No. 23A302

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

BLACKHAWK MANUFACTURING GROUP, INC., ET AL.

REPLY IN SUPPORT OF APPLICATION TO VACATE THE INJUNCTION PENDING APPEAL

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Respondents agree that the government's prior application presented this Court with three options for the status quo that should prevail during the government's appeal of the district court's judgment vacating the Rule: (1) the Rule could remain vacated as to everyone; (2) it could be allowed to take effect as to nonparties but not as to respondents and other parties; or (3) it could be allowed to take effect as to everyone, including the parties. Respondents acknowledge that, after extensive briefing on the merits and the equities, this Court chose the third option. And respondents do not and could not deny that the lower courts have now countermanded that judgment by unilaterally imposing the second option -- and done so on a materially identical

record, without even purporting to identify any changed circumstances.

Respondents fail to justify that extraordinary circumvention of this Court's order. To the contrary, they largely repeat the merits and equitable arguments this Court has already rejected. Respondents also emphasize the differences between universal vacatur and party-specific injunctive relief. Those differences are undoubtedly significant in many contexts. But respondents do not explain why they matter here, where the Court has already considered and rejected the option of narrowing the district court's universal relief to the parties. Instead of fashioning such party-specific relief, the Court issued an order allowing the government to implement the Rule as to parties and nonparties alike. The Court should adhere to that determination and vacate the district court's unprecedented injunction.

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

Respondents agree (Def. Distributed Opp. 7) that this application is governed by the same standard as the government's prior application seeking relief pending its appeal from the same underlying judgment: The government must establish "a reasonable probability" that this Court would grant certiorari if the Fifth Circuit affirmed the vacatur of the Rule; "a fair prospect that the Court would reverse"; a likelihood that the government would suffer irreparable harm; and that the "equities" support relief.

Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring); see Appl. 14-15. The Court "necessar[ily]" found that standard satisfied when it granted the government's prior application. Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). Respondents offer no justification for reaching a different result now.

A. Echoing the courts below, respondents assert that they are "likely to succeed on the merits." Blackhawk Opp. 2 (citation omitted); see id. at 10. In particular, respondents maintain that the Rule is inconsistent with the statutory definition of "firearm" and with the interpretation adopted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in the past. Id. at 11-13; Def. Distributed Opp. 3-5. But respondents made precisely the same arguments before. 23A82 Blackhawk Opp. 4-7, 11-13; 23A82 Def. Distributed Opp. 2-4. The government has already explained why those arguments are wrong: The Rule reflects the natural reading of the relevant statutory terms, and the Rule is consistent with ATF's longstanding interpretation. 23A82 Appl. 16-28 & n.3; 23A82 Reply Br. 3-9. Even more to the point, this Court has already concluded that notwithstanding respondents' arguments, the government has established the requisite likelihood that the Court

would grant certiorari and reverse. The standard here is exactly the same.[1]

Respondents emphasize (Blackhawk Opp. 4-5; Def. Distributed Opp. 12-13) that the government's prior application also argued that the district court's vacatur remedy was inappropriate. See 23A82 Appl. 27-34. But the government made clear that its challenge to the court's universal remedy would have supported only a "stay [of] the district court's vacatur as applied to individuals and entities that are not parties to this case." Id. at 34. In staying the vacatur in full, this Court presumably determined that the government had established the requisite likelihood that it would succeed in reversing the district court's decision outright, not just narrowing the remedy.

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[1] Defense Distributed asserts (Opp. 10-11) that this Court's grant of a stay did not necessarily reflect a finding that the government is more likely than not to prevail on the merits because a stay requires only a "fair prospect" of reversal. Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Defense Distributed thus suggests that the Court's grant of a stay technically did not preclude the district court from concluding that respondents had established the likelihood of success required for an injunction pending appeal. Cf. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam). But the differing verbal formulations used to describe the standards governing injunctions in the lower courts and stays in this Court cannot leave lower courts free to grant further relief after this Court has already taken the unusual step of granting an emergency stay. And in any event, any difference in those standards is beside the point now that the case has returned to this Court: As Defense Distributed elsewhere acknowledges (Opp. 7), this application is governed by the same "fair prospect" standard that the Court previously found satisfied.

B. Respondents also offer no reason for this Court to depart from its prior conclusions that the government faces irreparable harm and that the equities favor relief. Defense Distributed asserts (Opp. 12) that the difference between the district court's universal vacatur and its new party-specific injunction "chang[es] the set of people that an order [granting relief] would benefit" and therefore alters the "remedial analysis." In some cases that would be true. But the government has already explained why it is not true here, and respondents fail to explain why the difference between the vacatur and the injunction materially affects either side of the equitable ledger in this case.

First, the district court's vacatur harmed the government and the public because it made ghost guns readily available online without background checks, recordkeeping requirements, or serial numbers. 23A82 Appl. 34-36. That is a grave threat to public safety because the lack of background checks makes ghost guns uniquely appealing to felons, minors, and other prohibited persons -- and because when ghost guns are inevitably used in crime, they are essentially impossible to trace. Ibid. Respondents do not seriously dispute that the injunction imposes the same harm: Respondents are large-scale commercial distributors of ghost guns that sell their products online, so an injunction preventing ATF from enforcing the Rule against them ensures that ghost guns will remain broadly available. Appl. 17-18. And the court appears

poised to grant similar relief to other manufacturers who have now sought follow-on injunctions, further compounding the harm. Ibid.

Seeking to minimize those harms, Blackhawk asserts (Opp. 9) that they will be felt for only "several weeks or months," until the Fifth Circuit issues a decision. But the Fifth Circuit panel that had already heard argument in the government's underlying appeal declared that "the Final Rule is contrary to law," strongly suggesting that it will affirm the district court's vacatur in relevant part. Appl. App. 4a. Depending on the timing of the panel's decision, this Court may not have the opportunity to review it until October Term 2024 -- which means that the district court's injunction could remain in place for well over a year. And because the flow of untraceable ghost guns into the Nation's communities is essentially irreversible, the serious harms to the public and the government from respondents' sales during that time would continue even after the injunction ended.

Blackhawk notes (Opp. 9 & n.2) that the government did not seek stays when the district court previously entered some party-specific preliminary injunctions. But the government should not be penalized for forgoing requests for extraordinary emergency relief when this litigation was still in its preliminary stages. And in any event, the public-safety harms caused by ghost guns have become more apparent as this case has progressed: Between March 2023 and July 2023, for example, 13,828 suspected ghost guns were recovered by law enforcement and reported to ATF. Appl. App.

95a. Recent experience also suggests that party-specific relief serves to funnel buyers seeking ghost guns to those businesses permitted by the injunction to sell those guns without serial numbers or background checks.[2]

Second, respondents' briefs further confirm that this Court has already considered and rejected their arguments about the harms that relief would inflict on them. Respondents do not deny that the premise of their opposition to the government's prior application was that a stay would require them to comply with the Rule. Appl. 8-9, 19-20. And respondents simply repeat the same arguments about the harms of compliance here. Most notably, respondents again assert (Blackhawk Opp. 8-10; Def. Distributed Opp. 16-17) that the Rule will cause them financial harm; indeed, Blackhawk continues to rely (Opp. 17) on the same declaration, see Appl. 19.

Blackhawk asserts (Opp. 8) that "[t]he Government has no rebuttal to" the district court's finding that enforcing the Rule "would destroy BlackHawk's business model and force the company to close its doors." But the government has already explained why those arguments are wrong: Respondents may continue to sell firearms, weapon parts kits, and partially complete frames and receivers if they comply with the Act's licensing, recordkeeping, seri-

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[2] See Blackhawk Manufacturing, d/b/a 80 Percent Arms, ATF Rule Update, https://perma.cc/TXD4-BPTK (last visited Oct. 12, 2023) (advertising before the injunction was administratively stayed that "[a]fter the Supreme Court greenlit the ATF's New Rule on a national scale," Blackhawk had obtained an injunction pending appeal ensuring that the company "stand[s] as the last court protected 80% frame and jig manufacturer in the country").

alization, and background-check requirements -- requirements that 80,000 licensed firearms manufacturers and dealers already comply with in millions of sales each year. 23A82 Appl. 37-38. This Court presumably agreed, concluding that the public and government interests in preventing unchecked online ghost-gun sales outweighed any harm respondents might suffer from being required to comply with those straightforward requirements. The Court should adhere to that conclusion now.[3]

II. THE LOWER COURTS LACKED AUTHORITY TO COUNTERMAND THIS COURT'S STAY

When this Court granted a stay, it made an authoritative determination about the status quo that should govern pending appeal and any proceedings in this Court. Respondents still have not identified even a single prior case where a district court responded to this Court's order fixing the relationship between the parties during litigation by entering further relief based on the district court's own reweighing of the merits and the equities. And respondents also cannot justify that unprecedented circumvention of this Court's order.

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[3] Defense Distributed asserts (Opp. 15) that the government's filings below forfeited any "substantive argument" about the propriety of an injunction pending appeal. Neither the district court nor the Fifth Circuit credited that assertion, and it is wrong. As the government has consistently argued, this Court's stay reflects the Court's conclusion the government's merits and equitable arguments support ATF's ongoing enforcement of the Rule. See, e.g., C.A. Doc. 174-1, at 6-8 (Sept. 19, 2023); D. Ct. Doc. 254, at 9 (Aug. 17, 2023). The government was not required to repeat at length arguments that had already been exhaustively briefed in prior stay proceedings before the lower courts.

Respondents emphasize (e.g., Blackhawk Opp. 3-4) that this Court did not issue an opinion and that its stay order did not definitively resolve the merits of this litigation. But the Court's order did speak to precisely the same question that the district court purported to revisit: The proper relationship between the parties during appellate proceedings. And despite being presented with the option of granting the government's application only as to nonparties, this Court instead allowed the government to implement the Rule as to parties and nonparties alike. The lower courts had no authority to countermand that determination. Cf. Morehouse Enterprises, LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 78 F.4th 1011, 1017 n.4 (8th Cir. 2023) (recognizing, in a separate challenge to the Rule, that "[t]he net effect" of this Court's stay order "is that the Final Rule will remain in effect in its entirety while the Fifth Circuit considers the appeal").

Seeking to avoid that conclusion, Defense Distributed insists (Opp. 13) that when this Court granted a stay it did not "rule[] on" respondents' "alternative argument" for party-specific relief. That is wrong. As respondents admit (Blackhawk Opp. 5; Def. Distributed Opp. 13) they asked the Court to limit any stay to nonparties. That was not the sort of "alternative argument" (Def. Distributed Opp. 13) that lower courts are free to consider in the first instance after this Court issues a merits decision and remands a case for further proceedings. Instead, it was a request

to this Court to grant less than the full relief that the government sought. But the Court instead "granted" the government's application and "stayed" the vacatur in full. Appl. App. 49a. The Court thus necessarily rejected respondents' arguments for more limited relief. And the Court did so even though it often grants stays and other emergency relief subject to explicit "except[ions]," United States Army Corps of Eng'rs v. Northern Plains Res. Council, 141 S. Ct. 190 (2020), "condition[s]," Wheaton College v. Burwell, 573 U.S. 958, 959 (2014), or other limitations the Court deems appropriate in light of the merits and the equities, see Appl. 21 n.4.

Respondents thus cannot escape the conclusion that this Court already considered and rejected their arguments for party-specific relief from the Rule during the pendency of the government's appeal. That conclusion is fatal to their position: Respondents do not even attempt to justify the suggestion that lower courts can rely on arguments that this Court has rejected to grant relief that this Court has withheld. Because that is precisely what the district court's injunction did, it should be vacated.

III. RESPONDENTS' REMAINING ARGUMENTS LACK MERIT

Respondents' remaining arguments repeat points made by the lower courts, but without acknowledging the government's rebuttals or otherwise rehabilitating the district court's injunction.

First, like the lower courts, respondents emphasize (Blackhawk Opp. 3; Def. Distributed Opp. 8) that this Court stayed the

district court's summary-judgment order and final judgment "insofar as they vacate" the Rule. Appl. App. 49a. But respondents do not dispute that the Court granted all the relief the government sought; do not deny that the Court has used the same "insofar as" language in past stays without suggesting that it is an invitation to further relief; and do not acknowledge that repeating that routine language here simply ensured that the stay did not disturb uncontested portions of the district court's orders. Appl. 23.

Second, respondents echo (Blackhawk Opp. 9; Def. Distributed Opp. 17-18) the lower courts' determination that an injunction pending appeal was necessary to "preserve the status quo." Appl. App. 40a; see id. at 5a-6a. But once again, respondents made exactly the same arguments in opposing the government's prior stay application. See, e.g., 23A82 Blackhawk Opp. 14. The government has already explained why those arguments are wrong. See 23A82 Reply Br. 18. And the fact that both respondents and the lower courts pervasively rely on arguments that this Court has considered and rejected only further confirms the fundamental problem with the district court's injunction: It is an improper attempt to circumvent this Court's authoritative determination of the parties' rights during the pendency of this litigation.

CONCLUSION

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

Respectfully submitted.

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