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 *AMICI CURIAE* GUN VIOLENCE PREVENTION GROUPS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Brady Center to Prevent Gun Violence ("Brady"), Everytown for Gun Safety Support Fund ("Everytown"), and March For Our Lives ("MFOL") (the "Gun Violence Prevention Groups") submit this brief as *amici curiae* in support of the Government and reversal of the Fifth Circuit's decision.

The Gun Violence Prevention Groups are leading authorities on law and policy related to the prevention of gun violence. Brady is the nation's longest-standing nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and advocacy. Everytown is the education, research, and litigation arm of the nation's largest gun violence prevention organization. MFOL is a nationwide youth organization committed to gun-violence prevention. *Amici* have extensively studied ghost guns and fought for measures to curtail the rise of ghost guns and ensure public safety.

Amici regularly litigate issues involving the interpretation of federal firearms laws and submitted *amicus* briefs in earlier phases of the proceedings in

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[1] *Amici* certify that no counsel for any party helped author this brief and no entity or person other than *amici* and their counsel made any monetary contribution toward this brief.

this Court,[2] in the action below,[3] and in multiple parallel litigations involving ghost guns.[4]

INTRODUCTION

A ghost gun is an operational, unserialized, deadly, and untraceable weapon that can be assembled at home in as little as twenty minutes from a core component (*i.e.*, a near-finished frame or receiver) or a "kit"[5] freely available for purchase online—with no background check, no serial number, and no questions asked. This case centers on the regulatory authority of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF") to stop the unregulated sale of the core components used to assemble "ghost guns," including in "kit" form.

Purchasing unregulated ghost gun components is the easiest and most appealing form of purchase for those prohibited by federal law from possessing guns,

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[2] Gun Violence Prevention Groups Br., *Garland, v. VanDerStok*, 23A82 (S. Ct. Aug. 1, 2023).

[3] Gun Violence Prevention Groups Br., *VanDerStok, et al. v. Merrick Garland, et al.*, 22-CV-691, ECF No. 59 (N.D. Tex. Sept. 8, 2022); Gun Violence Prevention Groups Br., *VanDerStok, et al. v. Garland, et al.*, No. 22-11071 (5th Cir. Dec. 27, 2022).

[4] Gun Violence Prevention Groups Br., *Division 80 LLC v. Merrick Garland, et al.*, 3:22-CV-00148, ECF No. 24-1 (S.D. Tex. July 8, 2022); Gun Violence Prevention Groups Br., *Morehouse Enterprises, LLC, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, 22-CV-116, ECF No. 66 (D.N.D. Aug. 17, 2022); Gun Violence Prevention Groups Br., *Morehouse Enterprises, LLC, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.,* No. 22-2812 (8th Cir. Dec. 5, 2022).

[5] A ghost gun "kit" often consists of an unfinished frame or receiver and a jig or tools for finishing that frame or receiver (*i.e.*, making it operational).

such as persons who have committed violent felonies; minors; and persons subject to restraining orders for domestic abuse. This form of purchase is likewise ideal for any would-be criminal hoping to skirt the detection of law enforcement personnel. To a law-abiding gun owner, comporting with commonplace firearm regulations such as background checks is standard practice. But, for any person barred from firearm ownership or who intends to commit a crime using a firearm, such regulation is a serious barrier to purchase. Unsurprisingly, then, such individuals have sought out untraceable ghost gun components and kits for purchase in droves.

Ghost gun manufacturers and sellers are well aware of this reality. Indeed, they have created it and profited handsomely from it. Ghost gun manufacturers and sellers have marketed their products as "ridiculously easy" for amateurs to assemble into a "reliable firearm." *Infra* pp. 4–6. This marketing boasts that the "beauty" of their product is in "avoiding" the critical Gun Control Act restrictions on gun sales that keep the public safe. *Infra* p. 9.

The contempt of ghost gun purveyors for the Gun Control Act's life-saving restrictions is plain. In one of their ads, for instance, a seller of ghost gun components places the image of a middle finger where the serial number would be on a gun, with the tag-line: "Here's your serial number." *Infra* pp. 9–10.

[6]

The marketing campaigns rolled out by ghost gun sellers also speak for themselves. These campaigns have emphasized that ghost guns are designed to be converted into operable firearms quickly and easily. For instance, advertisements have promised "dummy proof" assembly[7]; assembly that is "ridiculously easy," even "for a non-machinist to finish"[8]; and "one of the

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[6] *Untraceable: The Rising Specter of Ghost Guns*, Everytown for Gun Safety ("Ghost Guns Report") (May 14, 2020), at 13, https://perma.cc/3Q63-G8CU.

[7] *1911 Phantom Jig*, StealthArms.net, https://perma.cc/L6984N5H (last visited June 29, 2024) (advertising a "phantom jig" that was "[d]esigned to be dummy proof").

[8] 80% Arms Home Page, 80percentarms.com, https://perma.cc/6EU9-5BS5 (last visited June 29, 2024) (advertising a jig offered for sale "that makes it ridiculously easy for a non-machinist to finish their 80% lower in under 1 hour with no drill press required").

simplest processes to date" to "build with ease."[9] Advertisements and promotional reviews also have boasted that amateurs can "go from opening the mail to a competition or defense ready pistol in under 15 minutes"[10]; that "building time doesn't take too long" so "[w]ithin an hour or two, you should be breaking it in at the range"[11]; that one need not be "handy" or "crafty" to be able to "complete a P80 frame in under 30 minutes"[12]; that one can complete the assembly in "record setting sub 45 minute time"[13]; and that all one needs is "simple tools" and to "follow basic instructions" to "turn an 80 lower receiver into an effective and reliable firearm."[14]

This ease and speed of assembly is as-advertised. Amateurs and experts alike have assembled kits in an hour or less.[15] In real-world examples, ghost guns have been assembled in "less than twenty-five minutes" with basic tools from a hardware store,[16] in

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[9] *City of Syracuse v. Bur. of Alcohol, Tobacco, Firearms & Explosives*, 20-CV-06885 ("*City of Syracuse*"), Dkt. 64 at 13, ¶ 26 (S.D.N.Y. Dec. 9, 2020).

[10] *80% Arms Introduces World's First Modular Polymer 80% Pistol, GTS-9*, The Shooting Wire, https://perma.cc/XXQ9-XHRZ (last visited June 29, 2024).

[11] Ghost Guns Report, *supra* note 6, at 10 & n.13.

[12] *City of Syracuse*, Dkt. 64 at 15, (S.D.N.Y. Dec. 9, 2020).

[13] *Id.* at 14.

[14] *Id.*

[15] Glenn Thrush, *'Ghost Guns': Firearm Kits Bought Online Fuel Epidemic of Violence*, N.Y. Times (Nov. 14, 2021), https://perma.cc/3T7W-EWLQ ("[An] amateur can . . . turn [a kit] into a working firearm in less than an hour." (emphasis added)).

[16] *People v. Blackhawk Mfg. Grp., et al.*, CGC-21-594577, Compl. ¶¶ 74, 115, (Cal. Super. Ct. Aug. 18, 2021).

"less than nineteen minutes,"[17] and "in approximately an hour and a half."[18] In earlier ghost gun litigation, one individual who had "never attempted to build a firearm using an unfinished frame or receiver," watched "videos on YouTube for thirty minutes," then built "a complete pistol from [a kit] in 86 minutes."[19]

Nothing in history or tradition impedes ATF from issuing regulations to foil this deadly and horrifying form of commerce. There is no history or tradition of gunmaking technology that allows total amateurs to assemble a functional firearm at home in minutes. Notwithstanding the challengers' suggestions to the contrary, those who today sell and assemble ghost guns are thus no more part of any claimed tradition of "gunsmithing" than are those who order and assemble IKEA furniture are part of a tradition of handcrafting furniture. *Infra* p. 21.

In order to protect public safety, the Gun Control Act of 1968 (the "Act"), Pub. L. No. 90-618, 82 Stat. 1213, as amended, subjects "firearms" to several interlocking requirements: background checks to prevent sales to persons convicted of crimes and other unauthorized individuals; licensing for manufacturers, importers, and dealers to ensure that firearms are built and sold responsibly; and serialization to help law enforcement trace firearms back to their first retail sale. 18 U.S.C. §§ 921–34.

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[17] *Id.* at ¶ 73.

[18] *City of New York v. Arm or Ally LLC*, 22-CV-5525, ECF No. 9, at 11 (S.D.N.Y. June 29, 2022).

[19] *City of Syracuse*, Dkt. 64-34, at ¶¶ 7, 10, 11 (S.D.N.Y. Dec. 9, 2020).

Congress adopted these requirements to "prevent guns from falling into the wrong hands" and "assist law enforcement." *Abramski v. United States*, 573 U.S. 169, 172–80 (2014).

The recent proliferation of "ghost guns" is a direct affront to the Act and its law-and-order objectives. Were Respondents correct that these components and kits are not "firearms" under the Act, ghost guns would once again proliferate among criminals and others prohibited from acquiring a firearm—as they did in the years prior to promulgation of ATF's regulatory action here[20]—all while undetectable to law enforcement. The Act authorizes regulations that, as ATF has done, stop such circumvention.

The Fifth Circuit failed to appreciate all of these realities. Among other things, the Fifth Circuit suggested that it is speculative that ghost gun kits and components will be "completed" at some "ill-defined point in the future" into operational guns; that, to the extent the decision blasts open a "loophole[]" in the Act that could "gut the law," the blame lies with Congress; and that ghost guns fit within a "gunsmithing" tradition traceable to before the "nation's founding." Pet. App. 8a, 23a, 24a, 28a. But, as we demonstrate here, these contentions all could not be further from the truth.

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[20] *See*, *e.g.*, Brady, *Ghost Guns*, https://perma.cc/LM4YXBJF (last visited July 1, 2024) (noting that, "Between 2016 and 2021, the number of ghost guns recovered by law enforcement agencies nationwide increased by 1,000%, with over 19,000 ghost guns recovered by law enforcement in 2021 alone").

The ATF acted well within its authority in promulgating the rule at issue. *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (the "Rule"). *Amici* write to highlight several of the reasons why. The Fifth Circuit's judgment should be reversed.

ARGUMENT

I. THE RULE RECOGNIZES THE URGENT THREAT GHOST GUNS PRESENT

Ghost guns pose a grave threat to public safety and the Fifth Circuit did not—and could not—hold otherwise. *See*, *e.g.*, Pet. App. 28a (not contesting the "important public policy interests" at stake or the risk that "bad actors" will leverage the Fifth Circuit's ruling to "completely circumvent" the Act); *id.* at 32a (not contesting the "important policy concerns put forth by ATF"); *id.* at 39a (hypothesizing that ATF in fact attempted to sweep more broadly than "ghost guns," but not denying the dangers of these guns). By design, ghost gun kits and near-complete frames and receivers are as easy to obtain and assemble as they are difficult to trace. That is a lethal combination.

The Fifth Circuit implied that the intended use of ghost gun kits and near-complete frames and receivers is a mystery. *See, e.g.*, Pet. App. 23a–24a (expressing uncertainty whether these "objects . . . could, if manufacture is completed, become functional at some ill-defined point in the future"). But there is no mystery. Prior to the Rule, purveyors of ghost gun kits and core components made clear that the entire purpose of their wares was quick assembly into untraceable, unserialized guns. Moreover, this

industry specifically targeted buyers interested in evading a background check or serialization.

For example, many advertisements "explicitly celebrat[e] the lack of a serial number."[21] And, as noted above, one seller promoted an "80% AR15 lower receiver" with an engraving of a man holding up a middle finger with the tag-line: "Here's your serial number."[22] Or, as another example, a 2023 settlement between the City of Los Angeles and Polymer80, "the nation's biggest seller of 'ghost gun' parts,"[23] cited numerous emails demonstrating that Polymer80 had information that its ghost guns were being purchased by minors. Polymer80 assured customers that its kit was "basically a pistol in a box," that its kits did "not require a serial number," and that the "beauty" of this product was avoiding "the need for a[] [Federal Firearms Licensee]" to transfer or sell it.[24] And in internal emails, Polymer80's CEO acknowledged that they "get calls periodically . . . because some 16 year old kid has ordered a pistol using his parents [sic] address and credit card."[25] It is no wonder that ghost guns have become the weapon of choice for criminals

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[21] Ghost Guns Report, *supra* note 6, at 12.

[22] *Id.* at 13.

[23] Tom Jackman, *Philadelphia Becomes Fourth City to Ban Largest Ghost Gun Parts Dealer*, Wash. Post (Apr. 14, 2024), https://perma.cc/HXA7-LKCC.

[24] *People v. Polymer80, Inc.*, 21STCV06257, Stipulated Judgment, p. 23, 25, (Los Angeles Super. Ct. Aug. 24, 2023) https://perma.cc/JLX3-6XPJ.

[25] *Id.* at 33.

and others who are prohibited from owning firearms.[26] Or, to take another disturbing example, JSD Supply included the following in its ghost gun marketing materials: that its wares were available "without the paperwork" and "off-the-books," that its ghost gun kits were sold with "[n]o serialization" and "no background check," that its kits "are used to create fully functional firearms with no registration or serial numbers required" and "with absolutely no paperwork," that "without serialization" on the wares there was "no way to track your purchase," and that it allowed those "looking at having a handgun" to do so "without the traditional headaches of background checks, registration, and serialization."[27] The Court need not ignore this troubling reality.

As discussed below, the Act's inclusive definition of "firearm" demands a realistic assessment of whether items are designed to be or can readily be converted into an operable firearm. The reality appreciated by the Rule, trumpeted by ghost gun purveyors, and disregarded by the Fifth Circuit, is that anyone with an internet connection, an hour or so, and

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[26] *Ghost Guns Recoveries and Shootings,* Everytown for Gun Safety, https://perma.cc/JKB7-ED45 (last visited June 29, 2024); Graham Ambrose, Note, *Gunmaking at the Founding*, 77 Stan. L. Rev. at 4 (forthcoming 2025) ("In California, somewhere between one quarter and half of firearms recovered at crime scenes are ghost guns, and most suspects caught with them cannot legally possess firearms at all."); Press Release, Dep't of Justice, Fact Sheet: Update on Justice Department's Ongoing Efforts to Tackle Gun Violence (June 14, 2023) https://perma.cc/3YN9-UYYB.

[27] Complaint ¶ 49, *Boyd v. Nott an LLC d/b/a JSD Supply, et al.* 24-000304-NP (Mich. 22d Jud. Circuit Mar. 11, 2024) (collecting sources).

basic household tools can convert ghost gun kits and near-complete frames and receivers into deadly weapons.[28]

II. THE FIFTH CIRCUIT'S RULING DEFIES THE ACT'S TEXT

The Act defines "firearm" as follows:

> (A) any weapon (including a starter gun) which will or *is designed to or may readily be converted* to expel a projectile by the action of an explosive; (B) *the frame or receiver of any such weapon*; (C) any firearm muffler or firearm silencer; or (D) any destructive device.

18 U.S.C. § 921(a)(3) (emphases added).

Amici agree with the Government that "firearm" encompasses ghost-gun kits and nearly finished frames and receivers. Gov't Br. 18–40. *Amici* submit that the Rule's classification of nearly finished frames and receivers as firearms is further compelled by the relationship between subparagraphs (A) and (B) of 18 U.S.C. § 921(a)(3).

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[28] Following the Rule's enactment, many unserialized gun kits are thankfully no longer available for online purchase. *See, e.g.*, P80 80% kit, *Pistol Parts Kit*, Polymer80, https://polymer80.com/partsandaccessories/partskits/ (last visited June 30, 2024). But ghost gun manufacturers have been known nonetheless to employ creative marketing not only to attract customers, but also to peddle "the illegal production of untraceable ghost guns." *See* Complaint for Damages & Injunctive Relief ¶¶ 28-30, *California v. Coast Runner Industries, Inc.,* No. 37-2024-00020896CNC (San Diego Super. Ct. May 5, 2024) (following a California bar on sales, the "Ghost Gunner" was subsequently rebranded and sold as the "Coast Runner").

"Firearm" is defined to include the "frame or receiver of any such weapon," and "such weapon" in (B) refers back to (A), which includes "any weapon" that "is designed to or may readily be converted to expel a projectile by the action of an explosive." By referring to "the frame or receiver of any *such* weapon" (emphasis added), (B) incorporates the description of "weapon" in (A), which covers both items already configured to fire *and* items that are "designed to or may readily be converted" into operable firearms. *See Slack Techs., LLC v. Pirani*, 598 U.S. 759, 761, 761 (2023) ("'[S]uch' usually refers to something that has already been described . . . .").[29] In other words, because subparagraph (A) encompasses not-yet-complete "weapon[s]," it necessarily follows that the reference to "frame or receiver of any *such* weapon" in

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[29] *See also, e.g.*, *Loc. Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 81 (2d Cir. 2003) ("'any such action' . . . refers back to" the phrase providing a right to "institute an action"); *Standard Oil Co. of Cal. v. United States*, 685 F.2d 1337, 1343 (Cl. Ct. 1982) ("'Such' refers back to the first clause of the sentence . . . ."); *Nicholas v. Saul Stone & Co.*, 224 F.3d 179, 185 (3d Cir. 2000) ("The phrase 'such action' . . . refers back to the immediately preceding sentence . . . ."); *United States v. Dotson*, No. 11-cr-00056, 2012 WL 76139, at *3 n.6 (S.D. Ind. Jan. 10, 2012) ("any such weapon" in 18 U.S.C. § 921(a)(3)(B) "refers back [to] section (A)"); *New York v. Arm or Ally, LLC*, No. 22-cv-06124, 2024 WL 756474, at *6–7 (S.D.N.Y. Feb. 23, 2024) (explaining that "Subsection (B)'s internal reference to 'any such weapon' described in subsection (A) does not make the two subsections mutually exclusive" and that "'any such weapon' in subsection (B)" makes it hard to imagine that Congress meant to limit subsection (A)'s reference to items "designed to" or that "may readily be" converted to that section).

(B) includes not-yet-complete frames or receivers, so long as they are "designed to" be or may "readily be converted" into the frame or receiver of an operable firearm. 18 U.S.C. § 921(a)(3) (emphasis added).

The Fifth Circuit disregarded this textual link between (A) and (B), principally concluding that Congress's omission of the "designed to or may readily be converted" language in (B) signals that "Congress explicitly declined to use such language in regard to frames or receivers." Pet. App. 17a.

The Fifth Circuit's siloed reading of (A) and (B) cannot be squared with the Act's text. As discussed, the phrase "any such weapon" links subsection (B) to subsection (A). Subparagraph (A) refers to "weapons" that are "designed to" be or that "may readily be converted" into an operable firearm, and (B) immediately refers back to "any *such* weapon" (emphasis added), thus incorporating the description from (A). *Supra* p. 12 & n.29. As Judge Oldham's concurrence noted, "[w]ith its placement immediately following (A), we can easily understand (B)'s 'any such weapon' language to incorporate the definition of 'weapon' in (A)." Pet. App. 57a.

The Fifth Circuit's contrary ruling that subsection (B) allows no "flexibility" such that only complete frames and receivers are "firearms," Pet. App. 17a, also offends common sense. That ruling "makes no sense" because it would mean "something less than a fully functional receiver could never be a receiver regardless of the circumstances," even if it were "missing . . . one pinhole or dimple which could easily be drilled," despite the fact that the Act "was revised

to" adopt an "inclusive" definition of firearm not subject to ready evasion. *California v. ATF*, No. 20-cv-06761, 2024 WL 779604, at *18 n.11 (N.D. Cal. Feb. 26, 2024) (cleaned up). Nor, as other courts have pointed out, would it have made sense for Congress to limit the Act to complete frames and receivers when "the plain language of the statute . . . clearly defined 'firearms' more broadly than a fully operational weapon." *New York v. Arm or Ally, LLC,* No. 22-cv-06124, 2024 WL 756474 (S.D.N.Y. Feb. 23, 2024), at *7 (cleaned up); *see Morehouse Enters., LLC v. ATF*, No. 22-cv-00116, 2022 WL 3597299, at *6 (D.N.D. Aug. 23, 2022). Indeed, the Fifth Circuit previously (properly) applied the Act to incomplete firearms in *United States v. Ryles*, 988 F.2d 13 (5th Cir. 1993), and attempted to distinguish *Ryles* here on the grounds that the unfinished firearm in *Ryles* took just "thirty seconds" to complete. Pet. App. 25a–26a. But that is a disagreement with how close a not-yet-complete gun must be to completion to be "readily" capable of completion, not a disagreement with the Act's coverage of unfinished firearms.

In focusing on how close to complete a firearm must be to be "readily" capable of completion, the Fifth Circuit neglected the Act's inclusion of materials "*designed* to . . . be converted" into a complete firearm, 18 U.S.C. § 921(a)(3) (emphasis added). There is no dispute that the kits and other items here were designed for one purpose only: to be converted into operable firearms. This Court could dispose of this case on that basis alone.

Under the Fifth Circuit's ruling, ghost gun kits and their key components are exempt from the Gun

Control Act's protections entirely: commercial licensing, background checks, recordkeeping, and serialization. Thus, as the Fifth Circuit would have it, a person suffering from severe mental illness with a history of violent felony convictions could go online and procure the materials needed to quickly assemble an unserialized ghost gun that is invisible to law enforcement. No reasonable reading of the Act requires that result.

III. THE RULE DOES NOT IMPAIR THE RIGHTS OF LAW-ABIDING GUN OWNERS

Respondents invoke the Second Amendment and the constitutional-avoidance canon to muddle what should be a straightforward statutory analysis. Defense Distributed Cert. Opp. 22, *Garland, v. VanDerStok*, 23852 (S. Ct. Aug. 1, 2023); VanDerStok Cert. Opp. 28–29, *Garland, v. VanDerStok*, 23852 (S. Ct. Aug. 1, 2023). This approach is wrong for the reasons the Government explains. Gov't Br. 46–47. The constitutional-avoidance canon has no bearing here because the Rule's implementation of the Act is fully consistent with the Second Amendment.

This Court analyzes the Second Amendment in two steps. First, the challenger must show that the Second Amendment's "plain text covers an individual's conduct." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). If not, the analysis ends. If so, the conduct is "presumptively protect[ed]" but, at step two, the Government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 7, 24. As this Court recently stressed, the Second

Amendment is "not . . . a law trapped in amber," and it "permits more than just those regulations identical to ones that could be found in 1791"—thus, a "challenged regulation [that] does not precisely match its historical precursors . . . 'still may be analogous enough to pass constitutional muster.'" *United States v. Rahimi*, No. 22-915, 2024 WL 3074728, at *6 (S. Ct. Jun. 21, 2024) (quoting *Bruen*, 597 U.S. at 30). The question is whether a gun regulation "comport[s] with the principles underlying the Second Amendment." *Id.* at 6.

Citing an article by Joseph Greenlee—a lawyer who works for the National Rifle Association and who recently worked for the Firearms Policy Coalition[30]—Respondents contend that the Rule "creates a substantial question under the Second Amendment," in light of the historical tradition of "self-manufactur[ing] . . . firearms." VanDerStok Cert. Opp. 28–29 *Garland, v. VanDerStok*, 23852 (S. Ct. Aug. 1, 2023) (citing Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 45–70 (2023) ("Greenlee")). The Fifth Circuit likewise drew upon this article to support its understanding of history. Pet. App. 8a. Both Respondents and the Fifth Circuit miss the mark. There is no Second Amendment right to assemble unserialized weapons, and forthcoming scholarship debunks Greenlee's mischaracterization of the historical record. Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 Calif. L. Rev.

[30] Notably, at the time of the Fifth Circuit's decision under review, Greenlee was a Senior Attorney and Director of Constitutional Studies for respondent Firearms Policy Coalition.

(forthcoming 2025) ("DeLay"), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4546050. Moreover, even if the Second Amendment were implicated here, the Rule is backstopped by a long history in this country of serialization and other rules for gun-making. And to the extent there is not a "dead ringer . . . precursor" of the Rule—which this Court has made clear the Second Amendment does not require, *see Rahimi*, 2024 WL 3074728, at *6, *10–11; *Bruen*, 597 U.S. at 30—that only speaks to the novel threat posed by a technology that now allows children and dangerous criminals to quickly assemble unserialized weapons. ⁂

A. The Rule Does Not Implicate the Text of the Second Amendment

The Rule's imposition of non-burdensome "conditions and qualifications on the commercial sale" of firearms does not offend the Second Amendment. *District Of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). The Second Amendment protects the right to "keep and bear Arms," U.S. Const. amend. II, and the Rule does not prohibit bearing or possessing firearms. As the Rule states, it does not "prohibit[] law-abiding citizens from completing, assembling, or transferring firearms without a license as long as those persons are not engaged in the business of manufacturing or importing firearms for sale or distribution, or dealing in firearms." 87 Fed. Reg. at 24,676. Nor are there "recordkeeping or marking requirements for personal, non-[National Firearms Act] firearms that are privately made." *Id.* at 24,678.

All the Rule requires is that commercial firearm manufacturers obtain a license and that commercial firearms be subject to background checks, serialization, and the other familiar safeguards of the Act. *See id.* at 24,681 n.81 (noting that purveyors of ghost gun kits and components "need only apply for a license like other commercial firearms manufacturers"). For those who wish to purchase a gun-assembling kit, they may freely do so, as long as they may lawfully possess firearms to begin with and as long as the kit itself is serialized. Serialized firearm-assembly kits are readily available for purchase.[31] That is enough. *See Doe v. Bonta*, 101 F.4th 633, 639 (9th Cir. 2024) (framing the *Bruen* textual inquiry around "the conduct the [challenged] regulation prevents plaintiffs from engaging in"). Commercial gun sales do not constitute some kind of Second Amendment free pass. Indeed, the Fifth Circuit—which did not rely on the constitutional-avoidance canon or even mention the Second

[31] *The One Complete Pistol & Frame Kit,* Zrodelta, https://perma.cc/U9F8-XEVF (last visited June 29, 2024); *Polymer80 – PF940C Serialized Pistol Frame Kit*, Arm or Ally, https://www.armorally.com/shop/polymer80-pf940c-serialized-pistol-frame-kit/ (Last visited July 1, 2024). Moreover, countless outlets offer finished but otherwise unassembled pistol frames that the buyer can make into a firearm, after purchasing the frame through an FFL. *See Polymer80 – PFC9 Serialized Compact Complete Pistol Frame – FDE*, Davidson Defense, https://perma.cc/ETF4-ZN9S (Last visited June 29, 2024); *PFC9 – Compact Pistol Frame Only – Black, Serialized,* Polymer80, https://polymer80.com/pfc9-compact-pistol-frame-only-black-serialized/ (last visited June 30, 2024); *GGP Combat Pistol Frame Compact*, Grey Ghost Precision, https://perma.cc/3FUN-6ZYF (last visited June 29, 2024).

Amendment in its analysis—has itself held that "ancillary firearm regulations such as background checks preceding sale" do not fall within the scope of the Second Amendment's plain text, but instead are presumptively lawful "conditions and qualifications on the commercial sale of arms." *McRorey v. Garland*, 99 F.4th 831, 837 (5th Cir. 2024); *see also B & L Prods., Inc. v. Newsom,* 2024 WL 2927734, at *8 (9th Cir. June 11, 2024) (holding that "[t]he most reasonable interpretation" of *Heller* and *Bruen* "is that commercial restrictions presumptively do not implicate the plain text of the Second Amendment," and that this presumption may be overcome only if "a challenged regulation meaningfully impairs an individual's ability to access firearms"). That makes sense: "The Supreme Court has made clear that the Second Amendment does not speak to all restrictions that impact firearms in any way." *B & L Prods.*, 2024 WL 2927734, at *8.

Bruen and *Rahimi* call for a threshold "plain text" analysis, *Bruen*, 597 U.S. at 17; *see Rahimi*, 2024 WL 3074728, at *14 (Gorsuch, J., concurring) (noting that, unlike this case, "no one question[ed]" in *Rahimi* that the law at issue "addresses individual conduct covered by the text of the Second Amendment"), and nothing in the text of the Second Amendment enshrines the right to assemble a firearm. *See, e.g.*, *Defense Distributed v. Bonta*, No. 22-cv-06200, 2022 WL 15524977, at *4 (C.D. Cal. Oct. 21, 2022) (holding plain text of Second Amendment does not cover the "self-manufacture of firearms"). Nor does the Second Amendment's protection extend to unserialized firearms. *See, e.g., United States v. Sing-Ledezma*, No.

23-cr-00823, 2023 WL 8587869, at *3 (W.D. Tex. Dec. 11, 2023) (collecting cases upholding § 922(k)'s ban on possessing firearms with obliterated serial numbers because "firearms with obliterated serial numbers are not 'in common use' and not used 'by law-abiding citizens for lawful purposes,' thus falling into the category of "dangerous and unusual weapons" that the Second Amendment does not protect"). In sum, given that the plain text of the Second Amendment does not cover ghost gun assembly, "there is no need to conduct a historical analysis." *United States v. Scheidt*, 103 F.4th 1281, 1284 (7th Cir. 2024).

B. Even if the Rule Implicated the Second Amendment's Text, the Rule Is Consistent With America's Tradition of Regulating Gun-Manufacturing

The Fifth Circuit, Judge Oldham's concurrence, and Respondents all draw upon what they call a "long-standing tradition of at-home weapon-making in this country," and further assert that this tradition was "previously unregulated" throughout our nation's history. Pet. App. 26a; *see* Defense Distributed Cert. Br. 4, *Garland, v. VanDerStok*, 23852 (S. Ct. Aug. 1, 2023). They base their understanding of this "rich history and tradition" principally upon an article by Greenlee. Pet. App. 8a, 26a, 36a. But Respondents and the Fifth Circuit badly misapprehend the history. There is no historical tradition of amateur gunmaking and, moreover, there is a long tradition of requiring serialization and other regulatory compliances for gun-manufacturing.

Forthcoming scholarship comprehensively rebuts Greenlee's article and the broader assumptions of those pushing the "self-made-arms narrative." DeLay, 113 Calif. L. Rev. (forthcoming 2025). As Professor DeLay explains, Greenlee makes three fatal errors. *First*, the self-made-arms narrative "defines 'arms-making' to include an implausibly huge range of activities." *Id.* at 58. For example, the narrative does so by counting everything from making "firearms from scratch" to "filling paper cartridges with a measure of gunpowder and a lead ball" as "arms-making." *Id.* *Second*, "the narrative conflates amateurs with professionals," which elides the fact that "[g]host gun kits" of today "are not aimed at professionals" and are instead "explicitly designed for and marketed to amateurs." *Id.* at 58–59. Greenlee does not and could not "substantiate a longstanding tradition of 'amateur-made arms.'" *Id.* at 59. *Third*, this narrative furthermore "mischaracterizes" what "consumers are actually doing with ghost gun kits," as they "are not *making* guns, but rather *assembling* them." *Id.* (emphasis added). Those who assemble ghost guns are no more part of a venerable tradition of gunmaking than someone who orders and then assembles a cabinet from IKEA is part of a tradition of furniture-making. *Id.* Greenlee evokes the image of a rustic frontiersman welding a firearm, whereas the parts here—easy enough for a child to assemble—are closer to LEGOs.

But even assuming that a "tradition" of gunmaking may be constitutionally or historically relevant to the issue of self-manufacturing firearms, so too is the long tradition of gunmaking *regulations*.

See, e.g., Graham Ambrose, Note, *Gunmaking at the Founding*, 77 Stan. L. Rev. at 6 (forthcoming 2025) ("Public and private authorities regulated gunmaking before, during, and after the Founding," including by requiring "gun labeling for . . . property designation."); *see id.* at 7 (concluding that "reasonable modern gunmaking regulations are consistent with the Nation's historical tradition of firearm . . . regulation and, therefore, permissible under *Bruen*"); *id.* at 21 (cataloguing six categories of gunmaking regulations: standard setting, identification, licensing and inspection, labor and impressment, restrictions on dangerous persons, and gunpowder-making); *see generally* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55 (2017) https://perma.cc/JP8Q-5WAJ. Importantly among those regulations is the longstanding practice of marking weapons—a precursor to modern-day serialization. Ambrose, *supra* at 28 (citing examples from multiple states of eighteenth-century laws either requiring labeling of firearms or preventing defacement of labeling markings); *id.* at 32 (describing colonial and state efforts to brand, stamp, label, and track weapons at the Founding); DeLay at 55 ("Major arms manufacturers began stamping serial numbers on firearms as early as the mid-nineteenth century"). As this Court just recently confirmed, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Rahimi*, 2024 WL 3074728, at *6; *see also*, *e.g.*, *id.* at *30 ("To be *consistent* with historical

limits, a challenged regulation need not be an updated model of a historical counterpart.") (Barrett, J., concurring).

The novel threat of ghost guns cries out for the "more nuanced" approach *Bruen* described, 597 U.S. at 30. Indeed, members of this Court have observed that it is wrong to assume that "founding-era legislatures maximally exercised their power to regulate," and that assumption is doubly incorrect when applied to forms of technology that did not even exist at the founding. *Rahimi*, 2024 WL 3074728, at *30 (Barrett, J., concurring); *see also id.* at *13 (Sotomayor, J., concurring) ("History has a role to play in Second Amendment analysis, but a rigid adherence to history, . . . impoverishes constitutional interpretation and hamstrings our democracy."). "Holding otherwise would be as mistaken as applying the protections of the [Second Amendment] right only to muskets and sabers." *Id.* at *6. But this Court need not break new ground on a "more nuanced" analysis. *Bruen* requires a "historical *analogue*, not a historical *twin*," 597 U.S. at 30, and history is replete with serialization and other gunmaking regulations that—even if they do not "precisely match," *Rahimi*, 2024 WL 3074728, at *6—sufficiently parallel the Rule here.

IV. THE RULE COMPORTS WITH ATF'S HISTORICAL REGULATION OF NEAR-COMPLETE FIREARMS

The Fifth Circuit determined that the Rule "materially deviates" from ATF's past regulation of near-complete firearms and held that this deviation proves that the Rule "encompass[es] items that were

not originally understood to fall within" the Act. Pet. App. 16a. This reasoning is simply wrong.

ATF has long regulated near-complete frames and receivers as firearms, as the Act requires, by defining "firearm" to reach items "designed to" or that "may readily be converted" into complete firearms, 18 U.S.C. § 921(a)(3), In 1976, ATF's Assistant Chief Counsel issued an opinion setting out a framework for evaluating whether an "unfinished" frame or receiver is a "firearm" under the Act. Admin. Record, *City of Syracuse*, ECF No. 60 (S.D.N.Y. Dec. 8, 2020), at ATF0264. The opinion explained that if "unfinished frames" or "castings" "*may readily be converted*" into firearms, "they are firearms." The opinion concluded that near-complete frames and receivers must be assessed "case-by-case" to gauge if they are "readily convertible" into firearms, because this will turn on "the nature of each firearm" and it would be unwise to institute a "rigid criterion" for what it means to be "readily convertible." *Id.* at ATF0267.

For decades, ATF followed the framework in the 1976 opinion in classification letters that turned on whether an unfinished frame or receiver could readily be converted into an operable firearm. *Id.* at ATF0001, ATF0014, ATF0020, ATF0023, ATF0050, ATF0051, ATF0053, ATF0065. Consistent with the definition of "readily" meaning "without much difficulty" or "with fairly quick efficiency," several of these letters referenced the ease and speed with which unfinished frames and receivers could be assembled into operable firearms. *Id.* at ATF0020 (receiver was a "firearm" because it required "75 minutes" to be made "functional"); *id.* at ATF0024 (same; "20 minutes"). In

2015, even before ATF fully appreciated the nature of the ghost gun kits and near-complete frames and receivers entering the market, ATF identified the relevant question as whether near-complete frames and receivers had "reached a stage of manufacture" at which they fall within the definition of "firearms." That is, ATF recognized—as it had since 1976—that not-yet-complete firearms can be firearms so long as they can be "readily" convertible into firearms. The only question is how to test that boundary.

It cannot be overstated that the Rule's express regulation of ghost gun kits and nearly finished frames and receivers is not novel in ATF practice. The novel aspect presented by this case is the recent development of technology for easy assembly of firearms. *See*, *e.g.*, DeLay at 55–56 (explaining that, over the "past fifteen years or so . . . advances in polymers, small-batch parts, manufacturing, [and] compact control milling" have "enable[d] unskilled buyers to easily assemble their own guns without professional assistance"). The market for ghost gun kits and components only recently gained momentum, as purveyors looked for ways to innovate around ATF's classifications. That innovation often took the form of technological changes (*e.g.*, kits that can be assembled into a firearm in minutes) and marketing ploys (*e.g.*, arbitrarily labeling a firearm only "80%"), and, in some cases, brazen efforts to hide the nature of their products from ATF. For example, in 2018, ATF refused to grant Polymer80's request to have a sample unfinished pistol frame classified as a non-firearm because Polymer80 had neglected to provide ATF with the jig, drill bits, end mill, and pistol parts that the

sample frame was sold with for readily converting it into a finished frame.[32] Rather than supply those items and risk having its product classified as a firearm, Polymer80 marketed and sold a complete kit for assembling a firearm, precipitating an ATF raid on its business for violating the Act, including by failing to conduct background checks on purchasers.[33] None of this industry maneuvering changes the fact that the Act has always treated nearly finished frames and receivers as firearms nor does it cancel out ATF's long history of carrying out that unambiguous directive. The Rule only clarifies that such recent gamesmanship does not suddenly render the Act's broad coverage of "firearms" self-defeating.

Despite accusing ATF of breaking new ground, the Fifth Circuit elsewhere did not dispute that ATF's "historical practice" included regulating near-complete firearms—this concession, in turn, forced the Fifth Circuit to entertain the untenable proposition that ATF has "acted outside of its clear statutory limits" for *decades*. Pet. App. 18a. Moreover, as epitomized by Judge Oldham's concurrence, the Fifth Circuit understood the Rule to "replace a clear, bright-line rule with a vague, indeterminate, multi-factor balancing test." *Id.* 33a. But it is the Act that demands classification of unfinished frames and

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[32]Affidavit of ATF Special Agent Tolliver Hart, In the Matter of the Search of the business and Federal Firearms Licensee kno wn as POLYMER80, which is located at 134 Lakes Blvd., Dayto n, NV 89403, No. 20-mj-123-
WGC (D. Nev. Dec. 9, 2020), https://perma.cc/WBC7-HYSB (last visited July 1, 2024).

[33] *Id.* at 4, 36.

receivers as firearms if they are "designed to" or "may readily be" converted into the frame or receiver of an operable weapon. 18 U.S.C. § 921(a). The Fifth Circuit's preference for a "bright-line" rule does not change what Congress wrote. The Rule correctly implements the Act by requiring consideration of relevant factors—the time, ease, equipment, and expertise needed to complete a nearly finished frame or receiver and any jigs, tools, and instructions sold alongside it, 27 C.F.R. 478.11, 478.12(c)—that determine, in the real world, whether an item is a firearm.

CONCLUSION

Congress adopted the Act to protect the public by comprehensively regulating firearms sales through background checks, recordkeeping, licensure, and serialization. Congress also specifically contemplated and guarded against potential evasion by not requiring that a firearm be "complete" or "functional," but instead defining "firearm" as including items "designed to" or that "may readily be converted" into complete firearms. 18 U.S.C. § 921(a)(3). Congress's public-safety objective and its text embodying that objective make it impossible to contend with a straight face that the Congress that passed the Act would look at a ghost gun kit sold as a "pistol in a box" or near-complete frame or receiver and conclude that those items—designed for no reason other than to be firearms—are not "firearms." The Fifth Circuit's decision should be reversed.

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