No. 22-976

In the
Supreme Court of the United States

MERRICK B. GARLAND, Attorney General, et al.,
Petitioner,

v.

MICHAEL CARGILL,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC., IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST, INTRODUCTION, AND SUMMARY OF ARGUMENT[1]

The National Shooting Sports Foundation, Inc. ("NSSF") is the trade association of the firearm, ammunition, hunting, and shooting sports industries. NSSF has over 10,500 members, including federally licensed manufacturers, distributors, and retailers of firearm and ammunition; manufacturers, distributors, and retailers of numerous other products for the hunting, shooting, and self-defense markets; public and private shooting ranges; gun clubs; sportsmen's organizations; and endemic media. To promote, protect, and preserve the shooting sports and America's hunting tradition, NSSF often submits *amicus* briefs in this Court and others in cases implicating Second Amendment freedoms.

Bump stocks were created to make shooting sports accessible to individuals suffering from limited hand mobility and other disabilities. The Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") historically welcomed law-abiding citizens' purchase and use of non-mechanical bump stocks, which are the only type at issue here. Indeed, ATF concluded many times over that non-mechanical bump stocks fall outside federal restrictions for automatic weapons. *See Cargill v. Garland*, 57 F.4th 447, 453-55 (5th Cir. 2023) (en banc); Lisa Marie Pane, *Once an Obscure*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Device, 'Bump Stocks' Are in the Spotlight, Associated Press (Oct. 4, 2017), https://bit.ly/3S6Ot2b.

In 2018, however, ATF reversed course, issuing a new rule that for the first time treats non-mechanical bump stocks as machineguns, subjecting all who possess one to criminal liability. 83 Fed. Reg. 66,514 (Dec. 26, 2018). The Fifth Circuit correctly rejected that new rule, concluding by a 13-3 vote that "an act of Congress is required to prohibit bump stocks." *Cargill*, 57 F.4th at 449 n.*. NSSF fully agrees with Judge Elrod's lead opinion: ATF lacks authority to criminalize conduct by administrative fiat, especially in the absence of a "distinct[]" direction from Congress. *See United States v. Grimaud*, 220 U.S. 506, 519 (1911). Reining in the ATF here is particularly important because this overreach hardly stands alone. It is just one exemplar of ATF's broader pattern of regulatory overreach.

Time and again in recent years, ATF has executed similar about-faces in service of restricting access to firearms with features it had previously recognized to be legal. The agency has tried to justify those efforts by taking an increasingly broad view of the "purpose" of the federal statutes setting forth its important but limited mission and an increasingly narrow view of the constraints that those statutes impose. Making matters worse, ATF has largely given the Second Amendment the back of the hand, imposing novel firearms restrictions without seriously grappling with constitutional text or historical tradition. The agency is in dire need of a reminder that it is not for ATF to decide which arms the people may keep and bear.

ARGUMENT

I. The Bump Stock Rule Exemplifies A Troubling Trend Of ATF Regulatory Overreach With Profoundly Destabilizing Consequences For The Firearms Industry And The People Whose Rights It Enables.

As Judge Tatel once observed, it "often" "looks for all the world like agencies choose their policy first and then later seek to defend its legality." David S. Tatel, *The Administrative Process & the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010). When it comes to ATF, that perception is increasingly proving a reality.

18 U.S.C. §922(*o*)(1) generally bans the possession of a "machinegun," a term separately defined in 26 U.S.C. §5845(b). "When ATF first considered the type of bump stocks at issue here," it told the public the obvious: "that they were not machineguns" within the meaning of that definition, and hence that their possession did not run afoul of §922(*o*)'s prohibition. *Cargill*, 57 F.4th at 450. The agency "maintained this position for over a decade, issuing many interpretation letters to that effect to members of the public." *Id.*; *see* JA16-68 (ATF letter rulings). But then ATF abruptly changed course. Shortly after the horrific October 1, 2017, shooting in Las Vegas, President Trump vowed that his administration would unilaterally "writ[e] out bumpstocks" no matter what. *Remarks by President Trump at 2018 White House Business Session with Governors* (Feb. 26, 2018), https://bit.ly/3RNibsP ("I'm writing that out myself. I don't care if Congress does it or not.").

And so it did. Following the President's orders, ATF purported to "reassess[]" the statute, 83 Fed. Reg. at 66,518, and ultimately "reversed its longstanding position in 2018, subjecting anyone who possessed a bump stock to criminal liability," *Cargill*, 57 F.4th at 450. Regulated parties, respondent included, were thus forced into federal court to stave off the risk of facing severe criminal penalties for possessing long-legal bump stocks based on ATF's novel, aggressive, and atextual construction of the law.

Unfortunately, such about-faces and unilateral overreaches are becoming all too common with ATF. In recent years, the agency has increasingly embraced a troubling practice of stretching statutory text well beyond what Congress enacted and the President signed, in service of prohibiting arms that it previously acknowledged are lawful—all while paying mere lip service to the implications of its actions for the fundamental right to keep and bear arms. *See infra* Part III.

Consider, for instance, ATF's frame-or-receiver rule (sometimes dubbed the "ghost-gun" rule). Frames and receivers are the primary structural components of a firearm; they house its firing mechanism. Federal law criminalizes buying and selling firearm frames or receivers outside a system of federally licensed manufacturers and dealers. *See* 18 U.S.C. §§921(a)(4)(C), 922. Since the 1960s, ATF consistently made clear that if a frame or receiver was less than 80% complete—in technical terms, if the fire-control cavity area was unmachined (i.e., completely solid)—it could be bought and sold outside this system.

Relying on that guidance, a vibrant industry emerged to serve the millions of American hobbyists who enjoy buying less-than-80%-complete frames or receivers and modifying them in their garages and workshops. But in 2023, ATF threw out 50-plus years of reliance interests buttressing the 80% rule and replaced it with a vague, multi-factor balancing test for incomplete frames or receivers. *See* 87 Fed. Reg. 24,652, 24,735, 24,739 (Apr. 26, 2022). Now, only ATF can predict whether a hunk of metal can be bought and modified without criminal consequences. ATF views this indeterminacy as a feature, not a bug: It gives ATF "flexibility" to regulate however it thinks "necessary," and "deter[s]" people from relying on "a minimum percentage of completeness." *Id.* at 24,668-69, 24,686. But the practical effect is more determinant: ATF's replacement of clear rules with amorphous standards threatens to stamp out the uniquely American tradition of amateur gunsmithing—all without any input from Congress.[2]

A similar story unfolded with respect to stabilizing braces. An Army veteran invented the stabilizing brace in 2012 to allow his friend—a veteran injured in combat—to participate in recreational shooting at a gun range. *See ATF's Assault on the Second Amendment: When is Enough Enough?: Hearing Before the H. Comms. on Oversight & the Judiciary*, 118 Cong. 3 (Mar. 23, 2023) (statement of Alex Bosco), available at https://bit.ly/3TPa5lP. Over the next decade, ATF repeatedly reassured the public

[2] The Fifth Circuit recently concluded that the frame-or-receiver rule exceeds ATF's statutory authority. *See VanDerStok v. Garland*, 86 F.4th 179, 188-90 (5th Cir. 2023).

that these disability-defeating braces could be affixed to pistols without converting them into "rifle[s]" within the meaning of the National Firearms Act, 26 U.S.C. §5845(c), or "short-barreled rifle[s]" under the Gun Control Act, 18 U.S.C. §921(a)(7)-(8). *See* 88 Fed. Reg. 6,478, 6,479-6,480 (Jan. 31, 2023). For almost a decade, manufacturers and individuals alike relied on that interpretation. *See id.* at 6,479. But last year, ATF abruptly changed its tune, reinterpreting federal law to claim that "millions of Americans were committing a felony the entire time they owned a braced pistol." *Mock v. Garland*, 75 F.4th 563, 582 (5th Cir. 2023).[3]

These recurring regulatory shifts have profound consequences both for the citizenry—"the people" whose rights the Second Amendment protects—and for members of the firearms industry. NSSF's members are heavily regulated, with everything up to and including criminal liability backing up the intricate legal regime governing their conduct. In the case of stabilizing braces, industry members relied on guidance from ATF about the metes and bounds of a statutory regime, and thus engaged in the production and sales of products that had been deemed legal. They built businesses based on what their government told them they could do. By completely reversing its position on the legality of those products, ATF pulled the rug out from under regulated entities and put them at risk of prosecution for conduct it has previously endorsed.

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[3] The Fifth Circuit recently held that the stabilizing brace rule likely violates the APA. *See Mock*, 75 F.4th at 583-86.

The same pattern has played out here. ATF long blessed non-mechanical bump stocks, but the 2018 rule does an about-face, promising up to a decade in prison for owners who do not "destroy the[ir] device[] or abandon [it] at an ATF office." 83 Fed. Reg. at 66,514; *see* 18 U.S.C. §922(*o*)(1). That kind of confiscatory, turn-in-your-lawfully-acquired-property-to-the-feds command is a rarity when it comes to the statute books, because Members of Congress like to be re-elected. But ATF has no such accountability and has shown no such restraint. And this kind of 180-degree change in regulatory practice not only foists uncertainty and instability on members of the firearms industry—as it would for any industry—but also leaves industry members guessing whether their next popular product will become a font of criminal liability overnight notwithstanding prior and express determinations to the contrary from their regulator. *See Biloxi Reg'l Med. Ctr. v. Bowen*, 835 F.2d 345, 352 (D.C. Cir. 1987) ("[T]he power of the sword of Damocles is not that it falls but that it hangs.").

Justice Scalia once explained the need for increased scrutiny when "an agency … repeatedly … attempts to expand the statute beyond its text." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). Through the bump stock rule and other recent actions, ATF has repeatedly lunged past statutory bounds to ban the disfavored firearm feature *du jour*, while barely even pausing to consider the impact of those bans on law-abiding citizens and industry members. And only ATF knows which feature it will seize upon next. Unless this Court puts a stop to it, a similar cycle of ATF overreach will repeat whenever the next firearm accessory or

practice falls from favor. The Court should return ATF to the limited role Congress assigned it before the agency can subject the citizenry to yet another illicit turn of the regulatory vise.

II. ATF Has No Authority To Close Perceived Loopholes In Criminal Statutes.

Respondent ably explains why non-mechanical bump stocks do not meet the statutory definition of "machinegun." Federal law defines "machinegun" in terms of a firearm's mechanical "function," not with "a shooter-focused approach or even a rate-of-fire approach." *United States v. Alkazahg*, 81 M.J. 764, 781 (N-M. Ct. Crim. App. 2021); *see* 26 U.S.C. §5845(b). And while a non-mechanical bump stock "may change *how* the pull of the trigger is accomplished, … it does not change the fact that the semiautomatic firearm shoots only one shot for each pull of the trigger." *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 471-72 (6th Cir. 2021); *see also Aposhian v. Barr*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, C.J., dissenting) (noting the government's concession "that if a shooter pulls the trigger of a semiautomatic rifle equipped with a non-mechanical bump stock without doing anything else, the rifle will fire just one shot"). Semi-automatic rifles equipped with a non-mechanical bump stock thus do not "automatically" "shoot" "more than one shot … by a single function of the trigger." 26 U.S.C. §5845(b).

The government's efforts to resist that conclusion not only are atextual, but lay bare ATF's deeply misguided view of its regulatory mission. The government all but admits that ATF's new rule rewrites the statute to close what the agency perceives

to be a "loophole." U.S.Br.40.[4] In essence, the government asks the Court to join ATF in reorienting the trigger-function-focused "letter" of §5485(b) to conform with (what ATF claims is) the statute's anti-rapid-fire "spirit." *See, e.g.*, U.S.Br.25, 35. But this Court long ago abandoned the practice of conjuring legislative spirits and undertaking the task of closing statutory loopholes, casting *Holy Trinity*'s "miraculous redeemer of lost causes" into the dustbin of history. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 116 (2007) (Scalia, J., dissenting). It is now hornbook law that closing statutory loopholes is a task exclusively reserved for the Article I branch. Courts "will not alter the text in order to satisfy the policy preferences of [an agency]." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). Perfecting perceived statutory shortcomings is a distinctly legislative task, as "[i]t is 'quite mistaken to assume' … that any interpretation of a law that does more to advance a statute's putative goal 'must be the law.'" *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017)).

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[4] To be sure, the government argues that "[a] rifle equipped with a bump stock fires multiple shots 'by a single function of the trigger.'" *See* U.S.Br.17-30. But it ultimately cannot help but concede the critical point: When an individual equips a semi-automatic rifle with a non-mechanical bump stock, the basic "technological means" of semi-automatic firing remains unchanged: Only a single projectile is fired each time a shooter applies forward pressure on the barrel and backward pressure on the trigger ledge. *See* U.S.Br.41. The only way to uphold the bump stock rule is thus to disregard the limits of the enacted text.

Moreover, using "legislative purpose" to evade the limits of enacted text gets things exactly backwards. "The positing of legislative 'purpose' is always a slippery enterprise." *Vartelas v. Holder*, 566 U.S. 257, 282 (2012) (Scalia, J., dissenting). It is even harder to pin down when a statute has undergone amendments over the years. In cases such as this one, then, "what counts as 'legislative intent' or the relevant 'legislative bargain[]' is simply not a 'fact of the matter' that can be established empirically." John F. Manning, *Inside Congress's Mind*, 115 Colum. L. Rev. 1911, 1946 (2015) (alteration in original). At best, supplanting enacted text with abstract notions of legislative purpose trades certainty for guesswork. At worst, it arrogates power to the Executive and Judicial Branches and thereby threatens basic liberties—as this case plainly shows. Either way, courts "cannot replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334 (2010).

In all events, whatever may be said about §5485(b)'s "evident purpose" (with little fear of contradiction given the impossibility of divining such a thing), "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018). "It is not the role of" administrative agencies "to identify and plug loopholes," but rather "the role of Congress to eliminate them if it wishes." *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 462 (2014) (Scalia, J., dissenting).

That is especially true when what the agency seeks to expand is the scope of a criminal law. "Making something a crime is serious business. It visits the moral condemnation of the community upon the citizen who engages in the forbidden conduct, and it allows the government to take away his liberty and property." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). That is why "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). And the metes and bounds of criminal statutes "are" (and must be) "for courts, not for the Government, to construe," lest unelected bureaucrats be given free rein to criminalize conduct by fiat. *Abramski v. United States*, 573 U.S. 169, 191 (2014).

That has been settled for more than two centuries. *See, e.g.*, *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."). This bedrock, liberty-enhancing principle applies with full force even when (as here) Congress has given an agency interpretive authority over a related, noncriminal provision in a hybrid statute: "A single statute with civil and criminal applications receives a single interpretation," *Carter*, 736 F.3d at 727, and the interpretation in the most liberty-threatening context, the "lowest common denominator, as it were, must govern," *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

To be sure, this Court has recognized a narrow exception in cases where Congress "distinctly" invited an agency's independent judgment about what conduct should be criminal.[5] *Grimaud*, 220 U.S. at 519; *see, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 667-73 (1997); *Touby v. United States*, 500 U.S. 160, 164 (1991). But even assuming such an exception could be squared with first principles, Congress has extended no such invitation here. To the contrary, the statutory text forecloses ATF's position. And lest there be any doubt, statutory structure confirms that ATF has no roving license to go beyond the text. While 18 U.S.C. §922(p) explicitly invites the Attorney General's rulemaking discretion with respect to the Security Exemplar, Congress included no such discretion-conferring language in §922(*o*)'s machinegun ban. And "where Congress includes particular language in one [sub]section of a statute but omits it in another [sub]section … it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720,

[5] This Court has also previously declined to embrace the view that "the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995). "While the Court has" subsequently "distance[d] itself from *Babbitt*," *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016), *rev'd sub nom.*, *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017), the distortionary effect of the *Chevron* doctrine has led some lower courts to continue to defer to agencies' interpretations of hybrid civil/criminal statutes.

722 (5th Cir. 1972)); *see also Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate" when "Congress has shown that it knows how to direct" the same thing "in express terms").[6]

Ultimately, the late Senator Dianne Feinstein—lionized as "a trailblazing champion" for gun control—said it best. *Press Release*, Everytown for Gun Safety (Sept. 29, 2023), https://bit.ly/3vyUL2Y. When ATF proposed bypassing Congress in favor of its new unilateral rule, Senator Feinstein excoriated the agency for its "about face" and its "[u]nbelievably" "dubious … claim[] that bumping the trigger is not the same as pulling it." U.S. S. Comm. on the Judiciary, *Feinstein Statement on Regulation to Ban Bump Stocks* (Mar. 23, 2018), https://bit.ly/47ws7wC; *see also id.* (decrying "Justice Department and ATF lawyers" for promulgating the rule despite "know[ing] that legislation is the only way to ban bump stocks"). For Senator Feinstein, answering the question that is now before the Court was easy: Section 5845(b) "must be amended" if Congress wants it "to cover bump stocks." *Id.* Senator Feinstein and NSSF may not have always seen eye to eye, but she got it exactly right here: ATF cannot accomplish by fiat what Congress has not enacted into legislation.

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[6] Congress also considered and explicitly rejected a proposed statute that would have attached criminal penalties to violations of ATF rules. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 919-20 (6th Cir. 2021) (Murphy, J., dissenting). Whatever weight such non-enactment history may carry, it supports respondent here.

III. ATF's Cavalier Embrace Of Ever More Novel Arms Prohibitions Displays Remarkable Indifference To Second Amendment Rights.

ATF's increasingly cavalier approach to belatedly banning arms the agency long treated as legal is all the more troubling given its constitutional implications. While regulate-now-justify-later should not be any agency's modus operandi, it should have no place in an agency whose entire regulatory mission brushes up against a fundamental constitutional right. Yet time and again, ATF has shown remarkable indifference to the impact of its novel regulatory efforts on law-abiding citizens and their constitutional rights.

1. Just as with any other fundamental right, an agency considering taking action that implicates the Second Amendment cannot regulate first and worry about the Constitution later. While ultimate constitutional issues are for the courts, not administrative agencies, *see* 5 U.S.C. §706 ("the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions"); *cf. Axon Enter., Inc. v. FTC*, 597 U.S. 175, 194-95 (2023), an agency charged with regulating in constitutionally sensitive areas cannot be heedless of constitutional values. The Federal Election Commission cannot simply ignore First Amendment considerations in regulating election spending, and ATF cannot proceed as if the Second Amendment protected only the militia. That is true not only as a matter of good governance, *see Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1909 (2020), but as a matter of basic administrative law.

After all, a final rule must "disclose the basis" for the agency's action to survive even arbitrary-and-capricious review, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962), and an agency can defend a rule only "based on the reasons it gave when it acted," *Regents*, 140 S.Ct. at 1909. Courts thus "cannot 'accept [government] counsel's post hoc rationalizations'" about constitutional concerns that the agency failed to confront. *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines*, 371 U.S. at 168-69). A rule "is lawful only if" an agency at a minimum disclosed and "rest[ed] 'on a consideration of the relevant factors'" at the rulemaking stage. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

In *Bruen*, this Court left no room for doubt about how to conduct Second Amendment analysis. When assessing the constitutionality of a law (or rule) that may implicate the right to keep and bear arms, the first question is whether "the Second Amendment's plain text covers [the] conduct" that the law (or rule) restricts. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). If it does, then the conduct is "presumptively protect[ed]" by the Constitution, and the government bears the burden of identifying a historical tradition justifying its regulation. *Id.* *Bruen* later "reiterate[d] that" point: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 24. There is no longer any room for tiers of scrutiny or rights-diluting interest-balancing;

under *Bruen*, "the traditions of the American people" carry the day. *Id.* at 26.

A law (or rule) that operates to ban firearms equipped with certain features plainly restricts conduct covered by the text, as a firearm remains an "arm" within the meaning of the Second Amendment regardless of whether it is fitted with a non-mechanical bump stock, an arm brace, or any other feature that leaves it a "bearable arm[]." *See District of Columbia v. Heller*, 554 U.S. 570, 581-82 (2008); *see also id.* (defining "arms" to include "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another").[7] So before ATF embarks on an effort to convert legal firearm features into contraband, it must determine whether doing so would be "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

This Court has already decided what "arms" may be banned "consistent with this Nation's historical

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[7] A few pre-*Bruen* cases held that "firearm accessor[ies]" such as silencers fall outside the Second Amendment's ambit because they are "not … weapon[s] in [them]sel[ves]." *United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018); *see, e.g.*, *United States v. Al-Azhari*, 2020 WL 7334512, at *3 (M.D. Fla. Dec. 14, 2020); *United States v. Hasson*, 2019 WL 4573424, at *4-5 (D. Md. Sept. 20, 2019). But that reasoning does not survive *Bruen*, which reiterated that "the Second Amendment's definition of 'arms'" extends to all "modern instruments that facilitate armed self-defense." 597 U.S. at 28. Indeed, that nothing-but-the-sum-of-its-parts theory was unsustainable even pre-*Bruen*, as it would allow states and ATF to outlaw all manner of common firearm components and thereby deprive the Second Amendment of all practical import.

tradition of firearm regulation": those that are (at a minimum) "'highly unusual in society at large,'" rather than "in common use today." *Id.* at 34, 47 (quoting *Heller*, 554 U.S. at 627); *see also Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring in the judgment) ("A weapon may not be banned unless it is *both* dangerous *and* unusual."). So in the context of a flat ban on arms, the critical question is whether the arms at issue are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. If they are, then a government may not ban them, period. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand."). That principle calls for extreme caution when the government reverses field to outlaw arms that it has long permitted to be lawfully possessed.

2. As an agency tasked with operating in such a constitutionally sensitive sphere, one would expect ATF to be acutely attuned to the need to ensure that its regulatory efforts do not overstep constitutional bounds. In fact, the agency has proven anything but.

Take what happened here. Despite receiving 16,000-plus comments raising Second Amendment objections to its proposed bump stock rule, ATF barely engaged with the right to keep and bear arms in promulgating it. Nothing in the final rule gives any indication that ATF even considered whether prohibiting the general public (i.e., "the people" whose rights the Second Amendment protects) from obtaining or possessing (i.e., "keep[ing] and bear[ing]")

non-mechanical bump stocks restricts conduct that "the Second Amendment's plain text covers." *Bruen*, 597 U.S. at 17; *see* U.S. Const. amend. II. The agency instead just declared that its (newfound) position that "bump-stock-type devices … qualify as 'machineguns' under Federal law" ends any Second Amendment inquiry because, in its view, *Heller* declared "machineguns" "not protected by the Second Amendment." 83 Fed. Reg. at 66,522.

Perhaps that might cut it if ATF were restricting a type of arm that *Heller* actually discussed. But whatever *Heller* may have had to say about firearms that all would have recognized as "machineguns" back "in 1939," *Heller*, 554 U.S. at 624, it certainly did not license ATF (or any other governmental actor) to short-circuit the constitutional analysis by stretching the historical understanding of "machinegun" to encompass things that ATF itself has previously acknowledged do not fit that bill. An ordinary handgun may be both a machine and a gun, but simply labeling it a "machinegun" does not pretermit the constitutional analysis. If ATF wants to *expand* its conception of what arms may be prohibited, then it is incumbent on ATF to grapple with the analysis this Court's cases command—namely, to ask whether firearms equipped with whatever feature or accessory it seeks to newly single out are "*both* dangerous *and* unusual." *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment). And simply intoning the words "dangerous and unusual," *see* 83 Fed. Reg. at 66,521, does not suffice to demonstrate that an arm actually fits that bill.

Perhaps one could excuse ATF's failure to do that in its final bump stock rule given that *Bruen* had not yet been handed down. But while agencies obviously need not predict the future, they are just as bound as any other government actor to "give[] full retroactive effect" to a decision of this Court interpreting the Constitution "regardless of whether [a rule] predate[s]" it. *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993). Yet while well over a year has passed since *Bruen* was handed down, the agency has neither revisited the bump stock rule in light of this Court's guidance nor engaged in the analysis *Bruen* commands in its subsequent rulemakings. Accordingly, while the Court should affirm for all the reasons set forth in respondent's brief, it should also take this opportunity to remind ATF that the Executive Branch is just as bound as the Judicial Branch to faithfully follow the constitutional pronouncements of this Court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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