

Nos. 22-11071, 22-11086

**In the United States Court of Appeals
for the Fifth Circuit**

JENNIFER VANDERSTOK, *et al.*,
Plaintiffs-Appellees,

v.

MERRICK GARLAND, UNITED STATES ATTORNEY GENERAL, *et al.*,
Defendants-Appellants.

BLACKHAWK MANUFACTURING GROUP, INC., *d/b/a* 80 PERCENT ARMS,
Intervenor Plaintiff-Appellee,

v.

MERRICK GARLAND, UNITED STATES ATTORNEY GENERAL, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Texas, 4:22-cv-691 (Hon. Reed O'Connor)

**Motion of Gun Violence Prevention Groups for Leave to File Brief
as *Amici Curiae***

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Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Fifth Circuit Local Rule 29.1, Brady, Everytown for Gun Safety Action Fund (“Everytown”), and March For Our Lives (“MFOL”) (together, the “Gun Violence Prevention Groups”), move for leave to file the attached *amicus* brief in support of Defendants-Appellants and reversal. *See Lefebure v. D’Aquila*, 15 F.4th 670, 673, 676 (5th Cir. 2021) (explaining that “[c]ourts enjoy broad discretion to grant or deny leave to amici” and that courts are “well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted” (quotation marks omitted)).

Defendants-Appellants consent to the Gun Violence Prevention Groups’ request for leave to file an *amicus* brief. Undersigned counsel contacted counsel for Plaintiffs-Appellees and Intervenor Plaintiff-Appellee on December 14, and 19, 2022 to inquire whether they would consent to the filing of the *amicus* brief. Counsel for Plaintiffs-Appellees responded that they do not consent and counsel for Intervenor Plaintiff-Appellee did not respond.

Brady is the nation’s longest-standing nonpartisan, nonprofit organization dedicated to reducing gun violence through education,

research, and advocacy. Brady has researched the prevalence of ghost guns, created resources to demonstrate the ease with which ghost guns can be obtained and assembled, and advocated on behalf of commonsense measures to stop the spread of ghost guns.

Everytown is the largest gun-violence-prevention organization in the nation. Everytown has advocated on behalf of measures to limit the proliferation of unserialized guns and studied the detrimental effects of these guns on safety and federal and state laws.

MFOL is a nationwide organization of young people committed to advocating on behalf of sensible gun-violence-prevention policies. MFOL has fought to curtail the rapid rise of ghost guns and has focused on the deadly effects of ghost guns on teenagers.

Proposed *amici* regularly submit *amicus* briefs regarding gun violence and laws and regulations bearing on such violence.¹ They have

¹ See, e.g., Brady Br., *New York State Rifle & Pistol Ass'n, et al. v. The City of New York, et al.*, No. 18-280 (S. Ct. May 14, 2019); Everytown Br., *Kim Rhode, et al. v. Xavier Becerra, et al.*, 20-55437 (9th Cir. June 19, 2020); MFOL Br., *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, 21-CV-11269, ECF No. 125 (D. Mass Feb. 3, 2022).

litigated cases concerning ghost guns in particular.² Proposed *amici* filed an *amicus* brief in the action below and *amicus* briefs in parallel litigations in the Southern District of Texas and in the District of North Dakota and Eighth Circuit.³

Given their deep expertise and interest in the subject-matter at issue in this litigation, proposed *amici* submit that the attached brief setting forth their views will provide the Court with timely assistance in its consideration of the lawful regulation of “ghost guns” and their core components. *See, e.g., Lefebure*, 15 F.4th at 675 (“An amicus who makes a strong but responsible presentation in support of a party can

² *See, e.g., Everytown for Gun Safety Action Fund, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, 20-CV-6885 (S.D.N.Y.) (filed Aug. 26, 2020); *Mayor and City Council of Baltimore v. Polymer80, Inc., et al.*, 24-C-22-002482 (Cir. Ct. Baltimore Cty.) (filed June 1, 2022).

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., *Division 80 LLC v. Merrick Garland, et al.*, 22-CV-148, 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. 16, 2022); Gun Violence Prevention Groups Br., *Morehouse Enterprises, LLC, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, No. 22-2812 (Dec. 5, 2022).

truly serve as the court's friend." (cleaned up)). Accordingly, proposed *amici* respectfully request leave to file the attached *amicus* brief.

December 27, 2022

Respectfully Submitted,
By: /s/ Kathleen R. Hartnett

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(1)(E), 27(d)(2), and 32(a), I hereby certify that the foregoing motion complies with length, typeface, and type-style requirements. This motion contains 659 words and was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

December 27, 2022

Respectfully Submitted,
By: /s/ Kathleen R. Hartnett

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through this Court's CM/ECF system.

December 27, 2022

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By: /s/ Kathleen R. Hartnett

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On Appeal from the United States District Court for the
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**Brief of *Amici Curiae* Gun Violence Prevention Groups in Support of
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CERTIFICATE OF INTERESTED PERSONS

VanDerStok, et al. v. Garland, et al. (No. 22-11071)

Blackhawk Manufacturing Group, Inc., v. Garland, et al. (No. 22-11086)

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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9. Fed. R. App. P. 26.1 Disclosure Statement

Amici are nonprofit corporations with no parent corporations. No publicly held company owns 10% or more of Brady, Everytown for Gun Safety Action Fund, or March For Our Lives.

Respectfully Submitted,
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STATEMENT OF INTEREST¹

Brady, Everytown for Gun Safety Action Fund (“Everytown”), and March For Our Lives (“MFOL”) (“Gun Violence Prevention Groups”) submit this brief in support of Defendants-Appellants and reversal.

Brady is the nation’s longest-standing nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and advocacy. Brady has researched ghost guns, created resources to demonstrate the ease with which ghost guns can be obtained and assembled, and advocated on behalf of commonsense measures to stop the spread of ghost guns.

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MFOL is a nationwide organization of young people committed to advocating on behalf of sensible gun-violence-prevention policies. MFOL has fought to curtail the rapid rise of ghost guns and has focused on the deadly effects of ghost guns on teenagers.

¹ *Amici* certify that no person or entity, other than *amici*, their members, or their counsel, contributed to the preparation or submission of this brief.

The Gun Violence Prevention Groups regularly submit *amicus* briefs regarding gun violence² and have litigated cases concerning ghost guns.³ The Gun Violence Prevention groups filed an *amicus* brief in the action below and *amicus* briefs in parallel litigations in the Southern District of Texas and the District of North Dakota and Eighth Circuit.⁴

² See, e.g., Brady Br., *New York State Rifle & Pistol Ass’n, et al. v. The City of New York, et al.*, No. 18-280 (S. Ct. May 14, 2019); Everytown Br., *Kim Rhode, et al. v. Xavier Becerra, et al.*, 20-55437 (9th Cir. June 19, 2020); MFOL Br., *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, 21-CV-11269, ECF No. 125 (D. Mass Feb. 3, 2022).

³ *Everytown for Gun Safety Action Fund, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, 20-CV-6885 (S.D.N.Y.) (filed Aug. 26, 2020); *Mayor and City Council of Baltimore v. Polymer80, Inc., et al.*, 24-C-22-002482 (Cir. Ct. Baltimore Cty.) (filed June 1, 2022).

⁴ 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. 16, 2022); Gun Violence Prevention Groups Br., *Division 80 LLC v. Merrick Garland, et al.*, 22-CV-148, ECF No. 24-1 (S.D. Tex. July 8, 2022); 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., *Morehouse Enterprises, LLC, et al. v. Bureau of Alcohol Tobacco, Firearms and Explosives, et al.*, No. 22-2812 (Dec. 5, 2022).

INTRODUCTION

To advance public safety, the Gun Control Act of 1968 (“Act”), Pub. L. No. 90-618, 82 Stat. 1213 subjects “firearms” to critical requirements: background checks to prevent sales to persons who have committed felonies, who are fugitives, and who are minors; licensing for manufacturers, importers, and dealers to ensure that firearms are built and sold responsibly; and serialization to allow law enforcement to trace firearms to their first retail sale. 18 U.S.C. §§ 921–931. Congress adopted these requirements to “prevent guns from falling into the wrong hands” and “assist law enforcement ... in investigating serious crimes.” *Abramski v. United States*, 573 U.S. 169, 172–80 (2014).

The recent proliferation of “ghost guns” has undermined the Act and Congress’s law-and-order objectives. A ghost gun is a fully functional, unserialized, and untraceable weapon that can be assembled in an hour or less from components freely available online or at gun shows (including in ghost gun “kits”) with no background check and no questions asked. Ghost guns thwart the Act by allowing criminals and other prohibited individuals to acquire, use, and traffic weapons, all while remaining undetectable to law enforcement.

In recent years, recoveries of ghost guns in connection with crimes have skyrocketed. Law enforcement reported 19,344 recoveries of ghost guns in 2021, compared to 1,758 recoveries in 2016; from 2016 through 2021, 692 ghost guns were recovered in connection with a homicide or attempted homicide.⁵ In October of this year, an individual was arrested on suspicion of murdering six individuals with a ghost gun, possessed despite a prior felony.⁶ In September, a 21-year-old admitted to selling ghost guns from his home.⁷ In August, one police department reported that ghost gun recoveries had increased “nearly ninefold” over the prior year.⁸ In July, a 17-year-old shot herself in the face with a ghost gun—despite that the family was not allowed to have guns due to the victim’s mother’s felony.⁹ In June, four individuals were charged with trafficking

⁵ *Definition of “Frame or Receiver” and Identification of Firearms*, 87 Fed. Reg. 24652, 24656 (Apr. 26, 2022).

⁶ Keegan Hamilton, *The Stockton Serial Killer Suspect Was Using an Untraceable Ghost Gun*, VICE (Oct. 20, 2022), <https://bit.ly/3O7aOKp>.

⁷ Dept. of Justice, *Sauk Rapids Man Pleads Guilty to Manufacturing, Selling Ghost Guns* (Sept. 29, 2022), <https://bit.ly/3Eemiam>.

⁸ Ben Lambert, *New Haven Police See “Ghost Guns” On the Rise in City*, New Haven Register (Aug. 17, 2022), <https://bit.ly/3THs9e5>.

⁹ Gun Violence Archive (July 18, 2022), <https://bit.ly/3vXsrVa>.

31 ghost guns interstate.¹⁰ Just days ago, the United States Attorney’s Office for the District of Colorado issued a release quoting an individual convicted of dealing ghost guns: “Right now, you look at the media, ... you see a lot of people shooting each other, mass killings and stuff. I ... thought, ‘man that could be one of the guns I put out on the streets.’”¹¹

Despite the suffering inflicted by unserialized firearms, Plaintiffs-Appellees below mocked the term “ghost guns” as a “derogatory” label meant to “re-brand an American tradition” and “treat[] companies that exist to support that tradition as enabling criminals.” ECF No. 16 at 23.¹² A gun violence epidemic is not an “American tradition.” And it is a *fact*—not “brand[ing]”—that ghost guns have empowered criminals.

ATF acted well within its authority in promulgating *Definition of “Frame or Receiver” and Identification of Firearms*, 87 Fed. Reg. 24652 (Apr. 26, 2022) (the “Rule”), which confirms that the core building blocks of ghost guns—unserialized, partially complete frames (the core

¹⁰ Kathy Reakes, *4 Charged, 31 Ghost Guns Seized in Multi-Agency Yonkers Bust*, Yonkers Daily Voice (Aug. 9, 2022), <https://bit.ly/3C757bc>; *see also, e.g., Ghost Guns Recoveries and Shootings*, Everytown Research (Apr. 8, 2022), <https://bit.ly/3bSCcwt>.

¹¹ U.S. Attorney’s Office, District of Colorado, *Colorado Man Shares Warnings About Ghost Guns* (Dec. 18, 2022), <https://bit.ly/3V7lgU6>.

¹² All “ECF” references are to the District Court docket, 4:22-cv-00691 (N.D. Tex.).

component of pistols) and partially complete receivers (the core component of long guns) and the kits enabling quick and easy conversion of these frames and receivers into operable ghost guns—are “firearms” under the Act’s plain language. The Act defines “firearm” to include not only fully complete firearms, but also “frame[s]” or “receiver[s]” that are “designed to” be or that “may readily be converted” into operable weapons. 18 U.S.C. § 921(a)(3). That text unambiguously encompasses ghost gun kits and most commercially available partially complete frames and receivers, which are designed to be and, in fact, readily can be converted into operable and unserialized weapons, or the frames and receivers of such weapons, in an hour or less. Indeed, their *only* purpose is to be quickly and easily converted into untraceable weapons.

The District Court misunderstood the Act in enjoining the Rule. Despite accepting in one breath that an “*incomplete* receiver may still be a receiver within the meaning of the statute,” ECF No. 56 at 10 (emphasis added), the District Court held the opposite in the next: “Congress did *not* choose to cover ... *incomplete*, nonfunctional frames or receivers,” *id.* at 9 (emphases added).

Congress plainly *did* choose to cover such items. The Act defines “firearm” without the words “complete” or “functional.” Rather, the Act defines “firearm” to include items that are “designed to or may readily be converted to expel a projectile”—*i.e., not yet capable of doing so*. 18 U.S.C. § 921(a)(3). That makes sense. Were 99.99%-complete frames and receivers not “firearms,” it would unravel the Act: any criminal could evade licensing, tracing, and background checks, simply by buying a ghost gun kit or partially complete frame or receiver, and quickly converting that purchase into a deadly weapon.¹³ Perhaps sensing this perversity, the District Court carved out from its injunction “individuals prohibited from possessing firearms.” ECF No. 91 at 3. But that carveout only makes sense if one recognizes that the items offered for sale by the Appellees are designed to be assembled into firearms. The District Court also begrudgingly accepted that the Rule’s purpose “is to prohibit high-risk individuals from gaining access to ghost guns, not to police ... law-

¹³ According to the District Court, so-called “80%”-complete frames and receivers *are* covered by the Act. ECF No. 56 at 10. That acknowledgement cannot be squared with the District Court’s holding that the Act excludes “incomplete ... frames or receivers.” *Id.* at 9. It also fails to account for the fact that the Act covers not just items that “may readily be converted” into an operable firearm, but items “designed to” be so converted. 18 U.S.C. § 921(a)(3).

abiding gun owners,” *id.* at 4. But it is the former, not the latter, celebrating the ruling below.

The District Court’s ruling is wrong and *amici* underscore three of the many reasons why.

First, the Rule implements the Act’s language and prevents the subversion of its purpose. Under the Act, “firearms” may be sold commercially only *by* licensed dealers and *to* law-abiding and responsible persons who pass a background check. Ghost gun kits and partially complete frames and receivers are “designed to” be and “may readily be converted” into operable firearms or the frames and receivers of such firearms and are thus firearms. 18 U.S.C. § 921(a)(3). Were they not regulated as such, as the District Court held, they could be sold *by* anyone and *to* anyone—the opposite of what Congress intended. The Act also requires commercial firearms to possess a serial number and criminalizes obliterating that number—all to help law enforcement fight crime. Ghost gun kits and partially complete frames and receivers lack serial numbers; they are invisible to law enforcement.¹⁴

¹⁴ References to background checks and serialization are limited to firearms distributed commercially, as the Rule does not require background checks on private firearm sales or restrict persons not otherwise prohibited from possessing firearms from making unserialized firearms for personal use. 87 Fed. Reg. 24652, 24676.

Second, the Rule recognizes practical reality in accounting for the ease and speed with which ghost gun kits and partially complete frames and receivers can be completed into deadly firearms. As ghost gun companies' advertising materials make clear, these items are designed with the sole purpose of being converted into functioning firearms. True to that singular purpose, kits and partially complete frames and receivers in fact *do* allow sophisticated and novice purchasers alike to convert these items into operable firearms swiftly and easily. One need only spend a moment on the websites of Appellees Tactical Machining or Blackhawk Manufacturing to see beyond doubt that the wares offered for sale are designed to be and are readily convertible into functional firearms.

Third, the Rule continues ATF's longstanding view that partially complete frames and receivers can be "firearms." Shortly after the Act's passage, ATF recognized that partially complete frames or receivers that could readily be converted into operable firearms were indeed "firearms," judging by the ease and speed with which they could be rendered functional. That the ghost gun industry has flouted ATF's oversight by *hiding* the ease and speed with which ghost guns can be assembled confirms that the industry knows what the Act has said all along:

partially complete frames and receivers “designed” to be or that may “readily be” converted into operable firearms or the frames and receivers of such firearms are “firearms.” The alarm sounded by Appellees below that the Rule reaches items “that have never been regulated,” ECF No. 16 at 1, is ahistorical and belied by the industry’s behavior.

The District Court’s rulings should be reversed.

ARGUMENT

I. The Rule Implements the Gun Control Act and Prevents its Subversion

A. The Rule Implements the Act’s Clear Definition of “Firearm”

The Gun Control 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).

Taken together, (A) and (B) classify as “firearms” partially complete frames and receivers and ghost gun kits that are “designed to” be or may “readily be converted” into operable firearms. That is because “firearm” is defined as the “frame or receiver of any such weapon,” with “such weapon” in (B) referring back to “weapon” in (A). And (A), in turn,

includes “any weapon” that is “designed to or may readily be converted to expel a projectile by the action of an explosive.” In other words, when (B) refers to “the frame or receiver of any such weapon,” it incorporates the description of “weapon” in (A), which covers items presently configured to fire *and* items that are “designed to or may readily be converted” into operable firearms. *See Local 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*”) (citation omitted). Because (A) includes not-yet-complete weapons, it follows that the “frame or receiver of any *such weapon*” in (B) includes partially complete frames or receivers as well (so long as they are “designed to” be or may “readily be converted” into the frame or receiver of an operable firearm).

The District Court failed to recognize how “such weapon” connects subparagraphs (A) and (B). According to the District Court, “[t]hat the firearm part is ‘designed’ to be or may one day become a frame or receiver does not change the fact that, in that moment, it is not ‘the frame or receiver of any such weapon.’” ECF No. 56 at 10. But that reading stops one step short: the phrase “such weapon” refers back to “weapon” in

18 U.S.C. § 921(a)(3)(A), which in turn includes items that are *not*—to quote the District Court—“in that moment” a complete firearm.

In short, under a straightforward application of the Act’s definition of “firearm,” partially complete frames and receivers, and the ghost gun kits used to assemble such frames and receivers into operable weapons, are “firearms” whenever they are “designed to” be or may “readily be converted” into operable firearms or the frames or receivers of such a firearm. The sole purpose for which these frames, receivers, and kits are made and sold, is to be converted into firearms; the actual conversion can be done with ease. Failing to regulate these items as “firearms” would contravene the Act’s plain language.

B. The Rule Advances the Act’s Purpose

The Act’s purpose demands the same interpretation. The Act has two principal ends and two principal means, all of which are directly served by the Rule and undermined by the District Court.

The ends: (1) promoting public safety by keeping guns out of the hands of persons who have committed felonies, have been convicted of domestic abuse, and are otherwise dangerous, and (2) assisting law enforcement in fighting crime. S. Rep. No. 90-1501, at 22 (1968) (“Senate

Report”) (“The principal purposes of this act are to make it possible to keep firearms out of the hands of those not legally entitled to possess them ... and to assist law enforcement ... in combating ... crime.”); H. Rep. No. 90-1577, at 4412 (1968) (explaining the “need” to combat “the growing use of firearms in violent crime”). Because unregulated ghost gun kits and partially complete frames and receivers allow dangerous individuals to obtain deadly and untraceable firearms, failing to regulate these items as “firearms” undermines the Act’s ends.

The means: (1) regulating who may buy or sell firearms; and (2) imposing strict rules on how firearms and firearm transactions are tracked. The Rule’s coverage of ghost gun kits and near-complete frames and receivers as “firearms” is faithful to the means Congress adopted, as it ensures that such objects are subjected to the Act’s limits on purchase, sale, and distribution. Indeed, failing to regulate these items as what they are—firearms—would undermine the Act and other firearm safety regulations that cross-reference the Act’s definition of “firearm.”

Federal firearms licensees. The Act designates federal firearms licensees (“FFLs”)—those who manufacture, sell, or import firearms—the “principal agent of [law] enforcement” in “restricting ... access to

firearms.” *Huddleston v. United States*, 415 U.S. 814, 824 (1974). If ghost gun kits and partially complete frames and receivers were not treated as firearms (as the Act requires), the effect would be to sideline FFLs with respect to the sale and acquisition of a rapidly growing source of crime firearms across the country.

Under the Act, FFLs—and only FFLs—may “engage in the business of importing, manufacturing, or dealing in firearms.” 18 U.S.C. § 922(a)(1)(A); *see id.* § 923(a). In exchange for this right, FFLs must serve as the Act’s frontline mechanism for implementation:

- FFLs may not “sell or deliver” firearms to individuals who are underage, reside out-of-state (with limited exceptions), or have a criminal history. 18 U.S.C. §§ 922(b), 922(d); *see* 27 C.F.R. § 478.99.
- FFLs must keep inventory and transaction records and must report suspicious purchases. 18 U.S.C. § 923(g)(1)(A) (requiring FFLs to keep “such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business”); 27 C.F.R. §§ 478.101 (record-keeping), 478.121–134 (same); 18 U.S.C. § 923(g)(3) (FFLs must report when an individual buys multiple handguns within a short timeframe).
- FFLs must make their records accessible to law enforcement officials, who can access these records to investigate and combat firearm-related crimes. *See infra*.

FFLs that fail to meet these or other duties may lose their license, 18 U.S.C. §§ 923(d), 923(e), and become susceptible to civil and criminal liability, *id.* §§ 922, 924.

The Act and its implementing regulations thus enshrine FFLs as scrutinizing gatekeepers at the point of sale, subject to harsh penalties for noncompliance.¹⁵ But FFLs’ functions attach only to “firearms.” If ghost gun kits and partially complete frames and receivers are not treated as “firearms,” FFLs would be removed from their post as the “principal agent of [law] enforcement” for this rapidly expanding source of deadly, untraceable guns. *Huddleston*, 415 U.S. at 824.

Background checks. Under the Act, every individual who purchases a firearm from an FFL must undergo a background check. 18 U.S.C. § 922(t)(1); 27 C.F.R. § 478.102(a). Absent recognizing ghost gun kits and partially complete frames and receivers as firearms—as the Act requires and the Rule confirms—untraceable and fully operational

¹⁵ In monitoring the point of sale, the Act keeps firearms out of dangerous hands in the first place, rather than forcing law enforcement to restrict possession after the firearms enter circulation. The Rule furthers this prophylactic premise: public safety is better served by preventing a criminal from purchasing a gun than it is by recovering a gun after a crime has already occurred.

firearms could be acquired by criminals, domestic abusers, minors, those with severe mental illness, and others.

Allowing unfettered access to dangerous weapons is the opposite of what Congress envisioned. In carefully regulating who may purchase a firearm, the Act “sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous.” *Barrett v. United States*, 423 U.S. 212, 218 (1976). That approach is consistent with a “longstanding” tradition of “prohibitions on the possession of firearms” that protect public safety, such as limiting possession by “felons and the mentally ill.” *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008); see *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022) (reaffirming that the Constitution protects “the right of ... *law-abiding* citizen[s]” to carry arms for self-defense) (emphasis added). The Act continues that tradition by “establish[ing] a detailed scheme to enable the dealer to verify ... whether a potential buyer may lawfully own a gun.” *Abramski*, 573 U.S. at 172.

So important is the identity of the purchaser that it is a crime for an FFL to sell a firearm without running a background check on the transferee, 18 U.S.C. § 922(t); for a buyer to “make any false or fictitious

... statement” concerning their identity, *id.* § 922(a)(6); or for FFLs to make any “false” statement regarding a buyer’s identity, *id.* §§ 922(m), 924(a)(3). The Rule implements Congress’s judgment of who may possess a firearm and the scheme for preventing circumvention of that judgment.

The District Court’s ruling magnifies the dangers the Act was designed to address. Congress saw “the ease with which any person can anonymously acquire firearms” as “a matter of serious national concern,” and responded accordingly. Senate Report at 22. For instance, to curtail anonymous purchases, Congress barred “the commercial mail-order traffic in firearms to unlicensed persons.” *Id.* at 23. Congress even *rejected* earlier proposed legislation that failed to “prohibit the mail-order sale” of firearms known for “their susceptibility to crimes.” S. Rep. No. 89-1866, at 34, 100 (1966). Absent regulation as firearms, ghost gun kits and partially complete frames and receivers are the modern incarnation of mail-order guns: they allow anonymous persons to buy a gun remotely and have that gun shipped across state lines to facilitate crime. In recent years, this has occurred with alarming regularity. Indeed, prior to the

Rule, ghost gun kit manufacturers proudly marketed anonymity and the avoidance of background checks.¹⁶

Straw purchases. Failing to classify ghost gun kits and partially complete frames and receivers as firearms would dilute the Act’s ban on “straw purchases,” *i.e.*, gun purchases made by someone who can pass a background check on behalf of someone else—often a prohibited buyer. Purchasers of ghost gun kits or partially complete frames and receivers would not even need to cloak their identities with straw purchases if these items were not recognized as firearms.

The Act aims to prevent the diversion of firearms to the criminal market, including by preventing “straw purchases.” Straw purchases have long fueled gun trafficking. *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, U.S. Dept. of the Treasury at 10 (June 2000), <https://bit.ly/3JXi6OP>; *Trafficking & Straw Purchasing*,

¹⁶ See, e.g., *Are Felons Restricted from Owning a Firearm that Was Built from an 80% Receiver?*, Polymer80 Blog (Oct. 21, 2020), formerly at <https://bit.ly/3DDzXGo> (“Convicted felons are not restricted from purchasing and owning 80% frames...”); *The History of Legally Buying Firearms Without an FFL*, 80% Arms Blog (Dec. 3, 2019), <https://bit.ly/3HClkFU> (no background check or serialization required); *JSD 80% Lower Receivers, Jigs, and Gun Parts Kits*, JSD Supply (last visited Feb. 12, 2022), <https://bit.ly/3rKrgqj> (same); *Ghost Gunner*, Ghost Guns (last visited Dec. 14, 2021), <https://bit.ly/3pUjDvj> (same); *Lower Receiver*, SS-Arms (last visited Dec. 14, 2021), <https://bit.ly/3GAVvVo> (same); *About*, R&B Tactical Tooling (last visited Nov. 19, 2021), <https://bit.ly/3oNKMZU> (same).

Giffords Law Center (last visited Dec. 14, 2021) <https://bit.ly/3FBTtnv> (“30,000 attempted straw purchases each year”).

Through several interlocking requirements, the Act forbids straw purchases. Gun buyers must fill out “Form 4473,” attesting to their identity, ATF Form 4473 (5300.9), <https://bit.ly/3CAv5Rl>, and it is a crime to misrepresent—on Form 4473 or elsewhere—“any fact material to the lawfulness of the sale,” 18 U.S.C. § 922(a)(6). Further, an FFL that fails to stop straw purchases at the point of sale can lose its license and face civil and criminal liability. *Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070, 1077–79 (7th Cir. 2011); *United States v. Carney*, 387 F.3d 436, 446 (6th Cir. 2004).

As the Supreme Court has recognized, protections against straw purchases are essential because, “[p]utting true numbskulls to one side, anyone purchasing a gun for criminal purposes would avoid leaving a paper trail by the simple expedient of hiring a straw.” *Abramski*, 573 U.S. at 183. Yet if ghost gun kits and partially complete frames and receivers were wrongly deemed not to be firearms under the Act, then none of the tools that ATF employs to combat straw purchases would be available for this segment of the market, leaving criminal buyers with

few roadblocks to obtaining firearms: criminal purchasers could—and surely would—simply procure an unserialized gun directly.

Serialization, record-keeping, and public safety. Ghost guns contravene the Act’s serialization and record-keeping provisions, making it more difficult for law enforcement to fight crime. *See United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) (“[W]e think it plain that [serialization] serves a law enforcement interest.”); *United States v. Harris*, 720 F.3d 499, 502 (4th Cir. 2013). By their very nature, ghost guns are fully operational, unmarked, and *untraceable* firearms, which impede law enforcement’s ability to prevent, detect, and prosecute violent crime by tracing illegal weapons to their source.

The Act mandates that every firearm possess a unique serial number and makes it a crime to tamper with a serial number or even “receive” a firearm with an already-tampered-with serial number. 27 C.F.R. § 478.92; 18 U.S.C. §§ 923(i), 922(k). Serialization allows ATF “to link a suspect to a firearm.” *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 204 (D.C. Cir. 2013). Possessing a firearm with an altered serial number triggers a sentencing enhancement—even if law enforcement can reconstruct the number. U.S.S.G. § 2K2.1(b)(4)(B); *see*

United States v. St. Hilaire, 960 F.3d 61, 64 (2d Cir. 2020); *United States v. Fuller-Ragland*, 931 F.3d 456, 467 (6th Cir. 2019).

The Act also assists law enforcement by subjecting FFLs to record-keeping duties to track firearm sales and inventory. 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. §§ 478.121–134. Law enforcement may “examine the inventory and records of [FFLs] ... without ... reasonable cause or warrant,” when associated with any “reasonable inquiry during the course of a criminal investigation.” 18 U.S.C. § 923(g)(1)(B); *see* 27 C.F.R. § 478.121(b). “FFL records” allow ATF to “trace a firearm” and identify its “path through the distribution chain.” *Nat’l Shooting Sports*, 716 F.3d at 204 (cleaned up).

Without serialization and record-keeping, these law-enforcement mechanisms break down. It is “no secret that a chain of custody for a firearm greatly assists in the difficult process of solving crimes” and reconstructing a chain of custody without “serial numbers” is “virtually impossible.” *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992). The inherent difficulty of tracing an unserialized firearm is one reason why “[f]irearms without serial numbers are of particular value to those engaged in illicit activity.” *Marzzarella*, 614 F.3d at 98. As a House

Committee report warned, “[g]host guns” pose a “homeland security challenge” because they “hamstring[] law enforcement’s ability to investigate crimes.” H. Rep. No. 116-88, at 2 (2019). Would-be criminals will naturally prefer untraceable ghost guns to traceable firearms. The District Court passingly referenced “federal firearms license[s],” “background checks,” and ensuring that firearms are “traceable,” ECF No. 56 at 1, 11, but nowhere grappled with the fact that its ruling would all-but-nullify these pillars of the Act when it comes to ghost guns.

* * *

In sum, the Rule implements the Act’s text, furthers its purpose, and prevents its subversion—contrary to the District Court’s analysis.

II. The Rule Properly Considers the Practical Reality that Ghost Guns Can be Quickly and Easily Assembled by Nonexperts

The Act defines “firearm” in practical terms, covering not only fully complete weapons, but also partially complete frames and receivers that are designed to be or may readily be converted into operable firearms or the frames or receivers of such firearms. 18 U.S.C. § 921(a)(3). The Rule implements this definition and Congress’s pragmatic approach—recognizing the indisputable reality that ghost guns can be assembled

from kits and partially complete frames and receivers easily and without any technical expertise, in an hour or less.

Courts have widely agreed that, under the Act, a “weapon designed to fire a projectile” that is “temporarily incapable of effecting its purpose,” is not “removed from” the definition of “firearm.” *United States v. Rivera*, 415 F.3d 284, 286 (2d Cir. 2005).¹⁷ Earlier this year, the California Superior Court refused to dismiss claims that a ghost gun kit purveyor violated the Act by distributing “kits which could readily be converted into firearms.”¹⁸ And this past summer, the D.C. Superior Court held that partially complete frames, receivers, and kits sold by a ghost gun

¹⁷ See, e.g., *United States v. Hardin*, 889 F.3d 945, 949 (8th Cir. 2018) (rejecting argument that “disrepair” of a gun, which rendered it inoperable, changed that the gun was “manufactured to be ... a gun”) (quotation marks omitted); *United States v. Cooper*, 714 F.3d 873, 881 (5th Cir. 2013) (“[W]e have consistently held that inoperable firearms can support convictions [under 18 U.S.C. § 921(a)(3).]”); *United States v. Mullins*, 446 F.3d 750, 756 (8th Cir. 2006) (gun that could be “modified” to function as a firearm, “without any specialized knowledge, in less than an hour,” is “readily convertible”); *United States v. Annis*, 446 F.3d 852, 857 (8th Cir. 2006) (gun that was not “operational” until “putting the bolt in” was a “firearm”); *United States v. Christmann*, 193 F.3d 1023, 1024 (8th Cir. 1999) (interpreting what it means to “readily” be convertible into a “firearm” under Sentencing Guidelines and explaining that it “turns on what the weapon is designed to do, not on whether it is capable of doing its job at the particular moment the crime was committed”); *United States v. Smith*, 477 F.2d 399, 400 (8th Cir. 1973) (gun that required “8-hour working day in a properly equipped machine shop” was “readily” convertible into an operational gun).

¹⁸ *Apolinar v. Polymer80, Inc.*, 2022 Cal. Super. Lexis 2591, at *6 (Cal. Sup. Ct. Feb. 2, 2022).

manufacturer—“regardless of their operability”—are “firearms” as they are “readily converted into firearms.”¹⁹ Even here, the District Court cited a case in which parts needed to be “assembled” into a firearm before use—acknowledging that the Act covers not-yet-functional items, so long as they are designed to be or readily convertible into functional firearms. ECF No. 56 at 14 (citing *United States v. Ryles*, 988 F.2d 13 (5th Cir. 1993)). In short, courts have had no difficulty applying the Act’s text and concluding that items that are “designed to or may readily be converted” into firearms are “firearms,” even if they are not presently complete.

Not only is statutory text dispositive, but a mountain of real-world evidence confirms that ghost gun kits and partially complete frames and receivers *are* designed to be and may readily be converted into operable firearms. Manufacturers and distributors have advertised that these kits, frames, and receivers are designed for the sole purpose of being assembled into functional guns. And—consistent with that purpose—these items can, in fact, be easily assembled by the most novice of gun-builders, even a child.

¹⁹ *District of Columbia v. Polymer80, Inc.*, No. 2020-CA-002878-B, at 5–6 (D.C. Sup. Ct. Aug. 10, 2022) (“On Polymer80’s website, they provide instructions to consumers on how to build firearms with these unfinished frames, receivers, and ... kits.”), <https://bit.ly/3A1f4EN>.

Specifically, through a single website, prior to the Rule one could buy a complete, all-in-one kit that “package[s] the unfinished frame or receiver with all the other parts needed to complete the firearm.” *Untraceable: The Rising Specter of Ghost Guns*, Everytown Research (May 14, 2020), <https://bit.ly/3DTrIWj>. Once a kit is delivered, assembly is simple. As observed by the head of ATF’s Los Angeles office:

If you can go to one of these big-box stores and put that type of furniture together, if you’re putting together your kids Christmas toys, you can make a homemade gun. It’s that easy.

Jonathan Edwards, A 13-Year-Old Boy Made and Trafficked ‘Ghost Guns,’ Authorities Say, and Then Killed His Sister with One, Wash. Post. (Dec. 3, 2021), <https://wapo.st/3Ggarb9>.

The District Court suggested it is speculative that such kits “may one day” become firearms. ECF No. 56 at 7, 8, 10. But as Intervenor-Appellees quietly conceded below, their products are designed for the sole purpose of allowing customers “to make ... firearms.” ECF No. 103 at 3.

Ghost gun kits are not only designed to be converted into firearms: they are designed to be converted *quickly*. Prior to the Rule, kit manufacturers and distributors touted this speed. *See, e.g., GST-9: 80% Pistol Build Kit, 80% Arms* (last visited Nov. 19, 2021),

<https://bit.ly/3x6n0T7> (“Our goal was for you to be able to go from opening the mail, to a competition or defense ready pistol in under 15 minutes.”). Manufacturers and distributors also published how-to guides to walk novices through the assembly. *See, e.g., How-To Manuals*, Polymer80 (last visited Dec. 17, 2021), <https://bit.ly/3qUwobt>.

Amateurs and experts alike have assembled kits in around an hour or less. *See* Glenn Thrush, ‘Ghost Guns’: Firearm Kits Bought Online Fuel Epidemic of Violence, N.Y. Times (Nov. 14, 2021), <https://nyti.ms/3EYiedv> (“[An] amateur can ... turn [a kit] into a working firearm in **less than an hour**.” (emphasis added)); Compl. at ¶¶ 74, 115, *People v. Blackhawk Mfg. Grp., et al.*, CGC-21-594577 (Cal. Super. Ct. Aug. 18, 2021) (officer assembled kit in “**less than 25 minutes**” with hardware store tools (emphasis added)); *id.* at ¶ 73 (ATF agent built kit “in **less than nineteen minutes**” (emphasis added)); Prelim. Inj. Mem., *City of New York v. Arm or Ally LLC, et al.*, 22-CV-5525, ECF No. 9, at 11 (S.D.N.Y. June 29, 2022) (ghost gun assembled “in **approximately an hour and a half**”) (emphasis added). 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**.” Decl. of J. McFarlan, *City of Syracuse, et al. v. Bur. of Alcohol, Tobacco, Firearms & Explosives*, 20-CV-6885 (“*City of Syracuse*”), ECF 64-34, at ¶¶ 8, 10, 11 (S.D.N.Y. Dec. 9, 2020) (emphasis added).

In short, the reality appreciated by the Rule—and disregarded by the District Court—is that anyone with an internet connection, an hour or so or less of free time, and basic household tools can convert ghost gun kits and partially complete frames and receivers into operable, untraceable firearms.

III. The Rule Comports with ATF’s Longstanding View that Partially Complete Frames and Receivers Can Be Firearms

Below, Plaintiffs-Appellees repeatedly asserted that the Rule veers from ATF’s historical views on what constitutes a firearm. ECF No. 16 at 1, 5, 15, 29, 38. To the contrary, for years after the Act’s passage, ATF understood that Congress defined “firearm” to include partially complete frames and receivers, and that the operative question is how quickly and easily—*i.e.*, “readily”—a partially complete frame or receiver can “be converted” into an operable weapon. 18 U.S.C. § 921(a)(3). That some purveyors of ghost gun kits and parts have tried to *hide* from ATF the ease with which their wares can be assembled only reinforces that a

partially complete frame or receiver that can quickly and easily be converted into a firearm is indeed a “firearm.”

The Act was enacted in 1968. In 1976, ATF’s Assistant Chief Counsel issued a framework for assessing whether an “unfinished” frame or receiver is a “firearm.” Admin. Record, *City of Syracuse*, ECF 60 (S.D.N.Y. Dec. 8, 2020), at ATF0265 (available at <https://bit.ly/3BTAgxX>). The framework explained that if “unfinished frames” or “castings” “*may readily be converted*” into firearms, “they are firearms.” *Id.* at ATF0266 (emphasis added). The framework noted that partially complete frames and receivers must be reviewed “case-by-case” to gauge if they are “readily convertible”:

[W]e view the current Bureau procedure in classifying “firearms” on a case-by-case basis as consistent with the letter and spirit of the [] Act. It is obvious that what constitutes “readily convertible” depends upon the nature of each firearm. That there may be cases where it is difficult to determine the side on which a particular “firearm” falls is not a sufficient reason to establish a rigid criterion for ... “readily convertible.”

Id. at ATF0267.

For decades, ATF followed that conclusion in classification letters that turned on whether items could “readily be converted” into an operable firearm. *Id.* at ATF0001, ATF0014, AATF0020, ATF0023,

ATF0050, AATF0051, AATF0053, ATF0065 (available at <https://bit.ly/3YJIZws>). Consistent with “readily” meaning “without much difficulty” or “with fairly quick efficiency,”²⁰ several of these letters referenced the ease and speed with which partially complete frames and receivers could be assembled into operable firearms. *Id.* at ATF0020 (receiver was a “firearm” because it required “75 minutes” of assembly); *id.* at ATF0024 (frame was a “firearm” because it required “20 minutes” of assembly).

Notwithstanding this history, Appellees complained below that the Rule’s focus on ease and speed of assembly marks a tectonic shift. That is belied by the ghost gun industry’s behavior. The industry has tried to hide from ATF the extent to which ghost gun kits and parts can “readily” be converted into firearms—a clear sign that, even before the Rule, the industry knew that the Act reaches these items. In an affidavit to support a warrant to search a facility operated by Polymer80 (a major seller of ghost gun kits and parts), an ATF agent stated that, in 2017, Polymer80 sought a determination that a partially complete pistol frame

²⁰ *Webster’s Third New International Dictionary* 1889 (1965) (defining “readily”).

is not a firearm by misleadingly submitting just the partially complete frame without the rest of the kit sold with the frame. Aff. of T. Hart, *In the Matter of the Search of the Business and Federal Firearms Licensee known as Polymer80*, 3:20-mj-123, ¶¶ 42–43 (D. Nev. Dec. 9, 2020) (<https://on.wsj.com/3pivOCi>). ATF responded to Polymer80 in a letter noting that, “the submitted sample is simply a component of a larger product,” and directing Polymer80 to “submit the complete ... [k]it.” *Id.* at ¶¶ 43–44. As of December 2020, Polymer80 had not “resubmitted the ... kit.” *Id.* at ¶ 45. ATF eventually obtained a kit through an informant who bought the “Buy Build Shoot” kit—advertised as having “all the necessary components” for a gun—with no background check, and assembled it into an operable gun in 21 minutes. *Id.* at ¶ 69.

Thus, ATF has long recognized that partially complete frames and receivers that can readily be assembled into operable firearms are firearms. That the ghost gun industry has hidden its products from ATF only confirms that the Rule lawfully implements the Act.

CONCLUSION

This Court should reverse the District Court's rulings.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 6,449 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) and Fifth Circuit Local Rule 32 because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point (above the line) and 12-point (footnotes) Century Schoolbook font.

December 27, 2022

Respectfully Submitted,
By: /s/ Kathleen R. Hartnett

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through this Court's CM/ECF system.

December 27, 2022

Respectfully Submitted,
By: /s/ Kathleen R. Hartnett