No. 22-976

In the
Supreme Court of the United States

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

Petitioners,

v.

MICHAEL CARGILL,

Respondent.

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

BRIEF OF AMICUS CURIAE SECOND AMENDMENT LAW CENTER, SECOND AMENDMENT DEFENSE AND EDUCATION COALITION, FEDERAL FIREARMS LICENSEES OF ILLINOIS, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., AND GUNS SAVE LIFE IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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AMICUS CURIAE STATEMENT OF INTEREST

The Second Amendment Law Center ("2ALC") is a nonprofit corporation in Henderson, Nevada. The Center defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.[1]

The Second Amendment Defense and Education Coalition, Ltd. ("SADEC"), is an Illinois not-for-profit corporation. SADEC is dedicated to the defense of human and civil rights secured by law including, in particular, the right to bear arms. SADEC's activities are furthered by complementary programs of litigation and education.

Federal Firearms Licensees of Illinois ("FFL-IL") is an Illinois not-for-profit corporation and represents federally licensed gun dealers across the State of Illinois that are harmed by that state's recent ban on the sale of common firearms. FFL-IL is a plaintiff in one of the lawsuits against that ban and believes that ATF's erosion of the definition of "machinegun" to encompass bump stocks is one more step closer to a ban on semiautomatic firearms.

Founded in 1875, the California Rifle and Pistol Association, Incorporated, ("CRPA") is a nonprofit

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[1] No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearm-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public.

Finally, Guns Save Life ("GSL") is an Illinois not-for-profit corporation with many members throughout that state. GSL teaches and trains individuals in the use of firearms, including firearms recently banned by Illinois. Like FFL-IL, GSL is wary of the potential expansion of ATF's power that this case could result in.

SUMMARY OF ARGUMENT

Both the Fifth Circuit and Respondent are correct that "[t]he definition of 'machinegun' as set forth in the National Firearms Act and Gun Control Act does not apply to bump stocks." *Cargill v. Garland*, 57 F.4th 447, 451 (5th Cir.). Arguing that it should be allowed to redefine a nearly century-old statute, Petitioners repeatedly speculate about Congress' intentions, and more troublingly, appears to consider itself the arbiter of what those intentions were. *See* Pet'rs' Br. 30, 34, 36, 40, 41. But the ATF may not usurp the role of Congress or effect presidential edicts banning bump stocks—particularly when the very

same bureau had said that bump stocks were *not* machineguns at least ten times. Pet'rs' Br. 8. Congress can speak for itself and pass a new law if it wishes to ban bump stocks, it does not need the ATF to speak for it. "[I]f the statute is ambiguous, Congress must cure that ambiguity, not the federal courts." Pet'rs' App. 4a; *see also VanDerStok v. Garland*, 86 F.4th 179, 182 (5th Cir. 2023) ("It has long been said—correctly—that the law is the expression of *legislative* will.").

The Fifth Circuit's decision and Respondent's brief covered these issues very well, and Amici need not reiterate those arguments here. Instead, they submit this brief to remind the Court that siding with the Petitioners here threatens to do great harm to the Second Amendment right to keep and bear arms. Indeed, if the Court determines that a bump stock meets the legal definition of a "machinegun," then the semiautomatic firearms owned by millions of Americans are just one regulatory change away from meeting a similar fate.

This is not a far-fetched concern. Amici FFL-IL and GSL are plaintiffs in a lawsuit challenging the new Illinois "assault weapon" law, which bans a large variety of common firearms. The Seventh Circuit recently upheld that ban by comparing the semiautomatic AR-15—just one of the rifles affected by the ban—to the fully automatic M16 and bafflingly concluding the two are "indistinguishable." *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1197 (7th Cir. 2023). The court also reached the ahistorical conclusion that firearms used by the military are unprotected by the Second Amendment, *no matter how common they are among civilians*. With that

damaging precedent in place, it does not take much for the ATF to next determine that many common semiautomatic firearms "can be readily restored" into machineguns, and in any case, such firearms are not constitutionally protected given the Seventh Circuit's ruling in *Bevis*.

While this Court should rule for Respondent, no matter how it rules, it should reaffirm and strengthen its position that semiautomatic firearms like the AR-15 "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994).

ARGUMENT

I. IF PETITIONERS PREVAILS, THE NEXT LOGICAL STEP IS FOR ATF TO CLASSIFY SEMIAUTOMATIC FIREARMS AS "MACHINEGUNS"

As Petitioners point out, the definition of machinegun includes "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." Pet'rs' Br. 4 (citing 26 U.S.C. § 5845(b)) (emphasis added). Should this Court decide that a bump stock can transform a lawful firearm into an illegal machinegun despite the internal mechanisms of the firearm not changing at all, then the ATF is perilously close to the regulatory power to declare that common semiautomatic firearms are also machineguns.

One only needs to look at another pending case to see this possibility already on the horizon. At oral argument in *VanDerStok v. Garland*, a case about ATF's new frame and receiver rules, "ATF's counsel conceded the agency took the word 'restored' from the

NFA and inserted it into a GCA regulation." 86 F.4th at 204 (Oldham, J., concurring). This is critical because the term "restored" has been held to mean "eight hours in a properly equipped shop with a sophisticated understanding of metallurgy." *Id*. at 207 (citing *United States v. Smith*, 477 F.2d 399, 400 (8th Cir. 1973)). Judge Oldham pointed out the problem with the ATF's position:

> 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. [citation omitted]. But every single AR-15 can be converted to a machine gun using cheap, flimsy pieces of metal—including coat hangers. [citation omitted]. 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.... Of course, an AR-15 could be "converted" to a machine gun. But unless that conversion could be done in a few

> seconds or minutes, *see United States v. Morales*, 280 F. Supp. 2d. 262, 272 (S.D.N.Y. 2003); *United States v. Reed*, 114 F.3d 1053, 1056 (10th Cir. 1997), 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.

VanDerStok, 86 F.4th at 208 (Oldham, J., concurring). If bump stocks can turn an AR-15 into a machinegun without changing the firearm's internals, then what stops the ATF from deciding that an AR-15 on its own is also "readily" made into a machinegun? After all, the conversion of an AR-15 into an automatic firearm takes less than eight hours and can be accomplished relatively quickly with a drill press and jig.

Petitioners' allies likely see this possibility too, and they welcome it. *See* Amicus Br. of Chi., et al. 33 ("Congress enacted the machine gun ban, first and foremost, to protect law enforcement officers. Banning bump stocks furthers that purpose, as well … assault rifles, like AR15s, already pose a grave threat to law enforcement officers…"); Amicus Br. of Giffords L. Ctr. 8 ("Semi-automatic rifles and automatic rifles have few mechanical differences."); Amicus Br. of Am. Med. Ass'n, et al. 10 ("[Semiautomatic weapons] are not

designed for sport or self-defense. They are weapons of war and have no place in civilian hands.").

No doubt that if this Court rules for Petitioners, all these amici (and others) would lobby the ATF to expand the definition of "machinegun" to include common semiautomatic rifles. Even if it is true that ATF has no current plans to try to ban semiautomatic firearms, it is no stranger to flipping its position, as it did on the bump stock issue and the pistol brace issue. *See Mock v. Garland*, 2023 WL 6457920, at *2 (N.D. Tex. Oct. 2, 2023). "The agency used to tell everyone that bump stocks don't qualify as 'machineguns.' Now it says the opposite. The law hasn't changed, only an agency's interpretation of it." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement respecting denial of certiorari). The ATF flipped its position on bump stocks because a President demanded it, and it may do the same on the legality of rifles like the AR-15. "[T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations." *Id.*

Given this clear danger, it is imperative that if the definition of "machinegun" is to be expanded at all, *Congress* should be the one expanding it, not the courts and certainly not government agencies like the ATF.

II. THE SEVENTH CIRCUIT'S DECISION IN *BEVIS V. CITY OF NAPERVILLE* PROVES AMICI'S FEARS ARE WELL-FOUNDED

A. The *Bevis* court held that semiautomatic firearms, like AR-15s, are not protected because they are "indistinguishable" from M16s, which are used for military purposes.

Granting ATF such broad rulemaking authority and twisting the boundaries set by Congress would not only give unprecedented control to the bureau to reclassify firearms, but it would also effectively gut the Court's holdings confirming that firearms commonly owned for lawful purposes such as self-defense[2] are constitutionally protected. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).

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[2] After *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), some courts have (wrongly) held that only those firearms most useful for self-defense have any Second Amendment protection. *See, e.g., Or. Firearms Fed'n v. Kotek Or. All. for Gun Safety*, 2023 WL 4541027, at *30 (D. Or. July 14, 2023) (acknowledging, but disregarding, that "there may be lawful purposes other than self-defense for which an individual can use a firearm"). And though semiautomatic rifles, like the AR-15, are commonly owned for self-defense, they are also used for other lawful purposes. *See* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 33 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

Those purposes must also be protected, as several courts and judges have observed. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (discussing "lawful purposes *like* self-defense," thereby implying the existence of other lawful purposes); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir.

The ATF would be aided in doing so by a recent ruling out of the Seventh Circuit upholding a ban on common rifles, pistols, and shotguns. *See Bevis*, 85 F.4th 1175. The *Bevis* court held that the banned firearms are not even "arms" under the Second Amendment, ignoring that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. The court reached that flawed conclusion by distinguishing between firearms used by civilians, and those used by the military, *Bevis*, 85 F.4th at 1179, a tactic employed by some amici in support of Petitioners here. *See, e.g.*, Amicus Br. of Am. Med. Ass'n, et al. 23 ("Dr. Sankoff believes militarized weapons, such as the AR-15 and attachments to such weapons that increase the rate at which they can fire have no place in a civilized society and should not be sold to civilians.").

And unlike this case in which "nobody, not even the Government, contends that semi-automatic rifles are

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2011) (striking down Chicago ordinance that barred firing ranges within city limits, and stating that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use."); *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (2011) ("Of course, the [Supreme Court] also said the Second Amendment protects the right to keep and bear arms for other 'lawful purposes,' such as hunting ...."); *Friedman v. City of Highland Park*, 577 U.S. 1039, 1039-40 (2015) (Thomas, J., and Scalia, J., dissenting) (discussing other lawful purposes such as hunting and target shooting). Indeed, if a state could ban any firearms except those most commonly used for self-defense, then many hunting rifles, as well as long-barrel shotguns, could be banned without violating the Second Amendment.

machineguns," Pet'rs' App. 31a, the Seventh Circuit concluded that the semiautomatic AR-15 and the select-fire M16 were virtually indistinguishable:

> Indeed, the AR-15[3] is almost the same gun as the M16 machinegun. The only meaningful distinction, as we already have noted, is that the AR-15 has only semiautomatic capability (unless the user takes advantage of some simple modifications that essentially make it fully automatic), while the M16 operates both ways. Both weapons share the same core design, and both rely on the same patented operating system
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> The similarity between the AR-15 and the M16 only increases when we take into account how easy it is to modify the AR-15 by adding a 'bump stock' (as the shooter in the 2017 Las Vegas event had done) or auto-sear to it, thereby making it, in essence, a fully automatic weapon.

Bevis, 85 F.4th at 1195-96. While this Court's decision in *Staples v. United States* seems to preclude this argument, the Seventh Circuit gave that case short shrift, somehow claiming that nothing in *Staples*—a

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[3] The Seventh Circuit only focused on AR-15s, even though the ban applies to hundreds of different rifles, pistols, and shotguns. *See Bevis*, 85 F.4th at 1183 ("[W]e will refer often to the AR-15 as a paradigmatic example of the kind of weapon the statute covers. We use it only illustratively, however; our analysis covers everything mentioned in the Act.").

case that held that AR-15s are widely accepted as lawful possessions, 511 U.S. at 612—is contrary to its ruling, *Bevis*, 85 F.4th at 1195. The panel then asserted that there was a supposed "long tradition, unchanged from the time when the Second Amendment was added to the Constitution, supporting a distinction between weapons and accessories designed for military or law-enforcement use, and weapons designed for personal use. *Id.* at 1202.

B. The *Bevis* decision and the "military veto" it establishes ignore both common sense and our nation's historical tradition.

The Seventh Circuit's ruling is as ahistorical as it is unprincipled, and it provides a critical warning to this Court against allowing the ATF to abuse loosened legal definitions. There is not, and has never been, a tradition that firearms may be banned merely because they are also used by the military. The supposed "distinction between military and civilian weaponry" the Seventh Circuit insisted on, *id.* at 1201, is an illusion.

As the *Bevis* dissent pointed out, the military uses many firearms that are also commonly used by civilians. "Under the majority opinion, the military's decision to award Beretta a military contract for the Beretta 92 would take the firearm out of the 'Arms' protected by the Second Amendment." *Id.* at 1226 (Brennan, J., dissenting). But we need not speculate about the Beretta 92 as the majority made it clear that the M17 and M18 pistols *could* be banned: "And these comments apply with equal force to the high-capacity handguns that are restricted by these laws. The latter

are almost indistinguishable from the 17- or 21-round M17 and M18 pistols that are standard-issue in the military." *Id*. at 1196. This is remarkable because the M17 and M18 pistols are military versions of the Sig P320 line of handguns, which began in the *civilian* market and only later were adopted by the military. *See* Matthew Cox and Hope Hodge Seck, *Army Picks Sig Sauer's P320 Handgun to Replace M9 Service Pistol*, Military.com (January 19, 2017), https://www.military.com/daily-news/2017/01/19/army-picks-sig-sauer-replace-m9-service-pistol.html (last accessed January 23, 2024). Thus, to the extent the military adopts popular firearms already in the civilian market, the Seventh Circuit's ruling effectively eviscerates *Heller*'s basic holding that firearms overwhelmingly chosen by American society for lawful purposes may not be banned. *Heller*, 554 U.S. at 628. It even undermines *Heller*'s more specific determination that handguns in particular may not be banned because "[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home…" *Id*. at 629.

Muddying the waters further, appellees in *Bevis* presented evidence below of the U.S. government itself selling surplus military firearms with magazines over ten rounds as part of the Civilian Marksmanship Program. Certainly, it cannot be that "the military's decommissioning and sale of its surplus weapons [means] that the Second Amendment right might spring into and out of life." *Bevis*, 85 F.4th at 1226 (Brennan, J., dissenting). More comically, the Seventh Circuit panel majority's "rule" would make muskets unprotected in the Founding Era because

they were the standard small arm used by both sides of the Revolutionary War. That can't be correct.

The Seventh Circuit's ridiculous rule that once the military adopts a firearm it is suddenly off limits to civilians is also echoed by Petitioners and some of their amici, albeit with different terminology. Petitioners argue, for example, that "[a] bump stock allows a shooter to fire at rates of up to 800 bullets per minute,[4] comparable to the rates of the conventional machineguns issued to American soldiers." Pet'rs' Br. 41. But the fact that American soldiers also use a firearm (or a somewhat similar one), without more, is not enough to justify banning it.

None of this is to say that weapons used by the military that are shown to be *dangerous and unusual* are protected. As one court explained, weapons "useful *solely* for military purposes" may be outside the scope of the Second Amendment. *Duncan v. Bonta*, 2023 WL 6180472, at *17 (S.D. Cal. Sept. 22, 2023) (emphasis added). But the firearms banned by Illinois and a handful of other jurisdictions with "assault weapon" bans[5] are not rocket launchers or warheads. They are ordinary firearms that are extremely common among civilians, so there is no serious argument that they are *only* useful for military purposes. And they may not be

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[4] The Seventh Circuit incorrectly claimed that the rate of fire of a semiautomatic AR-15 is 300 rounds per minute, which the court said was not a relevant difference from the M16's 700 rounds per minute. *Bevis*, 85 F.4th at 1196. As the dissent pointed out, the AR-15's actual rate of fire is closer to around 45-60 rounds per minute. *Id.* at 1224 (Brennan, J., dissenting).

[5] Several of those jurisdictions are amici in this matter. *See, e.g.*, Amicus Br. of Chi., et al.; Amicus Br. of D.C., et al.

banned just because some of them (though ironically, not the AR-15) might also be used by the military.[6]

More importantly, excluding common firearms from the Second Amendment just because they are also suitable for military use, without more, disregards our historical tradition. The Second Amendment was written by people who had just revolted against a tyrannical government. They sought to guarantee the People had a final recourse should the new government they were forming turn tyrannical. Tench Coxe, a delegate to the Constitutional Convention, wrote that "[w]hereas civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, … the people are confirmed by the article in their right to keep and bear their private arms." *Remarks on the First Part of the Amendments to the Federal Constitution*, under the pseudonym "A Pennsylvanian" in the Philadelphia Federal Gazette, June 18, 1789, p. 2 col. 1 (as quoted in the *Federal Gazette*, June 18, 1789). Coxe similarly wrote that "Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birthright of an American." Tench Coxe, Letter to the *Philadelphia Gazette*, 20 February 1788.[7]

This view dominated the Founding Era and 19th century. For example, in a speech to the House of

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[6] And of course, no military uses bump stocks.

[7] Coxe reaffirmed these views in 1813, writing that Americans "have all the right, even in profound peace, to purchase, keep and use arms of every description." Samuel Whiting, et al., *Second American Edition of the New Edinburgh Encyclopædia*, Volume 1 Part 2, at 652 (1813).

Representatives, Abolitionist Representative Edward Wade declared that the "right to 'keep and bear arms,' is thus guarantied, in order that if the liberties of the people should be assailed, the means for their defence shall be in their own hands." Rep. Edward Wade of Ohio, in the House of Representatives, Aug. 2, 1856.

Senator Charles Sumner's "The Crime Against Kansas" speech likewise bristled at the notion that opponents of slavery in Kansas should be disarmed of their cutting-edge Sharps rifles by the pro-slavery government. He exclaimed that "[n]ever was this efficient weapon more needed in just self defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached." Charles Sumner, *The Kansas Question, Senator Sumner's Speech, Reviewing the Action of the Federal Administration Upon the Subject of Slavery in Kansas* 22-23 (Cincinnati, G.S. Blanchard, 1856).

Similarly, Thomas Cooley, a longtime Michigan Supreme Court Justice and legal scholar, wrote that "[t]he right declared was meant to be a strong moral check against the usurpation and arbitrary powers of rulers, and as necessary and efficient means of regaining rights when temporarily overturned by usurpation." Thomas M. Cooley, LL.C., *The General Principles of Constitutional Law in the United States of America* 298 (1898).

And many commentators of the period specifically singled out the "arms of modern warfare" as what the Second Amendment protected most of all. *See, e.g.*, Henry Campbell Black, *Handbook of American Constitutional Law* 403-04 (1895) ("The citizen has at

all times the right to keep arms of modern warfare"); John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152 (1868) ("[A] militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons.").

Dozens of other examples abound. *See* C.D. Michel & Konstadinos Moros, *Restrictions That 'Our Ancestors Would Never Have Accepted': The Historical Case Against Assault Weapon Bans*, 24 Wyo. L. Rev. (forthcoming 2024), https://ssrn.com/abstract=4568820. But there is no need to belabor the point. There can be no historical tradition of barring common arms just because they may be useful in combat, when one of the main purposes of the Second Amendment was to be a "doomsday provision" for the People to protect themselves from a tyrannical government. *See Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). "Once one understands the history of tyrants resorting to taking away people's arms to suppress political opposition, *Heller* explains, one can see that the militia clause fits perfectly with the operative clause." *Duncan*, 2023 WL 6180472, at *6.

This Court has acknowledged that original purpose, commenting that history showed "that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Heller*, 554 U.S. at 598.

C. While this is not a Second Amendment case, a decision in Petitioners' favor threatens the right to bear arms.

Amici understand that this is not a Second Amendment case and that their views might not be vindicated until another day,[8] but they have taken this brief trip through history to show how a seriously flawed appellate ruling provides the tinder to spark a major constitutional conflagration if the ATF's powers are expanded with this ruling. Using the Seventh Circuit's logic in *Bevis*, it does not take much imagination to see how the ATF could create a rule saying semiautomatic firearms like the AR-15 are "readily restored" to machineguns. ATF could swat away any Second Amendment concerns by citing the Seventh Circuit's opinion that "[b]ecause [the AR-15] is indistinguishable from [the M16], the AR-15 may be treated in the same manner without offending the Second Amendment." *Bevis*, 85 F.4th at 1197.

With a bump stock ban upheld by this Court, the ATF could also argue that "a shooter can bump fire an

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[8] The Court should review such a case very soon, given that the right to bear arms is currently languishing in hostile circuit courts dead-set on undermining the right to keep and bear arms. This includes two cases that had been remanded by this Court following *Bruen*. *See Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke, J., dissenting) ("If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd."); *see also Bianchi v. Brown,* No. 21-1255, 2024 WL 163085, at *1 (4th Cir. Jan. 12, 2024) (Fourth Circuit taking matter en banc before the appellate panel had issued a ruling, thirteen months after oral argument with that panel.).

ordinary semi-automatic rifle even without a bump stock," making it the same thing whether or not a bump stock is present. Pet'rs' App. 31a. The Seventh Circuit certainly teed up that argument for the ATF in stating that "[i]f the AR-15 by itself is not a machinegun because it fires 'only' at the rate of 300 rounds per minute, and the auto-sear is also not a machinegun because it is just a component that holds a hammer in the cocked position, that would be a road map for assembling machineguns and avoiding legitimate regulations of their private use and carry." *Bevis*, 85 F.4th at 1196.

This Court should not give the ATF further support by eroding the definition of "machinegun" to allow it to encompass bump stocks. Instead, it should affirm the Fifth Circuit's ruling because it is not the job of courts "to determine our nation's public policy." Pet'rs' App. 48a. The Court should also reaffirm *Staples* (and rebuff the logic of *Bevis*) by confirming that AR-15s and other common semiautomatic firearms have "traditionally been accepted as lawful possessions." *Staples*, 511 U.S. at 612.

CONCLUSION

The ATF may not do an end-run around Congress just because the President wants to ban something that does not meet the statutory definition of a "machinegun." It is for the legislative branch to determine whether the definition of machinegun needs to be adjusted, not an unelected federal agency.

In ruling on this case, the Court should keep in mind the greater context of Second Amendment rights as well as the harmful precedents some lower courts

are establishing that allow the banning of common semiautomatic firearms. Expanding the definition of "machinegun" as the ATF desires would put these common firearms on the chopping block by putting the very power that *Bruen* sought to wrestle back from inferior courts into the hands of a regulatory agency. This Court must not grant the executive branch the unfettered ability to breach the Second Amendment's "unqualified command." *Bruen*, 597 U.S. at 17 (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961)).

Respectfully submitted,

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