

No. 23-852

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**In the Supreme Court of the United States**

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Merrick B. Garland, Attorney General, *et al.*,  
*Petitioners,*

v.

Jennifer VanDerStok, *et al.*,  
*Respondents.*

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

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**BRIEF OF AMICI CURIAE CITIZENS  
COMMITTEE FOR THE RIGHT TO KEEP AND  
BEAR ARMS, WESTERN STATES SHERIFFS'  
ASSOCIATION, JEWS FOR THE PRESERVATION  
OF FIREARMS OWNERSHIP, *ET AL.*  
IN SUPPORT OF RESPONDENTS  
(ALL AMICI LISTED ON INSIDE COVER)**

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August 20, 2024

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The following firearms rights groups and law enforcement groups are amici curiae in this case:

Citizens Committee for the Right to Keep and Bear Arms

Western States Sheriffs' Association

Jews for the Preservation of Firearms Ownership

California Rifle and Pistol Association

Second Amendment Law Center

Second Amendment Defense and Education Coalition, Ltd.

International Law Enforcement Educators and Trainers Association

Law Enforcement Legal Defense Fund

National Association of Chiefs of Police

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

The Citizens Committee for the Right to Keep and Bear Arms, founded in 1972, is a non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code. It is dedicated to promoting the benefits of the right to bear arms through education and advocacy. The Court's interpretation of the statutes and regulations at issue in this case directly impacts the Committee's organizational interests, as well as the Committee's members and supporters. The Committee's substantial expertise in the field of firearms rights should aid the Court in this case.

The Western States Sheriffs' Association was established in 1993, and consists of more than three hundred individual members from eighteen member states west of the Mississippi. The sheriffs' offices represent a diverse group of jurisdictions, from large cities to sparsely populated rural areas, and WSSA helps build alliances, develop partnerships with neighboring states, and empower the office of sheriff in the face of a wide variety of challenges.

Founded in 1989, Jews for the Preservation of Firearms Ownership is a non-profit, tax-exempt 501(c)(3) educational civil-rights organization aimed at educating the Jewish community and the general public about the historical evils that Jews have suffered when they have been disarmed. JPFO conducts many educational programs and has filed

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<sup>1</sup>No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than amici, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief.

amicus briefs in legal cases.

Founded in 1875, the California Rifle and Pistol Association, Inc., is a non-profit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA works to preserve the rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public.

Second Amendment Law Center, Inc. is a non-profit corporation in Henderson, Nevada. The Center defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Second Amendment Defense and Education Coalition, Ltd., is an Illinois non-profit corporation dedicated to defending human and civil rights secured by law, including the right to bear arms. SADEC's activities are furthered by complementary litigation and education programs.

The International Law Enforcement Educators and Trainers Association is an association of 4,000 professional law enforcement instructors committed to the reduction of law enforcement risk, and to saving lives of police officers and citizens through the provision of training enhancements for criminal justice practitioners.

Law Enforcement Legal Defense Fund is a non-

profit organization that provides legal assistance to law enforcement officers. LELDF has aided more than one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty.

The mission of the National Association of Chiefs of Police, a non-profit organization founded in 1967, is to promote and support the law enforcement profession. Membership is limited to command staff officers, and it currently has over 7,000 members.

Amici believe that the unwarranted assumption by the Bureau of Alcohol, Tobacco, Firearms & Explosives of the legislative power to make public policy regarding what is a “firearm,” contrary to statute, endangers firearms rights including Second Amendment rights. The Final Rule is also not justified by a “public health crisis” allegedly caused by “privately made firearms.”

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Respondents’ Briefs capably demonstrate that the issues in this case are solely questions of statutory interpretation regarding the authority of ATF to change—by administrative fiat—the definitions of “firearm” and “frame or receiver.” ATF has no authority whatsoever to change the statutory definition of a “firearm.” 18 U.S.C. § 921(a)(3). Similarly, ATF should not be able to change the longstanding regulation defining “frame or receiver” to include a precursor of a frame or receiver as itself a frame or receiver. See *Commerce in Fire Arms and Ammunition*, 33 Fed. Reg. 18555, 18558 (Dec. 14,

1968), codified at 27 C.F.R. § 478.11.

But the government and its amici try to justify the Final Rule by arguments grounded not in law but in public policy; namely, by relying on an alleged urgent need for tracing of unserialized firearms used in crime. ATF asserts that the Final Rule is necessary to address an “urgent public safety and law enforcement crisis posed by the exponential rise of untraceable firearms commonly called ‘ghost guns.’” Pet. Br. 2. Tracing by serial numbers is said to be important because “When police officers retrieve a gun at a crime scene, they can trace it to the buyer and consider him as a suspect.” Pet. Br. 4 (citing *Abramski v. United States*, 573 U.S. 169, 182 (2014)).

The preamble to the Final Rule posits that “the rule will enhance public safety by helping to ensure that more firearms may be traced by law enforcement to solve crime and arrest the perpetrators.” 87 Fed. Reg. 24669 (Apr. 26, 2022). It contends that “firearms tracing has become a critical tool for modern firearms investigations and prosecutions, which the prevalence of ghost guns threatens to upend” 87 Fed. Reg. 24677 (Apr. 26, 2022) (quoting *Fahr v. City of San Diego*, 2021 WL 4895974, at \*11 (S.D. Cal. Oct. 20, 2021) (not reported in F. Supp.)).

This brief demonstrates that these alleged public policy justifications are illusory.

First, tracing of firearms by serial number is inherently of very limited value in solving individual crimes of violence. Tracing only identifies the first retail purchaser of the firearm from a federally

licensed dealer. When, in response to a request by law enforcement, a gun found at a crime scene is traced by ATF's National Tracing Center, the Tracing Center contacts the manufacturer, which identifies the dealer to whom the gun was shipped. The dealer keeps records of individuals to whom firearms are sold. But the requirement that all firearms be serialized was established only in 1968. Until very recently, dealers could also dispose of those records after twenty years. There are many firearms in the national stock that are unserialized or for which records of the sale do not exist.

But identification of the first purchaser will usually not solve the crime. If the gun was sold, traded, given as a gift, or otherwise disposed of by the first purchaser there will generally be no record of that transaction. If the firearm was lost or stolen, neither federal law nor the laws of most states require reporting of the theft or loss. And even if the gun can be traced to the first purchaser or a transferee, that does not mean that that individual committed the crime. The prosecutor and law enforcement will still have to make the case for conviction.

Second, ordinary criminals do not acquire their firearms by purchasing them from licensed retail dealers, so the guns used by criminals cannot be traced in the vast majority of cases. Detailed studies, consistently over time, show that most firearms used by criminals are obtained from friends or family, or "off the street" or from underground markets. Significant numbers are also obtained by theft. The most comprehensive recent study by the Department of Justice shows that only 6.9% of guns used by

prison inmates to commit the crime for which they were incarcerated were purchased by the inmate from a licensed dealer under the inmate's own name. Criminals have many informal sources from which to obtain firearms, and need not resort to purchasing them from licensed dealers or building their own.

Third, there is little or no evidence that criminals are turning to unserialized, home-built guns to use in crime. Particularly, the extravagant claims that the use of such firearms in crime has increased exponentially, that they are fueling a gun "epidemic" and public health "crisis," and that they pose an "imminent and real-world threat to the lives and safety of all of us," are unfounded. There are about 500 million firearms in private hands in the United States. The numbers of legitimately manufactured Glock handguns and AR-15 platform rifles (on which unfinished frames or receivers are most often patterned) run into the millions, and dwarf the numbers of so-called "ghost guns."

In much of the briefing in this case by ATF and its amici, it is not even clear what is included in the category of "ghost guns." The claims that there has been a vast increase in the use of unserialized firearms in crime is largely predicated on tracing data. Yet ATF has issued a strong disclaimer that firearms traced "are not chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes," that they are not a random sample, and that they "should not be considered representative of the larger universe" of crime guns. In other words, tracing data is not reliable for determining the prevalence of "ghost guns" in crime.

Even if tracing requests were a valid approach to determining the number of unserialized firearms used in crime, ATF admits that part of the increase in tracing numbers is the result of “education, outreach, and training” that ATF has provided to law enforcement agencies since 2020. Such increases in tracing requests would also result from the Final Rule going into effect in 2022, as well as enforcement of recently passed “ghost gun” laws by states.

There is also little evidence that unserialized firearms are used in crime in large numbers. There appear to be no reliable statistics on their actual use in crime. A “database” created by a gun control group identified only 182 alleged shootings with “ghost guns” between 2013 and 2024 inclusive, for an average of about 15 shootings per year.

## ARGUMENT

### I. TRACING OF FIREARMS CONTRIBUTES LITTLE TO THE ABILITY OF LAW ENFORCEMENT TO SOLVE CRIMES OF VIOLENCE.

#### A. Tracing only identifies the first retail purchaser from a firearms dealer.

It is important to understand how tracing of firearms works, and its limitations.

For tracing to solve a violent crime committed with a gun, the gun must first be recovered from the crime scene.<sup>2</sup> For a variety of reasons, including a

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<sup>2</sup> “Crime scene” and “crime gun” are sometimes used very expansively for reporting purposes. If, for example, a felon is arrested in his home for a non-firearms offense committed elsewhere without a gun, but he is found to have a firearm in

disinclination on the part of the criminal to leave potential evidence behind for law enforcement, this will be a somewhat rare occurrence.

Nevertheless, guns are sometimes found at the scene of a violent crime. If the law enforcement agency believes that there might be some value in attempting to trace it, the relevant information is submitted to the National Tracing Center. Operated by ATF, the National Tracing Center is the only facility in the United States for tracing firearms. ATF, National Tracing Center, <https://www.atf.gov/firearms/national-tracing-center>.

The paper form for making a trace request includes, among other information, the manufacturer, importer, model, caliber, type, and “Serial Number (From Frame or Receiver),” ATF, National Tracing Center (NTC) Trace Request, ATF Form 3312.1, revised November 2022, <https://www.atf.gov/file/11771/download>. The trace request is then sent to the National Tracing Center by fax or email. ATF, Submitting Firearms Trace Requests, <https://www.atf.gov/firearms/submitting-firearms-trace-requests>. The query to the National Tracing Center may also be made by the law enforcement agency using a web-based application called e-Trace, if the agency has an e-Trace account. ATF, Fact Sheet - eTrace: Internet-Based Firearms Tracing and Analysis, April 2023, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-etrace-internet-based-firearms-tracing-and-analysis>.

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his closet in violation of 18 U.S.C. § 922(g)(1) (the felon-in-possession statute), his home may be considered a “crime scene” from which a “crime gun” has been recovered.

Based on this information, the National Tracing Center contacts the manufacturer or importer, who should have a record of all firearms transferred by it to licensees. The manufacturer informs the tracing center of the licensed dealer (which may be a wholesaler) to whom the firearm was transferred. The “federal firearms licensee,” sometimes referred to as an FFL, keeps a record of all sales. The gun can thus at least theoretically be tracked down the line to the first purchase by a person who is not an FFL. FFLs contacted by the Tracing Center to provide tracing information must respond “immediately to, and in no event later than 24 hours after the receipt of, a request by an ATF officer at the National Tracing Center” for such information. 27 C.F.R. § 478.25a.

But there are many reasons why a gun recovered from a crime scene might not be able to be tracked, or if tracked might not be useful in solving a crime.

First, federal law prior to 1958 did not require any small arms to bear a serial number, other than National Firearms Act weapons such as machine guns. 26 U.S.C. § 5842. The serialization requirement was first imposed for some ordinary firearms in 1958.<sup>3</sup> In that year, the Treasury

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<sup>3</sup> For a detailed historical analysis of the evolution in federal law of the terms firearm, frame, receiver, parts, and other relevant language, the history of serialization, close textual analysis of the successive federal firearms statutes, and the precedents and legal concepts underlying these developments, see Stephen P. Halbrook, “The Meaning of ‘Firearm’ and ‘Frame or Receiver’ in the Federal Gun Control Act: ATF’s Final Rule in Light of Text, Precedent, and History” (Aug. 17, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id](https://papers.ssrn.com/sol3/papers.cfm?abstract_id)

Department issued a regulation stating that for every firearm “produced on or after July 1, 1958,” the manufacturer or importer “shall identify it by stamping ... the name of the manufacturer or importer, and the serial number, caliber, and model of the firearm....” Final Rule, Interstate Traffic in Firearms and Ammunition, 23 Fed. Reg. 343 (Jan. 18, 1958) (then codified at 26 C.F.R. § 177.50). The regulation further stated that “individual serial numbers and model designation shall not be required on any shotgun or .22 caliber rifle....” *Id.* The requirement that all firearms be serialized by manufacturers and importers was not imposed until the Gun Control Act was passed in 1968. See 18 U.S.C. § 923(i).

Given the durability of firearms, and the fact that their basic designs and operating principles have not changed greatly since the very early twentieth century, there are many functional firearms currently in the national stock that do not have serial numbers and were never required to have them.

Second, ATF’s National Tracing Center does not maintain a comprehensive list of the non-licensed individuals to whom firearms were first sold after manufacture. Indeed, ATF has long been prohibited by law from making or maintaining such a list. See 18 U.S.C. § 926(a).<sup>4</sup> As noted, as part of a trace the

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<sup>4</sup> The laws regarding what records of firearms ATF may assemble and maintain are somewhat complicated and have varied over time. See Congressional Research Service, Statutory Federal Gun Registry Prohibitions and ATF Record Retention Requirements (Feb. 5, 2024), <https://crsreports>.

dealer must be contacted to determine the first retail purchaser. But although the dealer is required to record that information at the time of the sale, historically the FFL has not been required to maintain that information indefinitely. Until very recently, dealers could destroy such records after twenty years. See former 27 C.F.R. § 478.129(b). A recent change in the regulations made by the Final Rule in 2022 requires them to retain such records until the dealer goes out of business. See current 27 C.F.R. § 478.129(b), as amended by Final Rule, Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24746 (Apr. 26, 2022). Therefore, even if the dealer is successfully contacted as part of a trace, the records may not be available if the sale to the first purchaser occurred more than 22 years ago.

But even if the first retail purchaser is identified, that is the point at which the trail often goes cold.

**B. Tracing to the first retail purchaser usually will not solve the crime.**

ATF declares that in 2021 it was able to identify the first purchaser in 80% of its traces. ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns—Volume Two at 3. But what ATF doesn’t disclose is the percentage of traces that identify the actual criminal who committed the crime.

If the first purchaser is indeed the perpetrator of the crime, and there is other evidence sufficient to confirm that, perhaps the law enforcement agency

will have, through tracing, identified their man. But that is unlikely.

If the gun was sold, traded, given as a gift, or otherwise transferred to a private individual by the first purchaser, or was lost or stolen, there is likely to be no record of that transaction. Federal law, and the laws of most states, do not require any record to be kept of the individual to whom a gun is sold or transferred by a private citizen. Similarly, under federal law, and the laws of most states, there is no requirement that sales or transfers between private citizens must go through a licensed dealer.

The first purchaser also may have moved, have died, or be difficult to locate. If he is located, he may be unwilling to talk to law enforcement. If he talks to law enforcement, he may claim, truthfully or otherwise, that the gun was sold, or was lost or stolen from him.

Federal law does not require reporting of lost or stolen firearms except when the theft or loss is from an FFL's inventory. 18 U.S.C. § 923(g)(6); 27 C.F.R. § 478.39a. Generally, state laws do not require reporting of lost or stolen firearms, either. RAND Corporation, *The Effects of Lost or Stolen Firearm Reporting Requirements* (Updated July 16, 2024) ("As of January 1, 2024, 15 states and the District of Columbia require gun owners to notify law enforcement if their firearms are lost or stolen."), <https://www.rand.org/research/gun-policy/analysis/lost-or-stolen-firearms.html>.

Of course, even when a firearm can be traced to a first retail purchaser, or even to someone to whom the purchaser transferred the gun, that doesn't

mean that that individual committed the crime in question. The prosecutor and law enforcement still have to make the case for conviction. The fact that the individual may have once possessed the gun may be helpful in some cases, but it is unlikely to be dispositive.

There is one overriding reason, though, why tracing a crime gun to the first retail purchaser will not be helpful: criminals, by and large, do not get their guns by purchasing them at retail from federally licensed dealers, as the following section shows. They can easily get them elsewhere, and there is no need to resort to building their own firearms.

## **II. CRIMINALS DON'T BUY THEIR GUNS AT RETAIL FROM LICENSED DEALERS.**

A well-established body of consistent evidence shows that criminals don't get the guns they use in crime by going to a federally-licensed dealer, presenting identification, filling out extensive paperwork, swearing under oath that he is the actual purchaser and is not a prohibited person, and undergoing a computerized background check (National Instant Check System, or "NICS" check). They obtain their guns from other sources, often illegally, and by means that are certainly not subject to conventional serial number tracing.

In 2019, the Department of Justice published a detailed report regarding an in-person survey conducted in 2016 of federal and state prison inmates. Mariel Alper and Lauren G. Beatty, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*, U.S. Department of Justice,

Bureau of Justice Statistics (Jan. 2019), <https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf> (“2019 DOJ Report”). It is the best recent study on where criminals get their guns. It is based on a large-scale survey: 24,848 prisoners participated. *Id.* at 10. For prisoners who possessed or used a firearm during the crimes for which they were incarcerated, the study identified the source from which each prisoner had obtained the firearm used or possessed during the crime.

The results were revealing. Among inmates who had a firearm in their possession during the crime, the sources of the firearms were:

- Off the street/underground market: 43.2%
- Obtained from individual: 25.3%
- Theft: 6.4%
- Purchased/traded at retail source: 10.1%
- Other sources: 17.4%

2019 DOJ Report, Table 5, at 7.

As can be seen, over two-thirds of prisoners obtained their guns off the street, from an underground market, or from individuals. The transfers from individuals were generally from family or friends, according to the report. These evidently included straw purchases, because one of the subcategories was “gift/purchased for prisoner.” 2019 DOJ Report at 2, 7.<sup>5</sup> Of the 10.1% who bought

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<sup>5</sup> A “straw purchaser” is “a person who buys a gun on someone else’s behalf while falsely claiming that it is for himself.” *Abramski*, 573 U.S. 169, 171-72 (2014). *Abramski* held that such a statement is a materially false claim under 18 U.S.C. §

their guns at retail sources, 8.2% were purchased from a licensed dealer (FFL) and only 6.9% were purchased under the prisoner's own name. 2019 DOJ Report at 8.

Of the 17.4% of inmates who obtained their firearms from "other sources," about two-thirds were described as "found at location of crime/victim" or "brought by someone else." *Id.* at 7. Neither in the tables of sources, nor in the notes to those tables, nor in the text of the report itself is there any mention of a firearm built or assembled by the prisoner, or by any other private individual, or from a kit.

But the main point is: if the firearm was not purchased by the criminal in his own name from a licensed dealer, there will be no record of the sale to him, and a trace of the firearm will almost certainly be useless in identifying to whom the gun belonged at the time of the crime.

The findings in the 2019 DOJ Report that criminals do not purchase their guns at retail from licensed dealers is not isolated or unusual. It is consistently supported by high quality research going back to the early 1980s.

A seminal, book-length study on how and where criminals got their guns was first published in 1986, based on data collected in 1981. James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous*

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922(a)(6). Since that case was decided, Congress passed a statute expressly outlawing straw purchases under certain specified circumstances. See 18 U.S.C. §§ 922(d) and 932, as added or amended by the Bipartisan Safer Communities Act, Pub. L. 117-159, 136 Stat. 1313, § 12004.

(Transaction Publishers: 1986).<sup>6</sup> Wright and Rossi administered questionnaires to 2,000 adult inmates who were incarcerated in state prisons. Wright & Rossi at xxi (original Preface). The questionnaire inquired about the inmate's most recent firearm acquisition, not the gun used in the crime for which he was imprisoned. Results were reported separately for handguns and long guns.

Although Wright and Rossi broke down the categories in a different way than the 2019 DOJ Report, the results of the two studies are broadly consistent. For handguns, which are more frequently used in crime than long guns, the most common source according to Wright and Rossi was family and friends (44%). James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous 183-84* (Routledge: New Second Edition 2017). The second most common source was informal gray- and black-market sources combined (fences, drug dealers, off-the-street, etc.) which accounted for 26%. *Id.* These two sources provided a little over two-thirds of the guns, a finding very similar to the 2019 DOJ Report. Customary retail outlets combined, including gun shops, pawn shops, and hardware and department stores accounted for another 21%. Some of these might have been required to have an FFL, but some

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<sup>6</sup> Citations are to the New Second Edition (Routledge: 2017). Except for new material in later prefaces and introductions contained in the New Second Edition (2017) and Expanded Edition (2008), the text and findings in the New Second Edition are the same as in the original 1986 edition. Wright & Rossi at xv, xxix (Preface to Expanded Edition, and Introduction to the Aldine Transaction Edition). The fact that data collection took place in 1981 is documented in Wright & Rossi at xxii (original Preface).

might not.<sup>7</sup> The subcategory “gun shops,” which would certainly require a federal license, constituted 11% of the purchases, slightly higher than the 8.2% from FFLs identified in 2019 DOJ Report. (There was no NICS check during the 1980s, and the categories of prohibited persons were fewer).

Other studies report similar results. See, e.g., Department of Justice, Bureau of Justice Statistics, Survey of State Prison Inmates, 1991 (among those inmates who had possessed a handgun during the crime for which they were incarcerated, 37% had most recently acquired the weapon through theft or an illegal market, and 31% got the handgun from family or friends), <https://bjs.ojp.gov/content/pub/pdf/SOSPI91.PDF>; see also Katherine A Vittes, et al, “Legal status and source of offenders’ firearms in states with the least stringent criteria for gun ownership,” *Injury Prevention* 30 (2013) (responses from inmates in 13 states in 2004 showed that 34% of inmates got their gun from a friend or family

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<sup>7</sup> Whether these and other retail outlets had to be licensed would have depended on whether they were “engaged in the business” of dealing in firearms. It is, and was in the 1980s, unlawful for any person “except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms.” 18 U.S.C. § 922(a)(1)(A). In 1986, after Wright and Rossi gathered and published their data, Congress passed the Firearms Owners’ Protection Act (“FOPA”), which defined what “engaged in the business” meant. As applied to a dealer in firearms, it meant “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms....” 18 U.S.C. § 921(a)(21), as added by FOPA, Pub. L. 99-308, 100 Stat. 449, § 101 (May 19, 1986).

member, 30.4% from the street or a black market, and 13.4% from a gun store or pawnshop), <https://injuryprevention.bmj.com/content/injuryprev/19/1/26.full.pdf>.

As shown by these studies, criminals have many sources for firearms other than licensed dealers. Through these informal channels, firearms have been readily available to them for decades, and there is no need for criminals to resort to purchases through FFLs, much less to building their own firearms.

So what does this all mean? The alarmist predictions that the whole GCA scheme for tracing will come unraveled if the Final Rule's new definitions are not upheld, and that without effective tracing the ability of law enforcement to solve crimes will be grossly impaired, are simply untrue. In virtually all cases, there is no effective tracing by serial number now of guns purchased by criminals, and there hasn't been since the 1980s, because criminals don't get their guns by purchasing them from licensed dealers under their own names.

### **III. THERE IS NO CRISIS OR EPIDEMIC CAUSED BY USE OF UNSERIALIZED FIREARMS IN CRIME.**

#### **A. The claims that ghost guns are rampantly proliferating for use in violent crime are unsubstantiated.**

The preamble to the Final Rule contends that ATF is seeing "an exponential increase in the number of suspected PMFs recovered and reported for tracing." 87 Fed. Reg. 24669 (Apr. 26, 2022).

One of the government’s amici asserts that “ghost guns directly threaten public safety.” Brief of the District Attorney for New York County and the City of New York as Amici Curiae in Support of Petitioners at 3. Another amicus brief goes so far as to claim that “the free flow of ghost guns to foreign countries exacerbates the pervasive challenge of firearms trafficking, emboldening transnational criminal organizations and in turn causing harm in the United States by facilitating the fentanyl crisis, driving displacement and migration, and increasing the risk of terrorism.” Brief of Amicus Curiae Global Action on Gun Violence in Support of Petitioners at 4. According to the same amicus, “the domestic prevalence and non-regulation of ghost guns help fuel the gun epidemic in this country,” which it refers to as “a public health crisis.” *Id.*

Another brief dismisses efforts to “characterize this dispute as turning on issues such as the proper roles of the respective branches of government”—the main issue in this case—and instead states that the heart of this matter is that “ghost guns pose an imminent and real-world threat to the lives and safety of all of us, and their appropriate regulation is a matter of national urgency.” Brief of Gun Owners for Safety as Amicus Curiae in Support of Petitioners at 2.

But despite these overheated claims, there is no crisis of violent crime stemming from so-called ghost guns.

**B. The magnitude of the use of ghost guns in crime can only be evaluated against the backdrop of the overall number of firearms in this country.**

There are, and always have been, a lot of firearms in this country. Official government sources put the number produced for the U.S. market since 1899 at 494 million, although there has been some (unknown) amount of attrition since then. Jennifer Mascia and Chip Brownlee, “How Many Guns are Circulating in the United States?”, TheTrace.org (Mar. 6, 2023, updated Jul. 22, 2024), <https://www.the-trace.org/2023/03/guns-america-data-atf-total/>.

The two leading parts kits and unfinished frames and receivers appear to be for “Glock-like” handgun frames and AR-15 platform receivers.

According to ATF, about two and a half million handguns have been manufactured and introduced into commerce in the United States by Glock between 2016 and 2022, the last year for which data is available:

2016- 368,140  
2017- 175,696  
2018- 247,546  
2019- 273,613  
2020- 445,442  
2021- 581,944  
2022- 345,119

Total: 2,437,500<sup>8</sup>

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<sup>8</sup> Sources, ATF AFMER reports, available at:  
2016- <https://www.atf.gov/file/123801/download>;

Perhaps more pertinently, ATF reports that in 2022 alone, 6,183,507 pistols (not including revolvers) were manufactured in the United States. AFMER 2022, <https://www.atf.gov/firearms/docs/report/202406afmer2022revisedfinal5081pdf/> download. Over 13 million firearms were manufactured in that single year. *Id.* Numbers for the immediate previous years are comparable.

Data from the National Shooting Sports Foundation, an industry trade group, estimates there are 24 million+ modern sporting rifles (“MSRs”), consisting principally of AR-platform rifles, in American civilian circulation as of 2020, with an annual range of increase between 1.6 million and 2.8 million between 2016 and 2020. Daphane Cassidy, Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation , NSSF.org (July 20, 2022),<https://www.nssf.org/articles/commonly-owned-nssf-announces-over-24-million-msrs-in-circulation/>.

When viewed in this light, the 19,000 “ghost guns” alleged to have been traced in 2021 (see Part III. D., below) does not appear cataclysmic, but more like a drop in the bucket.

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2017- <https://www.atf.gov/file/133476/download>;

2018- <https://www.atf.gov/file/142946/download>;

2019- <https://www.atf.gov/resource-center/docs/report/2019-annual-firearms-manufacturers-and-export-report-afmer/download>;

2020- <https://www.atf.gov/firearms/docs/report/afmer-2020-final-web-report/download>;

2021- <https://www.atf.gov/firearms/docs/report/afmer-2021-final-web-report/download>;

2022- <https://atf.gov/firearms/docs/report/20240715afmerexcel2023rundate09july2024508xlsx/download>.

**C. The figures cited by ATF and its amici are often unclear about what items are considered to be “ghost guns.”**

It is frequently unclear at best what the term “ghost gun” might mean. It could be limited to a fully assembled, functional firearm that is unserialized. It could include “parts kits” that ATF or other law enforcement agencies believe might later be assembled into firearms. The instant case demonstrates that ATF considers a “parts kit”—even though that term is undefined—itsself to be a “firearm.” It might also include an unfinished frame or receiver that cannot in its present state be used to assemble a functioning firearm. ATF apparently thinks so, as demonstrated by the Final Rule, but that is not a “firearm” as conceived of by the ordinary individual. The courts below did not think so, either. Certainly a precursor to a frame or receiver cannot itself inflict harm on a human being, except possibly if it is used as a club. Only assembled, functional firearms can inflict harm.

Most importantly, does it include only guns recovered from the scenes of violent crime, in which the “ghost gun” was actually displayed, fired, or used to maim or kill? Very likely it includes regulatory seizures carried out to implement the prohibitions contained in the Final Rule or in state laws, where the only crime is possession rather than use in a killing, wounding, robbery, or the like.

From the statistics cited, we simply don’t know.

**D. The number of PMFs traced does not correspond to the number in circulation or the number used in violent crime.**

ATF has published trace data purporting to show that the number of privately-made firearms submitted to e-Trace increased more than 1000% between 2017 and 2021. The figures for those five years are 1,629 for 2017, 2,648 for 2018, 5,926 for 2019, 8,504 for 2020, and 19,273 for 2021. ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns—Volume Two, Part III at 6.

This data has been presented to this Court as if it is a meaningful proxy for the number of PMFs used in crime. See, e.g., Brief of the Local Government Legal Center et al. as Amici Curiae in Support of Petitioners 15.

The best confirmation that trace requests are not a proxy for the number of PMFs in circulation, or for the number used in violent crime, comes from ATF itself. In connection with the National Firearms Commerce and Trafficking Assessment recently released, ATF issued a comprehensive disclaimer. It is worth quoting in full:

Firearm traces are designed to assist law enforcement authorities in conducting investigations by tracking the sale and possession of specific firearms. Law enforcement agencies may request firearms traces for any investigative reason, and those reasons are not necessarily reported to the federal government. *Not all firearms used in crime are traced and not all firearms traced*

*are used in crime. Firearms selected for tracing are not chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe.* Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.

ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Firearms Trafficking Investigations—Volume Three (2024), <https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-firearms-trafficking>.

The “public policy” argument that “ghost guns” are a massive threat to public safety and represent a “crisis” and an “epidemic” is based largely on tracing data. It is hard to imagine an admission by ATF that more comprehensively undercuts that argument, and shows that tracing data, whatever its value may be otherwise, is worthless for the purpose for which it is offered in this case.

**E. ATF admits that the increase in tracing of suspected “ghost guns” in recent years is partly due to increased outreach and training to law enforcement agencies to report them.**

ATF has admitted that the rise in trace

submissions is partly an artifact of recent efforts to increase such reporting:

The dramatic rise in trace submissions involving PMF's reflects both increased criminal use of these firearms and enhanced awareness among law enforcement that ATF will process trace requests for PMFs. In particular, the substantial increase in PMF trace submissions since 2020 is in part attributable to education, outreach, and training that ATF has provided to LEAs on how to identify PMFs and the importance of submitting them for tracing. In September 2020, ATF issued guidance to all eTrace users explaining how to identify and trace PMFs. This guidance was formalized in the updated ATF Publication 3312.12—Police Officer's Guide to Recovered Firearms. In 2021, ATF trained more than 1,700 law enforcement personnel in approximately 14 PMF presentations across the country.

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The paper trace request form was revised in 2022 to allow the requesting agency to specify that the item in question is (ostensibly) a PMF. See National Tracing Center (NTC) Trace Request Form 3312.1 <https://www.atf.gov/firearms/docs/form/national-tracing-center-trace-request-atf-form-33121/> download. Previous versions of Form 3312.1 did not have a box to check to identify the item as a PMF. In addition to ATF's other activities to increase trace requests, the new form has undoubtedly increased traces of items believed to be PMFs. Such increased

tracing is also due, no doubt, to the promulgation of the Final Rule itself, and the recent passage of “ghost gun” laws by a number of states, both of which would cause law enforcement to submit trace requests for PMFs when previously they did not.

One of the government’s amici states that the New York Police Department recovered 263 ghost guns in in 2021, 436 in 2022, and is on a pace to recover 495 in 2024. Brief of the District Attorney for New York County and the City of New York as Amici Curiae in Support of Petitioners at 5. New York finalized laws against unserialized firearms and unfinished frames and receivers in October 2021. Anna M. Kaplan, New York State Senate, “Nation’s Toughest Restrictions on Ghost Guns Signed Into Law by Governor Kathy Hochul” (October 28, 2021), <https://www.nysenate.gov/newsroom/press-releases/2021/anna-m-kaplan/nations-toughest-restrictions-ghost-guns-signed-law>. It is therefore unsurprising that seizures of unserialized firearms and uncompleted frames and receivers would have increased substantially in 2021 and thereafter.

Oddly, the same brief notes that “To date, the New York County District Attorney’s Ghost Guns Initiative has prosecuted cases involving the seizure of over 165 ghost gun parts, 94 firearms, 444 high-capacity magazines, 49 silencers, and other gear including scopes and rapid-fire modification devices.” Brief of the District Attorney for New York County and the City of New York as Amici Curiae in Support of Petitioners at 21-22. What are these “ghost gun parts”? Incomplete frames and receivers? Or ordinary parts that do not need to be serialized? The brief does not say. And what makes up the 94

firearms? Are they completed, functioning firearms, or something else? And if “ghost guns” are such a dangerous threat, why so few prosecutions? Again, one is left wondering. Why mix in so-called “high-capacity” magazines (illegal in New York, but not in most states), and silencers, scopes, and rapid-fire modification devices? They have nothing at all to do with so-called “ghost guns,” but apparently may be considered useful for exaggerating the scope of the alleged problem.

**F. There is little or no evidence that PMFs are used to commit violent crimes in large numbers.**

ATF and its amici rely almost exclusively on tracing requests, anecdotal evidence, and accounts by local prosecutors to try to draw a connection between “ghost guns” and the supposed epidemic of violent crime. There appear to be no reliable statistics on the actual use of PMFs in violent crime. Because of this lack of data, there is little empirical basis for this Court to base its decision in this matter on any purported epidemic or crisis.

There is one “database” created by a group opposing firearms rights that is cited in the Brief of Amicus Curiae Global Action on Gun Violence in Support of Petitioners at 9. The group sponsoring the “database” characterizes “ghost guns” as a “weapon of choice for violent criminals.” Everytown for Gun Safety Foundation, Everytown Research & Policy “Ghost Guns Shootings,” <https://everytownresearch.org/report/ghost-guns-recoveries-and-shootings/>.

The “database” consists of very short, line-item descriptions of 182 shootings supposedly involving

“ghost guns” from 2013 through 2024, inclusive. The descriptions are derived from a collection of articles from online media, press releases from prosecutors’ offices, Facebook posts, and other miscellaneous sources. There is no systematic attempt to assemble all of the pertinent facts or categorize the information in an organized or scientific fashion. *Id.*

Frequently missing from the individual entries in this database are:

- Any explanation as to how it was determined that the weapon in question was a ghost gun;
- What kind of firearm it was (e.g., handgun, rifle), and what commercial firearm model it might have resembled or been based on;
- Whether the shooter assembled the “ghost gun” himself, or bought it already assembled from another person or source;
  - Whether the gun was built from a “parts kit”;
  - Whether the gun was built on a 3-D printed frame or receiver;
- Where, when, and how the individual who used the gun obtained it; and
- Whether the individual was prohibited by federal or state law from possessing a firearm, or from possessing the particular type of firearm used.

Even if everything described in the “database” were to be accepted as accurate, the 182 shootings listed during the years the twelve-year period 2013 through 2024 amount to an average of 15 shootings per year, nationwide. Some of the shootings were accidental, involved only minor injuries, or were

suicides. *Id.* Contrast these numbers with the report on the same page of the Global Action brief which states that “Between March 2023 and July 2023 alone, law enforcement agencies across the nation recovered 13,828 suspected ghost guns.” Br. Global Action at 9. There were 182 alleged shootings involving ghost guns over a span of twelve years, while 13,828 suspected ghost guns were supposedly recovered in a single five-month period. Something does not add up here. The fact is that the number of traces based on recoveries is meaningless for establishing the actual use of ghost guns in violent crime.

#### CONCLUSION

The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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