

## Busting Ghosts: How Regulatory Gaps Fail to Address Ghost Guns, and What Can Be Done Post-Bruen

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## Busting Ghosts: How Regulatory Gaps Fail to Address Ghost Guns, and What Can Be Done Post-*Bruen*

Wyatt Lutenbacher†

### Introduction

Gaps in federal regulation have allowed “privately made firearms,” or “ghost guns,” to proliferate.<sup>1</sup> Until August 2022, “firearm kits,” which allowed for easy assembly of functional firearms without serial numbers, could be purchased without a background check.<sup>2</sup> Federal law and the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) have historically regulated assembled weapons rather than firearm components, and as a result, firearm kits have circumvented traditional firearm regulations.<sup>3</sup> As a result, state and federal regulations have now had to try to adapt accordingly.<sup>4</sup> Yet in *New York State Rifle & Pistol*

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1. Ghost guns can also refer to 3D-printed firearms. See Champe Barton & Chip Brownlee, *What Are 3D-Printed Guns, and Why Are They Controversial?*, THE TRACE (Apr. 8, 2022), <https://www.thetrace.org/2021/02/3d-printer-ghost-gun-legal-liberator-deterrence-dispensed> [<https://perma.cc/JG99-ZVE>]. This note focuses solely on privately made firearms (PMFs).

2. OFF. OF PUB. AFFS., U.S. DEP’T OF JUST., Press Release No. 22-904, FRAME AND RECEIVER RULE GOES INTO EFFECT (2022) (“Last year, the Justice Department committed to modernizing our regulations to address the proliferation of ‘ghost guns’ . . .”).

3. See *Ghost Guns*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (citing 18 U.S.C. § 921(a)(3)), <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns/> [<https://perma.cc/2N72-2YY4>] (“[F]ederal law (and most state laws) define the term ‘firearm’ to include the frame or receiver of the weapon alone without any other parts or components . . . . If the frame or receiver of a firearm is *completed* or can be ‘readily converted’ to shoot, it is considered a ‘firearm’ . . . meaning it must . . . have a serial number imprinted on it . . . and that retail sellers . . . generally have to be licensed as firearm dealers, conduct background checks, and retain sale records.”).

4. *Id.* (“On April 26, 2022, the Biden Administration took executive action to begin to address the ghost gun crisis . . . . Fourteen states . . . and the District of

*Association v. Bruen*, the United States Supreme Court unsettled many firearm regulations by creating a new test for the Second Amendment that focuses on history and tradition.<sup>5</sup>

This Note posits that ghost guns are a problem not seriously addressed by federal regulations. To address these regulatory gaps, this Note will analyze proposed and potential administrative and legislative solutions, then defend them under the *Bruen* test. First, this Note will begin by describing the ghost gun epidemic and the relevant Second Amendment law, specifically the *Bruen* test.<sup>6</sup> Next, it will present and analyze both current and proposed federal regulations and legislation targeting ghost guns.<sup>7</sup> Finally, this Note will conclude by arguing that these current and proposed solutions are constitutional under *Bruen*.<sup>8</sup>

## I. Defining Ghost Guns and the Second Amendment Landscape

### A. What Are Privately Made Firearms, or “Ghost Guns?”

“Privately made firearms” (PMFs) or “ghost guns” colloquially refer to do-it-yourself firearms made with the help of firearm kits or unfinished receivers.<sup>9</sup> Because prior regulations held that PMF buyers were only buying firearm components—not ready-to-use firearms—the purchase was not subject to background checks or other safety measures.<sup>10</sup> After buying the parts, the firearm is not assembled by a federally licensed manufacturer, dealer, or importer; instead, it is designed to be easily assembled at home with the use of common tools.<sup>11</sup>

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Columbia have enacted laws to . . . regulate the sale and manufacture of untraceable, unserialized ghost guns.”).

5. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022) (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961)) (“[W]hen the Second Amendment’s plain text covers . . . conduct, the Constitution presumptively protects that conduct . . . [and] the government must then justify its regulation by demonstrating that it is consistent with this Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”).

6. See *infra* Part I.

7. See *infra* Parts II–III.

8. See *infra* Part IV.

9. *Ghost Guns*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns/> [<https://perma.cc/JQK7-XEP6>].

10. See *id.*

11. See *id.*

PMFs are dangerously easy to assemble. At the core of PMFs is an “80% receiver,” which is a firearm’s unfinished receiver, lacking the last 20% of assembly, which in some cases requires as little as the drilling of three holes and some machining.<sup>12</sup> PMF retailers also sell “jigs,” mechanical templates that allow buyers to easily identify where holes need to be drilled into 80% receivers and sometimes even include the necessary drill and mill bits.<sup>13</sup> With such a jig, even an inexperienced user can make an unfinished receiver fully functional in “under an hour.”<sup>14</sup> Once finished, the receiver must be assembled with the firearm’s other necessary parts, which, prior to the new regulations, were also unregulated because they did not constitute complete and regulated firearms.<sup>15</sup> And these remaining parts were often either included in the firearm kit or sold alongside unfinished receivers by the same retailer.<sup>16</sup>

Ghost guns are particularly appealing for criminal activity because they lack a serial number<sup>17</sup> and can be purchased and assembled without a background check.<sup>18</sup> Serial numbers and background checks are essential parts of firearm regulation, but

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12. *See What Is an 80% Lower?*, 80% LOWERS (Sept. 6, 2022), <https://www.80-lower.com/80-lower-blog/what-is-an-80-percent-lower/> [<https://perma.cc/SQA5-EUWN>] (“So, what parts of an 80 percent lower aren’t finished? These are the areas you must complete yourself, through drilling and fabrication, to make it a functional firearm: Drill the hammer pinhole[;] Drill the trigger pinhole[;] Drill the safety selector lever hole[;] Machine the fire control group cavity[.]”).

13. *80 Lower Jigs*, 80PERCENTARMS, <https://www.80percentarms.com/80-jigs/> [<https://perma.cc/Y9KM-DD3S>] (“The 80% jig is a collection of tools, measurements, and physical guides used to make a firearm on your own . . . [T]he jigs and parts are made specially to cater to the firearm being built . . .”).

14. *Id.* (“Why Use 80% Lower Jigs? . . . [q]uicker and easier build process that can complete a lower or frame in under an hour . . . [.] The good thing about . . . jigs is that you do not need a lot of experience . . . The only thing you need to know is the basics of firearm assembly.”).

15. Keegan Hamilton, *Ghost Guns Are Causing Chaos in American Courts*, VICE (Oct. 27, 2022), <https://www.vice.com/en/article/ghost-gun-loopholes-lawsuit-court/> [<https://perma.cc/SE4M-ADB9>].

16. *See, e.g., 1911 Build Kit*, 80% LOWERS, <https://www.80-lower.com/1911-build-kit/> [<https://perma.cc/6XFF-BR6V>] (“Sure, you could upgrade an existing 1911 frame with a parts kit like this. But why not . . . build a truly custom handgun . . . ? Pair up your 1911 build kit with a Stealth Arms 1911 80% frame.”); *Gun Build Kits*, 80 PERCENT ARMS, <https://www.80percentarms.com/complete-build-kits/> [<https://perma.cc/H859-R9W6>] (“Our Rifle Build Kits are everything you need to build your own AR15, AR10, or AR9 pattern rifles.”).

17. *Ghost Guns*, BRADY, <https://www.bradyunited.org/resources/issues/what-are-ghost-guns/> [<https://perma.cc/4FV8-CBDR>].

18. *Id.* (“As a result of this lack of regulation and serialization, prohibited and dangerous individuals have turned to ghost guns to evade federal and state gun regulations, emerging as the weapon of choice for criminal activity.”).

ghost guns circumvent both, resulting in them being easier to traffic and use in gun violence.<sup>19</sup>

i. Why Ghost Guns Have Gone Unregulated

Serial numbers play a vital role in gun violence prevention by being significant investigatory leads and allowing law enforcement to analyze trends or sources of gun crime.<sup>20</sup> The National Gun Control Act of 1968 (GCA) requires that federally licensed firearm importers and manufacturers “identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured . . .”<sup>21</sup> Until 2022, the ATF defined frames and receivers as “[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.”<sup>22</sup> Frames and receivers are both firearm parts and thus considered “firearms” under the GCA.<sup>23</sup> For that reason, frames and receivers must carry serial numbers even when sold alone.<sup>24</sup> To sell firearms, receivers, and frames, one needs a Federal Firearm License (FFL), which has strict rules and obligations, including a duty to conduct background checks on customers.<sup>25</sup>

But it is unclear exactly when a piece of metal becomes a frame or receiver.<sup>26</sup> Because of this uncertainty, retailers have been able to sell firearm kits containing unfinished receivers, or unfinished receivers alone, all without serial numbers or background checks.<sup>27</sup>

19. *See id.*

20. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL TRACING CENTER (NTC) FACT SHEET (2023), <https://www.atf.gov/resource-center/docs/undefined/ntc-fact-sheet-may-2023/download> [https://perma.cc/C4YL-MD6U]; *see also* Philip J. Cook, *Gun Theft and Crime*, 95 J. URB. HEALTH 305, 308 (2018) (discussing the role serial numbers play in tracking gun crime).

21. 18 U.S.C. § 923(i) (2018).

22. Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24652 (Apr. 26, 2022) (quoting 27 C.F.R. § 479.11 (2021)).

23. 18 U.S.C. § 921(a)(3)(B) (2018); *see also* 27 C.F.R. § 478.12(a)(1)–(2) (2025).

24. *See* 18 U.S.C. §§ 923(i), 921(a)(3) (2018).

25. *See* 18 U.S.C. §§ 923(a), 922(t) (2018); *Federal Firearms Licenses*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL TRACING CENTER, <https://www.atf.gov/firearms/federal-firearms-licenses> [https://perma.cc/6QQ2-GNGX].

26. Definition of “Frame or Receiver” and Identification of Firearms, 86 Fed. Reg. 27720, 27729 (May 21, 2021) (“The crucial inquiry, then, is the point at which an unregulated piece of metal, plastic, or other material becomes a regulated item under Federal law.”).

27. *See, e.g., What Is an 80% Lower?*, *supra* note 12. Retailers of firearm kits and 80% receivers openly use the serial number’s absence as a selling point. *See id.* (“The ATF says that any receiver blank that doesn’t meet the definition of a firearm is,

Since these retailers do not sell “firearms,” they do not need an FFL.<sup>28</sup> Without an FFL, these retailers do not have to abide by the ATF’s vital recordkeeping requirements or screen customers using the National Instant Criminal Background Check System (“NICS”).<sup>29</sup>

ii. Consequences of the Ghost Gun Epidemic

Ghost guns have become a weapon of choice in criminal activity. Between 2017 and 2021, there was a 1,083% increase in ghost gun trace requests submitted to the ATF, totaling 37,980 suspected ghost guns recovered by law enforcement.<sup>30</sup> In more recent years, they have only grown in popularity. In 2022 alone, federal law enforcement recovered 25,785 ghost guns in the United States,<sup>31</sup> a number that the Department of Justice admits “significantly underrepresents” the actual number recovered, since state and local law enforcement are still learning to identify and report ghost guns.<sup>32</sup>

By evading the NICS, ghost guns can be easily obtained by those otherwise prohibited from possessing firearms. In 2022, the NICS denied 131,856 firearm sales,<sup>33</sup> and one analysis of federal prosecutions involving ghost guns found that “[i]n nearly half of the prosecutions reviewed the defendants were prohibited from possessing any firearm and would not have passed a background check if one were required.”<sup>34</sup>

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well, just that: *Not* a firearm. If an 80% lower isn’t considered a firearm, then it doesn’t need a serial number. A background check and FFL aren’t required to buy one, either.”) (emphasis in original).

28. *Cf.* 27 C.F.R. § 478.11 (2023) (defining a “dealer” as “[a]ny person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker”).

29. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, No. 5300.15, FEDERAL FIREARMS LICENSEE QUICK REFERENCE AND BEST PRACTICES GUIDE (2021) (outlining FFL’s recordkeeping, background check, and security duties).

30. 2 BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): CRIME GUNS, pt. III, at 5 (2023) [hereinafter “NFCTA”].

31. OFF. OF PUB. AFFS., U.S. DEP’T OF JUST., FACT SHEET: UPDATE ON JUSTICE DEPARTMENT’S ONGOING EFFORTS TO TACKLE GUN VIOLENCE (2023).

32. NFCTA, *supra* note 30, at 5.

33. FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVS. DIV., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 2022 OPERATIONAL REPORT 32 (2022).

34. EVERYTOWN FOR GUN SAFETY, UNTRACEABLE: THE RISING SPECTER OF GHOST GUNS 17 (2020), <https://everytownresearch.org/report/the-rising-specter-of-ghost-guns/> [<https://perma.cc/G5S7-DNWJ>].

Ghost guns also pose a serious threat by way of interstate trafficking. Typically, FFL holders are required to file a report upon selling two or more pistols to the same person within five business days.<sup>35</sup> But because ghost gun retailers don't need an FLL, they can skip this requirement, allowing traffickers to avoid this report when purchasing in bulk, assemble the firearms at home, and then traffic them into stricter states. In one instance, a six-time convicted Massachusetts felon was charged for allegedly buying firearm kits online, assembling them in his basement using a milling machine, and selling them across state lines, profiting \$300 on each gun.<sup>36</sup>

For these reasons, ghost guns are a barrier to gun violence prevention. Yet the *Bruen* decision's new Second Amendment test could threaten effective regulation.

### B. *The Bruen Decision*

In *Bruen*, the Supreme Court struck down New York's "special need" permitting system and adopted a new test for Second Amendment regulations focused on history and tradition.<sup>37</sup> Prior to *Bruen*, appellate courts had generally adopted a two-step test.<sup>38</sup> At the first step, the government could justify the challenged regulation by showing it regulated an activity outside the scope of the Second Amendment as originally understood.<sup>39</sup> If successful, the inquiry ended and the law was constitutional.<sup>40</sup> But if the evidence was inconclusive, or the regulated activity was protected, the court then weighed the "severity of the law's burden."<sup>41</sup> At this second step, courts applied intermediate or strict scrutiny, with laws that regulated activities that were crucial to the Second Amendment at the Founding being analyzed under strict scrutiny.<sup>42</sup>

*Bruen* found this test to be "one step too many."<sup>43</sup> The Court relied on its decisions in *District of Columbia v. Heller* and *McDonald v. Chicago* and adopted a new test based on *Heller*'s "historical approach and its rejection of means-end scrutiny."<sup>44</sup>

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35. 27 C.F.R. § 478.126(a) (2022).

36. See Affidavit in Support of a [sic] Application for a Crim. Complaint at 3–16, *United States v. Blackmer*, No. 1:16-CR-00009 (D.N.H. Nov. 9, 2015).

37. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 8 (2022).

38. *Id.* at 17.

39. *Id.* at 18 (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (CA7 2019) (internal quotation marks omitted)).

40. *Id.*

41. *Id.* (quoting *Kanter*, 919 F.3d at 441 (internal quotation marks omitted)).

42. *Id.* at 18–19.

43. *Id.* at 19.

44. *Id.* at 24.

*Bruen* found that conduct under the umbrella of the Second Amendment’s plain text is “presumptively protect[ed]” and that regulations on such conduct may survive only if the Government demonstrates that the regulations are consistent with the “Nation’s historical tradition of firearm regulation,” meaning that the regulation has sufficient historical analogues.<sup>45</sup> The consistency of regulations is judged by “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”<sup>46</sup> And for cases “implicating unprecedented societal concerns or dramatic technological changes,” the Court held that a “more nuanced approach” may be required.<sup>47</sup> At bottom, *Bruen* requires courts to ask if the current law imposes a “burden on the right of armed self-defense” that is comparable to a historical tradition of regulation.<sup>48</sup>

*Bruen* caused an upheaval in the lower courts. Challenges to felon firearm prohibitions,<sup>49</sup> serial number requirements,<sup>50</sup> and bans on large capacity magazines and assault weapons<sup>51</sup> were all brought under the new standard. The Supreme Court has already heard a *Bruen* challenge to a federal statute prohibiting firearm possession for individuals with a restraining order against them.<sup>52</sup>

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45. *Id.* at 17.

46. *Id.* at 28–29 (“[W]hether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are ‘relevantly similar.’”) (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

47. *Id.* at 27.

48. *Id.* at 29 (citing *McDonald v. City of Chi.*, 561 U.S. 742, 767 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)) (internal quotation marks omitted)).

49. *Range v. U.S. Att’y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (upholding an as-applied challenge to 18 U.S.C. § 922(g)(1)); *cf.* *United States v. Jackson*, 110 F.4th 1120, 1125, 1129 (8th Cir. 2024) (rejecting as-applied and facial challenges to 18 U.S.C. § 922(g)(1)).

50. *United States v. Price*, 635 F. Supp. 3d 455, 465 (S.D. W. Va. 2022) (finding 18 U.S.C. § 922(k)’s prohibition of firearms with removed or obliterated serial numbers inconsistent with the historical tradition of firearm regulation), *rev’d* 111 F.4th 392, 408 (4th Cir. 2024); *cf.* *United States v. Holton*, 639 F. Supp. 3d 704, 712 (N.D. Tex. 2022) (upholding § 922(k) as consistent with the historical tradition of firearm regulation); *United States v. Walter*, No. 3:20-cr-0039, 2023 U.S. Dist. LEXIS 69163, at \*13 (D.V.I. Apr. 20, 2023) (same); *United States v. Bradley*, No. 2:22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at \*12 (S.D. W. Va. Mar. 23, 2023) (same).

51. *Bevis v. City of Naperville*, 85 F.4th 1175, 1203 (7th Cir. 2023) (upholding Illinois’ assault weapons ban because “military weapons lie outside the class of Arms to which the [Second Amendment] applies”); *Duncan v. Bonta*, 83 F.4th 803, 805–07 (9th Cir. 2023) (reversing lower court’s grant of a preliminary injunction against California’s large capacity magazine ban).

52. *United States v. Rahimi*, 602 U.S. 680, 701–02 (2024) (upholding 18 U.S.C. 922(g)(8), which prohibits an individual from possessing a firearm when they are subject to a domestic violence restraining order that contains a credible threat of



Because of how recent this new test is, the effectiveness of any ghost gun regulation must weigh its chances of survival under *Bruen*.

## II. Current Ghost Gun Regulations

### A. *The ATF's Attempt at Addressing Ghost Guns*

On April 8, 2021, former President Biden described “[g]un violence in this country” as an “international embarrassment” and signed six executive actions directing the Department of Justice to issue Rules on ghost guns.<sup>53</sup> On April 26, 2022, the resulting Rule, titled “Definition of ‘Frame or Receiver’ and Identification of Firearms,” was published in the Federal Register.<sup>54</sup>

The Rule aims to address the ambiguities that previously allowed ghost guns to proliferate.<sup>55</sup> Most importantly, the Rule: (1) expands the definition of “frame or receiver” to include more unfinished and 80% receivers,<sup>56</sup> (2) amends the definition of “firearm” to clarify when a firearm kit is a “firearm,”<sup>57</sup> and (3) defines “privately made firearm.”<sup>58</sup> In total, these changes allow for regulation of a previously near-untouched market.

The Rule amends 27 C.F.R. § 478.12, which defines frames and receivers for purposes of federal regulation, by clarifying that the definitions of “frame” and “receiver” both include a “partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver . . . .”<sup>59</sup> The Rule excludes any “forging, casting, printing, extrusion, [or] unmachined body . . . that

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violence).

53. Lauren Egan & Shannon Pettypiece, *Biden Targets ‘Ghost Guns’ and ‘Red Flag’ Laws in New Gun Control Measures*, NBC NEWS (Apr. 8, 2021), <https://www.nbcnews.com/politics/white-house/biden-target-ghost-guns-red-flag-laws-new-gun-control-n1263438> [<https://perma.cc/2P2E-ASL4>].

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

55. *Id.* (“The Department of Justice . . . is amending Bureau of Alcohol, Tobacco, Firearms, and Explosives . . . regulations to remove and replace the regulatory definitions of ‘firearm frame or receiver’ and ‘frame or receiver’ because current regulations fail to capture the full meaning of those terms.”).

56. *See id.* at 24689.

57. *See infra* notes 62–63.

58. Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. § 24655 (Apr. 26, 2022).

59. 27 C.F.R. § 478.12(c) (2023).

has not yet reached a stage . . . where it is clearly identifiable as an unfinished component . . . .”<sup>60</sup>

Additionally, the Rule authorizes the ATF to consider “any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit,” language that directly targets the sale of firearm kits or parts.<sup>61</sup>

The Rule also expands the definition of firearm to include a “weapon parts kit that is designed to or may readily be completed, assembled . . . or otherwise converted to expel a projectile by . . . explosive.”<sup>62</sup> Because of this change, retailers selling full firearm kits must now have a Federal Firearm License (FFL), conduct background checks on buyers, serialize the frame or receiver, and abide by FFL recordkeeping requirements.<sup>63</sup>

Finally, the Rule specifically defines a PMF as “[a] firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced.”<sup>64</sup> With this definition, the Rule also created a process seeming to require FFLs to keep records of any PMFs received and engrave them with unique serial numbers.<sup>65</sup>

### *B. Mile-Wide Gaps in the ATF’s New Rule*

While these regulations are a positive step toward the regulation of ghost guns, they leave open dangerous loopholes by *still allowing* the sale of unfinished receivers without background checks, serialization, or an FFL license. Such an interpretation comes from the examples provided in 27 C.F.R. § 478.12(c), which defines when “partially complete, disassembled, or nonfunctional frame or receivers” become regulated frames and receivers.<sup>66</sup>

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60. *Id.*

61. *Id.*

62. 27 C.F.R. § 478.11 (“Firearm”) (2023).

63. OFF. OF. PUB. AFF., U.S. DEP’T OF JUST., FACT SHEET: PRIVATELY MADE FIREARMS (PMFS), AKA “GHOST GUNS,” “BUY-BUILD-SHOOT” KITS, AND THE “FRAME OR RECEIVER” FINAL RULE, <https://www.justice.gov/opa/press-release/file/1493431/download> [<https://perma.cc/MUV6-FULC>] (“The ‘Frame or Receiver’ Final Rule updates the regulatory definition and makes clear that weapon parts kits that can be readily converted into a fully assembled firearm will be subject to the same regulations that apply to commercially manufactured, fully assembled firearms.”).

64. 27 C.F.R. § 478.11 (“Privately Made Firearm (PMF)”) (2023).

65. 27 C.F.R. § 478.124 (2023); 27 C.F.R. § 478.92(a)(2) (2023).

66. 18 U.S.C. § 921(a)(3) (2023) (“The term ‘firearm’ means (A) any weapon

Example 1 to subsection (c) provides that “[a] frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template *is a frame or receiver . . .*”<sup>67</sup> But in Example 4, the rule seemingly contradicts itself, finding that “[a] billet or blank of an AR–15 variant receiver without critical interior areas having been indexed, machined, or formed *that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools* such that it may readily be completed *is not a receiver.*”<sup>68</sup>

In other words, Example 4 states that an unfinished receiver is not regulated so long as it is not sold in the same transaction with a jig, other required parts for assembly, or with instructions, and is not machined in certain areas. The ATF has even adopted this interpretation in subsequent publications<sup>69</sup> and in court.<sup>70</sup> Polymer80, seemingly a company of choice for criminal use of ghost

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(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.”) (emphasis added).

67. 27 C.F.R. 478.12(c) (Example 1) (2023) (emphasis added).

68. *Id.* at Example 4 (emphasis added).

69. ATF, U.S. DEPT OF JUST., FINAL RULE 2021R-05F, DEFINITION OF “FRAME OR RECEIVER” AND IDENTIFICATION OF FIREARMS, <https://www.atf.gov/firearms/docs/guide/overview-final-rule-2021r-05f-definition-%E2%80%9Cframe-or-receiver%E2%80%9D-and-identification/download> [https://perma.cc/8FZE-CWAD] (“A billet or blank of an AR-15 variant receiver without critical interior areas having been indexed . . . that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver.”); ATF, U.S. DEPT OF JUST. TRAINING AID FOR THE DEFINITION OF FRAME OR RECEIVER & IDENTIFICATION OF FIREARMS: OVERVIEW OF FINAL RULE 2021R-05F at 7 (2022), <https://www.atf.gov/firearms/docs/guide/new-training-aid-overview-final-rule-2021r-05f-definition-frame-or-receiver-and/download> [https://perma.cc/7P4A-V5JQ] (same).

70. Defendant’s Opposition to Plaintiffs’ Motion for Preliminary and/or Permanent Injunction, at 23–24, *Morehouse Enters., LLC v. BATFE*, 2022 BL 295293 (D.N.D. Aug. 23, 2022) (No. 3:22-cv-00116-PDW-ARS) (“[An] [unfinished] frame or receiver is not [regulated] if it still requires . . . certain machining operations.”); Transcript of Hearing on Plaintiff’s Motion for Preliminary Injunction at 16, *Div. 80 v. Garland*, 2022 WL 3648454, (D.S.D. Tex. Aug. 23, 2022) (No. 3:22-cv-00148), ECF No. 68 (confirming that retailers can “sell[] receiver blanks . . . without a [FFL]” and that separate transactions do not violate the Rule); Defendants’ Brief in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 26, *VanDerStok v. Garland*, 633 F. Supp.3d 847 (D.N.D. Tex. 2022) (No. 4:22-cv-00691-O), ECF No. 41 (quoting 87 Fed. Reg. § 24,700) (same).

guns,<sup>71</sup> continues to sell unserialized 80% receivers, saying that this is completely permissible under the Rule.<sup>72</sup>

This loophole was challenged in a case filed by the Giffords Law Center and the state of California against the ATF.<sup>73</sup> The complaint highlights this “separate transaction” loophole and asks the ATF to address it,<sup>74</sup> alleging that the Rule violates the Administrative Procedure Act by contravening the text and purpose of its authorizing law, the GCA.<sup>75</sup> On February 26, 2024, in a decision on the merits, a California district court vacated Example 4 and heavily criticized the ATF, arguing that the ATF’s definition was “made without taking into account all relevant data” and that the ATF “failed to explain why it is not regulating such partially complete receivers *given that jigs and tools are easily obtainable*.”<sup>76</sup> The court declared Example 4 arbitrary and capricious, holding that while the ATF can “be engaged in reform one step at a time,” it does not do so by enacting a “categorical bar” on defining unfinished receivers as firearms “regardless of the availability of such jigs/tools in the open . . . .”<sup>77</sup>

### III. Potential Regulations on Ghost Guns

Laws proposed at the federal level can serve as illustrative examples of the path forward in regulating ghost guns. Action at

71. Joshua Eaton, *Polymer80’s Name Has Become Synonymous with ‘Ghost Guns.’ Now It’s in the Crosshairs*, NBC NEWS (Mar. 27, 2022), <https://www.nbcnews.com/news/us-news/polymer80-ghost-guns-kits-crime-re-na20864> [<https://perma.cc/TDT6-VNKB>] (claiming that almost 90 percent of ghost guns recovered by the LAPD were made from Polymer80 kits); Complaint for Violations of the Consumer Protection Procedures Act, at ¶ 1, District of Columbia v. Polymer80, Inc., No. 2020-CA-002878-B (D.C. Super. Ct. June 24, 2020) (alleging that 83.2% of recovered ghost guns since 2017 have been from Polymer80).

72. David Lane, *Polymer80 Changes Product Line to Comply with BATFE Rule*, RECOILWEB (Aug. 31, 2022), <https://www.recoilweb.com/polymer80-changes-product-line-to-comply-with-batfe-rule-176438.html> [<https://perma.cc/E2SB-R8AE>] (“Polymer80 has launched three new options for . . . legal firearms. OPTION 1 is an unserialized 80% frame . . . . No jig or tools are included with this product.”); See also *80% Lower Jig for AR-10 and AR-15 - Ultimate Jig*, JUGGERNAUT TACTICAL, <https://jtactical.com/products/47> [<https://perma.cc/7MDP-BWVQ>] (“Note: Due to ATF final rule 2021R-05F . . . you cannot order an 80% Lower and jig-related products at the same time. If you have both in your cart, you will not be able to . . . checkout.”).

73. California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, No. 20-cv-06761-EMC, 2023 U.S. Dist. LEXIS 22517, at \*4 (N.D. Cal. Feb. 9, 2023).

74. First Amended Complaint for Declaratory and Injunctive Relief, at ¶16, California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 2023 U.S. Dist. LEXIS 22517 (N.D. Cal. Feb. 9, 2023) (No. 20-cv-06761-EMCB), ECF No. 144.

75. *Id.* at ¶¶ 142, 150.

76. California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 20-CV-06761-EMC, 2024 WL 779604, at \*27 (N.D. Cal. Feb. 26, 2024).

77. *Id.* at \*26.

the federal level is essential in meaningfully combating gun violence and trafficking since states with weak gun laws allow for firearm trafficking into stricter states.<sup>78</sup>

A. *The Ghost Guns and Untraceable Firearms Act of 2023*

In 2023, the “Ghost Guns and Untraceable Firearms Act of 2023” (the Act) was introduced into the United States Senate.<sup>79</sup> The Act regulates ghost guns by creating a new “frame or receiver” definition<sup>80</sup> and by criminalizing the unlicensed manufacture, sale, and possession of “ghost guns,” or firearms that lack a serial number in accordance with the law.<sup>81</sup>

The Act modifies 18 U.S.C. § 921(a) to define a “frame or receiver” as “a part of a weapon that provides or is intended to provide the housing or structure to hold or integrate 1 or more fire control components . . . .”<sup>82</sup> “Fire control components” are defined in the Act as a weapon’s “hammer, bolt or breechblock, cylinder, trigger mechanism, firing pin, striker, and side rails.”<sup>83</sup> Notably, the Act seems to address the separate transaction loophole by excluding consideration of “whether the housing . . . has been indexed, drilled, or machined in any way” or “whether the article is sold, distributed, or marketed with or for any associated template, jig, mold, equipment, tool, instructions, or guide . . . .”<sup>84</sup> The Act also includes “object[s] . . . marketed or sold to become or be used as the frame or receiver of a functional firearm once completed, assembled, or

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78. Brian Knight, *State Gun Policy and Cross-State Externalities: Evidence from Crime Gun Tracing*, 5 AM. ECON. J. 200, 224 (2013) (“[T]rafficking flows respond to gun regulations, with guns imported from states with weak regulations into states with strict regulations . . . . [C]riminal possession rates tend to be higher in states exposed to weak regulations in other states.”); Daniel W. Webster & Garen J. Wintemute, *Effects of Policies Designed to Keep Firearms from High-Risk Individuals*, 36 ANN. REV. PUB. HEALTH 21, 30 (2015) (citing D. W. Webster, J. S. Vernick & L. M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 187 (2001)) (“The share of crime guns that originated from in-state retail sales in states with both [permit to purchase] policies and handgun registration was, on average, 37 percentage points lower relative to the comparison states lacking either policy . . . .”); Leo H. Kahane, *Understanding the Interstate Export of Crime Guns: A Gravity Model Approach*, 31 CONTEMP. ECON. POL’Y 618, 631 (2013) (“[T]he empirical results in this paper . . . find that differences in state laws can explain, in part, the pattern of illegal gun flow across state lines . . . . [G]uns tend to flow from states where gun laws are weak to states where gun laws are strict.”).

79. S. 2652, 118th Cong. (as introduced on July 27, 2023).

80. *Id.* § 3(a)(2), \*2–3.

81. *Id.* § 3(a)(3), \*4.

82. *Id.* § 3(a)(2), \*2–3.

83. *Id.* § 3(a)(3), \*5.

84. *Id.* § 3(a)(2), \*3.

converted,” which allows agencies to look at how an 80% receiver is marketed when making a regulatory determination.<sup>85</sup>

While the Act’s emphasis on firing components aligns closely with the ATF Rule’s new definitions of frames and receivers,<sup>86</sup> the Act goes further by specifically including objects that are “marketed or sold to become” or can “readily be . . . assembled, or otherwise converted to” frames or receivers, even if sold without the remaining necessary parts.<sup>87</sup> In contrast, the current Rule does not consider marketing in making regulatory determinations nor does it regulate unfinished receivers that are sold alone.<sup>88</sup> The Act’s definition of frames and receivers significantly improves on the recent Rule. By including unfinished receivers that are sold alone<sup>89</sup> and considering how the unfinished receiver is marketed,<sup>90</sup> the Act can address the Rule’s gaps. Finally, the Act criminalizes, beginning one year after its enactment,<sup>91</sup> possession of “ghost guns”<sup>92</sup> by unlicensed individuals, with or without an intent to sell or transfer it or make a firearm.<sup>93</sup> The Act, if enacted, would codify what has long been recommended by gun violence prevention groups.<sup>94</sup>

#### B. Fixing the Current Federal Rule by Vacating Example 4

As it stands, Example 4 in 27 C.F.R. § 478.12(c) creates the previously discussed “separate transaction loophole” that allows for unregulated sale of unfinished receivers.<sup>95</sup> By allowing this, the loophole seems to contradict the Rule’s purpose of cracking down on

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85. *Id.*

86. 27 C.F.R. § 478.12(a)(1)–(2) (2023) (defining “frame” and “receiver” as the parts that “provide[] housing” for components related to the “firing sequence”).

87. S. 2652, 118th Cong. § 3(a).

88. 27 C.F.R. § 478.12(c) (Example 4) (2023).

89. S. 2652 § 3(a)(2), \*3.

90. *Id.*

91. *Id.* at \* 7.

92. Defined as any firearm, including frames and receivers, which lacks a serial number engraved by a licensed manufacturer or importer. *Id.* at \*4.

93. *Id.* at \*7.

94. See EVERYTOWN FOR GUN SAFETY, *supra* note 34, at 21 (suggesting that “frame” or “receiver” should be defined as: “That part . . . which provides housing for the trigger group, including any such part (1) that is designed, intended, or marketed to be used in an assembled, operable firearm, or (2) that, without the expenditure of substantial time and effort, can be converted for use in an assembled, operable firearm”); Plaintiff’s Amended Complaint at ¶ 3, *California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 2023 U.S. Dist. LEXIS 22517 (N.D. Cal. Feb. 9, 2023) (No. 20-cv-06761-EMC) (arguing that unfinished receivers, sold alone, should be considered firearms because they can be “readily . . . converted” into a functional firearm).

95. See *supra* Part II.A.

the unregulated PMF market.<sup>96</sup> Example 4 holds that unfinished receivers, simply because they lack a few easily machined holes and are sold without jig kits, instructions, other parts, or templates, are outside the scope of regulation.<sup>97</sup> 27 C.F.R. § 478.12's plain text, aside from Example 4, does not suggest<sup>98</sup> that an unfinished receiver is not a receiver simply because it lacks a few machining operations and is not sold with a jig or instructions.<sup>99</sup> Removing Example 4 would bring unfinished receivers sold alone within the scope of federal regulation because the Rule's text and the GCA's purpose seem to support such a finding.

The GCA's purpose, according to the Rule's own interpretation, is to limit firearm trafficking and allow for firearm tracing.<sup>100</sup> The Rule purports to advance this purpose by restricting persons prohibited from owning firearms from purchasing or making PMFs,<sup>101</sup> and by combatting the role of PMFs in gun violence and trafficking.<sup>102</sup> But, contrary to these purposes, Example 4 allows for the easy, legal, and unregulated purchase of unfinished receivers.<sup>103</sup>

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96. 87 Fed. Reg. 24652, 24656–60 (Apr. 26, 2022) (discussing the barriers ghost guns pose to effective enforcement of the GCA as reasoning for the Rule).

97. *See supra* note 70.

98. *Compare* 27 C.F.R. § 478.12(c) (Examples 1–3) (2023) (finding that an unfinished receiver sold with “template holes” and an unfinished receiver sold with a “compatible jig” is a frame or receiver), *with* 27 C.F.R. § 478.12(c) (Example 4) (2023) (finding that a receiver that lacks indexing in “critical interior areas” and is not sold with “instructions” is not a frame or receiver).

99. Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, *VanDerStok v. Garland*, No. 4:22-cv-00691-O (N.D. Tex. Aug. 29, 2022), ECF No. 41 (quoting 87 Fed. Reg. 24668).

100. 87 Fed. Reg. 24665 (Apr. 26, 2022) (“Consistent with the language and purpose of the GCA, . . . this proposed provision [is] necessary to allow ATF to trace all firearms acquired and disposed of by licensees, prevent illicit firearms trafficking, and provide procedures for FFLs and the public to follow . . .”).

101. *Id.* at 24714 (“As explained in this rule, PMFs are being assembled from parts without background checks . . . [T]hey are easily acquired by persons prohibited by law from receiving or possessing firearms, and they therefore pose a significant threat to public safety.”).

102. *Id.* at 24674 (“[T]his rule is intended . . . to address the proliferation of unserialized ‘ghost guns,’ which are increasingly being recovered at crime scenes . . .”); *Id.* at 24656 (discussing cases of ghost gun trafficking as reason for promulgating the Rule).

103. *See* Plaintiffs Amended Complaint at ¶ 94, *California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 718 F. Supp. 3d 1060 (N.D. Cal. 2024) (No. 3:20-cv-06761) (“In other words, ATF has determined that the one-stop-shop purchase of single-transaction *kits* are firearms are subject to the GCA, but that 80 percent frames and receivers brought separately *are not* . . .”).

This gap in regulation is not faithful to the Rule’s authorizing statute, the GCA, and its definition of “firearm.”<sup>104</sup> The GCA defines a “firearm” as “any weapon . . . *which will or is designed to or may be readily converted to expel a projectile*” and includes within this definition “the frame or receiver of any such weapon.”<sup>105</sup> Yet, the Rule says that unfinished frames or receivers, which are “designed” to be “readily” converted into a functional weapon, are not firearms if sold alone absent some machining.<sup>106</sup>

Example 4 facially contradicts the Rule’s own definition of a frame or receiver. Unfinished receivers sold alone are excluded from the definition, despite the fact that unfinished receivers are “designed to or may readily be completed” or “converted to function as” a frame or receiver.<sup>107</sup> What is the purpose of an unfinished receiver, if not to be readily converted into a complete or functioning frame or receiver? Marketing surrounding unfinished receivers only emphasizes this point: one retailer directly links buyers to part kits and assembly instructions in the item’s description.<sup>108</sup> Another retailer offers bulk pricing on AR-15 lower receivers while touting their products as only needing a “small amount of finishing” to be functional, and not being subject to any “red tape” like registration because they are not considered “firearm[s].”<sup>109</sup>

Example 4 makes even less sense when one weighs the factors to be considered in defining “readily,” as codified in 27 C.F.R. § 478.11. “Time,” “ease,” “expertise,” and “parts availability” are all factors to be considered in determining whether a weapon may “readily” be converted to expel a projectile.<sup>110</sup> As already discussed, completing an unfinished receiver takes minimal time and

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104. This is also argued by the plaintiffs in the previously mentioned case, *California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*. *Id.* at ¶ 142 (“ATF’s . . . determinations are ‘not in accordance with law’ because they disregard the GCA . . . . Namely, . . . 80 percent receivers and frames—sold as part of an assembly kit, with associated templates, or alone—fall within the statutory definition . . . . They are ‘designed’ to be ‘readily converted’ into firearms, as is evident from their design and marketing . . . .”).

105. 18 U.S.C. § 921(a)(3) (2023) (emphasis added).

106. *See supra* note 70 (laying out ATF’s interpretation of the Rule).

107. 27 C.F.R. § 478.12(c) (2023).

108. *80% Lower Patriot Pack*, 80-LOWER, <https://www.80-lower.com/products/80-lower-patriot-pack/> (last visited Jan. 18, 2024).

109. *80% Lowers*, 80% ARMS, <https://www.80percentarms.com/80-lowers/> (last visited Jan. 18, 2024) (“[T]he ATF does NOT recognize an 80% complete lower as a firearm, and therefore an unfinished receiver is not subject to the same regulations . . . . This means, no RED TAPE including: NO [r]egistering an 80% Lower, No FFL Required, Ships right to your door, No[t]ransfer fees like a typical firearm.”) (emphasis in original).

110. 27 C.F.R. § 478.11 (“Readily”) (2023).



expertise, even without a jig.<sup>111</sup> And that is assuming buyers *aren't* using a jig, because a single transaction containing the unfinished receiver and jig would be regulated.<sup>112</sup> But buyers can still receive both by simply making two separate transactions.<sup>113</sup> Because buyers under the current Rule can still order jigs and other parts helpful for assembly in another transaction, the “parts availability” factor also cuts in favor of regulating the sale of *all* unfinished receivers.<sup>114</sup> This reasoning was used in part in *California v. ATF*, where the court said that the ATF’s failure to consider these factors, like time, is “particularly troubling.”<sup>115</sup>

To better align with the GCA’s purpose and text, courts should continue to uphold the vacatur of Example 4 granted in *California v. ATF*,<sup>116</sup> and the ATF should move toward an interpretation of the Rule that regulates unfinished receivers, even sold alone, as “firearms” because they are designed to be readily converted into functional firearms.

#### IV. Defending Current and Proposed Laws Under *Bruen*

##### A. Bruen’s First Step

*Bruen* requires courts to first determine if the Second Amendment’s “plain text” covers the regulated conduct.<sup>117</sup> The *Bruen* decision analyzed its previous Second Amendment decisions, *Heller* and *McDonald*, to hold that the Second Amendment’s plain text enshrines a law-abiding citizen’s right to armed self-defense.<sup>118</sup>

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111. See *What Is an 80% Lower?*, *supra* note 12. See also *How to Build an AR-15: The Ultimate Guide for Beginners*, 80-LOWER, (Nov. 9, 2022) <https://www.80-lower.com/80-lower-blog/how-to-build-an-ar15-the-ultimate-guide-for-beginners/> [<https://perma.cc/VW7A-5LGM>] (“Building an AR-15 is easy[.] That’s probably why you’re here: Building an AR-15 requires just a few common tools and no professional gunsmithing knowledge.”).

112. See C.F.R. § 478.12(c) (Example 1) (2023) (“A frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template is a frame or receiver . . .”).

113. *Id.*

114. *Id.*; 27 C.F.R. § 478.11 (2024) (“Readily”) (defining the factors relevant to making a determination that a firearm is “readily” available, including “parts availability”).

115. *California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 718 F. Supp. 3d 1060, 1090 (N.D. Cal. 2024).

116. *Id.* at 1098.

117. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022).

118. See *id.* at 29 (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)) (“Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are ‘central’ considerations . . .”); *id.* at 26 (quoting *District of Columbia v. Heller*,

Many courts have narrowly read the Second Amendment's plain text in determining what rights it affords. Courts have held that the Second Amendment's plain text does not protect a right to sell and transfer firearms,<sup>119</sup> to carry dangerous and unusual weapons,<sup>120</sup> or to carry a firearm as a convicted felon.<sup>121</sup>

In determining if conduct is protected under the Second Amendment, *Heller* remains influential because it contains Justice Scalia's "[non]exhaustive" discussion of the Second Amendment's boundaries.<sup>122</sup> Justice Scalia wrote that the Second Amendment right is not one to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" and does not cast doubt on "conditions and qualifications on the commercial sale of arms."<sup>123</sup>

#### i. Justice Kavanaugh's *Bruen* Concurrence

Justice Kavanaugh's *Bruen* concurrence may support finding that ghost gun regulations do not encroach on constitutionally protected conduct and are thus justified at the first step.<sup>124</sup> Justice Kavanaugh and Chief Justice Roberts wrote separately in *Bruen* to emphasize that the test is not a "regulatory straitjacket" nor a "blank check,"<sup>125</sup> and quoted from *McDonald v. Chicago* to argue

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554 U.S. 570, 635 (2008) ("The Second Amendment . . . 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense.").

119. *United States v. Tilotta*, No. 3:19-cr-04768-GPC, 2022 WL 3924282, at \*5 (S.D. Cal. Aug. 30, 2022) (quoting *Bruen*, 597 U.S. at 20) ("The plain text of the Second Amendment does not cover . . . commercially sell[ing] and transfer[ing] firearms . . .").

120. *Heller*, 554 U.S. at 627 ("We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'").

121. *See United States v. Washington*, No. 3:23-CR-00171-01, 2023 WL 6118532, at \*4 (W.D. La. Sep. 18, 2023); *United States v. Bivens*, No. 1:22-cr-23, 2023 WL 8101846, at \*5 (E.D. Tenn. Nov. 21, 2023) ("Section § 922(g)(1)'s ban on felons possessing firearms remains presumptively lawful because felons are not among 'the people' covered by the plain text of the Second Amendment."); *United States v. Drake*, No. 1:23-CR-21-HAB, 2023 WL 8004876, at \*8 (N.D. Ind. Nov. 16, 2023) (same). *Cf. United States v. Ball*, No. 22-cr-00449, 2023 WL 8433981, at \*13 (N.D. Ill. Dec. 5, 2023) (finding that felons are not excluded from the right to bear arms); *Range v. Att'y Gen. United States*, 69 F.4th 96, 103 (3d Cir. 2023) (quoting *Heller*, 554 U.S., at 582) (same).

122. *Heller*, 554 U.S. at 626–27.

123. *Id.*

124. The Act's prohibition on possession cannot be justified under this reasoning since it would criminalize possession and not just impose a condition on a commercial sale.

125. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) (Kavanaugh, J., concurring) (quoting *id.* at 30).

that *Bruen* does not cast doubt on “presumptively lawful . . . measures” like laws “imposing conditions and qualifications on the commercial sales of arms.”<sup>126</sup>

Because the concurrence built on *Heller* and *McDonald’s* language about “presumptively lawful” regulations,<sup>127</sup> determining if a regulation is a condition or qualification on the commercial sales of arms should take place before the first step. But some courts have held that this presumption of legality can still be overcome if the regulation eliminates a law-abiding population from acquiring firearms entirely.<sup>128</sup>

Determining what is a “condition or qualification” on a commercial sale of arms can be difficult and is an issue that the Ninth Circuit has grappled with already. Despite the phrase now having been litigated in several of its cases, the Ninth Circuit has nonetheless “strained to interpret the phrase . . . .”<sup>129</sup> In *Renna v. Bonta*, the Government argued that a law prohibiting the sale of handguns unable to meet certain safety standards, like microstamping,<sup>130</sup> was a presumptively lawful condition on a commercial sale. Yet, the court held that the “conditions and qualifications” phrase was too “opaque” to be relied on alone.<sup>131</sup> For that reason, and because the law was a “functional prohibition” on state-of-the-art firearms, the court held that the law was not presumptively lawful and thus required historical analogues.<sup>132</sup>

Other courts have come to opposite conclusions on laws imposing restrictions on firearm sales. Laws requiring licensed

126. *Id.* at 80–81 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010)).

127. *Id.*

128. *See Gazzola v. Hochul*, 88 F.4th 186, 196 (2d Cir. 2023) (“It follows that commercial regulations on firearms dealers, whose services are necessary to a citizen’s effective exercise of Second Amendment rights, cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms.”). *See infra* note 130.

129. *Renna v. Bonta*, No. 20-cv-2190-DMS-DEB, 2023 WL 2756981, at \*9 (S.D. Cal. Mar. 31, 2023) (quoting *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018)).

130. *Microstamping & Ballistics in California*, GIFFORDS LAW CTR., <https://giffords.org/lawcenter/state-laws/microstamping-ballistics-in-california/> [<https://perma.cc/LNM5-STPS>] (last updated Dec. 31, 2023) (“Microstamping technology causes a firearm to etch a unique microscopic code onto ammunition cartridge cases when the gun is fired that identifies the firearm’s make, model, and serial number. This technology could enable law enforcement to match cartridges found at crime scenes directly to the gun that fired them . . . .”).

131. *Bonta*, 2023 WL 2756981 at \*9 (quoting *Pena*, 898 F.3d at 976).

132. *Id.* (quoting *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 416 (4th Cir. 2021)) (“If the commercial sales limitation identified in *Heller* were interpreted as broadly as the State suggests, the exception would swallow the Second Amendment.”).

firearm dealers to have a place of business,<sup>133</sup> prohibiting an unlicensed transfer of a firearm to an unlicensed individual residing in a different state than the transferor,<sup>134</sup> imposing a firearm waiting period,<sup>135</sup> and requiring licensed dealers to maintain accurate and truthful records of sales,<sup>136</sup> have all been successfully defended as conditions on commercial sales, thus not requiring a “second step” analysis.

There is a strong argument that requiring unfinished receivers to have a serial number is a presumptively lawful commercial regulation under Justice Kavanaugh’s concurrence, *Heller*, and *McDonald*, since such a requirement is a “condition” on the “commercial sale” of a “firearm.”<sup>137</sup> This is especially true because, unlike in the *Renna* case, serial numbers are not a “functional prohibition”<sup>138</sup> on the sale of unfinished receivers as they are not a new or prohibitive technology or unheard of requirement.<sup>139</sup> Most courts weighing the constitutionality of serial number requirements have upheld them.<sup>140</sup> *Bruen* also seems to bless background check

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133. *Knight v. City of N.Y.*, No. 22-CV-3215 (VEC)(VF), 2024 WL 1126309, at \*17 (S.D.N.Y. Jan. 17, 2024) (quoting *United States v. Tilotta*, No. 3:19-cr-04768-GPC, 2022 WL 3924282, at \*5 (S.D. Cal. Aug. 30, 2022)) (“Knight claims that the place-of-business requirement impedes his ability to sell handguns . . . . But this conduct concerns the commercial sale of firearms. The plain text of the Second Amendment . . . right ‘does not imply a further right to sell and transfer firearms.’”).

134. *United States v. James*, 677 F. Supp. 3d 329, 344 (D.V.I. 2023) (quoting *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 37 n.9 (2022)) (“The Supreme Court stated that these regulatory prerequisites to acquiring firearms are presumptively lawful, so long as they do not act as to ‘deny ordinary citizens their right to public carry.’ . . . Rather, the statute prevents non-law-abiding citizens from circumventing reasonable commercial regulations.”).

135. *Rocky Mt. Gun Owners v. Polis*, 701 F. Supp. 3d 1121, 1136 (D. Colo. 2023) (“Because it imposes a condition on the commercial sale . . . the Act is presumptively lawful under *Heller*, and . . . Plaintiffs have failed to rebut that presumption by demonstrating that the plain text of the Second Amendment covers [the conduct].”).

136. *Tilotta*, 2022 WL 3924282 at \*15.

137. *Bruen*, 597 U.S. at 80–81 (Kavanaugh, J., concurring).

138. *Renna v. Bonta*, No. 20-cv-2190-DMS-DEB, 2023 WL 2756981, at \*10 (S.D. Cal. Mar. 31, 2023).

139. *United States v. Sharkey*, 693 F. Supp. 3d 1004, 1008 (S.D. Iowa 2023) (citing R.L. WILSON, *COLT: AN AMERICAN LEGEND* 16, 362 (1985)) (“Serial numbers, although rare on American-made firearms during the founding era, gained prominence during the mid-19th Century. Samuel Colt was an early adopter, incorporating serial numbers . . . as early as 1837, while other manufacturers followed suit in the 1850s and 1860s.”).

140. *United States v. Bradley*, No. 22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at \*11 (S.D. W. Va. Mar. 23, 2023) (finding 18 U.S.C. § 922(k), which prohibits firearms with altered serial numbers, to be constitutional and not regulating protected conduct); *United States v. Holton*, 639 F.Supp.3d 704, 710 (N.D. Tex. 2022) (same); *United States v. Dangleben*, No. 3:23-MJ-0044, 2023 WL 6441977, at \*9 (D.V.I. Oct. 3, 2023) (same); *United States v. Serrano*, 651 F. Supp. 3d 1192, 1210 (S.D. Cal. 2023) (same). *Cf.* *United States v. Price*, 635 F. Supp. 3d 455, 464 (S.D. W. Va. 2022)

requirements as constitutional in the context of firearm permits,<sup>141</sup> so it is unlikely that a court would find background checks suddenly objectionable for unfinished receivers.

ii. The Second Amendment's Plain Text and Ghost Guns

Assuming that the Rule and Act are *not* “presumptively lawful” commercial regulations, then regulations requiring serial numbers and background checks on ghost guns and prohibiting ghost gun possession may still be defended as not regulating conduct protected by the Second Amendment’s plain text.<sup>142</sup>

A plausible argument could be made that the Act and the Rule infringe on the right to manufacture firearms at home.<sup>143</sup> These arguments were brought forth in one challenge to the Rule in *Polymer80 v. Garland*.<sup>144</sup> There, the plaintiff argued that unfinished receivers are equally protected by the Second Amendment’s plain text because of how closely related and necessary they are to the right to bear arms.<sup>145</sup> In response, the Government argued that the Rule does not prevent law-abiding citizens from making, buying or possessing firearms and therefore does not infringe on the right afforded by the Second Amendment’s plain text.<sup>146</sup> While the court did not rule on these Second Amendment claims,<sup>147</sup> the precedent of courts narrowly

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(finding that 922(k) infringes on protected conducts and lacks historical analogues).

141. *Bruen*, 597 U.S. at 38 n.9 (quoting *Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting)) (“[N]othing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes . . . . Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check . . . are designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’”).

142. *Id.*

143. While one could argue that these laws restrict one’s right to keep and bear an unserialized firearm, serial number requirements have been regularly upheld. *See, e.g., Bradley*, 2023 U.S. Dist. LEXIS 49521 at \*11. For that reason, this section focuses on potential challenges alleging that the Rule and Act infringe on a historical right to privately manufacture firearms.

144. *Polymer80, Inc. v. Garland*, Civil Action No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311, at \*10–11 (N.D. Tex. Mar. 19, 2023) (“Plaintiff attacks ATF’s Final Rule . . . as unlawful in several respects: . . . that the Final Rule in conjunction with the ATF letters violate Polymer80’s Second Amendment rights by regulating constitutionally protected conduct ‘in a way that is inconsistent with the Nation’s historical tradition of firearm regulation’ . . . .”).

145. Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 16, *id.*

146. Defendant’s Opposition to Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction at 18, *id.* (quoting *Bruen*, 597 U.S. at 70).

147. *Polymer80*, 2023 U.S. Dist. LEXIS 91311, at \*33–34.

interpreting the Second Amendment's plain text<sup>148</sup> makes it unlikely that a court would buy this argument and find the Rule to infringe on a plain text right, since it does not restrict a law-abiding citizen's right to possess a firearm for self-defense.

One Delaware district court *has* found that the Second Amendment's plain text "implies a corresponding right to manufacture firearms."<sup>149</sup> There, a Delaware statute criminalized possession and manufacturing of unserialized, unfinished receivers.<sup>150</sup> The court found that the Second Amendment's right to keep and bear arms would be "meaningless" if no entity could manufacture a firearm.<sup>151</sup> But these arguments are extremely weak when applied to the Act's prohibition on possessing or manufacturing "ghost guns;" even if the Second Amendment implies a right to manufacture firearms, such a right is not infringed here. The Act would only prohibit manufacturing of "ghost guns" specifically, which are not firearms in common use for a lawful purpose and protected by the Second Amendment.<sup>152</sup> By their very nature "ghost guns" are preferable for criminal purposes, since

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148. *See, e.g.*, Knight v. City of N.Y., No. 22-CV-3215 (VEC)(VF), 2024 WL 1126309, at \*17 (S.D.N.Y. Jan. 17, 2024) (narrowly interpreting the Second Amendment's plain text so as to not include the commercial sale of firearms); Rocky Mt. Gun Owners v. Polis, 701 F. Supp. 3d 1121, 1136 (D. Colo. 2023) (same); United States v. James, 677 F. Supp. 3d 329, 344 (D.V.I. 2023) (holding that the Second Amendment's plain text focuses on one's right to publicly carry a firearm).

149. Rigby v. Jennings, 630 F. Supp. 3d 602, 615 (D. Del. 2022)

150. DEL. CODE ANN. tit. 11, § 1459A(b) (2023); DEL. CODE ANN. tit. 11, § 1463(b) (2023).

151. Rigby, 630 F. Supp. 3d at 615.

152. Based on *Heller* dicta, courts have found that "dangerous and unusual" weapons or weapons not in common use are not afforded Second Amendment protections. *See* United States v. Alaniz, 69 F.4th 1124, 1128 (9th Cir. 2023) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 21 (2022)) ("*Bruen* step one involves a threshold inquiry. In alignment with *Heller*, it requires a textual analysis, determining . . . whether the weapon at issue is 'in common use' today for self-defense . . ."); United States v. Miller, No. 3:23-CR-0041-S, 2023 U.S. Dist. LEXIS 172594, at \*5 (N.D. Tex. Sep. 27, 2023) (quoting *Bruen*, 597 U.S. at 21) ("[C]ourts must determine whether the weapon at issue is 'in common use' today for self-defense."); Bevis v. City of Naperville, 85 F.4th 1175, 1193 (7th Cir. 2023) (citing *Heller*, 554 U.S. at 625) ("We take from this that the definition of 'bearable Arms' extends only to weapons in common use for a lawful purpose. That lawful purpose . . . is at its core the right to individual self-defense."); Del. State Sportsmen's Ass'n, Inc v. Del. Dep't of Safety & Homeland Sec., Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*12 (D. Del. Mar. 27, 2023) ("I think that Defendants' narrower view of that requirement—that is, the view that a bearable arm must be "in common use" for self-defense—is the correct one."); Or. Firearms Fed'n v. Kotek, No. 2:22-cv-01815-IM, 2023 U.S. Dist. LEXIS 92513, at \*10 (D. Or. May 26, 2023) ("This court agrees . . . that whether a weapon is in common use for lawful purposes . . . is the first question—not the only question—that a court must consider under *Bruen*.").

they skirt record-keeping and serial number requirements.<sup>153</sup> Other courts have found similarly, holding that weapons with altered or obliterated serial numbers, despite being firearms, are not protected by the Second Amendment because they are not in common use for a lawful purpose.<sup>154</sup> The same logic applies here. A serialized firearm is preferable for a law-abiding person and self-defense purposes because it can more easily be returned after being stolen or lost.<sup>155</sup>

*B. Bruen's Second Step: Historic Analogues to Ghost Gun Regulations*

If the Act or Rule is found to infringe on a right recognized in the Second Amendment's plain text, sufficient historical analogues must then be provided to show that such regulations are part of the nation's "historical tradition" by way of analogical reasoning.<sup>156</sup>

*Bruen* provides that regulations addressing a longstanding societal problem undergo a "straightforward" analysis, and the Government must show them to have "distinctly similar" historical regulation.<sup>157</sup> But regulations addressing new societal problems or technological changes require a "more nuanced approach" and only need to be "relevantly similar"<sup>158</sup> to historical analogues.<sup>159</sup> Under this more nuanced approach, *Bruen* asks courts to compare how and why the laws burden a law-abiding citizen's right to armed self-defense.<sup>160</sup> Whether the laws impose a comparable burden on the right to armed self-defense is a "*central* consideration[]."<sup>161</sup>

153. See *supra* Part II.A.ii.

154. See *United States v. Bradley*, No. 22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at \*11 (S.D. W. Va. Mar. 23, 2023); *United States v. Walter*, No. 3:20-cr-0039, 2023 U.S. Dist. LEXIS 69163, at \*13 (D.V.I. Apr. 20, 2023).

155. *Report Firearms Theft or Loss*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/report-firearms-theft-or-loss> (last visited Jan. 19, 2023).

156. *Bruen*, 597 U.S. at 17 ("[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct . . . [T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

157. *Id.* at 26.

158. While *Bruen*'s dicta seems to create a dichotomy between regulations addressing longstanding problems and unprecedented problems, it does not articulate exactly how courts should apply a "straightforward" approach versus a "nuanced" approach aside from using "distinctly" and "relevantly." This Note will assume that *Bruen* affords more leniency by using the word "relevantly."

159. *Bruen*, 597 U.S. at 27–29.

160. *Id.* at 29.

161. *Id.* (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

i. Ghost Guns Require a “More Nuanced Approach”

The Act and Rule both target a “dramatic technological change” and unprecedented societal concern that was unimaginable at the founding: the proliferation of easily built, untraceable firearms.<sup>162</sup> In the eighteenth century, “[m]aking fine guns . . . was a most respectable and important craft open to anyone who had the requisite skill . . .”<sup>163</sup> Most gunpowder and bullets were made at home, and most weapons at the time came from small, individual gunsmiths.<sup>164</sup> Gunsmithing was an acquired skill and craft, either used as a primary trade or a secondary trade by tradesmen.<sup>165</sup> But now, because of advances in firearm technology, ghost guns are easily and quickly assembled by even the most inexperienced builders.<sup>166</sup> America faces an unprecedented need for firearm tracing due to the widespread and cheap availability of firearms and their parts, a result of mass production.<sup>167</sup> Therefore, ghost gun regulations should receive a more nuanced approach. Some courts have agreed, finding the rise of mass production to be evidence of such a need.<sup>168</sup>

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162. *Id.* at 29.

163. Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY’S L. J. 35, 79 (2023).

164. *See id.* at 45–49.

165. *Id.* at 66–68.

166. *See supra* notes 12–14.

167. *See* Richard Moore, *The Production of Muskets and Their Effects in the Eighteenth Century*, UNIV. OF PITT., (2014) <https://www.forbes5.pitt.edu/article/production-muskets-and-their-effects-eighteenth-century> [https://perma.cc/C9YW-YM8V] (“Before the Industrial Revolution, the scarcity of muskets due to lower production meant that armies and battles were relatively small in scale . . . . The introduction of machinery, standardization, and constant production meant more muskets to make larger armies.”); David Yamane, *The Sociology of Gun Culture*, SOCIO. COMPASS, July 2017, at 2 (citing PAMELA HAAG, *THE GUNNING OF AMERICA* (2016)) (“The 19th century shift from craft to industrial production . . . dramatically increased manufacturing capacities . . . . And like other mass produced commodities, the guns had to be sold to the public; where markets for them did not already exist, they had to be created. As the nation developed, so too did gun culture.”).

168. *See, e.g.*, *United States v. Sharkey*, 693 F. Supp. 3d 1004, 1008 (S.D. Iowa 2023) (holding that serial numbers are “rooted” in the development of mass production and increased availability of firearms); *United States v. Dixon*, No. 4:21-CR-00054-AGF-JSD, 2023 U.S. Dist. LEXIS 193268, at \*13 (E.D. Mo. Aug. 30, 2023) (acknowledging the role of mass production in the creation of serial number requirements).



## ii. Historical Analogues

The Act and Rule’s serial number requirements and prohibition on the possession or creation of ghost guns have several historical analogues.

In 1807, Massachusetts imposed a fine for selling, delivering or purchasing firearms that lacked the proper “marks of proof.”<sup>169</sup> These marks were placed onto firearms by stamping the prover’s name and the year that it was proved.<sup>170</sup> Penalties were imposed on those that falsely forged or altered a proof.<sup>171</sup> This law is a strong historical analogue because the law similarly regulates the right to armed self-defense in the same “how” and “why” as the current law.<sup>172</sup> Serial numbers require that a firearm be marked in a way that identifies the manufacturer,<sup>173</sup> are promulgated for the safety of the community,<sup>174</sup> and impose a minimal burden on the right to self-defense. Both laws require that those manufacturing weapons place a proof<sup>175</sup> or a serial number.<sup>176</sup> The current law may be even less burdensome. While Massachusetts’ law implicitly requires firearm owners to bring in their own firearms for proofing,<sup>177</sup> the Act and Rule seem to expand licensed manufacturers’ duty to serialize to unfinished frames and receivers<sup>178</sup> so that unfinished receivers are serialized before consumers purchase them.

This law was not an outlier, either.<sup>179</sup> In 1821, Maine passed a law requiring musket barrels to be similarly proved for safety and

169. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780, TO FEBRUARY 28, 1807, 261 (Manning & Loring, 1807).

170. *Id.* at 260.

171. *Id.* at 261.

172. *See* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. 1, 28–29 (2022).

173. *See* 18 U.S.C. § 923(i) (2023) (requiring licensed manufacturers and importers to identify each firearm).

174. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 169, at 259 (“Whereas no provision hath been made by law for the proof of fire arms manufactured . . . that many may be introduced into use which are unsafe, and thereby the lives of the citizens be exposed . . .”).

175. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 169, at 260 (“[I]f any person . . . shall manufacture within this Commonwealth, any musket or pistol, without having the barrels proved and stamped . . . [they] shall forfeit and pay for every such or pistol the sum of ten dollars . . .”).

176. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL TRACING CENTER (NTC) FACT SHEET (2023); *see also* Philip J. Cook, *Gun Theft and Crime*, 95 J. URB. HEALTH 305, 308 (2018) (discussing the role serial numbers play in tracking gun crime).

177. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 169, at 259 (allowing governor to appoint firearm “provers” that are required to prove all musket and pistol barrels).

178. *See supra* Part IV.A.; Part III.A.

179. *See* An Act Providing for the Inspection of Gunpowder, ch. 337, 1794 Pa. Laws

compliance with existing regulations before their sale and imposing a fine for altering such proof.<sup>180</sup> In 1820, New Hampshire similarly required that gunpowder barrels be proved and imposed fines on those who sold unproved barrels or misrepresented a barrel's proofing.<sup>181</sup>

Colonies and states also regulated gunpowder production and sales by way of licensing, further supporting a historical tradition of regulating even private firearm manufacturing. For example, in 1651, Massachusetts law required that one needed approval from two magistrates before they could move gunpowder out of the district.<sup>182</sup> Connecticut went further in 1775, requiring a license for gunpowder production and transportation.<sup>183</sup> Finally, Providence, Rhode Island also required a license for selling gunpowder.<sup>184</sup>

Further support can be found in colonial era census and trade laws, like Virginia's 1631 law requiring that censuses be taken that

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764 (1794), <https://firearmslaw.duke.edu/laws/1794-pa-laws-764-an-act-providing-for-the-inspection-of-gunpowder-chap-337> [<https://perma.cc/2CYB-BKVM>] (creating an inspection and regulatory scheme for gunpowder manufacture); An Act for the Inspection of Gunpowder, ch. 6, § 1, 1776–1777 N.J. Laws 6 (1776), <https://firearmslaw.duke.edu/laws/1776-1777-n-j-laws-6-an-act-for-the-inspection-of-gunpowder-ch-6-c2a7-1> [<https://perma.cc/7F9K-4FP9>] (fining those who sell gunpowder without prior inspection); An Act for Encouraging the Manufacture of Salt Petre and Gun Powder, The Public Records of the Colony of Connecticut, vol. 15 (1775), <https://firearmslaw.duke.edu/laws/the-public-records-of-the-colony-of-connecticut-hartford-1890-page-190-192-image-194-196-available-at-the-making-of-modern-law-primary-sources> [<https://perma.cc/4RE3-8F2F>] (requiring licenses for gunpowder manufacture).

180. An Act to Provide For the Proof of Fire Arms, ch. 162 § 1–3, Laws of the State of Maine, 802–03, <https://hdl.handle.net/2027/hvd.32044097923528?urlappend=%3Bseq=268%3Bownid=27021597765509246-274> (last visited Feb. 19, 2025).

181. An Act to Provide For the Appointment of Inspectors and Regulating the Manufactory of Gunpowder, tit. 62, ch. 2 § 1–9, Laws of the State of New Hampshire (1830), [https://www.google.com/books/edition/The\\_Laws\\_of\\_the\\_State\\_of\\_New\\_Hampshire/q4MlvgAACAAJ?hl=en&gbpv=1&pg=PA277&printsec=frontcover&dq=gunpowder](https://www.google.com/books/edition/The_Laws_of_the_State_of_New_Hampshire/q4MlvgAACAAJ?hl=en&gbpv=1&pg=PA277&printsec=frontcover&dq=gunpowder) (last visited Feb. 19, 2025).

182. Colonial Laws of Massachusetts Reprinted from the Edition of 1672, at 186 (1890) (1651 law), <https://archives.lib.state.ma.us/items/e271ee1f-b113-48d1-a270-7b94d3e422fe/full> [<https://perma.cc/967J-9NZ2>].

183. 15 The Public Records of the Colony of Connecticut 191 (1890) (1775 law), <https://firearmslaw.duke.edu/laws/the-public-records-of-the-colony-of-connecticut-hartford-1890-page-190-192-image-194-196-available-at-the-making-of-modern-law-primary-sources> [<https://perma.cc/DD5Q-KDZF>].

184. The Charter and Ordinances of the City of Providence, with the General Assembly Relating to the City 37 (1835) (1821 law), <https://firearmslaw.duke.edu/laws/the-charter-and-ordinances-of-the-city-of-providence-together-with-the-acts-of-the-general-assembly-relating-to-the-city-page-89-96-image-89-96-1854-available-at-the-making-of-modern-law-primary> [<https://perma.cc/7U4S-RAZS>].

track the “arms and munition” belonging to the population.<sup>185</sup> And in 1651, Massachusetts required merchants importing any ammunition to provide notice of the quantity to the notary within a month of the ammunition’s importation.<sup>186</sup>

With the rise of mass production in the mid-nineteenth century,<sup>187</sup> the sale and manufacture of firearms and gunpowder was increasingly regulated. Several city charters specifically delegated themselves power to regulate the sale or manufacture of gunpowder.<sup>188</sup>

These laws demonstrate an ample historical tradition of regulating the sale or manufacture of gunpowder by means of licensing, registration, and early forms of serialization. Many of these laws have been recognized as sufficiently analogous to modern laws prohibiting the altering or removal of serial numbers.<sup>189</sup> These laws represent a pattern of regulating the “who,”

185. Act LIII, Laws of Virginia (1632), <https://archive.org/details/statutesatlargeb01virg/page/200/mode/2up?q=lhi> (last visited Feb. 19, 2025).

186. Colonial Laws of Massachusetts Reprinted from the Edition of 1672, at 186 (1890) (1651 statute), <https://archives.lib.state.ma.us/items/e271ee1f-b113-48d1-a270-7b94d3e422fe/full> (last visited Feb. 19, 2025).

187. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 29 (2022).

188. An Act to Reduce the Law Incorporating the City of Madison, and the Several Acts Amendatory Thereto Into One Act, and to Amend the Same, 1847 Ind. Acts 93, ch. 61, § 8, pt. 4, <https://firearmslaw.duke.edu/laws/1847-ind-acts-93-an-act-to-reduce-the-law-incorporating-the-city-of-madison-and-the-several-acts-amendatory-thereto-into-one-act-and-to-amend-the-same-chap-61-c2a7-8-pt-4> [<https://perma.cc/URX4-2NCT>] (granting the power to regulate and license gunpowder manufacture and storage); An Act to Incorporate and Establish the City of Dubuque, 1845 Iowa Laws 119, ch. 123 § 12, <https://firearmslaw.duke.edu/laws/1845-iowa-laws-119-an-act-to-incorporate-and-establish-the-city-of-dubuque-chap-123-c2a7-12> [<https://perma.cc/VY7L-Z5YX>] (empowering city council to regulate and impose fines on gunpowder manufacturing); An Act to Incorporate the Mayor and Board of Aldermen of the City of Charlotte, 1866 N.C. Pvt. Laws 63, § 19, <https://heinonline.org/HOL/P?h=hein.ssl/ssnc0235&i=63> (last visited Feb. 19, 2025) (giving power to Aldermen to levy taxes on pistols, knives and deadly weapons); An Act to Amend an Act Entitled “An Act to Incorporate the Village of Rutland,” 1865 Vt. Acts & Resolves 213, § 10, <https://firearmslaw.duke.edu/laws/1865-vt-acts-resolves-213-an-act-to-amend-an-act-entitled-an-act-to-incorporate-the-village-of-rutland-approved-november-15-1847-c2a7-10> [<https://perma.cc/S6FW-JG93>] (allowing fire wardens to inspect gunpowder manufacturing and storage, with the power to order how it may be stored and created); An Ordinance to Regulate the Sale of Gunpowder, The Charter and Ordinances of the City of St. Paul 1866–67, § 1–2, <https://firearmslaw.duke.edu/laws/the-charter-and-ordinances-of-the-city-of-st-paul-to-august-1st-1863-inclusive-together-with-legislative-acts-relating-to-the-city-page-166-167-image-167-168-1863-available-at-the-making-of> [<https://perma.cc/K4M4-PAA5>] (prohibiting selling of gunpowder without obtaining a permit marking their name and location from local government and paying a fine).

189. See *United States v. Patton*, No. 4:21-CR-3084, 2023 U.S. Dist. LEXIS 171232, at \*6–7 (D. Neb. Sep. 26, 2023) (holding marks of proof “synonymous with

“what,” and “where” of manufacturing gunpowder. And the ghost gun regulations discussed in this Note do not infringe on the Second Amendment right to self-defense, but instead continue this historical tradition by regulating the kinds of firearms that are produced and sold so that serial numbers are available to track these questions of “who,” “what,” and “where.”

### Conclusion

Today’s easy access to homemade firearms is a massive barrier to significantly addressing gun violence and firearm trafficking.<sup>190</sup> The ATF’s recent Rule redefining frames and receivers is a step forward.<sup>191</sup> But the Rule leaves open a massive loophole that defeats the Rule’s purpose by allowing for the unregulated sale of unfinished receivers, so long as they are sold alone.<sup>192</sup>

This problem is solvable. To meaningfully address it, current regulations should be amended so that the definition of frames and receivers includes the sale of standalone unfinished receivers,<sup>193</sup> and courts should continue to uphold the *California v. ATF* vacatur.<sup>194</sup> Congress can look towards legislative steps like the Untraceable Firearms and Ghost Guns Act,<sup>195</sup> which would regulate the sale of unfinished receivers while criminalizing the possession, creation, and sale of untraceable firearms. And despite *Bruen*’s drastic changes to the legal landscape of the Second Amendment, these laws are completely defensible as the next steps in our Nation’s longstanding history of regulating the manufacture and sale of gunpowder and firearms.<sup>196</sup>

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serial numbers in this context”); *United States v. Dangleben*, No. 3:23-MJ-0044, 2023 WL 6441977, at \*9 (D.V.I. Oct. 3, 2023) (“[T]he historical regulations discussed above can be viewed as an antecedent to Section 922(k). Thus, in light of these historical analogues, the Court holds that 922(k) is consistent with this Nation’s tradition of firearm regulations.”); *United States v. Sharkey*, 693 F.Supp.3d 1004, 1008 (S.D. Iowa 2023) (“This burden is no more onerous than the historical regulations governing the sale and marking of firearms and gunpowder. Importantly, neither the historical regulations, nor § 922(k), deprived individuals of their ability to employ firearms for self-defense.”).

190. *See supra* Part II.A.ii.

191. *See supra* Part III.A.

192. *See supra* Part III.A.i.

193. *See supra* Part IV.B.

194. *California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 718 F. Supp. 3d 1060, 1097–98 (N.D. Cal. 2024).

195. *See supra* Part IV.A.

196. *See supra* Part V.

