

No. 23-852

---

---

In the

**Supreme Court of the United States**

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

v.

JENNIFER VANDERSTOK, ET AL.,  
*Respondents.*

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

**BRIEF OF CALIFORNIA GUN RIGHTS  
FOUNDATION AS AMICUS CURIAE IN SUPPORT  
OF RESPONDENTS**

STEPHEN M. DUVERNAY  
*Counsel of Record*  
Benbrook Law Group, PC  
701 University Ave., Ste. 106  
Sacramento, California 95825  
(916) 447-4900  
steve@benbrooklawgroup.com  
*Counsel for Amicus Curiae*

---

---

**TABLE OF CONTENTS**

Table of Authorities.....ii  
Interest of *Amicus Curiae*.....1  
Summary of Argument.....2  
Argument .....3  
I. Consistent With The Second Amendment Itself,  
Ensuring Home Manufacture Of Firearms  
Continues Is An Appropriate Check On  
Potential Tyranny.....3  
II. Ensuring The Continued Home Manufacturing  
Of Firearms Promotes Legitimate Privacy  
Interests .....9  
Conclusion .....14

## TABLE OF AUTHORITIES

### Cases

<i>Americans for Prosperity Found. v. Bonta</i> , 594 U.S. 595 (2021) .....	13
<i>Americans for Prosperity Found. v. Harris</i> , 182 F. Supp. 3d 1049 (C.D. Cal. 2016).....	13
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008) .....	3, 4, 5
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011) .....	8
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010) .....	3, 6
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995) .....	9
<i>Nixon v. Adm’r of Gen. Servs.</i> , 433 U.S. 425 (1977) .....	9
<i>United States v. Biswell</i> , 406 U.S. 311 (1972) .....	11
<i>United States v. Rahimi</i> , 144 S. Ct. 1889 (2024) .....	6
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977) .....	9

### Statutes

18 U.S.C. § 926(a) .....	6
Cal. Penal Code § 11106(a)(1) .....	11
Cal. Penal Code § 11106(a)(2) .....	11
Cal. Penal Code § 11106(d).....	12
Cal. Penal Code § 14240(a).....	12
Cal. Penal Code § 30352(b)(2).....	12

**Other Authorities**

Aguiano, <i>Leak of California gun owners' private data far wider than originally reported</i> , <i>The Guardian</i> (June 30, 2022).....	13
Ariel Zilber, <i>National Public Data admits hackers stole Social Security numbers in massive breach reportedly affecting nearly all Americans</i> , <i>N.Y. Post</i> (Aug. 19, 2024) .....	10
<i>Blackstone's Commentaries</i> (St. George Tucker ed. 1803).....	4
Bureau of Alcohol, Tobacco, Firearms and Explosives, <i>Enhanced Regulatory Enforcement Policy</i> , <a href="https://www.atf.gov/rules-and-regulations/enhanced-regulatory-enforcement-policy">https://www.atf.gov/rules-and-regulations/enhanced-regulatory-enforcement-policy</a> .....	7
Bureau of Alcohol, Tobacco, Firearms and Explosives, <i>National Tracing Center</i> , <a href="https://www.atf.gov/firearms/national-tracing-center">https://www.atf.gov/firearms/national-tracing-center</a> .....	7
Ellen Nakashima, <i>Hacks of OPM databases compromised 22.1 million people, federal authorities say</i> , <i>Wash. Post</i> (July 9, 2015) .....	10
Joseph Story, <i>Commentaries on the Constitution of the United States</i> (1833).....	4
Kevin Poulsen, et al., <i>Solarwinds Hack Victims: From Tech Companies to a Hospital and University</i> , <i>Wall St. J.</i> (Dec. 21, 2020) .....	10
Matthew Hendrickson, <i>Most owners of assault-style weapons in Illinois appear not to have registered them as required by law</i> , <i>Chicago Sun Times</i> (Jan. 8, 2024) .....	8

Nicholas Johnson, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014).....	6
Noah Webster, <i>An Examination into the Leading Principles of the Federal Constitution</i> , in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (Ford ed. 1888) .....	5
THE COMPLETE BILL OF RIGHTS (Neil H. Cogan ed., 2d ed. 2015) .....	4
THE FEDERALIST NO. 28 (J. Cooke ed., 1961).....	3
Yee, <i>Leak of California concealed-carry permit data is larger than initially reported</i> , L.A. Times (June 29, 2022) .....	13

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

California Guns Rights Foundation (“CGF”) is a non-profit organization that serves its members, supporters, and the public through educational, cultural, and judicial efforts to advance Second Amendment and related rights. CGF conducts research, promotes constitutionally-sound public policy, engages in litigation, educates the public about federal, state, and local laws, and performs other charitable programs. This Court’s interpretation of statutes and administrative law principles directly impacts CGF’s organizational interests and the rights of CGF’s members and supporters. And CGF’s experience litigating over the privacy interests associated with gun ownership gives it a unique perspective to address the privacy issues implicated by the Rule at issue here. It is currently litigating the State of California’s decision to hand over the personally identifying information of every person who has purchased a firearm in California for the past 28 years to anti-gun rights “researchers” who perform multi-year studies tracking gun owners. Persons who manufacture their own firearms without government-mandated disclosures would not be subject to this remarkable invasion of privacy.

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Start with an uncomfortable truth, hard-learned by the founding generation: That a central method for a despotic government to exercise power is through disarming the common people. The Second Amendment was thus designed to protect liberty by providing a check against the prospect of government tyranny. And the Civil War and its aftermath proved in even starker terms that the right to keep and bear arms is essential to preserve and defend liberty.

Against this backdrop, many firearm owners are sensitive to the compilation of government-controlled ownership lists that can facilitate efforts by the government to disarm them. Ensuring that law-abiding, responsible citizens may continue the private manufacture of firearms in common use without government interference or knowledge, just as they have since the Founding Era, guards against the doomsday scenario of government tyranny.

Furthermore, firearms owners have a legitimate privacy interest in their choice to build and keep their firearms at home: the very practice is often referred to as “private manufacturing.” Compulsory disclosure of a private manufacturer’s name and address to a federal firearms licensee (FFL) imperils these interests. Once such data is in the hands of an FFL, it is not merely subject to the all-too-common risk of data breaches. Given that FFLs are subject to the government’s regulatory command, that data can also be used for any purpose the government dictates. *Amicus* recounts its experience with the

State of California’s trampling of gun owners’ privacy interests: California now requires that gun owners’ private data be turned over to anti-gun-rights researchers so that they can be “followed” in massive, multi-year studies. In short, the privacy interests of private gun manufacturers deserve protection.

The decision below should be affirmed.

### ARGUMENT

#### **I. Consistent With The Second Amendment Itself, Ensuring Home Manufacture Of Firearms Continues Is An Appropriate Check On Potential Tyranny.**

We begin with the historical reality that some might consider uncomfortable: The right to keep and bear arms does not exist merely to facilitate defense against fellow citizens. It also exists to defend against—and potentially deter—the horrible prospect of government tyranny.

As this Court explained in *Heller*, “[d]uring the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.” *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). And the “Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution’s assignment of only limited powers to the Federal Government.” *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010); *see, e.g.*, THE FEDERALIST NO. 28, at 178 (Alexander Hamilton) (J. Cooke ed., 1961) (“If the representatives of the



people betray their constituents, there is then no resource left but in the exertion of that original right of self-defence, which is paramount to all positive forms of government.”); Tench Coxe, “A Pennsylvanian” (June 18, 1789), in *THE COMPLETE BILL OF RIGHTS* 296, 296 (Neil H. Cogan ed., 2d ed. 2015) (“As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear their private arms.”). In short, at the Founding “[i]t was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.” *Heller*, 554 U.S. at 599.

Post-ratification commentary strikes a similar chord in recognizing the essential role of the Second Amendment as a bulwark against tyranny. Justice Story explained that “[t]he right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers” and “enable[s] the people to resist and triumph over them.”<sup>3</sup> Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (1833); see also 1 *Blackstone’s Commentaries*, Editor’s App. 300 (St. George Tucker ed. 1803) (observing that the Second Amendment is “the true palladium of liberty” because “[t]he right of self defense is the first law of nature”; “in most governments it has

been the study of rulers to confine this right within the narrowest limits possible[,]” and when “the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction”). As Noah Webster succinctly put it, “[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed.” Noah Webster, *An Examination into the Leading Principles of the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (Ford ed. 1888).

Many firearms owners are sensitive to another reality: The more information the government has about its citizens’ firearms, the easier would be the task of disarming them to impose tyranny. “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.” *Heller*, 554 U.S. at 608–09 (quoting J. Story, *A Familiar Exposition of the Constitution of the United States* § 450 (reprinted 1986)). Allowing citizens to continue making guns in common use without government interference or knowledge, just as they have since the Founding Era, guards against these doomsday scenarios.

The Court recently recounted how the link between disarmament and tyranny carried through at the time of the Fourteenth Amendment’s adoption:

The spark that ignited the American Revolution was struck at Lexington and Concord, when the British governor dispatched

soldiers to seize the local farmers' arms and powder stores. In the aftermath of the Civil War, Congress's desire to enable the newly freed slaves to defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States. As a leading and early proponent of emancipation observed, "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." Cong. Globe, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens).

*United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (citation omitted); see also *McDonald*, 561 U.S. at 776–77; Nicholas Johnson, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* 78–83 (2014).

These concerns cannot be dismissed as paranoid on the grounds that lodging serial numbers with an FFL is not the same thing as a "government list," or that federal law nominally prohibits the Attorney General from establishing "any system of registration of firearms, firearms owners, or firearms transactions." 18 U.S.C. § 926(a). First, Congress can change the law at its pleasure. Second, what constitutes an Attorney General "registration" is not defined; is there a meaningful difference between an after-the-fact compilation of ATF forms and a "registry," for instance?

And third, in any event, a separate federal statute is rapidly operating to centralize huge numbers of FFL records with the Attorney General: Under 18 U.S.C. § 923(g)(4), when FFLs go out of business without a successor, they must deliver all of their records to the Attorney General. Given the legislative assaults on firearms businesses at all levels of government, many FFLs are being forced out of business, and their records go straight to the Attorney General. Indeed, the ATF boasts on its website that, as of February 2024, it was “receiv[ing] an average of *5 million out-of-business records per month*,” and that it had already “received several hundred million such records.” Bureau of Alcohol, Tobacco, Firearms and Explosives, *National Tracing Center*, <https://www.atf.gov/firearms/national-tracing-center>. In other words, a massive list of names and addresses of firearms owners already resides with the Attorney General, and the list grows longer with each gun store closure.<sup>2</sup> For these millions of gun owners, the act of providing their data to FFLs has operated, in fact, as a form of government registration.

Then-Judge Kavanaugh has emphasized that “there is not, and never has been, a ‘comprehensive federal system

---

<sup>2</sup> ATF itself has sped this process along with its so-called “Zero Tolerance” crackdown on FFLs. In 2023, it revoked 157 FFL licenses after conducting inspections (up from 88 in 2022), and 80 FFLs chose to cease operations rather than litigate. Bureau of Alcohol, Tobacco, Firearms and Explosives, *Enhanced Regulatory Enforcement Policy*, <https://www.atf.gov/rules-and-regulations/enhanced-regulatory-enforcement-policy>.

of firearm registration.” *Heller v. District of Columbia*, 670 F.3d 1244, 1292 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citing Council Comm. On Pub. Safety & The Judiciary, Comm. Rep. On B. 17-843, at 3 (D.C. 2008)). He explained that “highly unusual” state or local registration requirements, unlike licensing requirements, are not directed at ensuring the safe-handling of firearms, but rather “are often seen as half-a-loaf measures aimed at deterring gun ownership.” *Id.* at 1291. So too here. The Final Rule serves primarily to chill the exercise of Second Amendment protected rights.

In short, firearms owners have ample reason for concern that the federal government will bolster its already-enormous list of firearms owners.<sup>3</sup>

---

<sup>3</sup> Illinois’ efforts to create an “assault weapons” registry is illustrative: Only 1% of the State’s 2.5 million firearm permit holders registered a covered firearm before the ban took effect earlier this year. Matthew Hendrickson, *Most owners of assault-style weapons in Illinois appear not to have registered them as required by law*, Chicago Sun Times (Jan. 8, 2024), <https://chicago.suntimes.com/politics/2024/1/5/24023878/assault-weapons-ban-illinois-registered-legal>. This experience shows both (1) the political will to impose greater registration requirements, and (2) the widespread fear among gun owners that a government list is the first step to confiscation.

## II. Ensuring The Continued Home Manufacturing Of Firearms Promotes Legitimate Privacy Interests.

Relatedly, firearms owners have a legitimate privacy interest in their choice to build and keep their firearms at home. Indeed, the very practice at issue here is typically referred to as “private manufacturing.” The government assures without a hint of irony that “the Rule repeatedly disclaims any intent to regulate the *private* making of firearms by persons permitted to possess them,” Pet. Br. 47 (emphasis added), provided, of course that the home manufacturer discloses their “private” activity to an FFL—along with their name and address.

This Court has recognized a constitutional privacy interest in “avoiding disclosure of personal matters.” *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977). As with the First Amendment, see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 336 n.1 (1995), in the Second Amendment sphere individuals have many legitimate privacy interests relating to their gun ownership. To name a few, firearms owners appropriately wish to avoid: making their homes targets for crime, social stigma in many parts of the country, and government intrusion.

Once an FFL (or even the government) gathers data about one’s firearm ownership, there is no assurance that that fact will remain private. Several high-profile security breaches underscore the significant risk that even the most sensitive personal information compiled by the federal government is at risk. See, e.g., Ellen Nakashima, *Hacks of OPM databases compromised 22.1 million people, federal authorities say*, Wash. Post (July 9, 2015),

<https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/hack-of-security-clearance-system-affected-21-5-million-people-federal-authorities-say/> (detailing cyberattack that exposed “every file associated with an OPM-managed security clearance application since 2000”); Kevin Poulsen, et al., *Solarwinds Hack Victims: From Tech Companies to a Hospital and University*, Wall St. J. (Dec. 21, 2020), <https://www.wsj.com/articles/solarwinds-hack-victims-from-tech-companies-to-a-hospital-and-university-11608548402> (detailing Russian cyberattack where “[a]t least six federal agencies, including the departments of State, Homeland Security, Commerce and Energy, were hacked as part of the campaign”); Ariel Zilber, *National Public Data admits hackers stole Social Security numbers in massive breach reportedly affecting nearly all Americans*, N.Y. Post (Aug. 19, 2024), <https://nypost.com/2024/08/19/business/national-public-data-admits-hackers-stole-social-security-numbers/>. Public disclosure of addresses where guns are located, of course, would provide a roadmap for criminals to get guns without paying for them.

Moreover, FFLs hold gun owners’ data as virtual adjuncts to the ATF. As the Court has recognized when approving the Gun Control Act’s authorization of warrantless searches of FFLs, for example, “[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.” *United States v. Biswell*, 406 U.S. 311, 316 (1972). With effective

control of this data, the ATF or a future Congress can direct that it be used for any number of purposes that further undermine privacy interests.

*Amicus* has particular experience that highlights the legitimacy of these concerns. Since 1996, California has required firearm purchasers to provide extensive personal data at the time of any handgun purchase, and has collected the same information for all long gun purchases since 2014. This data includes fingerprints, home address, driver’s license number, phone numbers, and other identifying information. For 25 years, California law assured firearm purchasers that this data would only be provided within the government for law-enforcement purposes. Cal. Penal Code § 11106(a)(1) (stating that the purpose of collecting data in California’s Automated Firearms System is “to assist in the investigation of crime, the prosecution of civil actions by city attorneys . . . , the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property”); *id.*, subd. (a)(2) (restricting the Attorney General’s authority to share AFS information except “upon proper application” to specified state officers for criminal or civil law enforcement purposes, including peace officers, district attorneys and prosecutors, city attorneys pursuing civil law enforcement actions, probation and parole officers, public defenders, correctional officers, and welfare officers).

This all changed in 2021, when the California Legislature passed AB 173, which now requires that all of this data—along with data collected in California’s “Ammunition Purchase Records File”—be turned over to the University of California, Davis “Firearm Violence Research



Center” for “research purposes.” Cal. Penal Code §§ 11106(d); 30352(b)(2).<sup>4</sup>

*Amicus* has sued on behalf of its members to enjoin the operation of this law. *Barba v. Bonta*, San Diego Cnty. Super. Ct. No. 37-2022-00003676-CU-CR-CTL. In response, California has argued that sharing this detailed individual-level personal information with researchers is necessary to “link” individuals to other datasets and “follow” these unwitting subjects for years, which enables researchers to dig up additional information on gun owners and peer even further into their lives. And all of this is done without firearm owners’ knowledge or consent. In other words, California law now requires that gun owners’ personal data be transferred to researchers, who are hostile to their choice to exercise their Second Amendment rights, so they can monitor them for the rest of their lives.

California’s assurances that all of this data will not be shared more publicly ring quite hollow in light of the state’s dismal track record. In June 2022, the California Department of Justice caused a massive data breach that leaked personal identifiable information from the state’s firearm databases: It unlawfully disclosed the “names,

---

<sup>4</sup> AB 173 also authorizes the California Department of Justice to share information from the firearm and ammunition purchase databases with “any other nonprofit bona fide research institution accredited by the United States Department of Education or the Council for Higher Education Accreditation for the study of the prevention of violence.” Cal. Penal Code §§ 11106(d); 14240(a); 30352(b)(2).

dates of birth, gender, race, driver’s license numbers, addresses and criminal histories” for all concealed-carry applicants from the ten-year period 2011–2021. Yee, *Leak of California concealed-carry permit data is larger than initially reported*, L.A. Times (June 29, 2022), <https://lat.ms/3Pf3njS>; Aguiano, *Leak of California gun owners’ private data far wider than originally reported*, The Guardian (June 30, 2022), <https://bit.ly/3yYLMad> (“The California department of justice admitted it had exposed the personal information of as many as hundreds of thousands of gun owners in the state, in a controversial data breach that appears of a far broader scale than the agency first reported.”).

That data breach is just one of many missteps by the California Department of Justice. As this Court recounted in *Americans for Prosperity Foundation v. Bonta*, the Attorney General’s office suffered multiple “security breaches” within the context of First Amendment litigation over the compelled disclosure of charitable organizations’ donors. 594 U.S. 595, 603–05 (2021); see *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056–57 (C.D. Cal. 2016) (describing the Attorney General’s failure to maintain the confidentiality of charities’ tax filings).

In sum, *Amicus*’ members, and firearm owners across the Nation, have legitimate privacy interests in home manufacture of firearms for personal use.

**CONCLUSION**

The decision below should be affirmed.

Respectfully submitted,

STEPHEN M. DUVERNAY  
*Counsel of Record*  
Benbrook Law Group, PC  
701 University Ave., Ste. 106  
Sacramento, California 95825  
steve@benbrooklawgroup.com

*Counsel for Amicus Curiae*

August 20, 2024