include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver, i.e., to house or provide a structure for the primary energized component of a handgun, breech blocking or sealing component of a projectile weapon other than a handgun." 87 Fed. Reg. at 24739. The Final Rule also supplements 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 action of an explosive." *Id.* at 24728.[8] The Final Rule ***186** took effect on August 24, 2022. *Id.* at 24652.

II. Factual and Procedural Background

On August 11, 2022, the plaintiffs in this case[9] filed a petition for review in the Northern District of Texas. The plaintiffs claimed that two portions of the Final Rule, which redefine "frame or receiver" and "firearm," exceeded ATF's congressionally mandated authority. The plaintiffs requested that the court hold unlawful and set aside the Final Rule, and that the court preliminarily and permanently enjoin the Government from enforcing or implementing the Final Rule.

Roughly a month later, the district court issued its first of several preliminary injunctions. In this first injunction, the district court found that ATF's new definition of "frame or receiver" is facially unlawful because it included "firearm parts that are *not yet* frames or receivers" in contravention of Congress's clear language in the GCA. ***VanDerStok*** *v.* ***Garland***, 625 F. Supp. 3d 570, 578–79 (N.D. Tex. 2022), *opinion clarified*, No. 4:22-CV-00691-O, 2022 WL 6081194 (N.D. Tex. Sept. 26, 2022) (emphasis in original). The district court also found that weapon parts kits cannot be regulated by ATF under the GCA because "Congress's definition does not cover weapon parts, or aggregations of weapon *parts*, regardless of whether the parts may be readily assembled into something that may fire a projectile." *Id.* at 580 (emphasis in original). Relying on this same logic, the district court subsequently expanded the preliminary injunction and extended similar injunctions to other plaintiffs. The Government timely appealed each of these injunctions.

While those two appeals were pending, the district court granted summary judgment to the plaintiffs and vacated the Final Rule in its entirety. ***VanDerStok*** *v.* ***Garland***, No. 4:22-CV-00691-O, —— F.Supp.3d ——, **2023** WL 4539591 (N.D. Tex. June 30, **2023**). The logic of the district court's order closely tracked its logic at the injunctive stage: the court held that "the Final Rule's amended definition of 'frame or receiver' does not accord with the ordinary meaning of those terms and is therefore in conflict with the plain statutory language." *Id.* at ——, **2023** WL 4539591 at *14. ATF "may not," the court continued, "properly regulate a component as a 'frame or receiver' even after ATF determines that the component in question is *not* a frame or receiver." *Id.* (emphasis in original). Additionally, the court held that because "Congress did not regulate firearm parts as such, let alone aggregations of parts," ATF had no authority to regulate weapon parts kits. *Id.* at ——, **2023** WL 4539591 at *17. Holding that vacatur is "the 'default rule' for agency action otherwise found to be unlawful," the court vacated the Final Rule under 5 U.S.C. § 706(2)(C). *Id.* at ——, **2023** WL 4539591 at *18.

The Government promptly filed a notice of appeal, and subsequently filed an emergency motion to stay pending appeal. The district court denied the request for a stay pending appeal but granted a seven-day ***187** administrative stay so that the Government might seek emergency relief from this Court. The Government did so.

This Court considered and denied the Government's emergency motion to stay the district court's judgment as to the two challenged portions of the Final Rule but granted a stay as to the non-challenged provisions of the rule. ***VanDerStok*** *v.* ***Garland***, No. 23-10718, **2023** WL 4945360 (**5th Cir.** July 24, **2023**). The Government then requested a full stay from the Supreme Court. Without discussion, the Supreme Court stayed the district court's order and judgment "insofar as they vacate the [F]inal [R]ule" pending (1) this Court's decision and (2) either denial of certiorari thereafter or judgment issued by the Supreme Court after grant of certiorari. ***Garland*** *v.* ***Vanderstok***, No. 23A82, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, **2023** WL 5023383 (U.S. Aug. 8, **2023**).

This Court held oral argument on September 7, **2023**. Shortly beforehand, the Government voluntarily dismissed the two appeals relating to the injunctions. Thus, all that remains before this Court now is the appeal of the district court's final judgment vacating the Final Rule in its entirety.

III. Standard of Review

[1]"We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007) (citing *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

IV. Analysis

The plaintiffs challenged two portions of the Final Rule in the underlying lawsuit: (1) ATF's proposed definition of "frame or receiver" including incomplete frames and receivers; and (2) ATF's proposed definition of "firearm" including weapon parts kits. We analyze each challenged portion of the Final Rule in turn below, before addressing the appropriate relief should these specific portions of the Final Rule be held unlawful.

[2] [3]At the outset, we must ensure that we look through the proper lens when analyzing ATF's actions here.[10] "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); *see also Clean Water Action v. U.S. Env't Prot. Agency*, 936 F.3d 308, 313 n.10 (5th Cir. 2019) ("To be sure, agencies, as mere creatures of statute, must point to explicit Congressional authority justifying their decisions."). In the GCA—the source of ATF's capacity to promulgate the Final Rule—Congress delegated authority to ATF through the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." 18 U.S.C. § 926(a). Such a grant of authority from the legislature to an executive agency is generally policed by the Administrative ***188** Procedure Act ("APA"), which allows courts to set aside agency action found to be, among other things, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Thus, a core inquiry in a case such as this one is whether the proposed agency rule is a lawful extension of the statute under which the agency purports to act, or whether the agency has indeed exceeded its "statutory jurisdiction, authority, or limitations." *See id.*

[4] [5]How do we know when an agency has exceeded its statutory authority? Simple: the plain language of the statute tells us so. Therefore, "[w]e start, as we always do, with the text." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 671, 143 S.Ct. 1322, 215 L.Ed.2d 579 (2023); *see also* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) ("[T]he best evidence of Congress's intent is the statutory text."). "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, —— U.S. ——, 139 S. Ct. 2356, 2364, 204 L.Ed.2d 742 (2019). Here, we read the words of the GCA "in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Only where the statutory text shows that ATF has "clear congressional authorization" to enact a regulation can such a regulation withstand judicial scrutiny. *See* *West Virginia v. Env't Prot. Agency*, —— U.S. ——, 142 S. Ct. 2587, 2614, —— L.Ed.2d —— (2022) (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014)). As explained below, we hold that ATF lacked congressional authorization to promulgate the two challenged portions of the Final Rule.

a. ATF's proposed definition of "frame or receiver"

The GCA includes as a "firearm" the "frame or receiver" of a weapon. 18 U.S.C. § 921(a)(3)(C). The GCA itself does not define the term "frame or receiver." *See id.* The Final Rule, however, newly defines the term "frame or receiver" to include "a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." 87 Fed. Reg. at 24739.

Because Congress did not define "frame or receiver" in the GCA, the ordinary meaning of the words control. *See* *Bouchikhi v. Holder*, 676 F.3d 173, 177 (5th Cir. 2012). Both a "frame" and a "receiver" had set, well-known definitions at the time of the enactment of the GCA in 1968. In 1971, Webster's Dictionary defined a "frame" as "the basic unit of a handgun which serves as a

mounting for the barrel and operating parts of the arm" and a "receiver" as "the metal frame in which the action of a firearm is fitted and which the breech end of the barrel is attached." *Webster's Third International Dictionary* 902, 1894 (1971). Similarly, ATF's 1978 definition of frame and receiver—the most recent iteration of the definition before the Final Rule's proposed change—defined "frame or receiver" as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward position to receive the barrel."[11] ***189** 43 Fed. Reg. at 13537. As is apparent from a comparison of the dictionary definitions and the regulatory definition, ATF's previous understanding of "frame or receiver" closely tracked the public's common understanding of such terms at the time of enactment.[12]

[6] [7]After almost fifty years of uniform regulation, ATF, via the Final Rule, now purports to expand the terms "frame" and "receiver," as they were understood in 1968, to include changes in firearms in modern times. But the meanings of statutes do not change with the times. *See* *Bostock v. Clayton County*, —— U.S. ——, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). "This Court normally interprets a statute in accord with the ordinary public meaning of its terms *at the time of its enactment.* After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* (emphasis added). ATF's inclusion now of "partially complete, disassembled, or nonfunctional" frames and receivers materially deviates from past definitions of these words to encompass items that were not originally understood to fall within the ambit of the GCA. *See* *New Prime Inc. v. Oliveira*, —— U.S. ——, 139 S. Ct. 532, 539, 202 L.Ed.2d 536 (2019) ("[W]ords generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute" because "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands.") (cleaned up). As such, the proposed definition is an impermissible extension of the statutory text approved by Congress.

[8]A plain reading of the Final Rule demonstrates ATF's error. In the GCA's definition of "firearm," the first subsection includes flexible language such as "designed to or may readily be converted to expel a projectile by the action of an explosive." *See* 18 U.S.C. § 921(a)(3)(A). But the subsection immediately thereafter, which contains the term "frame or receiver," does not include such flexibility. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, —— U.S. ——, 141 S. Ct. 1761, 1782, 210 L.Ed.2d 432 (2021) (citation omitted). ATF's assertion that Congress has repeatedly used language such as "designed to" and "readily" in other definitions or statutes only emphasizes the point: Congress explicitly declined to use such language in regard to frames or receivers. Thus, we presume the exclusion of the phrase "designed to or may readily be converted" in the "frame or receiver" subsection to be purposeful, such that ATF cannot add such language where Congress did not intend it to exist. *See* *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

There is also a clear logical flaw in ATF's proposal. As written, the Final Rule states that the phrase "frame or receiver" ***190** includes things that are admittedly not yet frames or receivers but that can easily become frames or receivers—in other words: parts. As the district court put it, under the Final Rule, "ATF may properly regulate a component as a 'frame or receiver' even after ATF determines that the component in question is *not* a frame or receiver." ***VanDerStok***, —— F.Supp.3d at ——, **2023** WL 4539591, at *14 (emphasis in original). Such a proposition defies logic: "a part cannot be both *not yet* a receiver and a receiver at the same time." *Id.* (emphasis in original). This confusion highlights ATF's attempt to stretch the GCA's language to fit modern understandings of firearms without the support of statutory text.[13]

[9]The Government argues that ATF has historically regulated parts that are not yet frames or receivers as frames or receivers, thus making the Final Rule a valid extension of past agency practice. This argument fails for two reasons. First, as the district court aptly stated, "historical practice does not dictate the interpretation of unambiguous statutory terms." ***VanDerStok***, —— F.Supp.3d at ——, **2023** WL 4539591, at *15. Simply because ATF may have acted outside of its clear statutory limits in the past does not mandate a decision in its favor today. Second, the Government's current argument regarding the "readily converted" language as it applies to frames and receivers is at odds with its recent arguments in other courts. For example, in its briefing for a case in the Southern District of New York in early 2021, the Government stated that "the 'designed to' and 'readily converted' language are only present in the first clause of

the statutory definition. Therefore, an unfinished frame or receiver does not meet the statutory definition of a 'firearm' simply because it is 'designed to' or 'can readily be converted into' a frame or receiver." Fed. Defs.' Mem. of Law in Support of Mot. for Summ. J., Doc. 98 at 4, *Syracuse v. ATF*, No. 1:20-cv-06885 (S.D.N.Y. Jan. 29, 2021). Clearly, the Government has arbitrarily reversed course since authoring the *Syracuse* brief, yet it offers no explanation for its new regulatory position. *See Acadian Gas Pipeline Sys. v. FERC*, 878 F.2d 865, 868 (5th Cir. 1989) ("[A]ny departure from past interpretations of the same regulation must be adequately explained and justified."). The sharp change in the Government's argument over a few short years emphasizes the harm in relying so heavily on an agency's historical practice, rather than the unambiguous text of the statute.

Because it clearly conflicts with the plain language of the GCA, the challenged portion of the Final Rule that redefines "frame or receiver" to include partially complete, disassembled, or nonfunctional frames or receivers constitutes unlawful agency action.

b. ATF's proposed definition of "firearm"

The Final Rule purports to supplement the GCA's definition of "firearm" by including the following language: "The term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted ***191** to expel a projectile by the action of an explosive." 87 Fed. Reg. at 24728. In other words, ATF expanded the scope of the GCA from the explicit "firearm" to now include aggregations of weapon parts that can be "readily" assembled into a functional weapon. *See id.*

[10]The district court correctly held that ATF has no authority whatsoever to regulate parts that might be incorporated into a "firearm" simply because Congress explicitly *removed* such authority when it enacted the GCA. The GCA's predecessor statute, the Federal Firearms Act ("FFA"), had specific language that authorized regulation of "any part or parts of" a firearm. *See* Federal Firearms Act of 1938, Ch. 850, Pub. L. No. 75-785, 52 Stat. 1250, 1250 (1938) (repealed 1968). However, Congress *removed* this language when it enacted the GCA, replacing "any part or parts" with just "the frame or receiver of any such weapon." Thus, the GCA does not allow for regulation of all weapon parts; rather, it limits regulation to two specific types of weapon parts.[14] The Final Rule ignores this change completely and improperly rewrites and expands the GCA where Congress clearly limited it. *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, —— U.S. ——, 140 S. Ct. 768, 779, 206 L.Ed.2d 103 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.") (citation omitted). Again, the legislative will has been expressed, and we are bound to follow it.

Further, Congress has shown that it knows how to regulate "parts" of weapons when it so chooses. For example, section 921(a)(4)(C) of the GCA, in defining a "destructive device" (one of the four subsections of the "firearm" definition), states that such term means "any combination of parts either designed or intended for use in converting any device into any destructive device." 18 U.S.C. § 921(a)(4)(C). Congress thus clearly regulated combinations or aggregations of "parts" in one section of the GCA, yet it did not do so when it defined "firearm" within the same statute.[15] Another helpful example is the definition ***192** of "machinegun" in 26 U.S.C. § 5845(b), which includes "any part ... or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled." Conversely, in defining "firearm" under the GCA, Congress used more constrained language aimed at specifically named weapon parts, not any and all combinations of weapon parts that could later be assembled into a functioning weapon. In sum, the word "parts" is conspicuously absent from the definition of "firearm" in section 921, despite Congress's consistent—and meticulous—use of the word in other statutory provisions. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) ("Our more natural reading is confirmed by the use of the word ... elsewhere in the United States Code."). The point is a simple one: If Congress wanted to regulate aggregations of weapon parts with respect to "firearms," it could have. Congress, however, chose not to do so,[16] and ATF may not alter that decision on its own initiative. ATF cannot legislate.

ATF finds its primary justification for regulating weapon parts kits in the "designed to or may readily be converted to" language in the GCA's definition of "firearm." The Government argues that the statute captures any item or items that may be transformed or changed into a working firearm, based on the dictionary definition of "convert"[17] at the time of the GCA's enactment. Because weapon parts kits allow individuals to "convert" various parts into an operational firearm, the Government argues, the Final Rule's proposed definition falls clearly within the GCA's ambit.

But this stretches the words too far. The Government wants the word "convert" to be all-encompassing, such that any process or procedure that could ultimately lead to a finalized firearm can be regulated under the GCA's language. The language, however, is much more precise than that. In fact, the Government's emphasis on the word "convert" ignores the surrounding words: the GCA does not just regulate anything that can be "converted" (or, to use the Government's proposed synonym, "transformed") into a firearm but rather regulates "any weapon" that "may *readily* be converted" into a functional firearm. The phrase "may readily be converted"[18] cannot ***193** be read to include any objects that could, if manufacture is completed, become functional at some ill-defined point in the future. This would strip the word "readily"[19] of its meaning, revert the GCA to its prior articulation in the FFA, and allow for regulation of weapon parts generally, which, as we have seen, was not Congress's intent in passing the GCA. Look no further than the words ATF used in the Final Rule's proposed "firearm" definition: it includes weapon parts kits that "may readily be completed, assembled, restored, or otherwise converted to expel a projectile." 87 Fed. Reg. at 24728. Reading "converted" in conjunction with the other listed verbs—"completed, assembled, restored"—we can see that the definition itself contemplates less drastic measures than the full transformation actually required by these parts kits. *See Hilton v. Sw. Bell Tel. Co.*, 936 F.2d 823, 828 (**5th Cir**. 1991) ("When general words follow an enumeration of ... things, such general words are not to be construed in their widest extent, but are to be held as applying only to ... things of the same general kind or class as those specifically mentioned."). The 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.

The Government responds that courts have long recognized that disassembled, or nonoperational, weapons constitute "firearms" under the GCA, and cites our decision in *United States v. Ryles*, 988 F.2d 13, 16 (**5th Cir**. 1993). There, a defendant was in possession of a "disassembled [firearm] in that the barrel was removed from the stock and that it could have been assembled in thirty seconds or less." *Id.* We held that because this "disassembled shotgun could have been 'readily converted' to an operable firearm," it constituted a firearm under the GCA. *Id.* Unlike the firearm in ***194** *Ryles*, weapon parts kits are far from being "operable." Assembling a weapon parts kit takes much longer than thirty seconds, and the process involves many additional steps. Because of these differences, weapon parts kits are not " 'readily converted' to an operable firearm," and thus they do not constitute "firearms" under the GCA. *Id.*

Consider the long-standing tradition of at-home weapon-making in this country. *See* Greenlee, *supra.* We assume Congress was familiar with the relevant historical context when writing the GCA, yet Congress made no clear reference to aggregations of weapon parts or PMFs generally in the text of the GCA. Rather, as noted above, Congress clearly stated that the GCA "is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." 82 Stat. at 1213. Congress also emphasized that "it is not the purpose of [the GCA] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity." *Id.* at 1213–14. ATF's Final Rule, however, places substantial limits on the well-known and previously unregulated right to "the private ownership or use of firearms by law-abiding citizens for lawful purposes." *Id.* at 1213.

Take, for example, an individual who buys a weapon parts kit containing several unfinished parts he later intends to build and adapt into a functional firearm for his personal use. Section 922 of the GCA, which uses the term "firearm" to describe many of the "unlawful acts" contained therein, may place additional burdens on this individual now that ATF has included aggregations of parts in the definition of "firearm." Parts contained in the kit, which were previously unregulated, could now fall into the Final Rule's new definitions, such that the individual cannot sell,[20] transport to another state,[21] or, in some instances, possess the parts at all.[22] And key determinations, like which parts are regulated, what stage of manufacture they must be in, and how many together constitute an actual "firearm," are exceedingly unclear under the Final Rule, such that the individual must guess at what he is and is not allowed to do.[23] By expanding the types of items that are considered "firearms," ATF has cast a wider net than Congress intended: under the Final Rule, the GCA will catch individuals who manufacture or possess not just functional weapons, but even minute weapon parts that might later be manufactured into functional weapons. The Final Rule purports to criminalize such conduct and impose fines, imprisonment, and social stigma on persons who, until the Final Rule's promulgation, were law-abiding citizens. ATF cannot so transform the GCA to include aspects of the nation's firearm industry ***195** that were previously—and purposefully—excluded from the statute.[24]

As the district court succinctly stated, "the Gun Control Act's precise wording demands precise application." *VanDerStok*, —— F.Supp.3d at ——, 2023 WL 4539591, at *17. Yet ATF's proposed definition is not only imprecise, ambiguous, and violative of the statutory text, it also *legislates*. Thus, the challenged portion of the Final Rule that redefines "firearm" to include weapon parts kits constitutes unlawful agency action.

c. Public policy concerns

The Government and *amici* argue that the challenged portions of the Final Rule must be upheld to promote important public policy interests and carry out the essential purpose of the GCA. They point to serious concerns regarding public safety, the apparent rise in criminal usage of "ghost guns," and the current difficulties in firearm tracing for law enforcement. Without the Final Rule, they argue, bad actors will use the "substantial loopholes" in the text to completely circumvent the GCA and, ultimately, gut the law entirely.

[11] [12]"However, the fact that later-arising circumstances cause a statute not to function as Congress intended does not expand the congressionally-mandated, narrow scope of the agency's power." *Texas v. United States*, 497 F.3d 491, 504 (5th Cir. 2007). Likewise, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Where the statutory text does not support ATF's proposed alterations, ATF cannot step into Congress's shoes and rewrite its words, regardless of the good intentions that spurred ATF to act.

As this Court stated in *Cargill v. Garland*, "it is not our job to determine our nation's public policy. That solemn responsibility lies with the Congress." 57 F.4th 447, 472 (5th Cir. 2023). While the policy goals behind the Final Rule may be laudable, neither ATF nor this Court may, on its own prerogative, carry out such goals. That heavy burden instead falls squarely on Congress. *See Biden v. Nebraska*, —— U.S. ——, 143 S. Ct. 2355, 2372, 216 L.Ed.2d 1063 (2023) ("The question here is not whether something should be done; it is who has the authority to do it."). "If judges could add to, remodel, update, or detract from old statutory terms ... we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock*, 140 S. Ct. at 1738. Any "loopholes" in the law must be filled by Congress, not by ATF, and not by this Court. *See Cargill*, 57 F.4th at 461 ("Perhaps Congress's choice of words was prudent, or perhaps it was not. That is not for us to decide.").

[13] [14]Our concern for strict adherence to statutory text is especially heightened ***196** here where the Final Rule purports to criminalize what was previously lawful conduct. As described above, section 922 of the GCA describes a plethora of "unlawful acts" related to firearm possession, use, and sale, and section 924 describes the penalties for any violations, including hefty fines and imprisonment of up to ten years. *See* 18 U.S.C. §§ 924, 926. Because ATF's Final Rule expands the scope of the GCA to include previously unregulated conduct, an ordinary citizen who owns certain firearm-related items (and which items are included is only ATF's guess) may now be subjected to the criminal penalties contained within the GCA practically overnight, without the input of Congress. While agencies may enact regulations under a penal statute that result in criminal liability, the agencies must always look to statutory authority to sanction their actions. Only Congress can actually criminalize behavior.[25] Yet the Final Rule plainly exceeds the limits Congress itself placed on criminal liability in the realm of firearm regulation.[26] We therefore hold unlawful the two challenged portions of the Final Rule as improper expansions of ATF's statutory authority.

d. The remedy

We turn now to the appropriate remedy. The Government argues that the district court's universal vacatur of the entire Final Rule (i.e., not just the two challenged portions) was overbroad, regardless of the merits of the case. While this Court's precedent generally sanctions vacatur under the APA,[27] we VACATE the district court's vacatur order and REMAND to the ***197** district court for further consideration of the remedy, considering this Court's holding on the merits.

V. Conclusion

ATF, in promulgating its Final Rule, attempted to take on the mantle of Congress to "do something" with respect to gun control.[28] But it is not the province of an executive agency to write laws for our nation. That vital duty, for better or for worse, lies solely with the legislature. Only Congress may make the deliberate and reasoned decision to enact new or modified legislation regarding firearms based on the important policy concerns put forth by ATF and the various *amici* here. But unless and until Congress so acts to expand or alter the language of the Gun Control Act, 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. This it cannot do, especially where criminal liability can—and, according to the Government's own assertions, *will*—be broadly imposed without any Congressional input whatsoever. An agency cannot label conduct lawful one day and felonious the next—yet that is exactly what ATF accomplishes through its Final Rule. Accordingly, the judgment of the district court is AFFIRMED to the extent it holds unlawful the two challenged portions of the Final Rule, and VACATED and REMANDED as to the remedy.

Andrew S. Oldham, Circuit Judge, concurring:

I join my esteemed colleagues' majority opinion without qualification. I write only to explore additional problems with the Final Rule promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) ("Final Rule"). Part I provides additional background. Part II discusses ATF's unlawful conflation of two fundamentally different statutory regimes. Part III addresses the weapon parts kit provision. And Part IV considers the unfinished frame or receiver provision.

I.

ATF's overarching goal in the Final Rule is to replace a clear, bright-line rule with a vague, indeterminate, multi-factor balancing test. ATF's rationale: The new uncertainty will act like a Sword of Damocles hanging over the heads of American gun owners. Private gunmaking is steeped in history and tradition, dating back to long before the Founding. Millions of law-abiding Americans work on gun frames and receivers every year. In those pursuits, law-abiding Americans (and the law-abiding gun companies that serve them) rely on longstanding regulatory certainty to avoid falling afoul of federal gun laws. But if ATF can destroy that certainty, it hopes law-abiding Americans will abandon tradition rather than risk the ruinous felony prosecutions that come with violating the new, nebulous, impossible-to-predict Final Rule.

OLD RULE (A.K.A. 80% RULE)

Let's start with the Old Rule. Since 1968, Congress has defined the word "firearm" to mean "any weapon (including a ***198** starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive [or] *the frame or receiver of any such weapon.*" 18 U.S.C. § 921(a)(3)(A)–(B) (emphasis added). What is a "frame or receiver"? ATF defined that by regulation in 1968, too: The "frame or receiver" of a firearm is "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968) (to be codified at 26 C.F.R. pt. 178); *see also* 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978) (formerly codified at 27 C.F.R. § 478.11 (2020)). That is clear: It tells law-abiding gun owners, hobbyists, and gunsmiths when a piece of metal stops being a just a piece of metal and starts being the "frame or receiver" of a federally regulated firearm subject to federal gun laws and felony penalties.

The Old Rule even came with numerical certainty. In longstanding regulatory guidance, ATF took the position that a hunk of metal became a federally regulated "frame or receiver" only after it was 80% complete: "ATF has long held that items such as receiver blanks, 'castings' or 'machined bodies' in which the fire-control cavity area is completely solid and un-machined have not reached the 'stage of manufacture' which would result in the classification of a firearm [under the 1968 Old Rule]." ATF, *Are 80% or "Unfinished" Receivers Illegal?*, https://perma.cc/QX2X-8UHQ (last reviewed Apr. 6, 2020). The uninitiated might wonder what constitutes an unmachined receiver blank or solid fire-control area. So ATF helpfully provided pictures. Here are ATF's Old Rule pictures for an AR-15's frame or receiver:

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Ibid. (annotations in original). This Old 80% Rule is thus easy to understand, predict, and apply: the top two silver receiver pictures are only 80% complete; they are thus "unfinished"; and they do not constitute "firearms" under federal gun laws. Under the Old 80% Rule, any law-abiding American consumer or manufacturer knew that as long as the fire-control area remained solid, the silver pieces of metal ***200** were just that—metal. They could be bought and sold without concern for the federal gun laws.[1]

For decades, millions of Americans have lawfully purchased pieces of metal like those silver ones and worked on them in garages and workshops across the country. Such homemade firearms have a rich history and tradition, dating back to the Founding. *See, e.g.*, Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 45–71 (**2023**). So the Old Rule allowed Americans to purchase the silver pieces of metal, to machine the final 20% of the metal in their homes or garages, and thus to make 100%-complete receivers. *See* ROA.228–44 (ATF's pre-2022 Old Rule classification letters on partially complete frames and receivers). An enthusiast or amateur gunsmith might mill the fire-control area with a drill press so the receiver could hold a trigger assembly. And the enthusiast or amateur gunsmith might drill three holes through the receiver to hold the safety selector, trigger, and hammer pins. And voila: the modern analogue to the homemade rifle Daniel Boone's father gave him when he was 12. Greenlee, *supra*, at 69.

NEW RULE (A.K.A. FINAL RULE)

Congress has done nothing to change the statutory definition of "firearm" or "frame or receiver" since 1968.[2] And for 54 years, the regulatory text stayed the same too. Then in 2022, without any direction or authorization from Congress, ATF changed everything:

> • ATF eliminated the 80% threshold for unfinished "frames or receivers." And it replaced that numerical certainty with "I-know-it-when-I-see-it" subjectivity that is evocative of Justice Stewart's obscenity standard. *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). Under the New Rule, a hunk of metal turns into a federally regulated "frame or receiver" when ATF thinks "it is *clearly identifiable* as an unfinished component part of a weapon." Final Rule, 87 Fed. Reg. at 24728 (emphasis added).
>
> • ATF promulgated a non-exhaustive list of eight factors that its Director may balance in considering whether a hunk of metal constitutes a partially complete or disassembled "frame or receiver": "[T]he Director may consider any associated [1] templates, [2] jigs, [3] molds, [4] equipment, [5] tools, [6] instructions, [7] guides, or [8] marketing materials that are sold, distributed, or possessed with [or otherwise made available to the purchaser or recipient of] ***201** the item or kit." *Id.* at 24739. So the silver pieces of metal in the pictures above are now federally controlled firearms, so long as they are

sold with a jig, template, or other item useful in finishing the receiver. *See ibid.*

• ATF promulgated a non-exhaustive list of eight factors that its Director may balance in considering whether a hunk of metal can be "readily" converted to a "frame or receiver": "(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 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." *Id.* at 24735.

• And ATF changed the statutory definition of firearm to include "weapon parts kit[s]." *Id.* at 24727–28. Such a "kit" consists of gun parts. And ATF concedes that *none* of those parts is a "firearm" under federal law. Still, ATF says that a collection of parts is "firearm" if ATF, in its wisdom and its subjective judgment, determines the parts *look* like the building blocks of a firearm. *Id.* at 24689 (weapon parts kits are firearms if they are "clearly identifiable" as such).

Why did ATF promulgate a 98-page Final Rule—replete with multiple, non-exhaustive, eight-factor balancing tests and subjective standards evocative of *Jacobellis*—to replace the Old 80% Rule? ATF says its concern is so-called "ghost guns": Frames and receivers finished in private homes and garages do not have serial numbers, and that makes it difficult for the Government to track the homemade guns. *Id.* at 24652. (Hence the Government's "ghostly" moniker.) But if that was all ATF cared about, it would just require serialization of all frames and receivers—even those (like the silver pieces of metal pictured above) that are only 80% complete. *See* 27 C.F.R. § 479.102 (requiring "a manufacturer" to serialize frames and receivers). ATF expressly did not do that, however; it instead expressly *exempted* private individuals from serializing their frames and receivers. *See* Final Rule, 87 Fed. Reg. at 24653. That is the precise opposite of what ATF would do if it cared about tracing so-called "ghost guns."

ATF instead chose to change the meaning of "firearm" so that it can apply to any piece of metal that has been machined beyond its "primordial" state. Why? ATF wants the "flexibility" to regulate unformed, unfinished pieces of metal when it, in its judgment, thinks regulation is "necessary." *Id.* at 24669. And ATF wants to "deter" people from relying on "a minimum percentage of completeness (e.g., '80.1%')." *Id.* at 24686. So it deleted the Old 80% Rule and replaced it with new, indeterminate, multi-factor-balancing, and eye-of-the-beholder standards. But it never pointed to a single homemade gun that escaped regulation under the Old Rule but would stay out of criminals' hands under the New Rule.

II.

ATF's foundational legal error is that it conflated two very different statutes: the Gun Control Act of 1968 and the National Firearms Act of 1934. Those two statutes give ATF very different powers to regulate ***202** very different types of weapons. To take just one very obvious example, when it comes to things like machine guns, the National Firearms Act empowers ATF to maintain a central registry called "the National Firearms Registration and Transfer Record." 26 U.S.C. § 5841(a). That database requires registration of every machine gun; registration of every person who ever possesses it; and strict limitations on every machine gun transfer (including a $200 tax on each sale and six-to-twelve month waiting periods). None of these restrictions apply to transactions involving ordinary firearms under the Gun Control Act. And ATF promulgated the Final Rule under the Gun Control Act to apply to *all* firearms—not just machine guns. Still, ATF mushed the statutes together and then liberally borrowed terms from both.

I first (A) explain the statutory conflation. Then I (B) explain how ATF exploited that conflation to generate its multi-factor balancing tests.

A.

First, the statutory conflation. As the majority notes, *see ante* n.16, ATF's Final Rule repeatedly uses the word "restored":

> Firearm .... The term shall 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.
>
> ...
>
> Partially complete, disassembled, or nonfunctional frame or receiver. The terms "frame" and "receiver" shall include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, *restored*, or otherwise converted to function as a frame or receiver.

Final Rule, 87 Fed. Reg. at 24735, 24739 (emphasis added).

This is unlawful because (1) ATF took the word "restored" from a different statute with a very different scope and meaning. And (2) ATF cannot defend that choice by pretending that the relevant statute fairly includes the word "restored."

1.

First, the two very different gun control statutes. The first is the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 ("GCA"). The GCA was Congress's response to the assassination of President Kennedy. According to the FBI, Lee Harvey Oswald used the pseudonym "A. Hidell" to purchase a 6.5x52mm Carcano bolt-action hunting rifle from a mail-order advertisement in the back of *American Rifleman* magazine. VINCENT BUGLIOSI, RECLAIMING HISTORY: THE ASSASSINATION OF JOHN F. KENNEDY 200 (2007). "A. Hidell" mailed a money order for $21.45 ($19.95 for the rifle and $1.50 for postage) and later picked up the rifle from P.O. Box 2915 in Dallas, Texas. *Ibid.* Congress's response in the GCA was, *inter alia*, to prohibit mail-order weapons and to impose identification requirements that prohibit pseudonymous purchases. *See Interstate Shipment of Firearms: Hearings on S. 1975 and S. 2345 Before S. Comm. on Com.*, 88th Cong. (1964). The GCA regulates interstate transactions involving *any* firearm—including common bolt-action hunting rifles.[3]

***203** By contrast, the National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 ("NFA") applies to a much narrower class of firearms and firearm accessories—such as fully automatic machine guns.[4] The NFA was Congress's response to gangster shootouts like the St. Valentine's Day Massacre of 1929. On that bloody Valentine's Day, seven members of Bugs Moran's gang were gunned down in Chicago. The four shooters used at least two Thompson submachine guns. Congress's response in the NFA was, *inter alia*, to impose a 100% tax on machine gun purchases in an effort to reduce or eliminate them. *See* National Firearms Act: *Hearings Before the H. Comm. on Ways & Means on H.R. 9066*, 73d Cong. 12 (1934). That explains why the NFA appears in Title 26 (the Internal Revenue Code), as opposed to alongside the GCA in Title 18. Today, the NFA applies only to weapons like machine guns, short-barreled shotguns and rifles, and suppressors. And it imposes numerous restrictions (including transfer taxes and registration requirements) that apply *only* to NFA weapons and not to non-NFA weapons like common bolt-action hunting rifles. *See, e.g.*, 26 U.S.C. § 5821 (taxes on NFA weapons).

ATF promulgated the Final Rule under the GCA—not the NFA. *See, e.g.*, Notice of Proposed Rulemaking, Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27720, 27726–27 (May 21, 2021) ("NPRM") (citing as statutory basis the terms "firearm," "frame," and "receiver" in GCA); Final Rule, 87 Fed. Reg. at 24734 (same). That makes some sense because ATF wants the Final Rule to apply to *every* firearm, *every* frame, and *every* receiver (the GCA's scope)—not just to NFA items like machine guns.

The problem is that Congress chose to use the word "restored" *only* in the NFA and not in the GCA. "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391, 135 S.Ct. 913, 190 L.Ed.2d 771 (2015); *see also Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). When Congress defined NFA weapons like machine guns, it chose to reach weapons that could be "restored" to be machine guns. *See, e.g.*, 26 U.S.C. § 5845(b) ("The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily *restored* to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.") (emphasis added). But when Congress defined ordinary GCA "firearms," it chose not to reach weapons that could be "restored" to function as firearms. Rather, the GCA defined "firearm" in relevant part to mean "any weapon (including a starter gun) which will or is designed to *or may readily be converted* to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A)

(emphasis added). We must interpret the two statutes to have different scopes consistent with their different texts.[5]

***204** 2.

At oral argument, ATF's counsel conceded the agency took the word "restored" from the NFA and inserted it into a GCA regulation. *See* Oral Arg. at 0:30–8:00. Counsel defended conflating the two statutes by arguing that "restored" (used only in the NFA) is close enough to the text used in the GCA ("converted") that the Government could mush together the two statutes and promulgate a Final Rule that uses both terms interchangeably.

This argument fails for two reasons. First, the ordinary meaning of "converted" is not the same as "restored." To "convert" means to change something from one form to a new, different form: "To alter, as a vessel or *firearm*, so as to change from one class or type to another." *Convert*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 583 (2d ed. 1934; 1950) ("WEBSTER'S SECOND") (emphasis added). To "restore," by contrast, means to bring something back to its original form: "To bring back to, or put back into, the former or original state; to repair; to renew; specif. [ ] To rebuild; reconstruct." *Restore*, WEBSTER'S SECOND at 2125. Thus, a firearm *A* can be *converted* to a new, different *B*. Or an old, broken firearm *A* can be *restored* to new, functional *A*. But it makes no sense to say *A* is *restored* to *B*, nor does it make sense to say *A* is *converted* to *A*.[6]

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 accomplished by filing away internal parts of a semi-automatic firearm. *See* *Staples v. United States*, 511 U.S. 600, 603, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). Or by replacing them. *See* *Roe v. Dettelbach*, 59 F.4th 255, 257 (7th Cir. 2023). But either way, the firearm is "converted" from one thing (*A*, a semi-automatic weapon) into a different class or type of firearm (*B*, a fully automatic weapon). And either way, the AR-15 is *not* "restored" into a machine gun because its original state (semi-automatic) was not an old version of the renewed one (fully automatic). *Cf.* *United States v. TRW Rifle 7.62x51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 691 (9th Cir. 2006) ("The United States argues, and we agree, that the 'former or original state' of the rifle refers to the essential definition of a machinegun, that is whether it was ever capable of firing automatically more than one shot, without manual reloading, by a single function of the trigger.").

Consider another example. If a lifelong Anglican decides to become Roman Catholic, a "reasonable person, conversant with the relevant social and linguistic conventions" might say that she "converted" from *A* (Anglicanism) to *B* (Catholicism). *Cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003). But no one would say the lifelong Anglican "restored" her new Catholic faith.[7] In faith ***205** as in firearms, the words "converted" and "restored" are not interchangeable.

Thus, in the context of ordinary GCA firearms, like bolt-action hunting rifles, Congress used the word "converted." In the context of NFA machine guns, Congress used the word "restored." That means the GCA covers firearms (*B*) and things (*A*) that can be readily converted into firearms (*B*). Whereas the NFA concerns firearms that start as machine guns (*A*) and can be restored to functioning machine guns (*A*).

B.

All of this matters because the central dispute in this case is how far back ATF can reach to regulate the *A* that can be converted to *B*. Everyone agrees ATF can regulate the gun itself, *B*. But how far back in the manufacturing process of the gun *B* can ATF reach to regulate things *A* that can be *theoretically converted* into guns? ATF concedes that it cannot reach all the way back to "unformed blocks of metal" or metal in its "primoradial state." Final Rule, 87 Fed. Reg. at 24663. So primordial ooze is not *A*. But anything more refined than that is subject to the Final Rule's multi-factor balancing tests and eye-of-the-beholder standards.

The GCA, however, says nothing about primordial ooze, unformed blocks of metal, or any of ATF's various indeterminate standards for *A*. Rather, the GCA says ATF can regulate *A* as a "firearm" only if *A* can "readily be converted" into a firearm *B*. 18 U.S.C. § 921(a)(3)(A). That is, a firearm is anything (*B*) that expels a projectile with an explosive, or anything (*A*) that can be *readily converted* to a thing (*B*) that fires a projectile with an explosive.

Consider (1) how courts distinguish "readily be converted" from "readily restored." Then consider (2) how ATF ignores that distinction. The result is (3) a fatally vague Final Rule.

1.

Let's start with ordinary GCA firearms. When it comes to ordinary firearms, like bolt-action hunting rifles, courts have interpreted "readily be converted" to mean minimal effort—something like "three to twelve minutes" with a drill and no special skills. *See, e.g.*, *United States v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2d Cir. 1971). The GCA standard arises with some frequency when criminal defendants are charged with possessing gun parts or inoperable guns that nonetheless count as firearms because they can "readily be converted" to fire. *See ibid.* For example, this disassembled Tec-9 handgun is still a "firearm":

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United States v. Morales, 280 F. Supp. 2d 262, 277 (S.D.N.Y. 2003). That is because it might be reassembled "in about five seconds." *Id.* at 272. Similarly, an inoperable shotgun can "readily be converted" to GCA firearm if it only requires "about fifteen to twenty minutes" of manipulation. *United States v. Reed*, 114 F.3d 1053, 1056 (10th Cir. 1997). And a starter gun—which is expressly mentioned in the text of § 921(a)(3)—is a GCA firearm because it can be converted to expel projectiles using basic tools, without any specialized knowledge, "in a matter of minutes" and "easily [in] less than an hour." *United States v. Mullins*, 446 F.3d 750, 755–56 (8th Cir. 2006).

NFA weapons like machine guns are a different story. Recall that machine guns face an entirely different and more onerous regulatory regime—including registration requirements for every machine gun, registration requirements for every seller and purchaser, $200 taxes for every transfer, and multi-month waiting periods. Owing in part to the significantly heavier burdens that attach to machine gun ownership, courts have interpreted the NFA's text ("readily restored") to reach *much* further than the GCA's text ("readily be converted"). While the GCA only reaches conversions that can be accomplished

in *minutes* using *minimal* effort, the NFA reaches restorations that can be accomplished in *hours* using *maximal* effort.

Take, for example, *United States v. Smith*, 477 F.2d 399 (8th Cir. 1973) (per curiam). That case concerned possession of an unregistered Thompson submachine ***207** gun. The gun had been permanently decommissioned: Its barrel had been filled with metal. *Id.* at 400. And the gun was welded in *two* places to make it impossible to fire: "The barrel of the gun was welded closed at the breech and was also welded to the receiver on the outside under the handguard." *Ibid.* Nonetheless, the Government proffered an expert to prove that a permanently decommissioned weapon could be "readily restored":

> [The Government's expert] testified that there are two possible ways by which the firearm could be made to function as such. The most feasible method would be to cut the barrel off, drill a hole in the forward end of the receiver and then rethread the hole so that the same or another barrel could be inserted. To do so would take about an 8-hour working day in a properly equipped machine shop. Another method which would be more difficult because of the possibility of bending or breaking the barrel would be to drill the weld out of the breech of the barrel.

Ibid. The court held that was sufficient to support Smith's NFA conviction because eight hours in a properly equipped shop with a sophisticated understanding of metallurgy constituted a ready restoration. *See id.* at 400–01. Other courts have interpreted the NFA to reach a machine gun that was permanently decommissioned by the military "by torch-cutting its receiver—the frame portion of the rifle that contains the firing mechanisms, located between the barrel and the stock—into two pieces." *TRW Rifle*, 447 F.3d at 688. The court reasoned the machine gun could be "readily restored" by welding the two pieces back together and then using "a hand grinder (or dremel tool), a splitting disk, a drill press, and hand files" to restore its firing mechanism. *Id.* at 692. The court credited expert testimony that someone with the proper tools and knowledge could do that in two hours. *Ibid.* A similar case estimated that the same restoration could be done in six hours. *See United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422–24 (6th Cir. 2006).

* * *

These cases illustrate what should be obvious to any law-abiding American: Federal law treats NFA machine guns differently from ordinary GCA firearms like bolt-action rifles.

2.

The distinction was not obvious to ATF, however. In Footnote 43 of the Final Rule, ATF says "readily" means *either* "readily be converted" under the GCA *or* "readily restored" under the NFA—terms ATF understands as interchangeable in a string cite of cases arising under both statutes. *See* Final Rule, 87 Fed. Reg. at 24661 n.43. ATF points to Footnote 43 and its mishmash of GCA-NFA precedents over and over throughout the Final Rule. *See id.* at 24684 n.96, 24685 n.103, 24698 n.123, 24700 n.125 (pointing to footnote 43). As ATF explains, "this rule is guided by ... relevant case law." *Id.* at 24698.

The problem is that NFA precedents are not "relevant case law." *Ibid.* As to ordinary GCA firearms, ATF is limited to regulating things that can "readily be converted" into firearms. 18 U.S.C. § 921(a)(3). That means things that are close enough to firearms that they can be finished "in about five seconds," *Morales*, 280 F. Supp. 2d. at 272, in "about fifteen to twenty minutes," *Reed*, 114 F.3d at 1056, or in "easily less than an hour," *Mullins*, 446 F.3d at 755. ATF cannot avail itself of the NFA's *much* broader for machine guns. Yet in interpreting the GCA's ordinary-gun standard, ATF expressly relied on cases like *Smith* and its eight-hours-in-a-professional-shop-with-expertise ***208** standard. *See* Final Rule, 87 Fed. Reg. at 24662 n.43; *see also id.* at 24678–79 (explicitly linking the Final Rule's understanding of "readily" to the machine-gun-restoration standard under the NFA).

The practical implications of ATF's position are staggering. According to ATF, the word "readily" means the same thing in the GCA, the NFA, and the Final Rule. If that were true, then millions and millions of Americans would be felons-in-waiting. That is because the AR-15 is

the most popular rifle in America; almost 20 million of them were in American homes as of 2020. *See* NSSF Releases Most Recent Firearm Production Figures, https://perma.cc/TBS8-JSSH (Nov. 16, 2020). But every single AR-15 can be converted to a machine gun using cheap, flimsy pieces of metal—including coat hangers. *See* Mike Searson, *Turning Your AR-15 into an M-16*, Recoil Magazine, https://perma.cc/L5G9-E9BJ (June 5, 2019). That is obviously far easier than the 8-hour-in-a-professional-shop standard announced in *Smith* to govern "ready restoration" under the NFA.

For decades, America's AR-15 owners have relied on the fact that AR-15s are not subject to the NFA's ready-restoration standard. Recall the NFA applies to machine guns *B* and things that can be "readily restored" to function as machine guns *B*. *See supra* Part II.A.2. By contrast, an AR-15 was never a machine gun *B* and hence cannot be "readily restored" to a machine gun *B*. Of course, an AR-15 *A* could be "converted" to a machine gun *B*. But unless that conversion could be done in a few seconds or minutes, *see Morales*, 280 F. Supp. 2d. at 272; *Reed*, 114 F.3d at 1056, AR-15 owners had no reason to worry that their rifles were capable of ready conversion into unregistered machine guns. The Final Rule eliminates that certainty, says "readily" means the same thing in the GCA and the NFA, and says Americans violate federal gun laws if they could in theory manufacture a prohibited weapon in eight hours in a professional shop with metallurgical expertise. *See Smith*, 477 F.2d at 400; Final Rule, 87 Fed. Reg. at 24661 n.43 (relying on *Smith*).

3.

After conflating the GCA and the NFA, the Final Rule includes a list of eight non-exhaustive factors to guide ATF's understanding of "readily":

> (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 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.

Final Rule, 87 Fed. Reg. at 24735. The Final Rule emphasizes this list is "nonexclusive." *Id.* at 24698. And ATF explicitly disclaimed the need to explain how any of these factors would balance in practice: "It is not the purpose of the rule to provide guidance so that persons may structure transactions to avoid the requirements of the law." *Id.* at 24692.

This approach violates the Fifth Amendment and its guarantee of fair notice. *See FCC v. Fox Television Stations*, 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). The "Government violates this guarantee ***209** by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Even if "some conduct [ ] clearly falls within the provision's grasp," a law can still be vulnerable to a vagueness challenge. *Id.* at 602, 135 S.Ct. 2551. With its nonexclusive list of eight factors and lack of concrete examples, the Final Rule produces "more unpredictability and arbitrariness than the Due Process Clause tolerates." *See Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 1215, 200 L.Ed.2d 549 (2018) (citation omitted).

ATF dismisses the problem by pointing to courts that have rejected vagueness challenges to the term "readily." Final Rule, 87 Fed. Reg. at 24700, n.126 (pointing to cases listed in 87 Fed. Reg. at 24679 n.79). But that argument fails for two reasons. Nearly all of ATF's cited precedents involve the NFA, not the GCA. *See id.* at 24679 n.79 (also citing cases on state laws and the ADA). And as discussed above, courts have interpreted the NFA more expansively than the GCA. But more relevantly, the cited precedents dealt with the word "readily" as it exists in statutory text. They did not consider ATF's nonexclusive eight-factor balancing test with no concrete examples. It is the text of the Final Rule, not the text of the statute, which falls short of the Due Process Clause.[8]

ATF also argues that it could provide sufficient guidance in individual cases: Where "persons remain uncertain" as to the exact scope of the Rule, "they may submit a voluntary request to ATF for a classification." Final Rule, 87 Fed. Reg. at 24692. But this does nothing to cure the Final Rule's vagueness. As important as the Fifth Amendment's guarantee of fair notice to individuals is the Amendment's prohibition against "arbitrary enforcement" by government officials. *See* *Johnson*, 576 U.S. at 595, 135 S.Ct. 2551 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). It is thus of no use for ATF to say that it will tell ordinary people what they can do. The law exists to tell both the people *and* government officials what they can do. *See* *Sessions*, 138 S. Ct. at 1228 (Gorsuch J., concurring in part and concurring in the judgment) ("Vague laws [ ] threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). The nonexclusive eight-factor balancing test provides no guidance to anyone and hence is void for vagueness.

III.

Next consider the Final Rule's approach to weapon parts kits. The Final Rule expands the GCA's definition of "firearm" to include weapon parts kits:

> ***210** Firearm .... The term shall 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.

Final Rule, 87 Fed. Reg. at 24735. But this expansion cannot stand for two reasons.

First, as the majority cogently explains, *see ante* at 192, Congress knows how to regulate gun parts, either individually or as a collection. The GCA's predecessor, the Federal Firearms Act, defined "firearm" to mean "any weapon ... *or any part or parts of such weapon.*" Pub. L. No. 75-782, 52 Stat. 1250, 1250 (1938) (repealed 1968) (emphasis added). But Congress removed this language when it enacted the GCA. Moreover, Congress regulates parts elsewhere in the GCA (as well as in the NFA). *See, e.g.*, 18 U.S.C. § 921(a)(4)(C) (defining "destructive device" as, *inter alia*, "any combination of parts ...."). The omission of any reference to "parts" in § 921(a)(3) indicates that Congress did not sweep "parts" into the GCA's definition of firearm.

Second, the structure of § 921(a)(3) presumes that all covered firearms have either a frame or a receiver. Therefore, a weapon parts kit that does not include a frame or receiver cannot be regulated under § 921(a)(3).

Start with the statutory text. Section 921(a)(3) defines the term "firearm" in four sub-sections: (A), (B), (C), and (D). Consider only (A) and (B). Subsection (A) defines "firearm" to include "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). Subsection (B) defines "firearm" to include "the frame of receiver of *any such weapon.*" *Id.* § 921(a)(3)(B) (emphasis added). With its placement immediately following (A), we can easily understand (B)'s "any such weapon" language to incorporate the definition of "weapon" in (A). Thus, Subsection (B) defines "firearm" to include "the frame of receiver of any such weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." Or put another way, § 921(a)(3) defines "firearms" to include, *inter alia*, certain weapons (A) and the frame or receiver of said weapons (B). Section 921(a)(3) does not contemplate a weapon covered by (A) that does *not* have a frame or receiver covered by (B).

Contrast the statute with two hypothetical weapon parts kits covered by the Final Rule. The first kit contains a frame as defined by § 921(a)(3)(B). That means that the kit contains a firearm under § 921(a)(3). The frame (separate and apart from anything else in the kit) triggers the GCA and its various requirements. *See, e.g.*, 18 U.S.C. § 923(i) ("Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or

manufactured by such importer or manufacturer."). In this hypothetical, the frame is doing all the work—it is sufficient to trigger the GCA, so it does not matter what else is included in the frame-containing kit.

Now consider a different kit covered by the Final Rule: This second kit contains *no* frame or receiver as defined by § 921(a)(3)(B). *See* Final Rule, 87 Fed. Reg. at 24685 ("The Department disagrees with the comment that weapon parts kits must contain all component parts of the weapon to be 'readily' converted to expel a projectile."). This kit is incomplete because it does not contain a frame or receiver—and hence contains *nothing* that triggers ***211** § 921(a)(3)'s text. It beggars belief to suggest that such an incomplete parts kit is a weapon in any sense of the word. An incomplete weapon parts kit will *never* turn itself into a functioning weapon of any sort. Any argument to the contrary is "[p]ure applesauce." *King v. Burwell*, 576 U.S. 473, 507, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015) (Scalia, J., dissenting).

ATF's only response is to say that it'll deem incomplete kits as "firearms" based on "a case-by-case evaluation of each kit." Final Rule, 87 Fed. Reg. at 24685; *cf. Jacobellis*, 378 U.S. at 197, 84 S.Ct. 1676 (Stewart, J., concurring). How is any American supposed to know when a collection of gun parts meets that standard?

In sum, § 921(a)(3) contemplates that a covered "weapon" (A) has a "frame or receiver" (B). Insofar as the Final Rule seeks to regulate weapons that do not, the rule is unlawful.

IV.

Finally, consider the Final Rule's treatment of *unfinished and incomplete* frames and receivers. This is perhaps ATF's most aggressive attempt to bootstrap hunks of metal and plastic into the GCA's definition of a "firearm." As explained in the preceding sections of this opinion, the GCA's definition of a "firearm" includes (1) functioning guns, (2) weapons that are "designed" to be functioning guns, (3) weapons that can "readily be converted" to functioning guns, and (4) the "frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3)(A)–(B). Thus, if a felon possesses a functioning handgun, that obviously violates the GCA. If the same felon possesses a non-functioning handgun, that still might violate the GCA if the gun was "designed" to be a functioning gun. And if the same felon possesses a field-stripped handgun,[9] that violates the GCA in two separate ways: the gun can be reassembled (and hence "readily be converted" to a functioning gun), and the frame or receiver of the field-stripped weapon is a "firearm" under § 921(a)(3)(B) even without reassembly.

But that statutory definition is not capacious enough for ATF. In the Final Rule, ATF asserts that anything beyond primordial ooze, liquid polymer, and wholly unformed raw metal *can* constitute a firearm. Here's how ATF explains the bootstrapping:

> (c) Partially complete, disassembled, or nonfunctional frame or receiver. The terms "frame" and "receiver" shall include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver, i.e., to house or provide a structure for the primary energized component of a handgun, breech blocking or sealing component of a projectile weapon other than a handgun, or internal sound reduction component of a firearm muffler or firearm silencer, as the case may be. The terms shall not include a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon ***212** (e.g., unformed block of metal, liquid polymer, or other raw material).

Final Rule, 87 Fed. Reg. at 24739. But this expansion cannot stand, because (A) a frame or receiver parts kit is not a frame or receiver, (B) the Final Rule's examples defining "frame or receiver" are nonsensical, and (C) the Final Rule fails to sufficiently engage with then-contemporaneous definitions of "frame" or

"receiver."

A.

To begin, a frame or receiver *parts kit* is not a frame or receiver within the meaning of § 921(a)(3)(B).

Seven years before the GCA was passed, WEBSTER'S THIRD defined *frame* as "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm," WEBSTER'S THIRD INTERNATIONAL DICTIONARY 902 (1961), and *receiver* as "the metal frame in which the action of a firearm is fitted and which the breech end of the barrel is attached." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1894 (1961). Now, the Final Rule attempts to expand those definitions, so that "frame" includes a "frame parts kit" and "receiver" includes a "receiver parts kit." Final Rule, 87 Fed. Reg. at 24739.

But ATF cannot simply add the phrase "parts kit" and regulate as if the frame/receiver *parts* are the frames/receivers themselves. A frame parts kit does not serve as "the basic unit of a handgun which serves as a mounting for the barrel"; it is a collection of parts that could in theory be assembled into a frame. A receiver parts kit is not a "metal frame"; it is a collection of parts that can be assembled into a metal frame. Thus, as a matter of common-sense statutory interpretation, the parts kits cannot qualify as frames or receivers under § 921(a)(3)(B). *See Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 12, 24 L.Ed. 708 (1877) (presuming that words in statutory text are to be given "their natural and ordinary signification.").

ATF's contrary view has no stopping point. For example, ATF says it will regulate "[a] complete frame or receiver of a weapon that has been disassembled, damaged, split, or cut into pieces, but not destroyed in accordance with paragraph (e)." Final Rule, 87 Fed. Reg. at 24739. Paragraph (e) in turn states that "[a]cceptable methods of destruction include completely melting, crushing, or shredding the frame or receiver." *Ibid.* It is thus unclear if any gun part could *ever* fall outside ATF's definition of a "firearm." On the front end, anything that has been refined beyond primordial ooze or raw liquid polymer could one day be a firearm. And on the back end, anything that has not been melted down into primordial ooze or raw liquid polymer could one day be restored to function as a firearm.

This makes little sense. If I went to a junk yard and picked up a piece of metal that used to be part of a truck, no reasonable person would say I'm holding a truck because the metal has been formed beyond primordial ooze and hence could be "completed, assembled, restored, or otherwise converted to function" as either a truck or truck frame. Likewise, if I cut a truck into 100 pieces, scattered them on the ground, and then picked up some, no reasonable person would say I'm holding a truck or truck frame because the piece hadn't been melted down to its primordial state.

B.

Next, the Final Rule says even unformed pieces of metal or plastic can constitute frames and receivers when they are found with instructions or jigs. In the section on frames and receivers, the Final Rule gave multiple examples of what is or is not a frame or receiver within the meaning ***213** of § 921(a)(3)(B). *See* Final Rule, 87 Fed. Reg. at 24739. Examples 1 and 4 are key. Example 1 provides:

> Frame or receiver: A frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template is a frame or receiver, as a person with online instructions and common hand tools may readily complete or assemble the frame or receiver parts to function as a frame or receiver.

Ibid. In contrast, Example 4 provides:

> Not a receiver: A billet or blank of an AR-15 variant receiver without critical interior areas having been indexed, machined, or formed that

> is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver.

Ibid. Note the difference between Example 1 (frame or receiver) and Example 4 (not a frame or receiver): the presence of a jig or other template. Thus, it is the jig or template that triggers the GCA.

The implication of these examples is stark. On a workbench you find two receiver blanks like the silver ones pictured on page 3 of this opinion. Neither has "critical interior areas" that are "indexed, machined, or formed." *Ibid.* But the right receiver blank is accompanied by a plastic jig. The left one is not. Under the Final Rule, the right receiver blank is a frame or receiver, thus triggering a five-year prison sentence for unlicensed manufacturing, importing, or dealing. *See* 18 U.S.C. §§ 922(a)(1)(B), 924 (a)(1). The left is just innocuous metal. How can this be? It seems that the presence of the jig changes that receiver blank from something that is not a firearm under § 921(a)(3) to something that is. But § 921(a)(3)(B) only refers to frames and receivers. Section 921(a)(3)(B) does not mention jigs (or instructions, templates, equipment, tools). How can the jig or template change the nature of the receiver blank, such that the blank goes from unregulable to regulable under § 921(a)(3)(B)?

It obviously cannot. Consider the lumber in every Home Depot across America. It obviously has been machined beyond its primordial state; much of it has been pressure treated, and all of it has been cut to specified lengths. The same is true about every screw, nut, and bolt in the store; all of them have been machined beyond their primordial states and cut to specified lengths. Now, if I walk into the Home Depot with instructions for making a chair, would any reasonable person say I possess a chair? Of course not.[10]

C.

Let's close with the ATF's eye-of-the-beholder standard. As noted in previous sections of this opinion, dictionaries define *frame* and *receiver*—like the Old 80% Rule—in terms of critical components, parts, and functions. For example, the frame or receiver must be able to hold a trigger or the breechblock. Or it must have ***214** certain parts milled, etc. In the place of these standards, ATF said metal or plastic is a frame or receiver if it has "reached a stage of manufacture where it is *clearly identifiable* as an unfinished component part of a weapon." Final Rule, 87 Fed. Reg. at 24739 (emphasis added). Or rather, once an ordinary person can look at an object and say that it looks like an "unfinished component part of a weapon," *see ibid.*, it has become a frame or receiver within the meaning of § 921(a)(3)(B). How does this interact with ATF's assertions throughout the Final Rule that it now regulates anything machined beyond primordial ooze and liquid polymer? Unclear. What does "clearly identifiable" mean? Also unclear. What objects do ordinary people (who might associate "receivers" more readily with football than guns) think are "clearly identifiable" as firearm components? Yet again, unclear. All we know is that ATF, like Justice Stewart, is confident that it can identify a GCA firearm when it sees one.

ATF's problem is that § 921(a)(3)(B) covers objects that *are* frames and receivers, not objects that *look* like frames or receivers.[11] A recent Internet fad illustrates the point. Consider the "cakes that look like food" Internet trend. *See, e.g.*, Chelsweets, *Cakes That Look Like Food: 10 Amazing Cakes*, YouTube (Jan. 22, 2018), https://perma.cc/UGH6-MXA2. One could make a cake that looks like a hamburger, just as one could make a cake that looks like a gun frame or receiver. One is "clearly identifiable" as a hamburger, just as the other is "clearly identifiable" as a gun part. But that does not make the former taste like a Big Mac, just as it does not make the latter covered by the GCA.

* * *

The Final Rule is limitless. It purports to regulate any piece of metal or plastic that has been machined beyond its primordial state for fear that it might one day be turned into a gun, a gun frame, or a gun receiver. And it doesn't stop regulating the metal or plastic until it's melted back down to ooze. The GCA allows none of this. I concur in the majority's opinion holding the Final Rule is unlawful. And I further concur that the matter should be remanded to the district court to fashion an appropriate remedy for the plaintiffs.

All Citations

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Footnotes

[1] "Positive law is a manifestation of the legislative will." *Arnold v. United States*, 13 U.S. 104, 119, 9 Cranch 104, 3 L.Ed. 671 (1815); *see also Farrar v. United States*, 30 U.S. 373, 379, 5 Pet. 373, 8 L.Ed. 159 (1831) ("[The President] cannot in the absence of *law* exercise the power of making contracts, and much less, as in this case, against the expression of the *legislative will.*") (emphasis added); *Kindle v. Cudd Pressure Control, Inc.*, 792 F.2d 507, 512 (5th Cir. 1986) (describing "the express legislative will" as "the determinant"); *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 820 (4th Cir. 1995) (noting the "deference to legislative will" inherent in statutory interpretation); *Winstead v. Ed's Live Catfish & Seafood, Inc.*, 554 So. 2d 1237, 1242 (La. Ct. App. 1989), *writ denied*, 558 So. 2d 570 (La. 1990) ("The supreme expression of legislative will ... is of course the codes and statutes."); *In re Chin A On*, 18 F. 506, 506–07 (D. Cal. 1883) ("[I]t is the duty of the court to obey the law, as being the latest expression of the legislative will.").

[2] *See Forrest General Hospital v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019) ("The Constitution, after all, vests lawmaking power in Congress. How much lawmaking power? 'All,' declares the Constitution's first substantive word.").

[3] *ATF History Timeline*, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/our-history/atf-history-timeline.

[4] The GCA's predecessor statutes include the National Firearms Act of 1934 and the Federal Firearms Act of 1938, both of which involved the taxation and regulation of firearms. *See* National Firearms Act of 1934, ch. 757, Pub. L. 73-474, 48 Stat. 1236; Federal Firearms Act of 1938, ch. 850, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968).

Of particular note, the Supreme Court has stated: "The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous." *Staples v. United States*, 511 U.S. 600, 622, 114 S.Ct. 1793, 128 L.Ed.2d 608 (Ginsburg, J., concurring) (noting also "the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity").

[5] The GCA is found in Title 18 of the United States Code, which bears the label "Crimes and Criminal Procedure." *See* 18 U.S.C. § 922.

Interestingly, Congress's jurisdictional hook whereby it finds authority to regulate firearms in the manner described is the requirement that the firearm travelled in interstate commerce. *See generally id.*; 18 U.S.C. § 921(2) (defining "interstate or foreign commerce"); *see also, e.g., 2.43D Possession of a Firearm by a Convicted Felon*, Fifth Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (2019) (requiring, under element number four of the offense, that the Government prove beyond a reasonable doubt "[t]hat the firearm [ammunition] possessed traveled in [affected] interstate ... commerce; that is, before the defendant possessed the firearm, it had traveled at some time from one state to another"). While not challenged in this appeal, the interstate-commerce

requirement may call into question ATF's jurisdictional authority to promulgate certain provisions of the Final Rule.

6 The Supreme Court has held that, to be banned, a weapon must be "both dangerous and unusual," and thus, "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano v. Massachusetts*, 577 U.S. 411, 418, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (Alito, J., concurring). Of course, for many years now, millions of AR-15 rifles have been sold to civilians, who may lawfully possess them.

7 The Final Rule defines a PMF as: "A firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced." 87 Fed. Reg. at 24735.

8 Among other things not substantially challenged in this litigation, the Final Rule also defined the term "frame" in relation to handguns and the term "receiver" in relation to long guns, defined what "variant" means relative to firearms, required that FFLs serialize PMFs that they accept into inventory, and required FFLs to maintain records on firearms transactions for the entirety of their business operations, replacing a prior twenty-year requirement. Finally, the Final Rule contains a severability clause. *See* 87 Fed. Reg. at 24730.

9 The plaintiffs and plaintiff-intervenors in this action are two individuals, Jennifer **VanDerStok** and Michael Andren; Tactical Machining, LLC; Firearms Policy Coalition, Inc.; BlackHawk Manufacturing Group, Inc. d/b/a 80 Percent Arms; Defense Distributed; Second Amendment Foundation, Inc.; Not An LLC d/b/a JSD Supply; and Polymer80, Inc.

The defendants in this action are Merrick **Garland**, U.S. Attorney General; the United States Department of Justice; Steven Dettelbach, in his official capacity as Director of ATF; and ATF. These defendants are collectively referred to herein as "the Government."

10 Notably, the *Chevron* doctrine has not been invoked on appeal. Even if the Government had done so, *Chevron* would likely not apply for several reasons, including the GCA's unambiguous text and its imposition of criminal penalties. *See, e.g.,* *Cargill v. **Garland***, 57 **F**.**4th** 447, 464–66, 472–73 (**5th** **Cir**. **2023**).

11 ATF's 1968 definition of "frame or receiver" was identical: "That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." Commerce in Firearms and Ammunition, 33 Fed. Reg. 18,555, 18,558 (Dec. 14, 1968).

12 The Government itself acknowledged that "ATF's prior regulatory definitions have been 'consistent with common and technical dictionary definitions.' " ***VanDerStok***, —— F.Supp.3d at ———, **2023** WL

4539591, at *13 (quoting Defs.' Supp. Br.) (emphasis removed).

13 Perhaps noticing the error in its incredibly broad and murky proposal, ATF affirmatively excluded from the definition's scope "a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon (e.g., unformed block of metal, liquid polymer, or other raw material.)." 87 Fed. Reg. at 24739. ATF's attempt to carve out this vague laundry list of unfinished products further demonstrates that the proposed definition lacks any objective hook in the statute.

14 In the Senate Report connected to the passage of the GCA, the committee stated in reference to the amended definition of "firearm" in section 921(a)(3): "It has been found that it is impractical to have controls over each small part of a firearm. Thus, the revised definition substitutes only the major parts of the firearm; that is, frame or receiver for the words 'any part or parts.' " S. Rep. No. 90-1097 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2200.

15 Yet another example within the same statute: Congress defined "firearm silencer" and "firearm muffler" in section 921(a)(25) to include "any combination of *parts*, designed or redesigned, and intended for us in assembling or fabricating a firearm silencer or firearm muffler." 18 U.S.C. § 921(a)(25) (emphasis added).

And another example: In section 921, Congress defined "handgun" to include "any combination of *parts* from which a firearm described in subparagraph (A) can be assembled." 18 U.S.C. § 921(a)(30)(B) (emphasis added).

And another: In section 922, when defining certain unlawful acts under the GCA, Congress explicitly stated that "[i]t shall be unlawful for any person to assemble from imported *parts* any semiautomatic rifle or any shotgun." 18 U.S.C. § 922(r) (emphasis added).

Moreover, to further demonstrate the particular use by Congress of the term "parts" and the assembling of parts: The 1990 Crime Control Bill, H.R. 5269, would have made it unlawful to assemble a semi-automatic rifle or shotgun that is identical to one that could not be imported. *See* Crime Control Act, § 2204, P.L. 101-647 (1990), enacting current 18 U.S.C. § 922(r). Congresswoman Jolene Unsoeld (D., Wash.) offered an amendment to kill the ban on domestic manufacturing by inserting "from imported parts" into the bill such that the enactment, as passed, made it unlawful "to assemble from imported parts any semi-automatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation ..." She argued—correctly—that "Congress, not a nameless, faceless bureaucrat in the Treasury Department, should decide which firearms Americans can own." 136 Cong. Rec. H8863–64 (Oct. 4, 1990). The Unsoeld amendment passed by a vote of 257 to 172. *See id.* at H8867; 18 U.S.C. § 922(r).

16 The Government apparently recognized as much in recent litigation, arguing that "Congress has chosen to exclude firearm parts from the scope of the GCA, including parts that could be assembled with a homemade receiver and frame to make a firearm." Gov't's Mot. to Dismiss, *California v. ATF*, No. 3:20-cv-06761, 2020 WL 9849685 (N.D. Cal. Nov. 30, 2020). Notably, the Government went on to assert that "Congress has also chosen to permit the home manufacture of unserialized firearms for personal use." *Id.* Much like in the *Syracuse* brief, *supra*, the Government seemingly took a completely opposite position

in previous litigation than it takes before this Court in the present matter.

17 The Government cites to Webster's 1968 edition to define "convert" as "to change from one state to another; alter in form, substance, or quality; transform, transmute." *Webster's Third New International Dictionary of the English Language* 499 (1968) (formatting altered).

18 Further demonstrating its misunderstanding and misuse of the statutory text, ATF apparently equates the phrase "readily be converted" from the GCA with the phrase "be readily restored" in the National Firearms Act ("NFA"). However, these two different statutes have radically different regulatory scopes: the former regulates ordinary firearms (like a standard-issue pistol or rifle), while the latter regulates machine guns, suppressors, and short-barreled shotguns that are among the most heavily controlled items in our country (if not the world). It is unsurprising that, given their very different scopes, courts have interpreted these texts to reach very different results. *Compare* *United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2d Cir. 1971) (interpreting the GCA's "readily be converted" text to mean something as short as twelve minutes), *with* *United States v. Smith*, 477 F.2d 399, 400–01 (8th Cir. 1973) (interpreting the NFA's "be readily restored" text to mean up to eight hours of work, done in a professional shop, by an individual with an advanced understanding of metallurgy). Despite these differences, in the Final Rule, ATF expressly conflates the two statutory phrases and claims that it can regulate partially complete "frames or receivers" using *either* standard. *See, e.g.*, 87 Fed. Reg. at 24661 n.43 (relying on *Winlee Derringer* and *Smith*); *id.* at 24678–79 (relying on NFA and GCA interchangeably). This haphazard combination of standards employed by ATF in its Final Rule is the direct result of an agency that has strayed too far from its statutory foundation provided by Congress.

19 ATF itself understood the importance of the word "readily" in the statute—the Final Rule includes numerous factors that might help ATF determine when something can "readily" be made into a working firearm. 87 Fed. Reg. at 24735. The appellees make many well-reasoned arguments regarding the ambiguity and vagueness of the Final Rule's "readily" standard. To the extent ATF relies on such a subjective multi-factor test to determine on a case-by-case basis when parts may "readily" be converted into a working firearm, this Court looks to the wisdom of the Supreme Court: "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable ..." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012).

20 18 U.S.C. § 922(a)(1).

21 *Id.* at § 922(a)(2).

22 *Id.* a § 922(g).

23 *See* *United States v. Nat'l Dairy Corp.*, 372 U.S. 29, 32–33, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963)

("[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."); *Johnson v. United States*, 576 U.S. 591, 595, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("Government violates [the due process clause] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

24 Congress has been particular in limiting ATF's authority in a number of respects. In fact, when the NFA was reenacted as Title 2 of the GCA, and remained a chapter of the Internal Revenue Code, it set forth definitions including "machine gun" and "rifle," as well as for particular parts. It also excluded from the definition of "firearm" certain weapons. Thereafter, ATF began removing excepted weapons from this category, thus bringing them within the NFA's definition of prohibited weapons. Congress responded in kind and acted to prevent ATF from doing so. *See* Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, 125 Stat. 552, 609 (Nov. 18, 2011).

25 *See, e.g.*, 1 Charles E. Torcia, WHARTON'S CRIMINAL LAW § 10 (15th ed. 2019) ("It is for the legislative branch of a state or the federal government to determine ... the kind of conduct which shall constitute a crime."); *but see* Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855 (2020) (analyzing the growing trend in "administrative crimes," or crimes created and defined by agencies' rules).

26 Even if the Court (and the parties) were wrong in concluding that the statute is unambiguous, we would nevertheless reach the same conclusion here because under the rule of lenity, we construe ambiguous statutes against imposing criminal liability—precisely what ATF has done here. The rule of lenity is a "time-honored interpretive guideline" used by this Court and others "to construe ambiguous statutes against imposing criminal liability." *Cargill*, 57 F.4th at 471 (quoting *Liparota v. United States*, 471 U.S. 419, 429, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985)). This interpretive rule mandates that, should the GCA's text be at all unclear, we err on the side of those citizens who now face unforeseen criminal liability under ATF's new definitions. *See* *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992) ("Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one," and therefore, it is "proper ... to apply the rule of lenity and resolve the ambiguity in [the citizens'] favor."); *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) ("[W]e are construing a criminal statute and are therefore bound to consider application of the rule of lenity."). To the extent an argument for the statute's ambiguity holds any water, we would rely on the rule of lenity to further bolster the conclusion that ATF, a non-legislative government agency, exceeded its statutory authority in promulgating the challenged portions of the Final Rule. *See* *Cargill*, 57 F.4th at 471 ("[A]ssuming the definition ... is ambiguous, we are bound to apply the rule of lenity.").

27 *Data Mktg. P'ship, LP v. United States Dep't of Lab.*, 45 F.4th 846 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate remedy" for unlawful agency action.); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374–75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation."); *accord* *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action.").

[28] As Justice Thurgood Marshall once wisely advised: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure ... [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 635, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (Marshall, J., dissenting).

[1] Insofar as the Old Rule applied to frames and receivers that were, say, 81% complete, ATF regulated pieces of metal that were both (1) frames and receivers and (2) things that were not yet frames and receivers. As the majority opinion notes, *see ante*, at 189-90, it is unclear how the GCA permits that. My point in this separate concurrence is that even if the GCA permits the Old 80% Rule, it cannot permit ATF's attempt to regulate any piece of metal that has been machined beyond its "primordial" state. *E.g.*, Final Rule, 87 Fed. Reg. at 24678.

[2] Indeed, Congress has considered several bills to regulate so-called "ghost guns" and rejected them. *See, e.g.*, Untraceable Firearms Act of 2021, S.1558, 117th Cong. (2021). No such bill has made it past bicameralism and presentment. Thus, ATF and the Executive Branch sought to do through this Final Rule what they could not do through the normal legislative process. *Cf.* *Biden v. Nebraska*, —— U.S. ——, 143 S. Ct. 2355, 2373, 216 L.Ed.2d 1063 (**2023**) ("The Secretary's assertion of administrative authority has conveniently enabled him to enact a program that Congress has chosen not to enact itself." (internal quotation and citation omitted)).

[3] Throughout this opinion, I use "GCA" and "ordinary" to refer to the firearms captured in 18 U.S.C. § 921(a)(3)(A)–(B). That includes the types of firearms Americans can buy at sporting-goods and big-box stores, like semiautomatic pistols, revolvers, hunting rifles, and shotguns.

[4] Throughout this opinion, I use "NFA items" to refer to the items captured in 26 U.S.C. § 5845. These include suppressors, *id.* § 5845(a)(7), and destructive devices, *id.* § 5845(f). Both are NFA items even though they also appear in 18 U.S.C. § 921(a)(3)(C)–(D). For the sake of simplicity, I use "machine guns" and "NFA items" interchangeably—both because machine guns are prototypical NFA items and because ATF's Final Rule relies extensively on court precedents involving machine guns. *See infra* Part II.B.2.

[5] The textual distinction is particularly powerful because Congress knew how to use the word "converted" in the NFA when it wanted to. For example, the GCA added the definition of "destructive device" to the NFA in 1968. And when it did so, Congress used "converted" in the definition of the NFA item "destructive device." 18 U.S.C. § 921(a)(4)(B). That further underscores the textual anomaly of the word "restored"—which appears only in the NFA provisions governing things like machine guns, short-barreled rifles, and short-barreled shotguns. 26 U.S.C. § 5845(b)–(e).

[6] Note that this critique of "restored" also applies to the Final Rule's similarly inappropriate uses of the words "completed" and "assembled." *See* Final Rule, 87 Fed. Reg. at 24735, 24739. Neither word appears in the pertinent text of the GCA. *See* 28 U.S.C. § 921(a)(3). And both words have definitions that diverge from

that of the relevant word in § 921(a)(3), "converted."

7 Some may dismiss such "homey examples" on the grounds that ordinary meaning is a legal concept without concern for everyday conversation. *See, e.g.*, Tara Leigh Grove, *Foreword: Testing Textualism's 'Ordinary Meaning'*, 90 Geo. Wash. L. Rev. 1053, 1082–83 (2022); Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 Tex. L. Rev. (forthcoming 2024). To the extent that the critique has purchase as a theoretical matter, it is irrelevant here. ATF has provided no argument that the analysis of ordinary meaning as a legal concept changes the definition of commonplace words like "converted" or "restored."

8 ATF essentially responded with variation of the motte-and-bailey argument. *See* Scott Alexander, *All in All, Another Brick in the Motte*, Slate Star Codex (Nov. 3, 2014), https://perma.cc/PA2W-FKR9. The Final Rule is clearly more expansive than the text of § 921(a)(3). When pressed on due process concerns with the Final Rule, ATF retreated to the text of § 921(a)(3) and argued that courts have rejected such attacks on the GCA. But the Final Rule is not the GCA. ATF may either have the text of the GCA, as upheld against due process challenges by various courts, or the more expansive Final Rule, which has never encountered such a challenge. But it may not mix and match legal texts with defenses.

9 Field stripping a firearm involves disassembling it without any special tools for routine cleaning and maintenance. *See, e.g.*, Bob Boyd, *DIY Guide: Field-Stripping a Glock*, SHOOTING ILLUSTRATED (Dec. 17, 2019), https://perma.cc/A7CA-YVKC; *cf. United States v. Spencer*, 439 F.3d 905, 911 (8th Cir. 2006) (noting a "field stripped" machine gun was disassembled "into approximately ten to fifteen different parts" and "could be reassembled in about five or ten minutes") (quotation omitted).

10 In its briefing before our court, ATF attempts to engage a related hypothetical by arguing that a person possesses a bicycle when they buy a disassembled one. See Blue Br. 19. That is a red herring for two reasons. First, a disassembled bicycle is no different than a field-stripped gun; the former is a bicycle just as the latter is a gun. *See supra* note 9 and accompanying text. Second, the Final Rule reaches far, far beyond a bicycle "shipped with plastic guards attached to the gears or brakes that must be removed before it is used." Blue Br. 19. To make the analogue work, ATF would have to contend that metal machined beyond its primordial state and rubber machined beyond liquid ooze constitutes a bicycle if possessed with a template or instructions for manufacturing the bike.

11 It is no answer to say that the Old 80% Rule allowed the regulated community to escape regulation by making 79%-complete frames and receivers. *See* Final Rule, 87 Fed. Reg. at 24686. Such a response might be valid on public policy grounds, but as the majority notes above, *see ante* at 194-96, public policy is the purview of Congress, not the federal courts. *See* *Lamie v. U.S. Tr.*, 540 U.S. 526, 542, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

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EXHIBIT E

2006 WL 659347
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

John MCENTEE and Scott Ouellette,
Plaintiffs–Appellants,
v.
INCREDIBLE TECHNOLOGIES, INC.,
Defendant–Appellee.

No. 263818.
|
March 16, 2006.

Synopsis
Background: Players of electronic golf game brought action against supplier of game to recover money lost while participating in contest that also provided an opportunity to win money. The Wayne Circuit Court dismissed players' claims for lack of standing. Players appealed.

Holdings: The Court of Appeals held that:

[1] claim under statute providing a civil remedy for money lost playing or betting on cards or dice was preempted by Gaming Control and Revenue Act, and

[2] Consumer Protection Act did not apply.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (2)

[1] Gaming and Lotteries Particular Contexts

Statute providing a civil remedy to gamblers for money lost "by playing or betting on cards, dice or by any other device in the nature of such playing or betting" did not enable players of electronic golf game to recover from supplier of the game the money they lost while participating in contest that also provided an opportunity to win money, even if contest constituted illegal gambling; golf game was a "gambling game" to the extent it was played for money, such that any claim for recovery of gambling losses under statute was preempted by the Gaming Control and Revenue Act. M.C.L.A. §§ 432.202(v), 432.203(3), 432.204a(1)(e), 432.207a, 750.315.

1 Case that cites this headnote

[2] Antitrust and Trade Regulation Exemptions and safe harbors
Gaming and Lotteries Trial

Players of electronic golf game who lost money while participating in gambling contest involving game could not bring action against supplier of game under Consumer Protection Act; golf game was subject to the exclusive regulatory authority of Gaming Control Board to the extent it was played for money, and Consumer Protection Act exempted any transaction or conduct specifically authorized under laws administered by a regulatory board. M.C.L.A. §§ 432.202(v), 432.207a, 445.904(1)(a).

Before: DAVIS, P.J., and CAVANAGH and TALBOT, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** In this action to recover monies allegedly lost to defendant through gambling, plaintiffs appeal as of right from the trial court's order dismissing plaintiffs' claims on the basis that plaintiffs lacked standing to bring this action under either MCL 750 .315 or the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We affirm.

Defendant **Incredible** Technologies, Inc. (IT) develops, manufactures, markets, and sells electronic Golden Tee® arcade games, which are based on the sport of golf. The games feature a "Hole–n–Win" contest, in which a player who pays to participate in the contest receives a specific sum of money for achieving a hole-in-one on a designated hole. Plaintiffs initiated this action to recover monies allegedly lost while playing Hole–n–Win, an activity that plaintiffs allege constitutes illegal gambling.

[1] Plaintiffs contend that they have standing to bring this action under MCL 750.315. We disagree.

A standing defense may be raised by a trial court *sua sponte,* as it was in this case. *46th Circuit Trial Court v. Crawford Co.,* 266 Mich.App. 150, 177–178, 702 N.W.2d 588 (2005). Whether a party has standing is a question of law this Court reviews de novo. *Rohde v. Ann Arbor Public Schools,* 265 Mich.App. 702, 705, 698 N.W.2d 402 (2005). Where a party's claim is governed by statute, the party must have standing as bestowed by statute. *46th Circuit Trial Court, supra* at 177, 702 N.W.2d 588, citing *In re Foster,* 226 Mich.App. 348, 358, 573 N.W.2d 324 (1997).

In addition, the interpretation and application of a statute is a question of law this Court reviews de novo. *Eggleston v. Bio–Medical Applications of Detroit, Inc.,* 468 Mich. 29, 32, 658 N.W.2d 139 (2003). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Title Office, Inc. v. Van Buren Co. Treasurer,* 469 Mich. 516, 519, 676 N.W.2d 207 (2004), quoting *In re MCI,* 460 Mich. 396, 411, 596 N.W.2d 164 (1999). In construing a statute, the court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Morris & Doherty, PC v. Lockwood,* 259 Mich.App. 38, 44, 672 N.W.2d 884 (2003) (citations omitted).

The language in MCL 750.315 expressly provides a civil remedy for a plaintiff who loses money to a defendant through playing or betting on cards, dice, or by any other device in the nature of such playing or betting. See *Raymond v. Green,* 194 Mich. 639, 161 N.W. 857 (1917); *Lassen v. Karrer,* 117 Mich. 512, 76 N.W. 73 (1898). However, where a plaintiff's cause of action arises out the playing of a game, machine, or equipment for money, we hold that the plaintiff's cause of action under MCL 750.315 is preempted by the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.201 *et seq.*

Under the MGCRA, the Legislature vested the Michigan gaming control board (MGCB) with exclusive jurisdiction over all matters relating in any way to the licensing, regulating, monitoring, and control of the non-Indian casino industry. *Papas v. Gaming Control Bd.,* 257 Mich.App. 647, 658–659, 669 N.W.2d 326 (2003). Under the MGCRA, the MGCB has expansive and exclusive authority to regulate all aspects of casino gambling in Michigan, including the duty to review casino license applications, promulgate rules and regulations to implement and enforce the act, provide for the levy and collection of penalties and fines for violation of the act or administrative rules, receive complaints from the public, and conduct investigations into the conduct of gambling operations to assure compliance with the act and to protect the integrity of casino gaming. MCL 432.204(17). And, under MCL 432.204a(1)(e), the MGCB has the power to "[a]dopt standards for the licensing of all person under this act, as well as for electronic or mechanical gambling games or gambling games, and to establish fees for the licenses."

***2** Further, the MGCRA applies to "all persons who are licensed *or otherwise participate in gaming under this act,"* MCL 432.203(4) (emphasis added). Under the MGCRA, "casino" is broadly defined as "a building in which gaming is conducted." MCL 432.202(g). "Gaming" means "to deal, operate, carry on, conduct, maintain, or expose or offer for play any gambling game or gambling operation." MCL 432.202(x). Further,

> "Gambling game" means any game played with cards, dice, equipment or a machine, including any mechanical, electromechanical or electronic device ... for money, credit, or for any representative of value ... but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player. [MCL 432.202(v).]

And, "gambling operation" means the conduct of authorized gambling games in a casino. MCL 432.202(w).

To the extent the Golden Tee games are played for money, the Golden Tee games are considered "gambling games" under the plain language of MCL 432.202(v). Consequently, the Golden Tee games, as well as the suppliers of the games, are governed by the MGCRA. MCL 432.207a. And, any building in which the Golden Tee games are operated, maintained, or exposed or offered for play is considered a casino and is subject to the regulations promulgated by the MGCB under the MGCRA. MCL 432.202(g); MCL 432.202(x).

Any law that is inconsistent with the MGCRA does not apply to casino gaming. MCL 432.203(3). Thus, this Court has held that the MGCRA preempts inconsistent laws, including common law. *Kraft v. Detroit Entertainment, LLC,* 261 Mich.App. 534, 551–552, 683 N.W.2d 200 (2004). Therefore, we hold that plaintiffs' cause of action under MCL 750.315 is preempted by the MGCRA.

[2] Plaintiffs also contend that they have standing to bring this action under the MCPA. We disagree. The MCPA expressly exempts from its reach "[a] transaction or conduct specifically authorized under laws administered by a regulatory board ... acting under statutory authority of this state...." MCL 445.904(1)(a); *Kraft, supra* at 540, 683 N.W.2d 200. And, to the extent the Golden Tee games are played for money, the games and suppliers of the games are subject to the exclusive regulatory authority of the MGCB. Therefore, we hold that defendant is exempt from plaintiffs' MCPA claims.

We affirm.

All Citations

Not Reported in N.W.2d, 2006 WL 659347

EXHIBIT F

2005 WL 3179624
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

L.E. **DIEHL**, Plaintiff-Appellant,
v.
R.L. **COOLSAET** CONSTRUCTION COMPANY and Liberty Mutual Group, Defendants-Appellees.

No. 253596.
|
Nov. 29, 2005.

Before: WHITBECK, C.J., and SAAD and O'CONNELL, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals by right an order granting summary disposition in favor of defendants. We affirm.

In July 1998, Ameritech hired **Coolsaet** Construction Company ("**Coolsaet**") to install plastic conduit in certain utility easements in the city of Westland. During the course of the installation, **Coolsaet** dug a ditch across the width of plaintiff's property and, as a result, damaged or removed some tree roots, causing trees on plaintiff's property to die. Both **Coolsaet** and Liberty Mutual, **Coolsaet's** insurer, refused to replace the trees or reimburse plaintiff for the cost of the trees. Plaintiff brought an action in contract and under the Michigan Consumer Protection Act (MCPA) against defendants seeking damages for the loss of the trees and for medical expenses incurred as a result of anxiety, frustration, and stress. In response, defendants filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendants argued that plaintiff's claims were barred by the statute of limitations, plaintiff was not a third-party beneficiary of the contract between **Coolsaet** and Ameritech or of the contract between **Coolsaet** and Liberty Mutual, and that the MCPA did not apply. After a hearing on defendants' motion, the trial court granted summary disposition in favor of defendants.

On appeal, plaintiff argues that summary disposition was inappropriate because he was an intended third-party beneficiary of both the contract between Ameritech and **Coolsaet** and the insurance agreement between Liberty Mutual and **Coolsaet**. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). By statute, a third party may only enforce a contract if "the promisor ... has undertaken to give or to do or refrain from doing something directly to or for [the third party]." MCL 600.1405(1). Therefore, only intended, not incidental, third-party beneficiaries may enforce a contract. *Koenig v. City of South Haven,* 460 Mich. 667, 680; 597 NW2d 99 (1999).

Plaintiff failed to offer any proof that he was an intended third-party beneficiary of the contract between Ameritech and **Coolsaet**. Plaintiff alleged in his complaint that **Coolsaet** had a contractual obligation to install the conduit without damaging plaintiff's property. However, plaintiff failed to produce a copy of the contract or any other documentary evidence regarding the relevant terms or provisions of the contract between the parties. In the absence of such evidence, plaintiff has failed to substantiate his claim that he was an intended beneficiary. Because plaintiff failed to present documentary evidence establishing a genuine issue of material fact, defendants' motion for summary disposition was properly granted on this issue.

Similarly, plaintiff failed to produce any evidence that he was an intended third-party beneficiary of the insurance agreement between Liberty Mutual and **Coolsaet**. When an insurance agreement fails to specifically denominate an individual, or a particularly defined class to which the individual belongs, as an intended third-party beneficiary, the individual does not have a right to sue for contract benefits. *Schmalfeldt v. North Pointe Insurance Co,* 469 Mich. 422, 429; 670 NW2d 651 (2003). The insurance coverage at issue was clearly provided for the sole purpose of protecting **Coolsaet**, and the contract's terms simply do not suggest that the parties intended to enter into the contract to benefit plaintiff directly. Therefore, the trial court correctly granted defendants summary disposition on plaintiff's claim that he is a third-party beneficiary to these contracts.

***2** Plaintiff argues that he has a cause of action under the MCPA. We disagree. Under the MCPA, it is unlawful to use unfair or unconscionable practices in the conduct of trade or commerce. MCL 445.903(1). The MCPA defines "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes...." MCL 445.902(d). The intent of the act is "to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes." *Noggles v. Battle Creek Wrecking, Inc,* 153 Mich.App 363, 367; 395 NW2d 322 (1986). If an item is purchased primarily for commercial purposes, then the MCPA does not apply. *Zine v. Chrysler Corp,* 236 Mich.App 261, 273; 600 NW2d 384 (1999).

Here, Ameritech hired **Coolsaet** to install plastic conduit along certain utility easements in the city of Westland. The installation of the plastic conduit was for commercial purposes, so the MCPA does not apply. Moreover, contrary to plaintiff's assertions, he was not a "party to the transaction" under MCL 445.903(1)(n) and (1)(y), so these sections do not apply to him. Because plaintiff failed to establish that he was a third-party beneficiary of either contract and because the MCPA does not apply, the trial court did not err when it granted defendants' motion for summary disposition.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 3179624

EXHIBIT G

STATE OF MICHIGAN

IN THE 22nd JUDICIAL CIRCUIT FOR THE COUNTY OF WASHTENAW

GUY BOYD,

Plaintiff,

v.

Case No. 24-000304-NP
Hon. Julia B. Owdziej

NOT AN LLC d/b/a JSD SUPPLY and
KYLE THUEME,

Defendant.

CIVIL-CRIMINAL LITIGATION CLINIC By: David Santacroce (P61367) Attorney for Plaintiff 863 Legal Research Building 801 Monroe Street Ann Arbor, MI 48109-1215 (734) 763-4319	PENTIUK, COUVREUR & KOBILJAK, P.C. By: Kerry L. Morgan (P32645) And: Randall A. Pentiuk (P32556) Attorneys for Defendant Not an LLC d/b/a JSD Supply, Only 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100 kmorgan@pck-law.com rpentiuk@pck-law.com

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ORDER GRANTING DEFENDANT NOT AN LLC D/B/A JSD SUPPLY'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City of
Ann Arbor, County of Washtenaw on: _____

PRESENT: THE HON. _____.
Julia B. Owdziej
Circuit Court Judge

The parties hereto, having appeared before this Court, the matter having been briefed, oral argument having been heard, the Court being fully advised in the premises, and for the reasons stated on the record;

NOW THEREFORE:

IT IS HEREBY ORDERED that Defendant, Not an LLC d/b/a JSD Supply's Motion for Summary Disposition is hereby granted in its entirety with prejudice and without costs or attorney fees to either party.

IT IS SO ORDERED.

This Order resolves the last pending claim against Defendant Not an LLC d/b/a JSD Supply, but does not close the case against Co-defendant KYLE THUEME.

_____

Hon. Julia B. Owdziej
Circuit Court Judge