No. 23A____

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

DEFENSE DISTRIBUTED, ET AL.

APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL
ENTERED BY THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are the U.S. Department of Justice; the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); Merrick B. Garland, in his official capacity as Attorney General of the United States; and Steven Dettelbach, in his official capacity as Director of ATF.

Respondents (intervenor plaintiffs-appellees below) are Blackhawk Manufacturing Group, Inc. (doing business as 80 Percent Arms) and Defense Distributed.

Additional intervenor plaintiffs-appellees below that are not respondents to this application are Second Amendment Foundation, Inc.; Not An L.L.C. (doing business as JSD Supply); and Polymer80, Inc. Plaintiffs-appellees below that are not respondents to this application are Jennifer VanDerStok; Michael G. Andren; Tactical Machining, L.L.C.; and Firearms Policy Coalition, Inc.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

VanDerStok v. Garland, No. 22-cv-691 (Sept. 14, 2023) (granting injunction pending appeal)

United States Court of Appeals (5th Cir.):

VanDerStok v. Garland, No. 22-11071 (notice of appeal filed Nov. 1, 2022)

VanDerStok v. Garland, No. 22-11086 (notice of appeal filed Nov. 4, 2022)

VanDerStok v. Garland, No. 23-10463 (notice of appeal filed May 1, 2023)

VanDerStok v. Garland, No. 23-10718 (Oct. 2, 2023) (denying motion to vacate injunction pending appeal)

Supreme Court of the United States:

Garland v. VanDerStok, No. 23A82 (Aug. 8, 2023) (granting stay pending appeal)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants Merrick B. Garland, et al., respectfully applies to vacate the injunction pending appeal entered on September 14, 2023, by the United States District Court for the Northern District of Texas (App., infra, 7a-48a).

Two months ago, this Court granted emergency relief in this case by staying the district court's vacatur of a rule issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to address the explosion of untraceable firearms commonly called "ghost guns." App., infra, 49a; see Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (Rule). The Rule does not prohibit the purchase, sale,

or possession of any firearm by anyone legally entitled to own a gun. Instead, it simply clarifies that under the federal firearms laws, commercial manufacturers and sellers of certain products that can readily be converted into functional firearms or their key components must obtain licenses, mark their products with serial numbers, maintain transaction records, and conduct background checks. Those requirements play a vital role in keeping guns away from criminals and allowing law enforcement to trace guns used in serious crimes.

This Court's prior stay reflects an authoritative determination that the government should be allowed to implement the Rule during appellate proceedings. The Court granted that relief despite the manufacturer plaintiffs' assertion that they would be irreparably harmed by a stay because it would require them to comply with the Rule. And the Court stayed the vacatur in full despite being squarely presented with the alternative of granting a stay only as to nonparties, a result that would have prevented the government from enforcing the Rule against plaintiffs while the appeal ran its course.

Notwithstanding their representations in this Court that a stay would require them to comply with the Rule, two of the manufacturer plaintiffs -- respondents here -- responded to this Court's grant of a stay by immediately returning to the district court and asking it to enjoin the government from enforcing the Rule against them pending appeal. A month later, the district

court granted that extraordinary relief. The court did not purport to rely on any change in the facts or the law. Instead, it considered the same arguments this Court had just considered on a materially identical record, yet reached diametrically opposing conclusions. The district court insisted that the government is unlikely to succeed in reversing the court's vacatur, that barring the government from enforcing the Rule would impose no irreparable harm, and that the balance of the equities favors respondents. The Fifth Circuit then relied on substantially similar reasoning to deny the government's motion to vacate the injunction, dismissing the argument that the injunction violates principles of vertical stare decisis.

This Court should vacate the district court's unprecedented injunction for the same reasons it stayed the district court's vacatur of the Rule. The Court has already concluded that the government has a sufficient likelihood of success to warrant relief. It has already rejected respondents' arguments based on the purported harms they would suffer if they were required to comply with the Rule. And although the district court's injunction is narrower than the prior vacatur, it imposes essentially the same harms on the government and public: Because respondents are commercial distributors selling their products over the Internet, the injunction ensures that ghost guns remain freely available online. Indeed, respondent Blackhawk Manufacturing is already capitalizing on the injunction, touting its status as "the last court protected

80% frame and jig manufacturer in the country" and offering "10% OFF of your order."[1] Other manufacturer plaintiffs have now sought their own injunctions. Absent relief from this Court, therefore, untraceable ghost guns will remain widely available to anyone with a computer and a credit card -- no background check required.

Finally, quite apart from the merits of the arguments that supported this Court's prior grant of a stay, the Court's intervention is warranted for an additional and more fundamental reason: The district court and the Fifth Circuit have effectively countermanded this Court's authoritative determination about the status quo that should prevail during appellate proceedings in this case. In so doing, the lower courts openly relied on arguments that this Court had necessarily rejected to grant relief that this Court had withheld. The Court should not tolerate that affront to basic principles of vertical stare decisis.

STATEMENT

Because this Court is already familiar with the Rule and the prior proceedings, we briefly summarize the relevant background before turning to the events since this Court's grant of a stay.

A. The Rule

ATF adopted the Rule in 2022 to update its regulations implementing the federal firearms statutes, including its interpretation of the definition of a regulated "firearm." See 23A82 Appl.

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[1] Blackhawk Manufacturing, d/b/a 80 Percent Arms, ATF Rule Update, https://perma.cc/TXD4-BPTK (last visited Oct. 5, 2023).

6-11 (discussing the statutory and regulatory framework). Congress has broadly defined "firearm" to include "any weapon" that "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). Congress also included "the frame or receiver of any such weapon," 18 U.S.C. 921(a)(3)(B), ensuring that the key structural component of a firearm is subject to serial-number, background-check, and recordkeeping requirements, even if it is sold alone.

The provisions of the Rule at issue here clarify ATF's interpretation of that definition to address firearms commonly called "ghost guns." Ghost guns can be made from kits and parts that are available online to anyone with a credit card and that allow anyone with basic tools and rudimentary skills to assemble a fully functional firearm in as little as twenty minutes. 23A82 Appl. 8-10. Some manufacturers of those products assert that they are not "firearms" regulated by federal law, and thus can be sold without serial numbers, transfer records, or background checks. Those features of ghost guns make them uniquely attractive to criminals and others who are legally prohibited from buying firearms or intend to use them to commit crime.

The Rule, which took effect on August 24, 2022, 87 Fed. Reg. at 24,652, responded to the exponential increase in the availability of ghost guns -- and a corresponding explosion in their use in crimes -- by clarifying that a weapon parts kit that allows a purchaser to readily assemble an operational weapon is a "firearm"

and that a “frame or receiver” includes “a partially complete, disassembled, or nonfunctional frame or receiver” that may be readily converted into a functional one. Id. at 24,735, 24,739. Under the statute as interpreted in the Rule, commercial manufacturers and sellers of covered products must obtain licenses; mark their products with serial numbers; conduct background checks to ensure that those products are not sold to children, felons, or other prohibited persons; and keep records to allow law enforcement to trace firearms used in crimes.

B. This Court’s Stay Of The District Court’s Vacatur

1. Respondents Blackhawk Manufacturing and Defense Distributed are two manufacturers and distributors of products regulated by the Rule. They -- along with other manufacturers and distributors, individual firearm owners, and advocacy organizations -- filed this suit in the United States District Court for the Northern District of Texas challenging the Rule’s treatment of weapon parts kits and partially complete frames and receivers.

In late 2022 and early 2023, the district court entered preliminary injunctions prohibiting the government from enforcing the two challenged provisions of the Rule against some plaintiffs, including respondents, as well as respondents’ customers. D. Ct. Doc. 188, at 10-11 (Mar. 2, 2023); D. Ct. Doc. 118, at 11-12 (Nov. 3, 2022). The government appealed those preliminary injunctions.

On June 30, 2023, before the Fifth Circuit resolved the appeals, the district court granted respondents’ and the other plain-

tiffs' motions for summary judgment. App., infra, 52a-89a. The court held that ATF "acted in excess of its statutory jurisdiction" in adopting the challenged portions of the Rule and vacated the Rule in its entirety nationwide. Id. at 75a; id. at 85a-89a. On July 5, the court entered a final judgment memorializing the vacatur. Id. at 50a-51a.

On July 24, the Fifth Circuit granted in part and denied in part the government's motion for a stay pending appeal. C.A. Doc. 45-1 (July 24, 2023). The court declined to stay the vacatur of the two challenged portions of the Rule, but stayed the vacatur of the unchallenged portions of the Rule. Id. at 3. The court also expedited the underlying appeal, id. at 4, and held oral argument on September 7, see C.A. Doc. 168 (Sept. 7, 2023).

2. In the meantime, on July 27, the government filed an application for a stay pending appeal with this Court. The government argued that this Court would likely grant certiorari and reverse a Fifth Circuit decision affirming the district court's vacatur because the Rule reflects the natural reading of the statutory definition of "firearm." 23A82 Appl. 15-27. The government also argued that the district court erred in granting universal vacatur. Id. at 27-34. On the equities, the government explained that "[t]he district court's vacatur of the challenged provisions of the Rule imposes grave and irreparable harm to the government and the public by enabling the irreversible flow of large numbers of untraceable ghost guns into our Nation's communities." Id. at

34. "On the other side of the ledger, a stay would impose only a minimal burden on respondents' lawful activities" because "[t]hey would be entirely free to continue making, selling, and buying the exact same products so long as they complied with the routine regulatory requirements that tens of thousands of licensees abide by on [a] daily basis." Ibid.; see id. at 34-39.

Although the government asked this Court to stay the district court's vacatur in full, it also identified an alternative if the Court concluded that the government was likely to succeed only in its challenge to the universal scope of the district court's remedy or that the equities warranted narrower relief: At a minimum, the government urged the Court to "stay the district court's vacatur as applied to individuals and entities that are not parties to this case." 23A82 Appl. 34; see id. at 40.

Respondents (and the other plaintiffs) opposed the government's application, emphasizing the purported harms that a stay would impose on them. Defense Distributed asserted that a stay would "inflict[] * * * severe economic harm on Defense Distributed as to threaten its existence." 23A82 Def. Distributed Opp. 15-16. Blackhawk claimed that enforcement of the Rule would "put Respondents, along with millions of Americans, at risk of irreparable harm by Applicants' efforts to exercise -- by threat of criminal penalties -- a regulatory power outside the scope of Applicants' delegated authority." 23A82 Blackhawk Opp. 27. Other manufacturer plaintiffs argued that they would "face[] 'irrepara-

ble harm, either by shutting down [their] operations forever or paying the unrecoverable costs of compliance,'" if the Court granted a stay. 23A82 VanDerStok Opp. 38 (citation omitted).

The explicit premise of those arguments was that if this Court granted the government's application to stay the vacatur in full, respondents would be required to comply with the Rule during the pendency of the appeal. Blackhawk, for example, argued that "a stay will put Respondents * * * at risk of irreparable harm * * * [from] Applicants' enforcement of [the Rule]." 23A82 Blackhawk Opp. 2; see, e.g., 23A82 Def. Distributed Opp. 15 ("If the Rule is allowed to go into effect vis-à-vis Defense Distributed, irreparable harms will undoubtedly result."). Accordingly, although plaintiffs principally argued that the Court should deny the application outright, they argued in the alternative that any stay should be "limit[ed]" to nonparties. 23A82 VanDerStok Opp. 5; see id. at 39-40; 23A82 Def. Distributed Opp. 7 ("If nothing else, the parties that established [Administrative Procedure Act (APA), 5 U.S.C. 701 et seq.] violations below are entitled to relief for the duration of the appeal.").

On August 8, the Court granted the government's stay application in full. The Court's order provided:

> The application for stay presented to Justice Alito and by him referred to the Court is granted. The June 30, 2023 order and July 5, 2023 judgment of the [district court], insofar as they vacate the [Rule], are stayed pending the disposition of the appeal * * * and disposition of a petition for a writ of certiorari, if such a writ is timely sought.

App., infra, 49a.

C. The District Court's New Injunction

1. On August 9 -- the day after this Court's order -- Defense Distributed moved in the district court for an injunction pending appeal. Blackhawk followed with its own motion five days later. Respondents did not argue that circumstances had changed since this Court's order. To the contrary, respondents argued that they would face irreparable harm in the absence of injunctive relief for the same "reasons [they] first introduced at the preliminary injunction stage" and had continued to invoke in opposing a stay in this Court. D. Ct. Doc. 249, at 5 (Aug. 9, 2023); see D. Ct. Doc. 251, at 1 n.1 (Aug. 14, 2023) ("incorporat[ing] by reference [Blackhawk's] earlier memorandum of law in support of its motion for [a] preliminary injunction"). Defense Distributed, for example, relied on the same declaration it had invoked in opposing the government's stay application. Compare 23A82 Def. Distributed Opp. 15-16, with D. Ct. Doc. 249, at 5.

2. On September 14, the district court granted an injunction. App., infra, 7a-48a. The court first concluded that notwithstanding its entry of a final judgment and the pendency of an appeal, it had "ancillary enforcement jurisdiction" to grant an injunction pending appeal. Id. at 41a; see id. at 12a-41a.

The district court next held that respondents are likely to succeed on the merits. App., infra, 42a-43a. The court began with the premise that its summary-judgment order and final judgment

remain "the law of the case." Id. at 30a. The court stated that it was not bound by this Court's stay because that stay "cover[ed] only th[e] [district court's] grant of vacatur" and not its "judgment on the merits that the challenged provisions of the Final Rule are unlawful." Ibid. Notwithstanding this Court's stay, therefore, the district court maintained that respondents had demonstrated not just a likelihood of success on appeal, but "an actual success on the merits of their claims." Id. at 43a.

The district court also found that an injunction was necessary to "prevent irreparable harm" during the "appeals process." App., infra, 45a; see id. at 43a-46a. Relying on the same evidence that respondents had invoked in opposing a stay, the court found that "any resumed enforcement efforts against [respondents] would result in significant harm to their businesses" and that an injunction was necessary to "preserve the status quo." Id. at 44a-45a.

Finally, the district court found that the balance of the equities and the public interest supported an injunction. App., infra, 46a-47a. The court reiterated its view that, despite this Court's stay, "[t]he controlling law of this case is that the Government Defendants' promulgation of the two challenged provisions of the Final Rule transgress the boundaries of lawful authority prescribed by Congress." Id. at 46a (citations omitted). And because "there can be 'no public interest in the perpetuation of unlawful agency action,'" the district court believed that there "is no injury that the Government Defendants and the public at-

large could possibly suffer." Id. at 46a-47a (citation and emphases omitted).

The district court's injunction prohibits the government from "implementing and enforcing" the challenged provisions of the Rule against respondents "pending the disposition of the appeal" in the Fifth Circuit "and disposition of a petition for a writ of certiorari, if such a writ is timely sought." App., infra, 48a. The court also extended the injunction to prohibit enforcement against respondents' customers, "except for those individuals prohibited from possessing firearms" under 18 U.S.C. 922(g). Ibid.

3. On October 2, the Fifth Circuit granted in part and denied in part the government's motion to vacate the injunction. App., infra, 1a-6a. The court held that "the district court's injunction sweeps too broadly insofar as it affords relief to non-party customers" and therefore vacated the injunction pending appeal "as to non-party customers." Id. at 3a; see id. at 6a. The Fifth Circuit explained that the government had made clear that the statutory provisions interpreted in the Rule primarily apply to commercial manufacturers and sellers, not to individuals who are lawfully entitled to possess firearms. Id. at 3a.[2]

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[2] As the government explained in its briefing in the Fifth Circuit, the government intends to enforce the Rule against both parties to this case and nonparties. See C.A. Doc. 197, at 2-3 (Sept. 26, 2023). But it is not a violation of the Gun Control Act of 1968 or the Rule for persons not otherwise prohibited from possessing firearms to possess weapon parts kits or partial frames or receivers, and this case only implicates the requirements for their commercial sale. See id. at 3. Non-prohibited persons therefore may lawfully purchase and use weapon parts kits and

The Fifth Circuit declined, however, to vacate the injunction to the extent it bars enforcement of the Rule against respondents. App., infra, 2a-6a. The court gave three reasons for that disposition.

First, the Fifth Circuit stated that this Court "could have simply stayed the district court's vacatur order and judgment without qualification" but instead chose to stay those orders only "'insofar as they vacate the Final Rule.'" App., infra, 4a (brackets omitted).

Second, the Fifth Circuit agreed with the district court that injunctive relief was appropriate under the traditional standard for preliminary relief. App., infra, 4a-5a. The Fifth Circuit summarily endorsed the district court's conclusions that respondents "would be irreparably harmed" if they were required to comply with the Rule; that respondents "are likely to succeed on the merits because the Final Rule is contrary to law"; and that "both the balance of equities and the public interest weigh in favor of allowing orderly judicial review of the Final Rule before anyone shuts down their businesses or sends them to jail." Id. at 4a.

Third, the Fifth Circuit rejected the government's argument that the district court had "flouted [this] Court's August 8 order" staying the district court's vacatur. App., infra, 5a. The Fifth

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partially complete frames or receivers for personal use so long as the manufacturer, importer, or dealer from which they purchased such items complies with the commercial sale requirements in the Act. See 18 U.S.C. 922(a)(2)-(3).

Circuit stated that "[t]here is a meaningful distinction between vacatur (which is a universal remedy) and an injunction that applies only to two named plaintiffs." Ibid. The Fifth Circuit acknowledged that the parties' briefing in this Court had specifically raised the possibility of limiting "the district court's universal vacatur" to "the parties" and that this Court "did not follow that alternative path." Ibid. But the Fifth Circuit declined to assign any significance to the Court's choice because it expressed doubt that "there is such a thing as an 'as-applied vacatur' remedy under the APA." Ibid.

ARGUMENT

This is the rare application where this Court has already applied the relevant legal standard in the very same case and determined the government should obtain emergency relief. As before, the government seeks relief from a district court order blocking implementation of the Rule pending appeal. This request should thus be governed by the same traditional standard, which asks whether the government has established (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the [government] would likely suffer irreparable harm" and "the equities" otherwise support relief. Merrill v. Milligan, 142 S. Ct.

879, 880 (2022) (Kavanaugh, J., concurring); see Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam); 23A82 Appl. 15.[3]

This Court's answer should be the same as it was two months ago. The Court has already determined that the government has established the requisite likelihood that the Court will grant review and reverse; that the government would be irreparably harmed by an order blocking enforcement of the Rule; and that any harm respondents may suffer from being required to comply with the Rule does not justify denying relief. And although the district court's party-specific injunction applies less broadly than its universal vacatur, the balance of the equities is materially unchanged because respondents are commercial sellers of firearms that widely distribute their products online. The injunction thus means that anyone seeking to buy a gun without a background check -- including felons, minors, and other prohibited persons -- can readily procure and complete an untraceable firearm from respondents' websites (or

[3] As the Fifth Circuit noted, the government has sought to vacate rather than stay the district court's injunction. App., infra, 2a & n.*. That difference in form reflects the unusual posture of this case: Ordinarily, applications like this involve a request to stay a district court's vacatur or preliminary or permanent injunction during the pendency of an appeal and any proceedings in this Court. See, e.g., 23A82 Appl. 1, 40-41. Here, however, the district court itself granted an injunction only "pending the disposition of the appeal" and "a petition for a writ of certiorari." App., infra, 48a. Granting a stay pending appeal and certiorari would therefore foreclose all possible applications of that injunction, so the government has styled its application as seeking vacatur rather than a stay. But the practical effect is the same, and the Fifth Circuit thus correctly recognized that the inquiry should be guided by the traditional stay standard. Id. at 2a n.*.

the websites of the other plaintiff-manufacturers that have already sought follow-on injunctions).

More fundamentally, this Court should grant this application to vindicate basic principles of vertical stare decisis and the Court's role in our judicial system. The Court's power to grant stays and other relief in aid of its jurisdiction preserves its ability to authoritatively fix the rights of the parties while a case works its way to the Court. When the Court considered the government's prior stay application, it was presented with three options for the status quo pending appeal and certiorari: (1) the Rule could remain vacated as to everyone; (2) it could be allowed to take effect only as to nonparties but not as to respondents and other plaintiffs; or (3) it could be allowed to take effect as to everyone, parties and nonparties alike. After extensive briefing, this Court chose the third option. Yet the district court and the Fifth Circuit have now overridden this Court's determination and unilaterally imposed the second option while the appeal proceeds. And the lower courts countermanded this Court's stay without even purporting to identify any change in the facts or the law -- instead, they openly accepted the very arguments this Court had necessarily rejected. The Court should not tolerate such circumvention of its orders.

I. THIS COURT SHOULD GRANT THIS APPLICATION FOR THE SAME REASONS IT GRANTED THE GOVERNMENT'S PRIOR APPLICATION

When this Court granted a stay pending appeal, it necessarily found the requisite likelihood that it would eventually grant review and reverse and that the equities favored relief. Those conclusions apply equally here.

First, the Court's grant of a stay reflected a determination that there is "a reasonable probability" that this Court "would eventually grant review" and "a fair prospect that the Court would reverse." Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Those findings are "necessary for issuance of a stay." Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis added). And by definition, those findings continue to apply here: The district court granted an injunction pending appellate review of the very same judgment that was before this Court in the government's last application.

Second, the Court must have credited the government's contention that it "would likely suffer irreparable harm absent the stay" and that "the equities" favored relief. Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Both sides of the equitable ledger remain materially unchanged.

The government's prior application explained that preventing ATF from enforcing the Rule would have harmed the government and the public by "effectively giv[ing] respondents -- and other ghost-

gun manufacturers and sellers -- the green light to resume distribution of ghost guns without background checks, records, or serial numbers," thereby posing "an acute threat to public safety." 23A82 Appl. 36. In other words, the harm to the government and public was the ready availability of ghost guns online. The district court's new injunction imposes the same harm: Respondents are manufacturers that sell ghost guns over the Internet without background checks or serial numbers. Indeed, Defense Distributed's website is "ghostgunner.net." And Blackhawk is already using the new injunction for marketing purposes. See Blackhawk Manufacturing, d/b/a 80 Percent Arms, ATF Rule Update, https://perma.cc/TXD4-BPTK (last visited Oct. 5, 2023).

The district court's injunction thus means that anyone seeking to buy a ghost gun online can easily do so. And although other manufacturer plaintiffs did not previously seek their own injunctions -- perhaps because they recognized that this Court's stay plainly foreclosed such relief -- they have now done so as well. See D. Ct. Doc. 263 (Sept. 20, 2023) (Not An L.L.C.); D. Ct. Doc. 262 (Sept. 15, 2023) (Tactical Machining). If the district court adheres to its approach and grants those injunctions, it will further multiply the number of available sellers.

On the other side of the ledger, this Court's grant of a stay necessarily reflected its conclusion that any harm the Rule might impose on respondents and other manufacturers did not justify denying or narrowing the relief the government sought. In par-

ticular, the Court considered and rejected Defense Distributed's argument that a stay would inflict "severe economic harm" and "threaten its existence." 23A82 Def. Distributed Opp. 15. The Court likewise rejected Blackhawk's assertion that it would suffer "irreparable harm" if it were required "by threat of criminal penalties" to comply with the firearms statutes as interpreted in the Rule. 23A82 Blackhawk Opp. 27.

In granting an injunction pending appeal, the district court did not purport to identify any new or changed circumstance relevant to the equities. To the contrary, at each relevant stage of this litigation -- when seeking a preliminary injunction, when opposing a stay pending appeal, and when seeking an injunction pending appeal -- respondents have made the same arguments based on the same record. Relying on a declaration it filed in the district court, for example, Defense Distributed has consistently asserted that allowing ATF to enforce the Rule while this litigation proceeds would cause irreparable harm by "inflict[ing] such severe economic harm on Defense Distributed as to threaten its existence." D. Ct. Doc. 164, at 6 (Jan. 12, 2023) (Mem. of Law in Support of Mot. for Prelim. Inj.); see 23A82 Def. Distributed Opp. 15 (same); D. Ct. Doc. 249, at 5 (Mot. for Inj. Pending Appeal) (similar). Blackhawk's motion for an injunction pending appeal likewise relied on the same arguments it has made throughout this litigation, including in opposing a stay in this Court. See D. Ct. Doc. 251, at 1 n.1 (Mot. for Inj. Pending Appeal) ("incor-

porat[ing] by reference [Blackhawk's] earlier memorandum of law in support of its motion for [a] preliminary injunction").

In short, this Court previously determined that the government's interest in preventing the distribution of untraceable ghost guns to anyone with a computer and a credit card outweighed any harm respondents and other manufacturers might suffer from being required to comply with federal laws requiring licenses, serial numbers, background checks, and recordkeeping for commercial firearms sales -- routine requirements that tens of thousands of firearms dealers follow in selling millions of firearms each year. 23A82 Appl. 37-38. That determination applies equally here.

II. THE LOWER COURTS HAD NO AUTHORITY TO COUNTERMAND THIS COURT'S ORDER FIXING THE PARTIES' RIGHTS PENDING APPEAL

Vacatur of the district court's injunction is also warranted for a more fundamental reason: Once this Court has considered and decided an application for emergency relief and made an authoritative determination about the status quo that should govern pending appeal, lower courts have no power to revisit the matter (at least absent a significant change in circumstances). Yet the district court and the Fifth Circuit openly flouted that principle here. Immediately after this Court issued its stay, those courts considered the same arguments based on the same record and effectively countermanded this Court's order based on their own view of the merits and the equities.

Respondents and the lower courts have not cited -- and we have not found -- any prior example of a district court entering an injunction pending appeal in a case in this posture. To the contrary, "basic principles of vertical stare decisis" dictate that a lower court "lacks the 'power or authority' to reach the opposite conclusion" from a higher court "on the same issues, in the same emergency posture, and in the same case." Alabama Ass'n of Realtors v. United States Dep't of Health & Human Services, 557 F. Supp. 3d 1, 8, 10 (D.D.C. 2021) (quoting Briggs v. Pennsylvania R.R., 334 U.S. 304, 306 (1948)); cf. Volkswagenwerk A. G. v. Falzon, 461 U.S. 1303 (1983) (O'Connor, J., in chambers).

The lower courts' approach would subvert this Court's authority and needlessly multiply emergency litigation. It would mean that any time this Court stays a district court's vacatur or broad injunction, the lower court would be free to adhere to its contrary view of the merits and the equities and grant a narrower injunction pending appeal. Successful applicants for stays would then be required to return to this Court to seek emergency relief a second time -- just as the government has been forced to do here.

There is no justification for such a regime. This Court is quite capable of granting partial stays or otherwise tailoring emergency relief when it concludes that the merits and the equities warrant it.[4] And especially where, as here, the Court is squarely

[4] See, e.g., United States Army Corps of Eng'rs v. Northern Plains Res. Council, 141 S. Ct. 190, 190 (2020) (staying vacatur and injunction with "except[ion]"); Andino v. Middleton, 141

presented with that option but declines to adopt it, the lower courts have no basis to override this Court's authoritative determination about the proper relationship between the parties during the pendency of appellate proceedings.

III. THE LOWER COURTS FAILED TO JUSTIFY THE DISTRICT COURT'S EXTRAORDINARY AND UNPRECEDENTED INJUNCTION

The lower courts attempted to justify the district court's injunction by parsing the language of this Court's stay order, by engaging in their own reexamination of the merits and the equities, and by emphasizing the difference between a universal vacatur and a party-specific injunction. None of those arguments justifies the extraordinary and unprecedented relief granted below.

A. This Court stayed the district court's summary-judgment order and final judgment "insofar as they vacate" the Rule. App., infra, 49a. The lower courts highlighted that language, suggesting that it was significant that the Court did not "stay[] the district court's vacatur order and judgment without qualification." Id. at 4a; see id. at 30a. But vacatur was the only remedy the district court granted, and a stay of the vacatur was the only relief the government sought in its application. See 23A82 Appl. 40 ("The

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S. Ct. 9, 10 (2020) (staying preliminary injunction with "except[ion]"); North Carolina v. Covington, 583 U.S. 1109, 1109 (2018) (granting in part and denying in part application for stay); Trump v. International Refugee Assistance Project, 582 U.S. 571, 582 (2017) (per curiam) ("grant[ing] the Government's stay applications in part and narrow[ing] the scope of the injunctions"); Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014) (per curiam) (granting injunction pending appeal with "conditions" and limitations).

application for a stay of the district court's judgment vacating the rule should be granted.").

The lower courts erred in treating this Court's routine "insofar as" language as an implicit invitation to grant further relief. This Court has previously used that formulation when staying the vacatur of agency action without suggesting that the phrase limits a stay's effect. See Louisiana v. American Rivers, 142 S. Ct. 1347, 1347 (2022) ("The district court's October 21, 2021 order, insofar as it vacates the current certification rule, 40 C.F.R. Part 121, is stayed."). And adhering to the same formulation made sense here because both orders at issue also disposed of various matters unrelated to the merits. The district court's summary judgment order granted motions to intervene and denied a plaintiff's motion for an injunction. App., infra, 88a-89a. And the final judgment "denied as moot" various outstanding claims. Id. at 51a (capitalization and emphasis omitted). By staying those orders "insofar as they vacate" the Rule, id. at 49a, this Court granted full relief to the government while making clear that those uncontested portions of the orders were undisturbed.

B. The lower courts likewise seriously erred in engaging in their own reexamination of the merits and the equities while disregarding the contrary determinations necessarily reflected in this Court's grant of a stay. The Fifth Circuit summarily endorsed the district court's conclusions that "the Final Rule is contrary to law," that "the balance of the equities and the public interest

weigh in favor of" preventing the Rule's enforcement against respondents pending appeal, and that the countervailing harms to the government and the public do not justify allowing the Rule to take effect. App., infra, 4a; see id. at 4a-5a, 42a-47a. Those are the very same arguments this Court had just considered and rejected in granting a stay. Remarkably, however, neither lower court even acknowledged this Court's stay order in assessing likelihood of success or the equities.

C. Finally, the Fifth Circuit sought to justify the injunction by asserting that this Court's stay order addressed only "a universal vacatur" and thus did not foreclose the possibility of party-specific injunctive relief. App., infra, 5a. That is wrong. As the Fifth Circuit acknowledged (ibid.), both the government and the plaintiffs squarely presented this Court with the alternative of narrowing relief to the parties by staying the vacatur only "to the extent it applies to nonparties." 23A82 Appl. 40; see pp. 8-9, supra. This Court's grant of a full stay thus reflected a determination that the government should be permitted to implement the Rule as to parties and nonparties alike.

In resisting that straightforward conclusion, the Fifth Circuit suggested that this Court could not have narrowed the vacatur in the way the parties suggested because the Fifth Circuit doubted that "there is such a thing as an 'as-applied vacatur' remedy under the APA." App., infra, 5a. But even if the Fifth Circuit were correct that a district court cannot grant as-applied vacatur in

the first instance, but see 23A82 Appl. 28-32, there can be no doubt that this Court has the authority to stay a universal vacatur in some but not all of its applications. The decision to grant a stay involves an inherently "equitable judgment," and "[t]his Court may, in its discretion, tailor a stay." Trump v. International Refugee Assistance Project, 582 U.S. 571, 582 (2017) (per curiam); see n.4, supra. Indeed, the Court has previously granted a partial stay in a markedly similar context, staying a district court's vacatur of a nationwide permit "except as it applie[d]" to a particular project. United States Army Corps of Eng'rs v. Northern Plains Res. Council, 141 S. Ct. 190 (2020). The Court could have adopted the same approach here, but instead stayed the vacatur in full. The Court should not allow the lower courts to countermand that authoritative determination about the proper scope of relief pending appeal.

CONCLUSION

This Court should vacate the injunction pending appeal entered by the district court.

Respectfully submitted.

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