No. 23-852

IN THE

# Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

*Petitioners,*

v.

JENNIFER VANDERSTOK, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF THE FIREARMS REGULATORY ACCOUNTABILITY COALITION AND PALMETTO STATE ARMORY, LLC AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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## INTRODUCTION[1]

The Gun Control Act ("GCA") regulates guns that shoot projectiles and guns that "may readily be converted" to shoot projectiles. For decades, and consistent with the phrase's plain meaning, courts have interpreted "readily be converted" to reach inoperative guns that can be made operational in a few minutes.

The GCA also regulates "the frame or receiver" of a gun. And again, courts and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") have for decades interpreted this phrase in accordance with a longstanding, well-settled technical meaning.

These clear and consistent interpretations of the GCA have allowed the gun industry and the gun-owning public to comply with the law and avoid the felony criminal penalties that attach to noncompliance.

Now, under the guise of providing additional "clarity" where none was needed, the Government has created regulatory chaos. In the Rule under review, ATF "defines" the key statutory terms using a pair of non-exhaustive, unweighted, and subjective multifactor tests. These standards are practically impossible to apply—and intentionally so. The Government claimed vague definitions were necessary to preserve "flexibility" and to "deter" the creation of unregulated guns that would escape "the spirit and intent of the

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to fund the brief's preparation or submission.

GCA." This unbounded agency discretion and *in terrorem* regulation is patently unlawful.

The Government's amorphous balancing tests misinterpret the GCA. They flout the text, structure, and purpose of the statute, and raise difficult constitutional questions under this Court's fair-notice and Second Amendment precedents. At minimum, the multifactor tests are not unambiguously compelled by the statutory text and thus flunk the rule of lenity. And if this Court upholds ATF's vague standards, the agency will be emboldened to continue wielding regulatory uncertainty as a tool to undermine lawful gun ownership.

For these reasons, the Court should affirm.

## INTEREST OF *AMICI CURIAE*

**The Firearms Regulatory Accountability Coalition, Inc.** ("FRAC") is a non-profit association working to improve business conditions for the firearms industry by ensuring the industry receives fair and consistent treatment from firearms regulatory agencies. FRAC is the premiere national trade association representing U.S. firearms manufacturers, retailers, importers, and innovators on regulatory and legislative issues impacting the industry in the United States.

**Palmetto State Armory, LLC** ("PSA") designs and manufactures guns, parts, and accessories for use by civilians and law enforcement. Because PSA's business is regulated by ATF, it has an interest in ensuring that ATF's regulations are lawful and offer workable guidance for the public.

*Amici* oppose firearms regulatory agencies using vague multifactor tests to define the scope of criminal statutes. As *amici* know firsthand, these "multi-factor, weight-of-the-evidence test[s]" "make[ ] it nigh impossible for a regular citizen" to comply with federal gun laws. *See, e.g.*, *FRAC v. Garland*, No. 23-3230, 2024 WL 3737366, at *11 (8th Cir. Aug. 9, 2024) (quotations omitted). They also offend basic constitutional guarantees of due process and the right to gun ownership.

## SUMMARY OF ARGUMENT

The Government adopted the Rule at issue in this case ostensibly to provide a "more comprehensive definition" of "firearm." *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652, 24,652 (April 26, 2022). The GCA definition reaches "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), and "the frame or receiver of any such weapon," *id.* § 921(a)(3)(B). The Rule focuses on two phrases: (i) "readily be converted," and (ii) "frame or receiver."

The Rule purports to define these terms using non-exhaustive, multifactor balancing tests. It says that it will assess "readily be converted" by analyzing at least eight factors, including "time," "expense," "equipment," "scope," and more. 27 C.F.R. § 478.11. And to determine whether a piece of metal is a "frame" or "receiver," it will also assess a non-exhaustive list of factors, including "templates," "tools," "marketing materials," and more. *Id.* § 478.12(c).

These standards are virtually impossible to apply. For one, they do not define the relevant factors: "time" and "expense" are listed as relevant factors, but there is no indication of how much time or money is probative. The agency also does not weight the factors or otherwise explain how to holistically apply them: there is no way to assess an item that can be converted in a lot of "time" but with little "expense" (or vice versa). And because the lists of factors are non-exhaustive, the agency always retains discretion to spring new factors on regulated parties.

From the agency's perspective, these issues are features, not bugs. The Government devised a vague standard to give itself "flexibility." 87 Fed. Reg. at 24,669. It expressly did not want to "provide guidance" on the precise scope of the GCA because "persons may structure transactions to avoid the requirements of the law," *id.* at 24,692, which—in ATF's view—would "skirt[ ] the spirit and intent of the GCA." *Id.* at 24,669. In other words, the agency intends to use indeterminacy to "deter" unlicensed gunmaking, *id.* at 24,686, even legal unlicensed gunmaking that the agency does not like.

The agency's unbounded standards are not the "single, best meaning" of the GCA. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). The standards' factors and amorphous methodologies appear nowhere in the statutory text. And multifactor tests that intentionally obscure the meaning of a statute carrying criminal penalties are not "necessary to carry out" that statute, 18 U.S.C. § 926(a), and thus exceed the agency's rulemaking authority, *see Michigan v. EPA*, 576 U.S. 743, 751–54 (2015) (rejecting

agency's interpretation of "appropriate and necessary"). Worse still, the agency's unlawful interpretation puts the GCA on a collision course with this Court's fair-notice and Second Amendment precedents.

Even if ATF's multifactor tests were permissible under a *de novo* reading of the statute (they are not), they would independently be foreclosed by the rule of lenity. Lenity stems from the Constitution's requirement that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 588 U.S. 445, 452 (2019). The result is that Congress must speak "plainly and unmistakably" before courts will find that it has criminalized conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971) (citations and quotations omitted). If there is any doubt about Congress's language, lenity resolves the ambiguity in favor of the citizen.

In the context of a rulemaking like this one, lenity means ATF's regulation cannot be upheld unless "the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994). As a statute with both criminal and noncriminal applications, the GCA must be interpreted consistently in both settings. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Thus, this Court has held it "proper" when interpreting criminal gun-control statutes "in a civil setting" "to apply the rule of lenity and resolve the ambiguity in [the citizen]'s favor," *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality); *see also id.* at 519 (Scalia & Thomas, JJ., concurring).

In this case, lenity applies because ATF's broad, amorphous multifactor tests are not unambiguously compelled by the GCA. To the contrary, the agency for years applied narrower, more precise interpretations of the statute. And if the agency has discretion to employ amorphous standards, it also has discretion to employ more precise tests that put the public on notice of what is unlawful. The availability of interpretations that favor the citizen forecloses the agency's interpretation that favors the prosecutor.

Finally, the agency is badly in need of a course correction. It regularly interprets criminal gun-control statutes the way it has done in this Rule: attempting to use vague, qualitative standards that give the agency unbridled discretion to surprise regulated parties with felony prosecutions. Just this month, the Eighth Circuit found a different ATF multifactor test unlawful because it "articulated no standard whatsoever" and "allow[ed] ATF to reach whatever result it wants." *FRAC*, 2024 WL 3737366, at *9, *11; *accord Mock v. Garland*, 75 F.4th 563, 578–88 (5th Cir. 2023). An inscrutable methodology is unacceptable in a statutory context where compliance mistakes result in "felony conviction and imprisonment followed by a lifetime ban on firearm ownership." *FRAC*, 2024 WL 3737366, at *2.

This Court should affirm.

## ARGUMENT

### I. THE GOVERNMENT'S MULTIFACTOR TESTS VIOLATE THE STATUTE.

#### A. The Rule Imposes Unweighted, Multifactor Balancing Tests That Make Compliance Virtually Impossible.

All statutes "have a single, best meaning" that "is fixed at the time of enactment." *Loper Bright*, 144 S. Ct. at 2266. According to the Government, the single, best meaning of the GCA mandates the "test most beloved by [an agency] unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

First, the Rule purports to interpret the phrase "readily be converted." 18 U.S.C. § 921(a)(3)(A). That phrase is important to the regulated public because it determines whether an item is an unregulated piece of metal or a "firearm"—the unlicensed manufacture or sale of which carries heavy criminal penalties. The agency asserts that the term "readily" mandates assessment of a non-exhaustive list of factors, including:

> (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.

The Rule also interprets the terms "frame" and "receiver." 18 U.S.C. § 921(a)(3)(B). The scope of these terms is also important because the GCA defines "firearm" to include the "frame or receiver" of a gun. *Ibid.* According to the agency, the best interpretation of these terms mandates assessment of a non-exhaustive list of factors, including an item or kit's "[1] templates, [2] jigs, [3] molds, [4] equipment, [5] tools, [6] instructions, [7] guides, or [8] marketing materials." 27 C.F.R. § 478.12(c).

These non-exhaustive, multifactor tests make it virtually impossible to determine whether any given "piece of metal" is covered by the GCA. Pet. App. 39a. For one, none of the factors are defined: for example, "time" and "expense" are relevant, but there is no indication of *how much* time or *how much* expense triggers liability. In concrete terms, if it takes one hour to convert an item into a functioning gun, does that make it more likely or less likely that the agency will classify the item as a "firearm"? There is no answer; the agency did not want to spell out "time limits." 87 Fed. Reg. at 24,700. What about $250 in expenses to convert an item into a gun? Is that a lot or a little in

the agency's view? Again, no answer. ATF did not think it necessary to provide "exact definitions" for its "expense" factor. *Id.* at 24,699. The same goes for "ease," "expertise," "equipment," and the like. All the regulated public knows is that the agency considers these factors "relevant." It has no idea how the agency will apply them.

Even if a party managed to divine how the agency would apply its eight listed factors, that would only be the start of his problems. That is because the factors are not weighted. There is no way to analyze a kit that can be put together quickly but at great expense, or vice versa. There is no way to tell whether an item is a frame if it has "jigs" and "molds," but no "equipment" or "guides." Worse still, the enumerated factors are "nonexclusive." 87 Fed. Reg. at 24,699. So even if a party manages to figure out how the agency will apply and weight the factors, the agency can simply add in new ones to reach a different outcome in an enforcement posture with prison time on the line.

In sum, the agency's "multi-factor test" fails to provide regulated parties with any of the required "predictability and intelligibility." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.). The result is that a law-abiding citizen "must guess at what he is and is not allowed to do" under the Rule. Pet. App. 27a.

The Government admits as much. The agency says it deliberately chose to make its factors indiscernible to confer upon itself "flexibility" and to prevent "manufacturers" from "develop[ing] products aimed at complying" with a clear interpretation of "the GCA." 87 Fed. Reg. at 24,699. In the agency's

view, clarity was a *problem*. If ATF "provide[d] guidance" on what was covered by the GCA, the agency explained, "persons may structure transactions to avoid the requirements of the law." *Id.* at 24,692. Such compliance efforts, in the agency's view, "skirt[ ] the spirit and intent of the GCA." *Id.* at 24,669. So, rather than providing an "easily" understandable rule explaining what is covered, the Rule instead offers a vague sense of what "can be" covered to "deter" people from *any* unlicensed gunmaking—even *lawful* unlicensed gunmaking. *See id.* at 24,686.

Judge Oldham recognized this policy for what it was. "ATF's rationale," he explained, is to use "uncertainty" as "a Sword of Damocles hanging over the heads of American gun owners." Pet. App. 33a. By imposing a "nebulous, impossible-to-predict Final Rule," the agency "hopes law-abiding Americans will abandon" the lawful, unregulated gunmaking that is disfavored by the Government but allowed by the GCA. *Ibid.*

### B. The Rule's Unweighted, Multifactor Balancing Tests Are Not The Single, Best Meaning Of The Gun Control Act.

The Rule's indeterminate standards do not reflect the "single, best meaning" of the GCA. *Loper Bright*, 144 S. Ct. at 2266.

The Government's error is evident from "the text." *Campos-Chaves v. Garland*, 144 S. Ct. 1637, 1647 (2024). The agency's paragraphs of factors appear nowhere in the statute. The Rule thus attempts to justify its byzantine multifactor tests not on the statutory language but on the "spirit and intent of the

GCA." 87 Fed. Reg. at 24,669. Perhaps that analysis would have been convincing a century ago. *Cf. Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). But today, the "text must prevail" over a purported legislative purpose. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 n.6 (2009).

To be sure, the Government's brief now tries to cram some of the factors into the text. It says "readily"—in the phrase "readily be converted"—must include some consideration of the tools or expertise needed for conversion. Pet. Br. 21–22. It also suggests that the terms "frame" and "receiver" are best interpreted as considering whether a piece of metal comes with "instructions" or certain "marketing materials." *Id.* at 10–11. (Though where the agency gets "instructions" and "marketing materials" from a word like "frame" is never really explained.)

But even if the Government's textual analysis could justify the *relevance* of some of the Rule's factors, it in no way justifies the Rule's proffered *application* of those factors. Indeed, the Government offers no textual defense of its methodology: a pair of unweighted, non-exhaustive multifactor balancing tests.

The GCA's limited grant of rulemaking authority forecloses that methodology. Under the statute, the Attorney General "may prescribe *only* such rules and regulations as are *necessary to carry out* the provisions of this chapter." 18 U.S.C. § 926(a) (emphasis added). Even if the phrase "necessary to carry out" confers "a degree of discretion" on the agency, the Court must still "independently interpret the statute and effectuate the will of Congress." *Loper Bright*, 144

S. Ct. at 2263; *see Michigan*, 576 U.S. at 751–54 (rejecting agency's interpretation of "appropriate and necessary"). "Necessary" means "convenient, or useful or conducive." *United States v. Comstock*, 560 U.S. 126, 133 (2010) (cleaned). And here "necessary" modifies "to carry out" and is itself modified by "only." So to be a valid rulemaking exercise under § 926(a), the Government must act only in a way that improves the functioning of the GCA and that is consistent with Congress's enacted text.

Under this standard, the Rule is plainly not "necessary." By the Government's own admission, its multifactor tests will make it "difficult to determine" whether a product is covered by the GCA. 87 Fed. Reg. at 24,692. And that is no accident. The "purpose" of the multifactor tests is not "to provide guidance so that persons" can comply with "the law." *Id.* at 24,692. Rather, they are designed to obfuscate the meaning of statutory terms in order to "deter" the creation of products that in the agency's view "*can be*"—i.e. not necessarily *are*—"firearms within the meaning of the governing law." *Id.* at 24,686 (emphasis added). An interpretation that makes it difficult to apply the statute is not "necessary to carry out" the statute.

The textual shortcomings also reveal structural problems with the Government's interpretation. This Court interprets "statute[s] as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned); *see Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 545 (2013). Here, the Rule's intentional indeterminacy fails to "read the words Congress enacted in their context and with a view to their place in the overall

statutory scheme." *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023).

Namely, these provisions appear in the GCA—a criminal statute. It is thus no small mistake to incorrectly ascertain the scope of the statutory text. Rather, it is a felony punishable by years behind bars, fines, and a lifetime ban on gun ownership. *See* 18 U.S.C. § 924(a)(1), (g)(1). Such severe consequences bely an interpretation that leaves people "uncertain" about the law's reach and that does not "provide guidance so that persons may" comply. 87 Fed. Reg. at 24,692. "Only a two-faced Congress," *In re: MCP No. 185*, No. 24-7000, 2024 WL 3650468, at *6 (6th Cir. Aug. 1, 2024) (Sutton, C.J., concurring), would pair draconian criminal penalties with an "impossible-to-predict" standard, Pet. App. 33a.

Neighboring GCA provisions confirm that the best reading of the statute requires precision. When Congress used terms that were amenable to bright lines, it provided them. A "short-barreled shotgun" must have a barrel "less than eighteen inches in length" or "an overall length of less than twenty-six inches." 18 U.S.C. § 921(a)(6); *see also id.* § 921(a)(8) (similar for "short-barreled rifle"). A gun is an "antique firearm" if it was "manufactured in or before 1898." *Id.* § 921(a)(16)(A). "Armor piercing ammunition" must use enumerated metals or be "larger than .22 caliber" with a "jacket" that "has a weight of more than 25 percent of the total weight of the projectile." *Id.* § 921(a)(17)(B). Although aspects of these provisions may still present ambiguities, the point is that Congress recognized it would be unjust to criminalize possession of specific guns without clearly defining those

guns to the extent possible. The structural import is that when the agency issues rules "necessary to carry out" the statute, the best reading of both that rule-making authority and the underlying terms is one that clearly delineates the scope of the statute.

The legislative history confirms that indiscernible multifactor tests are not the best reading of the GCA. When Congress enacted the GCA, there was a rich "tradition of at-home gun-making" that "predates this nation's founding, extends through the revolution, and reaches modern times." Pet. App. 8a. Thus, "the federal government has never required a license to build a firearm for personal use." *Ibid.* Undoubtedly aware of this centuries-old tradition when it enacted the GCA, Congress clarified that its law was "not intended to *discourage or eliminate* the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, 1214 (Oct. 22, 1968) (emphasis added). A "subjective multi-factor test" that spawns "ambiguity and vagueness," Pet. App. 24a n.19, will plainly "discourage" and may "eliminate" the lawful gunmaking activities of law-abiding citizens—directly contrary to Congress's statutory statement of purpose.

Not only do the Government's multifactor tests have no basis in the text, structure, and purpose, they also violate the presumption "that, when Congress enacts statutes, it is aware of relevant judicial precedent" and does not impliedly "intend[ ] to depart from [those] precedents." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013); *see also Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201 (1993).

First, take fair notice. This Court has long held

that "a statute which … forbids … an act in terms so vague that men of common intelligence must necessarily guess at its meaning … violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, (1926). That is, the Government "must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). These principles apply with special force in the criminal context. *See infra.* Even when the Government has multiple "options for how to read" a statute, it may not choose an option that would not result in "any remotely clear lines." *Snyder v. United States*, 144 S. Ct. 1947, 1957–58 (2024) (rejecting Government's interpretation over "lack of fair notice").

The Rule's interpretation of the GCA violates these fair-notice precedents. It expressly withholds notice of the statute's scope in order to preserve agency "flexibility," 87 Fed. Reg. at 24,668, and to "deter" even lawful unlicensed gunmaking, *see id.* at 24,686. An interpretation of a criminal statute that wields "uncertainty" as a deterrent, Pet. App. 33a, raises serious constitutional concerns and would thus require "clear statutory language," *FBI v. Fazaga*, 595 U.S. 344, 355 (2022). But the text here—"readily," "frame," "receiver," and "necessary"—offers no clear statement to justify the agency's constitutionally-dubious multifactor tests.[2]

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[2] The Government says the terms being interpreted "appear[ ] in the Act itself, and [no one] suggests that the Act is unconstitutionally vague." Pet. Br. 48. But even if the statute is not unconstitutionally vague, *but see Peoples Rts. Org., Inc. v. City of*

[Footnote continued on next page]

The Government's interpretation also fails to comport with this Court's teachings on the Second Amendment. The Constitution guarantees Americans "an individual right" to gun ownership. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Thus, the Rule's indeterminate interpretation of the GCA raises "special" concerns because it combines a "vague" standard with "criminal sanctions" to create an "obvious chilling effect" on a constitutional right. *See Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). Indeed, as Judge Oldham explained below, no gun is safe. The AR-15—"the most popular rifle in America"—could theoretically "be converted to a machine gun using cheap, flimsy pieces of metal—including coat hangers." Pet. App. 52a. Under the agency's indeterminate standard, "millions and millions" of lawful gun owners could "be felons-in-waiting." *Ibid.* "When legislation and the Constitution brush up against each other," this Court "seek[s] harmony, not to manufacture conflict." *United States v. Hansen*, 599 U.S. 762, 781 (2023). The potential for such conflict here confirms that a vague, multifactor balancing test is not the best reading of the GCA.

In sum, the text, structure, legislative context, and substantive canons confirm that the single, best meaning of the GCA is not an indiscernible, unweighted, and non-exhaustive multifactor balancing

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*Columbus*, 152 F.3d 522, 537 (6th Cir. 1998), that is no answer to the claim asserted. It "is the text of the Final Rule, not the text of the statute, which falls short of the Due Process Clause." Pet. App. 54a–55a & n.8. It was ATF—not Congress—that chose to use an amorphous multifactor balancing test to intentionally obscure the scope of the GCA as a deterrence mechanism.

test.

## II. LENITY FORECLOSES THE GOVERNMENT'S INTERPRETATIONS.

The Government's interpretation of the GCA cannot survive ordinary *de novo* review under *Loper Bright*. *See supra*. But even if it could, the rule of lenity would require rejection of the Government's capacious and indeterminate reading of a criminal statute.

### A. Under The Separation Of Powers, Only Congress May Make An Act A Crime.

The Framers believed the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." The Federalist No. 51, at 321 (James Madison or Alexander Hamilton) (Clinton Rossiter ed., 1961). They warned that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" is "the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

Thus, our constitutional system delineates specific roles for each branch of the federal government. "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *Davis*, 588 U.S. at 451. The executive, for its part, may "decide whether to prosecute a case," *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *The Confiscation Cases*, 74 U.S. (7 Wall) 454 (1868)), but cannot create administrative crimes, *United States v. George*, 228 U.S. 14, 22 (1913). Finally, when the executive prosecutes a case under a law enacted by Congress,

the judiciary must "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), including by holding the executive to account when "the Government interprets a criminal statute too broadly," *Abramski v. United States*, 573 U.S. 169, 191 (2014).

Because the Framers reserved the criminal lawmaking function to Congress—not the judiciary or the executive—it must speak "plainly and unmistakably" where it wishes to attach criminal liability to an activity. *Bass*, 404 U.S. at 348 (citations and quotations omitted); *see also Davis*, 588 U.S. at 451. This "clear-statement rule" "reinforces" the "fundamental separation-of-powers principle" that "[t]he Constitution allows only Congress to create crimes." *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 917–18 (6th Cir. 2021) ("*Gun Owners II*") (Murphy, J., dissenting); *Guedes v. ATF*, 920 F.3d 1, 41–42 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part). It also "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348.

Under these principles, the Constitution will not tolerate ambiguity in penal statutes. As Chief Justice Marshall explained long ago, "probability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820).

### B. The Rule Of Lenity Prevents The Executive From Defining New Crimes Through Rulemaking.

The "'rule of lenity' is a new name for an old idea—

the notion that 'penal laws should be construed strictly.'" *Wooden v. United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F.Cas. 202, 204 (No. 93) (CC Va. 1812) (Marshall, C. J.)). Under lenity, the Court will "resolve [statutory] ambiguity in [a defendant]'s favor" unless "the Government's position is unambiguously correct." *Granderson*, 511 U.S. at 54 (citing *Bass*, 404 U.S. at 347–49). Lenity safeguards the "principle that the power of punishment is vested in the legislative" branch. *Wiltberger*, 18 U. S. (5 Wheat.) at 95 (Marshall, C.J.).

Though it arose in the context of criminal prosecutions, lenity applies where, as here, a statute carrying criminal penalties is construed in a civil setting. This Court's decision in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), makes that clear. There, as here, the Court was called to review ATF's interpretation of a gun-control statute "in a civil setting." 504 U.S. at 517. The question was whether a gun manufacturer "makes" a regulated short-barreled rifle when it sells "a pistol together with a kit containing a shoulder stock and a 21-inch barrel, permitting the pistol's conversion into an unregulated long-barreled rifle, or, if the pistol's barrel is left on the gun, a short-barreled rifle that is regulated." *Id.* at 507. The plurality found the term "make," 26 U.S.C. § 5845(i), ambiguous because of the dual-use nature of the parts kit. *Thompson*, 504 U.S. at 512–18. Given the ambiguity presented by the kit's additional "useful purpose" that would not incur criminal liability, the plurality held that the parts had "not been 'made' into a short-barreled rifle for purposes of the" National Firearms Act. *Id.* at 518. Justices

Scalia and Thomas concurred and found ambiguity elsewhere: "whether the making of a regulated firearm includes the manufacture, without assembly, of component parts." *Id.* at 519. Because this question was "sufficiently ambiguous to trigger the rule of lenity," the concurring opinion agreed "that the kit is not covered." *Ibid.*

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a unanimous Court cited *Thompson* as authority that it must apply lenity when interpreting criminal statutes in a civil setting. There, the Court considered whether a conviction for driving under the influence of alcohol was a "crime of violence" under the Comprehensive Crime Control Act. 543 U.S. at 6–7. Although the interpretive issue arose "in the deportation context," the Court recognized that it "must interpret the statute consistently, whether [it] encounter[s] its application in a criminal or noncriminal context." *Id.* at 11 n.8 (citing *Thompson*, 504 U.S. at 517–18). Thus, the Court explained, if the statute was ambiguous, it "would be constrained to interpret any ambiguity in [the challenger]'s favor" under "the rule of lenity." *Ibid.*

In addition to maintaining consistency, lenity respects the roles of the coordinate branches. In a criminal prosecution, lenity restrains the judicial and executive branches alike—that is, the rule prevents courts and prosecutors from reading statutes broadly to capture activity they believe Congress ought to have proscribed. *See Bass*, 404 U.S. at 348 ("legislatures and not courts should define criminal activity"); *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring) ("the Justice Department …

knows … an erroneously broad view will be corrected by the courts when prosecutions are brought"). Because the basis for that restraint is Congress's authority to make the criminal law, there is no reason it should be different when the executive interprets that law through rulemaking.

To hold otherwise would be to privilege the executive interpretation over judicial interpretation—applying lenity to judicial construction but not executive construction of a statute. But "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Ibid.* Indeed, a rule that allowed agencies to interpret criminal statutes more broadly than courts would violate this Court's teaching that "the reviewing court—*not* the agency whose action it reviews—is to decide all relevant questions of law." *Loper Bright*, 144 S. Ct. at 2265 (cleaned) (emphasis altered). Thus, just as lenity protects Congress's prerogative in a criminal prosecution, so too in administrative rulemakings.

Both considerations are at work here. This case, just like *Thompson* and *Leocal*, calls for the interpretation of a criminal statute in a civil context—if ATF's rule is upheld, then anyone possessing a forbidden piece of metal or proscribed set of parts faces years in prison. And just as the rule of lenity would constrain a court's interpretation in a criminal prosecution, so too it must constrain an identical interpretation advanced in an administrative rulemaking. Thus, if the

statute is ambiguous, then lenity requires construing the statute in Respondents' favor.

### C. Lenity Precludes The Government's Amorphous Interpretation Of A Criminal Statute.

Lenity forecloses interpreting the GCA to require a pair of vague, unweighted, non-exhaustive multifactor balancing tests.

To begin, the Government's interpretation is not the unambiguous import of the GCA. The relevant phrases are "frame or receiver," 18 U.S.C. § 921(a)(3)(B), and "readily be converted," *id.* § 921(a)(3)(A). And ATF may issue "only" rules that are "necessary to carry out" the GCA. *Id.* § 926(a). As explained above, this text forecloses an interpretation that would require amorphous, multifactor balancing tests to assess the scope of the statute. But, at minimum, the GCA does not unambiguously compel the agency's vague standards.

First, take "frame or receiver." For over 40 years, ATF interpreted "frame or receiver" with a precise technical definition: "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 tracked the common understanding of these terms. Pet. App. 15a–16a & n.12. It was also issued much closer in time to the "enactment of the statute," and "remained consistent over time." *Loper Bright*, 144 S. Ct. at 2258. Courts recognized this definition was "not difficult to understand" and

provided "unambiguous[ ]" guidance about what products fell "within the scope of … the GCA." *See, e.g.*, *United States v. Rowold*, 429 F. Supp. 3d 469, 473 (N.D. Ohio 2019). The agency's previous definition shows that the statute does not unambiguously require a broad, amorphous balancing test to ascertain whether an item is a "frame" or a "receiver."

"Readily be converted" is also amenable to a narrower, more precise definition. At minimum, Respondents and the Fifth Circuit are correct that this phrase is best read to categorically exclude parts kits—given the express reference to "parts" elsewhere in the GCA and in a since-repealed definition of "firearm." Pet. App. 19a–28a; *see Rudisill v. McDonough*, 601 U.S. 294, 308 (2024) ("differences in language like this convey differences in meaning") (cleaned). And more generally, the agency could better "carry out" the statute, *see* 18 U.S.C. § 926(a), through an interpretation that sets specific, numeric thresholds, *cf. City of Arlington v. FCC*, 569 U.S. 290, 294–95 (2013) (upholding agency's quantitative interpretation of "reasonable period of time" where it was expressly delegated "authority to implement" the provision). For example, instead of interpreting "readily" to mean that "time" is merely "relevant," 87 Fed. Reg. at 24,735, the agency could more narrowly and precisely interpret the statute to include "a range of" times, *see Tripoli Rocketry Ass'n, Inc. v. ATF*, 437 F.3d 75, 81 (D.C. Cir. 2006); *accord United States v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2d Cir. 1971) (finding covered items that "could be converted to shoot live ammunition within three to twelve minutes"). Thus, the agency's

amorphous standards are not unambiguously mandated by the statutory text.

These viable competing interpretations of the GCA confirm that lenity applies in this case. Lenity comes into play where a statute is susceptible to at least "two readings of what conduct Congress has made a crime." *Bass*, 404 U.S. at 347; *see also Granderson*, 511 U.S. at 41 (applying lenity where text was "susceptible" to multiple "interpretations"). That is because the existence of multiple viable interpretations shows the statute is not "unambiguous with regard to the point at issue." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 739 (1996).

Lenity thus requires rejection of the Government's interpretations. The Government's multifactor tests are not the narrowest reading of the criminal statute. Quite the opposite. The Government adopted its indeterminate "multi-factor analysis" to preserve agency "flexibility" and "prevent[ ] … manufacturers from developing products aimed at complying" with a "narrow interpretation" that "skirt[s] the spirit and intent of the GCA." 87 Fed. Reg. at 24,669. It was "not the purpose of the rule to provide guidance" on the scope of the GCA. *Id.* at 24,692. A rule that maximizes agency discretion, eschews a "narrow interpretation," and disclaims notice to the public is plainly not the narrowest interpretation of a criminal statute.

The Government's brief fails to refute lenity. It asks this Court to apply an "anti-circumvention principle[ ]" to *maximize* the statute's reach to avoid "evasion of the law." Pet. Br. 41–45. But that "position turns the rule of lenity upside down." *See United States v. Santos*, 553 U.S. 507, 519 (2008) (plurality).

The Government may not resolve ambiguity through the invocation of a "presumptive intent to facilitate [GCA] prosecutions." *Ibid.* And, in all events, the Government's logic is flawed. One cannot "evade" the law until its meaning is discerned. By putting the cart (evasion) before the horse (meaning), the Government assumes its own conclusion: the GCA must include parts kits to avoid evasion of the GCA's regulation of parts kits. And finally, "[t]hat the regulated parties wish to see more specific [requirements] does not mean they wish to skirt or circumvent the law, as ATF insinuates." *FRAC*, 2024 WL 3737366, at *9. Rather, they "may simply wish to comply with the law by producing" items that are not subject to the GCA. *Ibid.*

Lenity requires rejection of the Government's maximalist reading of a criminal statute.

## III. THE RULE IS PART OF A DISTURBING TREND BY ATF TO DETER GUN OWNERSHIP THROUGH VAGUE, OVERINCLUSIVE REGULATIONS.

The Rule's vague multifactor balancing tests are no fluke. They are part of a disturbing pattern in which ATF puts legal guns and gun accessories in regulatory purgatory by issuing "interpretations" of federal firearms statutes that require amorphous, subjective analyses the agency is then free to apply broadly. By refusing to offer any concrete guidance on what gun products carry "ruinous felony" penalties, the agency uses "uncertainty" as "a Sword of Damocles" to deter even lawful gun ownership with "impossible-to-predict" regulatory standards. Pet. App. 33a.

The approach follows an insidious logic. ATF

knows that this Court will find that the agency "exceeded its statutory authority" when it speaks clearly about its unlawful interpretations. *See, e.g.*, *Garland v. Cargill*, 602 U.S. 406, 415 (2024). But by claiming a mushy "qualitative" analysis that vests the agency with unbounded discretion, Pet. Br. 48, perhaps the courts will not see the agency's rules for what they are: naked power grabs.

Consider the agency's recent rule on pistol braces. *See* Factoring Criteria for Firearms With Attached "Stabilizing Braces," 88 Fed. Reg. 6478 (Jan. 31, 2023). Pistol braces are "orthotic devices that attach to the rear of a firearm" to help individuals "fire heavy pistols safely and comfortably." *FRAC*, 2024 WL 3737366, at *2 (cleaned). ATF for years considered braces beyond the purview of restrictive firearms statutes, resulting in "millions" of unregistered "braces in circulation." *Id.* at *4. But then the agency issued a rule that purported to evaluate the classification of braces with a "multifactor framework." *Ibid.* That framework, like the one here, failed to offer any "identifiable metric[s] that members of the public can use to assess whether their weapon falls within the Final Rule's" ambit. *Id.* at *8. As a result, the agency's test "articulated no standard whatsoever" and allowed "ATF to reach whatever result it wants." *Id.* at *9, *11. Under the guise of a qualitative analysis, the agency could clandestinely achieve its substantive goal: regulating "99% of braced weapons" and subjecting millions of Americans to potential felony prosecutions. *Id.* at *9. That rule was rightfully recognized as unlawful by both courts of appeals that reviewed it. *See id.* at *7–*13; *see also Mock*, 75 F.4th at 578–88.

ATF subjected muzzle brakes to a similar treatment. A muzzle brake is an accessory "used to reduce recoil by redirecting combustion gases created from discharging a firearm." *Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14, 18 (D.D.C. 2014) (quotation omitted). ATF took the position that some muzzle brakes functioned as heavily-regulated "firearm silencers" under the GCA and the National Firearms Act. *Id.* at 18. But rather than setting clear rules for when this felony-backed regulation kicked in, the agency directed parties to "a list of six characteristics that are allegedly common to 'known silencers.'" *Id.* at 25. The agency did not say whether its list was exhaustive, nor did it specify how many characteristics in common were "enough" to trigger scrutiny. *Ibid.* Thus, the "agency's approach" left "regulated parties" "guessing" at the legality of their products. *Ibid.* That methodology was rightfully "set aside." *Id.* at 26.

It is the same story with hobby-rocket fuel. ATF classified a "commonly used" "fuel in hobby rockets" as a heavily-regulated "explosive." *Tripoli Rocketry Ass'n,* 437 F.3d at 76. To make this determination, the agency told parties it looked at "the speed at which the material burns." *Id.* at 77. So one might think ATF would just tell parties the burn speed that qualifies as an explosive. Not so. The agency instead said that the hobby-rocket fuel qualified as an explosive because it burned "much faster" than other materials. *Id.* at 81. But the agency "never" identified the burn speed of the other materials, which is of course "necessary to make a comparison." *Id.* at 82. Once again, the agency, in reality, offered "no standard whatsoever for determining when a material" was regulated. *Id.* at 84. That methodology was rightly rejected in

court. *Ibid.*

ATF's analysis in this case is just like these prior unlawful actions. Just as it did with pistol braces, muzzle brakes, and hobby-rocket fuel, the agency purports to subject parts kits to "a qualitative standard." Pet. Br. 48. The standard lists "factors relevant" to its analysis, *id.* at 9, but fails to explain "which factors are significant and which less so, and why." *LeMoyne-Owen*, 357 F.3d at 61. In other words, the Government's "totality-of-the-circumstances test" is "not a test at all but merely [an] assertion of an intent to perform test-free, ad hoc, case-by-case evaluation." *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 461 (2014) (Scalia, J., dissenting). Just as courts recognized in these prior instances, the Rule here is likewise unlawful.

This Court should not allow ATF to continue using its regulatory authority to render it "nigh impossible for a regular citizen to determine" their obligations under federal firearms statutes. *FRAC*, 2024 WL 3737366, at *11 (quotations omitted).

## CONCLUSION

This Court should affirm.

Respectfully submitted.

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