

GHOST GUNS: BETWEEN CLANDESTINE PRACTICES AND SECOND AMENDMENT RIGHTS

ARTÍCULO

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INTRODUCTION

The technological advances of the past decades have reimagined how firearms are made, distributed, and regulated. Innovations in 3D printing and the increased popularity of online shopping and forums have cultivated a gun culture around convenience and modernization that is every bit intriguing as it is worrisome. This modernization of gun ownership, coupled with enhancements to our Second Amendment rights,

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has forced the United States Government and various of its jurisdictions to re-evaluate firearm regulation, considering the emergence of what are recently known as ghost guns. Ghost guns, which are privately made firearms whose existence is unknown to the government because they bypass the need for serial numbers, can be built by individuals from part kits, from individual parts commercially or illegally acquired, or by implementing 3D printing technology. Due to their recency, only a few states and the Federal Government have started regulating them, resulting in new legislation and administrative policies that are slowly making their way into court dockets across the country. Naturally, these new legal battles will only increase as the remaining jurisdictions start addressing this new technology. With concerns surrounding Second, and even First Amendment rights, the remaining U.S. jurisdictions should be examining their gun laws, because whether their intentions are to expand or limit the proliferation of these weapons, their growing presence across the United States is indisputable and should be addressed. This article's purpose is to, first, present a clear outlook of what this new technology is, and how it's being implemented; then, to examine the latest legislation and regulation, and whether they could potentially survive Second Amendment scrutiny; and lastly, assess whether there is a need for this type of legislation in Puerto Rico.

I. WHAT ARE PRIVATELY MADE FIREARMS?

A. Emergence and Industry Response

The self-making of firearms in the United States pre-dates the Republic.¹ However, the commercial firearms industry had not been substantially affected by privately made firearms (PMFs) because their impracticality outweighed their appeal. Nevertheless, a noticeable shift was created due to the convergence of the technological advancements of the past decade.² The three main factors that contributed to the increase of PMFs were: (1) the emergence of the internet as an unlimited source of information on how to make a PMF and a marketplace for purchasing anything needed to make it; (2) the creation of high-strength polymers as alternatives to metals; and (3) advancements in computer software and 3D printing technology that allows the manufacturing of these weapons at a decreased time and price.³ These innovations generated a departure from the longstanding practice of metalworking, to a more convenient method of privately manufacturing firearms which still resemble commercially manufactured firearms in both functionality and appearance.⁴

Due to a variety of materials, models, and price ranges, PMFs can take many forms. Primitive ones were forged from metals and building them required a high level of exper-

¹ Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S LAW JOURNAL 35, 36 (2022). See also PAMELA HAAG, *THE GUNNING OF AMERICA: BUSINESS AND THE MAKING OF AMERICAN GUN CULTURE* 16 (2016).

² Report of the U.S. Dep't of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, *NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT: FIREARMS IN COMMERCE* 30 (2022).

³ *Id.*

⁴ *Id.* at 32.

tise. Currently, modern PMFs can be assembled at home using 3D-printed parts (made from polymers and/or metals), or a combination of 3D-printed parts and commercially sold parts, while others are built from kits.⁵ These kits also contain 3D-printed parts and are sold in varying degrees of completeness. Some offer all the necessary parts to build a firearm, with just slight modifications needed to convert the parts into a functional weapon, and others offer all the necessary parts, except for the part legally considered a firearm—the frame or receiver. In this case, companies include blueprints so customers can make them, and even offer the required 3D printers and materials. However, due to this article's discussion regarding federal and state regulation and its focus on frames and receivers, when discussing PMFs we will be primarily referencing firearms made from readily available parts such as those found in kits.⁶

Kits rapidly grew in popularity because the companies selling them are not federally licensed dealers, meaning that customers are not subject to background checks, and that the weapons lack serial numbers, making them untraceable. This untraceability created a problem for law enforcement, as recovered unserialized firearms started complicating criminal investigations.⁷ As PMFs became more widespread, state and local officials, as well as private entities, began urging the federal government to regulate them.⁸ In doing so, the newly coined *ghost guns*,⁹ became a priority for the Biden Administration,¹⁰ forcing the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to modernize its regulatory definitions to subject these firearms to the Gun Control Act (GCA),¹¹ and other federal legislation.

As a result, ATF regulations defined a privately made firearm 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.”¹² By incorporating frames and receivers in the defi-

5 *Untraceable: The Rising Specter of Ghost Guns*, EVERYTOWN FOR GUN SAFETY (May 14, 2020), <https://everytownresearch.org/report/the-rising-specter-of-ghost-guns/> (reporting on the online marketplace for PMFs, specifically kits); see *Trafficked with Mariana van Zeller*, *Ghost Guns*, NATIONAL GEOGRAPHIC (February 1, 2023), <https://www.nationalgeographic.com/tv/shows/trafficked-with-mariana-van-zeller/episode-guide/season-03/episode-03-ghost-guns/vdka32139329>.

6 EVERYTOWN FOR GUN SAFETY, *supra* note 5.

7 *Id.*; Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24, 652 (Apr. 26, 2022) (amending 27 C.F.R. §§ 447, 478 and 479).

8 *Petition for rulemaking to amend the definition of “Firearm frame or receiver*, EVERYTOWN FOR GUN SAFETY (December 11, 2019), <https://everytownlaw.org/wp-content/plugins/pdf-viewer-block/inc/pdfs/web/viewer.html?file=https://everytownlaw.org/wp-content/uploads/sites/5/2020/06/petition-for-rulemaking-to-amend-the-definiton-of-firearm-frame-or-receiver.pdf>; Letter from Attorney Generals to Secretary Pompeo and Attorney General Barr (April 13, 2020), https://ag.ny.gov/sites/default/files/letter_to_defense_distributed.pdf.

9 U.S. Dep’t of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, *supra* note 2 at 36–37 (2022) (the term ghost gun is frequently used by the media. Gun enthusiasts also refer to them as 80%-kit, 80%-gun, and 80%-receiver, among other terms. The 80% is alluding to the frames and receivers being sold partially operable, with the remaining 20% being the modifications performed by the buyer).

10 The White House, *Fact Sheet: The Biden Administration Cracks Down on Ghost Guns, Ensures that ATF Has the Leadership it Needs to Enforce Our Gun Laws* (April 11, 2022), THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/>.

11 Gun Control Act of 1968, 18 U.S.C. §§ 921–931 (2018).

12 27 CFR § 478.11 (emphasis added).

dition, the Agency prohibited unlicensed dealers from selling the aforementioned parts because the GCA's firearm definition includes frames and receivers —since they are the serialized parts of a firearm— and forces any person who engages in the business of manufacturing or selling them to be licensed.¹³ The goal with this new definition was to clearly identify these new ghost guns as federally regulated firearms, but even after that legal ambiguity was addressed, businesses found ways to circumvent the new regulation.

Some ways for companies to sidestep this regulation were to offer unfinished frames and receivers that eluded the new definition —which will be discussed further on— and 3D printers, in addition to blueprints and materials, so customers can, instead of ordering kits, make their own parts. Both options created legal loopholes that bypass new federal regulations and allow any technologically proficient person with the necessary time and budget to continue making firearms in the privacy of their own home.¹⁴

B. Data

Who is using ghost guns? Something that began as a niche interest among gun enthusiasts grew into a nationwide concern as the technology evolved and turned these weapons into accessible commodities.¹⁵ Now, PMFs are being purchased by traffickers who flood vulnerable communities with them,¹⁶ and individuals who are barred from owning a firearm, such as school shooters.¹⁷ But the untraceable nature of PMFs means that most of the data is collected from crime scenes or seizures. However, gaps in interagency communication and reporting processes during scarcely implemented recovery protocols make the collection of data a difficult task.¹⁸

According to ATF, from January 2016 to December 2021, the agency received more than 45,000 reports of suspected PMFs recovered from criminal investigations, including 692 homicides or attempted homicide cases.¹⁹ This data shows an exponential increase in PMFs, seeing as numbers for 2021 were eleven times the amount for 2016 and almost double the amount of the previous year.²⁰ Nevertheless, the ATF Office of Strategic Intelligence

¹³ 18 USC §§ 922(a)(1)(A), 923(a).

¹⁴ In some cases, 3D printers are even able to print every part of a weapon, therefore eliminating the need to purchase a kit.

¹⁵ Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24686 (Apr. 26, 2022) (amending 27 C.F.R. 447, 478 and 479) (the price may vary depending on various factors, but a kit can be purchased for a few hundred dollars. In terms of build time, an expert can assemble a kit in under 30 minutes, while a moderately skilled person can take a few hours).

¹⁶ Abené Clayton, *Ordered Online, Assembled at Home: The Deadly Toll of California's 'Ghost Guns,'* THE GUARDIAN (May 18, 2021) <https://www.theguardian.com/us-news/2021/may/18/california-ghost-guns-deadly-toll>.

¹⁷ Ivan Pereira, *'Ghost Guns' Showing Up in School Shootings, Experts Fear Trend Will Get Worse,* ABC NEWS (March 17, 2022), <https://abcnews.go.com/US/ghost-guns-showing-school-shootings-experts-fear-trend/story?id=83346844>.

¹⁸ Travis Taniguchi et al., *THE PROLIFERATION OF GHOST GUNS: REGULATION GAPS AND CHALLENGES FOR LAW ENFORCEMENT* 9-10 (2021), https://www.policinginstitute.org/wp-content/uploads/2021/08/NPF_The-Proliferation-of-Ghost-Guns_Final_2021.pdf.

¹⁹ 87 Fed. Reg. 24656. (Apr. 26, 2022) (to be cited 27 CFR 447, 478 and 479).

²⁰ *Id.* (broken down by calendar year, the total annual numbers of suspected PMFs recovered are: 2016: 1,758; 2017: 2,552; 2018: 3,960; 2019: 7,517; 2020: 10,109; 2021: 19,344).

and Information believes that those numbers are likely far lower than the actual amount of PMFs recovered, since some law enforcement agencies incorrectly report PMFs as serialized firearms or skip the reporting process completely to conserve resources.²¹ As with record keeping, traceability is also an obstacle in criminal investigations, as evidenced by ATF statistics, which show that over the past five-year period, the agency was only able to successfully trace to an individual purchaser less than one percent of the suspected ghost guns nationwide.²²

Traffickers are also buying kits, assembling them, and selling them for a profit. In an effort to curb this practice, the Department of Justice (DoJ) launched in July 2021 its Firearms Trafficking Strike Force,²³ in collaboration with ATF, other federal agencies, and local and state law enforcement. But initiatives like these have a limited effect, considering that the task force was only able to charge five people in the Chicago area with illegally selling and/or trafficking PMFs.²⁴ Tactics that only seize a few dozen firearms seem inefficient when faced with hundreds of thousands of estimated guns nationwide.

News organizations and non-profits have also reported on the proliferation of ghost guns. For example, Everytown for Gun Safety, an organization focused on gun safety and one of the plaintiffs in a suit against the DoJ that propelled the ATF's regulatory changes,²⁵ traced the use of PMFs based on news coverage of shootings and seizures.²⁶ Although helpful, these collections of news reports lack accuracy since the majority are based on preliminary information offered by law enforcement in the early stages of an investigation. What authorities may interpret as a serialized weapon in the beginning may turn out to be a PMF, given that these firearms may have counterfeit or duplicative markings appear-

21 *Id.* n.18.

22 *Id.* at 24659 (citing ATF Office of Strategic Intelligence and Information. "These numbers (as of January 21, 2022) include traces for both U.S. and international law enforcement agencies").

23 *U.S. Attorney's Office Provides Update on Chicago Firearms Trafficking Strike Force*, U. S. ATTORNEY'S OFFICE (August 22, 2022), <https://www.justice.gov/usao-ndil/pr/us-attorney-s-office-provides-update-chicago-firearms-trafficking-strike-force>.

24 *Id.*; 2 *Indiana Men Charged with Trafficking Guns from Indianapolis to Chicago*, CBS CHICAGO (June 27, 2022) <https://www.cbsnews.com/chicago/news/devante-brown-corey-sartin-indiana-men-charged-trafficking-guns-indianapolis-chicago/>; Brian L. Cox, *Federal Jury Convicts Glenview Man of Selling Ghost Gun*, CHICAGO TRIBUNE (February 9, 2022), <https://www.chicagotribune.com/suburbs/glenview/ct-gla-ghost-gun-tl-0217-20220209-ka6iodps05ardm07aaw5ggftt4-story.html>; Jason Meisner, *In Gun Trafficking's New Frontier, Man Charged with Manufacturing Ghost Guns in South Side Apartment*, CHICAGO TRIBUNE (May 31, 2022), <https://www.chicagotribune.com/news/criminal-justice/ct-south-side-man-ghost-guns-federal-charges-20220531-xuzcgrfjgibu5jx20poaq7wrs4-story.html>.

25 *Cities, with Support from Everytown, Sue to Compel ATF to Address the Growing Threat From 'Ghost Guns'*, EVERYTOWN FOR GUN SAFETY (August 26, 2020), <https://everytownlaw.org/case/cities-with-support-from-everytown-sue-to-compel-trump-administration-to-address-growing-threat-from-ghost-guns/>; Brad Brooks, *U.S. Cities Sue Federal Government Over Untraceable 'Ghost Guns'*, U.S. LEGAL NEWS (August 26, 2020), <https://www.reuters.com/article/us-usa-guns-ghostguns/u-s-cities-sue-federal-government-over-untraceable-ghost-guns-idUSKBN25M1OW>; *ATF Sued by State of Illinois, City of Kansas City, Everytown Law Over Firearms License Granted to Manufacturer Tied to Gun Trafficking*, EVERYTOWN FOR GUN SAFETY (January 19, 2021), <https://everytownlaw.org/press/atf-sued-by-state-of-illinois-city-of-kansas-city-everytown-law-over-firearms-license-granted-to-manufacturer-tied-to-gun-trafficking/>.

26 *Ghost Guns Recoveries and Shootings*, EVERYTOWN FOR GUN SAFETY (April 8, 2022), <https://everytownresearch.org/report/ghost-guns-recoveries-and-shootings/>.

ing to be serial numbers.²⁷ The organization also produced a report in 2020 that studied the online marketplace of PMFs, specifically kits,²⁸ finding that in 2014, out of the eighty sellers identified, twenty-six were offering the necessary parts to build a PMF, including unfinished frames and receivers. Meanwhile, the remaining fifty-four were offering the parts between January 2015 and May 2020.²⁹

Similarly, VICE News reports that as part of an investigative journalism piece, of all the police departments they contacted, seventeen provided data on more than 8,500 PMFs recovered since 2016, “with the vast majority found in the last three years.”³⁰ They speculate that those numbers likely represent a small portion of the total PMFs seized because various police departments reported not keeping records of unserialized guns, while others ignored their inquiries.³¹ The study also noted that consumers see this technology as a business opportunity. They interviewed a man in Los Angeles, CA that has been selling ghost guns to gang members for the last five years. The unidentified man shared that he purchases the parts online for \$350 to \$400 and resells the guns for \$1,600 each.³² These kits provide for a good business model considering that the companies offer products at a more affordable price when compared to their licensed counterparts, and the anonymity and swiftness of the transaction are extremely attractive to organized crime.

These examples demonstrate how modern technological advancements have transformed how firearms are acquired in the United States and make us wonder how, or if, these new methods can be regulated.

II. REGULATION

A. Federal Regulation

The National Firearms Act (NFA) was enacted in 1934 to provide for the taxation of manufacturers, importers, and dealers of firearms.³³ Although the NFA did not regulate ownership or licensing, it did define a firearm as a “shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person.”³⁴ Four years later, Congress enacted the Federal Firearms Act of 1938 (FFA) “to

²⁷ Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24656, n.18 (Apr. 26, 2022) (amending 27 C.F.R. §§ 447, 478 and 479); Report of the U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT: FIREARMS IN COMMERCE 39 (2022).

²⁸ *Untraceable: The Rising Specter of Ghost Guns*, EVERYTOWN FOR GUN SAFETY (May 14, 2020), <https://everytownresearch.org/report/the-rising-specter-of-ghost-guns/>.

²⁹ *Id.*

³⁰ Keegan Hamilton & Patricio Matos, *Untraceable ‘Ghost Guns’ Are Surging Across the US, Exclusive Data Shows*, VICE NEWS (June 1, 2022), <https://www.vice.com/en/article/akv5p4/ghost-guns-police-data-surging>.

³¹ *Id.*

³² *Id.*

³³ National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 123.

³⁴ *Id.*

regulate commerce in firearms.”³⁵ The FFA provided for a different and broader definition of firearm, which includes “any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.”³⁶

The FFA was later repealed by the Gun Control Act of 1968 (GCA),³⁷ which is considered the biggest piece of federal gun regulation in U.S. history. The GCA regulates interstate and foreign commerce in firearms by imposing federal licensing requisites on manufacturers, sellers, and individuals.³⁸ It defines the term firearm as any weapon “which will or is designed to or may readily be converted to expel a projectile by the action of an explosive”, including “*the frame or receiver of any such weapon*.”³⁹ Although the GCA regulates frames and receivers as firearms, it does not provide a definition for them. Similarly, the Act regulates licensing, yet, if an individual is not involved in the business of manufacturing or dealing firearms, the GCA does not prohibit them from making said weapons.⁴⁰ That is, a person does not need a license or any type of federal authorization to manufacture a firearm for personal and lawful use.⁴¹

The federal firearm definition has evolved to incorporate a broader class of weapons, including current practices such as those weapons that may readily be converted into a firearm and their operable parts. However, the law cannot contemplate every new technological development, therefore, the GCA prescribes the Attorney General to promulgate the necessary rules and regulations to carry out and interpret its provisions.⁴² Since modern PMFs escaped GCA, NFA, and other federal firearms legislation, on April 11, 2022, Attorney General Garland signed the ATF Final Rule 2021R-05F (Final Rule),⁴³ which modified ATF Regulations.⁴⁴ The rule was announced a year prior and ATF received more than 290,000 comments during the 90-day open comment period, making it the highest number of comments to a proposed rule in DoJ’s history.⁴⁵ The rule, among other things, amends the definitions of *frame or receiver* and *firearm* since the previous regulations “fail[ed] to capture the full meaning of those terms”,⁴⁶ and defines *privately made firearms* with the express purpose of providing “clarity given advancements in firearms technology”.⁴⁷

These changes aim to stop the proliferation of ghost guns by: (1) requiring retailers to run background checks before selling kits that contain the necessary parts to build a

³⁵ Federal Firearms Act of 1938, Pub. L. 75-785, 52 Stat. 1250.

³⁶ *Id.*

³⁷ Gun Control Act of 1968, 18 U.S.C. §§ 921-934 (2018).

³⁸ *Id.* § 921(a)(3).

³⁹ *Id.* (emphasis added).

⁴⁰ U.S. Dep’t of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, *supra* note 28 at page 30.

⁴¹ 18 U.S.C. §§ 922(o), (p), (r), 923; 26 § U.S.C. § 5822 (2018); 27 C.F.R. §§ 478.39, 479.62, 479.105 (2022).

⁴² 18 U.S.C. § 926 (2018).

⁴³ Press Release, Dep’t of Justice, Frame and Receiver Rule Goes Into Effect (August 24, 2022.), <https://www.justice.gov/opa/pr/frame-and-receiver-rule-goes-effect>.

⁴⁴ 27 C.F.R. § 53 (2022).

⁴⁵ Department of Justice, *supra* note 44.

⁴⁶ Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) (amending 27 C.F.R. §§ 447, 478 and 479).

⁴⁷ *Id.*

firearm, to avoid selling guns to prohibited purchasers, such as convicted felons; (2) modernizing the definition of *frame or receiver*, which helps law enforcement in the tracing of these guns by clarifying which part of the firearm must be marked with a serial number; (3) requiring that federally licensed dealers and gunsmiths add a serial number to 3D-printed guns or any unserialized firearm taken into inventory, and (4) requiring federal firearm licensees to retain records for the length of time they are licensed, thus expanding record retention beyond the 20-year requirement.⁴⁸

The new rule expanded the definition of *firearm* to mean “any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive” including the “frame of receiver of any such weapon” and “a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive.”⁴⁹ By modernizing the definition, ATF makes clear that parts kits that are designed to readily convert into functional firearms fall within the ATF’s regulatory power, as well as their frames and receivers.⁵⁰ Now, these kits and their parts are subject to the same regulations as traditional firearms. The rule extended regulation over new frames and receivers by redefining the terms. The *frame* is now “the part of a handgun . . . that provides housing or a structure for the primary energized component designed to hold back the hammer, striker, bolt, or similar component prior to initiation of the firing sequence.”⁵¹ Meanwhile, *receiver* was defined as “the part of a rifle, shotgun, or projectile weapon other than a handgun, or variants thereof, that provides housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence.”⁵²

The importance of regulating frames and receivers lies in the fact that these parts bear the firearm’s serial number. If a firearm is taken apart, or never assembled, the pieces that are technically regulated and registered are the frames and receivers. As we anticipated, companies circumvent this by offering unfinished frames and receivers that, according to them, cannot be readily converted into functioning firearms as defined by the GCA because they require special modifications. In an attempt to address this, the rule also defined a *partially complete, disassembled, or nonfunctional frame or receiver*, which means a “frame or receiver parts kit, . . . designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver.”⁵³ In addition, the new regulation provides examples to explain that the rule is applicable to frames and receivers that are marketed as unfinished. It specifies that the definition of *frame or receiver* includes kits that contain partially completed receivers sold with compatible jigs or templates used, together with online instructions and common tools, to readily complete or assemble the part into a functional receiver.⁵⁴

48 Department of Justice, *supra* note 44.

49 87 Fed. Reg. 24735.

50 Dep’t of Justice, *supra* note 44.

51 87 Fed. Reg. 24735.

52 *Id.*

53 *Id.* at 24739.

54 *Id.*

The new rule also amended the definition of *readily*—using case law interpretations of the GCA’s definition of the word—,⁵⁵ to mean a “process, action, or physical state that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speediest, or easiest process, action, or physical state.”⁵⁶ According to the rule, some factors relevant in making the determination are: time, ease, expertise, equipment, availability of parts, expense, scope, and feasibility.⁵⁷ This change is significant since the interpretation of *readily* and equivalent terms such as *readily completed* or *readily assembled* are a source of dispute between dealers and ATF, specifically, because these terms are the determining factor on whether an unfinished product is considered a firearm regulated under the GCA and NFA.

ATF uses the factors mentioned above to determine if a product qualifies as a firearm when the sellers of unfinished frames and receivers want confirmation on whether their products are subject to federal regulation.⁵⁸ To obtain an ATF determination letter regarding the classification of a product, the seller must provide a sample, accompanied by instructions and any accessories or attachments, such as templates, jigs, molds, or tools made available by the seller.⁵⁹

When uncertainty surrounds the classification of a product, ATF can also issue an open letter to clarify whether such product is subject to regulation. Utilizing this method, five months after the approval of Final Rule 2021R-05F, ATF issued an open letter to all federal firearm licensees regarding the impact of the rule on partially completed semi-automatic pistol frames.⁶⁰ The letter clarified that partially completed, disassembled or nonfunctional frames being marketed as partially complete “have reached a stage of manufacture where they ‘*may readily be completed, assembled, restored or otherwise converted*’ to a functional frame.”⁶¹ Furthermore, it explained that “the term ‘readily’ does not involve evaluation of a percentage of completion . . . Rather, the analysis examines how efficiently, quickly, and easily a clearly identifiable component part of a weapon can be completed, assembled, restored, or otherwise converted” to provide structure for the fire control component.⁶²

Additionally, the letter emphasized that the term “applies to every classification of a partially complete frame or receiver under this Rule, whether sold alone or as part of a

55 Gun Control Act of 1968, 18 U.S.C. §§ 921(a)(3)(A) (2018); see *U.S. v. Dodson*, 519 F. App’x. 344, 352–53 (6th Cir. 2013) (a ninety minute restoration using widely available parts and equipment fit comfortably within the readily restorable standard); *U.S. v. TRW Rifle 7.62x51mm Caliber*, 447 F.3d 686, 692 (9th Cir. 2006) (two-hour restoration process using ordinary tools falls within the meaning of readily restored); *United States v. Mullins*, 446 F.3d 750, 756 (8th Cir. 2006) (a one hour modification of a starter gun by a person lacking any specialized knowledge is considered a readily convertible weapon).

56 87 Fed. Reg. 24735.

57 *Id.*

58 *Id.* at 24688–89.

59 27 C.F.R. § 478.92(c) (2022) (for a GCA weapon); 27 C.F.R. § 479.102(c) (2022) (for a NFA weapon).

60 Open Letter, U.S. Dept of Justice, Impact of Final Rule 2021-05F on Partially Complete Polymer80, Lone Wolf, and Similar Semiautomatic Pistol Frames (December 27, 2022), <https://www.atf.gov/rules-and-regulations/docs/open-letter/all-fpls-dec2022-open-letter-impact-final-rule-2021-05f/download>.

61 *Id.*

62 *Id.*

kit”,⁶³ making these partially complete pistol frames ‘frames’ and ‘firearms’ as defined by the GCA and its regulations, even without any templates, molds, equipment, or instructions.⁶⁴

The issuing of an open letter has been ATF’s only action regarding the new rule.⁶⁵ There has been a noted reluctance from ATF to enforce the rule, evidenced by a lack of action toward retailers that continue to sell unfinished frames and receivers. It was reported that ATF officials told members of Congress they fear enforcing the rule would almost certainly elicit court challenges claiming that the regulatory changes violate the GCA and the Second Amendment.⁶⁶ This was in fact the case, seeing that a Texas federal judge granted a preliminary limited injunction in favor of a coalition of pro-gun plaintiffs that claimed the new rule was inconsistent with the GCA.⁶⁷ The scope of enforcement of the rule is yet to be determined as this case, and others like it, make their way toward higher courts. With failed congressional attempts to regulate PMFs,⁶⁸ only time will tell if this regulation meets a similar fate or if the proliferation of these firearms can be concretely addressed at a federal level.

B. State Regulation

Due to the Trump Administration’s unwillingness to regulate the proliferation of PMFs—including efforts to facilitate the publication of blueprints for 3D-printed guns—,⁶⁹ regulation fell upon the states. By the end of 2022, more than a dozen states and the District of Columbia had enacted laws to regulate some aspects of privately made firearms. Some of these laws were enacted before the surge of PMFs,⁷⁰ while others were a response to it. Similar to federal regulation, a number of these statutes target unfinished frames and receivers by prohibiting their possession if they lack serial numbers.⁷¹ While other statutes act by: (1) prohibiting the manufacture of firearms without state-issued permanent serial numbers;⁷² (2) outlawing the possession of firearms that are manufactured

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Press Release, Sen. Dick Durbin, Durbin Joins Colleagues in Urging DOJ & ATF To Clarify & Enforce Ghost Guns Rule (Oct. 20, 2022), https://www.durbin.senate.gov/newsroom/press-releases/durbin-joins-colleagues-in-urging-doj-and-atf-to-clarify_enforce-ghost-guns-rule (various groups, including numerous U.S. Senators, urged ATF to issue enforcement guidance to clarify the new rule’s reach).

⁶⁶ Glenn Thrush, *New Federal Rule Has Done Little to Stem Spread of ‘Ghost Guns’*, NEW YORK TIMES (Dec. 15, 2022), <https://www.nytimes.com/2022/12/15/us/politics/ghost-guns-biden.html>.

⁶⁷ Janet Miranda, *Gun Part Maker Wins Partial Pause of ATF’s ‘Ghost Gun’ Ban*, BLOOMBERG LAW (Sept. 6, 2022), <https://news.bloomberglaw.com/litigation/gun-part-maker-wins-partial-pause-of-atfs-ghost-gun-ban>; *VanDerStok v. Garland*, No. 4:22-cv-00691-O, 2022 WL 4009048, (N.D.Tex. Sept. 12, 2022).

⁶⁸ Untraceable Firearms Act of 2020, S. 3743, 116th Congress (2020) (introduced); Ghost Guns are Guns Act, H.R. 1454, 117th Congress (2021) (introduced).

⁶⁹ 83 Fed. Reg. 24166 (May 24, 2018); 83 Fed. Reg. 24198 (May 24, 2018) (the Trump Administration proposed two new federal rules that would have loosened regulations in order to circumvent a 5th Circuit decision that confirmed the lower court’s denial of a preliminary injunction that sought to enjoin enforcement of laws that require pre-approval to publish the blueprints, due to matters of national security).

⁷⁰ Va. Code Ann. § 18.2-308.5 (2004) (prohibition of plastic or undetectable firearms dates back to 2004).

⁷¹ Del. Code Ann. tit. 11 §§ 1459A, 1462 (2022).

⁷² Conn. Gen. Stat. § 29-36a(a) (2020).

or assembled without serial numbers;⁷³ (3) barring licensees from selling unserialized firearms;⁷⁴ (4) prohibiting the manufacturing of firearms for personal use and the parts used to make them,⁷⁵ and (5) banning licensed dealers and manufacturers from selling or delivering unserialized firearms.⁷⁶ While some laws were passed as a preemptive tactic, other US jurisdictions saw bigger upsurges of PMFs that forced legislatures to reform their gun laws.

i. California

Although California has the toughest gun laws in the nation,⁷⁷ it saw the biggest upsurge of PMFs in the country, with ATF reporting that 30 percent of all guns recovered by agents in cities like Los Angeles and Sacramento were unserialized,⁷⁸ while the Los Angeles Police Department reported a 400 percent increase in PMF recoveries since 2017.⁷⁹ To tackle this, the California penal code was amended in 2017 to prohibit ownership of firearms that lack serial numbers, or any identification mark provided by the state, by forcing a person who manufactures or assembles an unserialized firearm to permanently affix a serial number in a manner that meets or exceeds the requirements imposed by the G.C.A.⁸⁰ Additionally, the law states that any violation of the provision is punishable by a one-year imprisonment and/or a \$1,000 fine.⁸¹ But records show that the law has been ineffective, seeing that since July 2018 only 2,214 PMFs have been registered—an insignificant number compared to the 4.2 million suspected firearms in the state—and that not one charge has been filed since January 2019.⁸²

The increase of PMFs led the state to categorize their proliferation as an “overwhelming threat to public safety” in a 2020 lawsuit against ATF.⁸³ The state, parents of children killed with these weapons and the Gifford’s Law Center to Prevent Gun Violence sought federal injunctive relief, requesting that ATF reverse its determination that unfinished frames and receivers were not firearms under the GCA.⁸⁴

73 NJ Stat. Ann. § 2C:39–3(n) (2019).

74 DC Code § 7–2504.08(a) (2016).

75 Haw. Rev. Stat. § 134–10.2 (2022).

76 Mass. Gen. Laws Ch. 269 § 11E (2022).

77 *Gun Laws in California*, EVERYTOWN FOR GUN SAFETY (2023) <https://everytownresearch.org/rankings/state/california/>.

78 Alain Stephenson, *Ghost Guns are Everywhere in California*, THE TRACE (2019) <https://www.thetrace.org/2019/05/ghost-gun-california-crime/>.

79 Kris E. Pitcher (Chief of Detectives), *Response to Council Motion File No. 21-0899 Relative to the impact of Ghost Guns in the City* (Oct. 19, 2021) <https://lacity.primegov.com/Portal/viewer?id=399032&type=2>.

80 Cal. Penal Code. § 29180 (b)(2) (2022).

81 *Id.* § 29180 (c)a, (g) (the 2022 gun law reform also states that by January 1, 2024, the possession of an unserialized firearm will also be punishable by up to one year of imprisonment or a \$1,000 fine).

82 Alaine_Stephenson, *supra* nota 78.

83 Complaint for Declaratory and Injunctive Relief, *State of California v. ATF*, 2023 WL 1873087 (N. D. Cal.) (No. 3:20-cv-06761) (Available at: <https://oag.ca.gov/sites/default/files/Compl.%20As-Filed%20CA%20ov.%20ATF.pdf>).

84 *Id.*

In an effort to combat the spread of PMFs, cities like Los Angeles and San Francisco started banning them in 2021,⁸⁵ until a state-wide gun law reform was passed in 2022,⁸⁶ which recognized that “[t]he proliferation of unserialized ghost guns . . . dangerously undermine[s] the effectiveness of laws and protections critical to the health, safety, and well-being of Californians.”⁸⁷ Now, the firearm definition includes frames and receivers,⁸⁸ which are named *firearm precursor parts* that are newly defined as an “article that has reached a stage in manufacture where it may readily be completed, assembled or converted to be used as the frame or receiver of a functional firearm,”⁸⁹ or, an article “that is marketed or sold to the public to become or be used as the frame or receiver of a functional firearm once completed, assembled or converted.”⁹⁰ This means that PMFs—and frames and receivers—must be regulated as any other firearm and thus cannot be sold or transferred unless registered and serialized by an authorized federal licensee.⁹¹

As of January 1, 2023, the law also requires a manufacturer license to make more than three PMFs in a year or to use a 3D printer to make them.⁹² Limiting the use of 3D printers, and CNC milling machines,⁹³ in the manufacturing of firearms and their precursor parts is a bold and overreaching attempt at reducing the spread of these weapons. An attempt that could be considered inconsistent with the GCA, and that critics have anticipated and even condemned as unconstitutional since it results in denying someone the equipment needed to exercise a constitutional right.⁹⁴ This sweeping reform is the first of its kind, which begets the question of whether it will go unenforced like previous legislations or be forced to undergo lengthy legal battles.

85 Megan Cassidy, *San Francisco Supervisors Vote to Ban Untraceable ‘Ghost Guns’*, SAN FRANCISCO CHRONICLE (2021) <https://www.sfchronicle.com/bayarea/article/San-Francisco-supervisors-vote-to-ban-untraceable-16441684.php>; Julia Wick, *L.A. City Council Votes to Ban ‘Ghost Guns’*, LOS ANGELES TIMES (2021) <https://www.latimes.com/california/story/2021-11-30/l-a-city-council-votes-to-ban-ghost-guns>.

86 Hannah Wiley, *California Enacts Sweeping Gun Control Laws, Setting Up a Legal Showdown*, LOS ANGELES TIMES (2022) <https://www.latimes.com/california/story/2022-07-12/gavin-newsom-signs-firearm-laws-supreme-court-gun-rights>; Assem. Bill 1621, 2021-2022 Reg. Session (Cal. 2022) https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1621 (unserialized weapons); Sen. Bill 1327, 2021-2022 Reg. Session (Cal. 2022) <https://archive.is/37SRs> (private rights of action); Sen. Bill 918, 2021-2022 Regular Session (Cal. 2022) <https://archive.is/qjz4m> (concealed carry restrictions).

87 Assem. Bill 1621, 2021-2022 Reg. Session (Cal. 2022).

88 Cal. Penal Code. §16520 (2022).

89 *Id.* § 16531 (similar to the language used in the new federal regulation).

90 *Id.* (the law covers finished and unfinished frames and receivers).

91 *Id.* §§ 27530, 16515 (§27530 prohibits the sale or ownership transfer of firearms without a serial number a federal licensee; §165151 defines a federal licensee).

92 *Id.* § 29010 (unlicensed individuals are free to manufacture 3 firearms even if for personal and lawful use, which is a more stringent limitation than the GCA).

93 *Id.* § 29185 (computer numerical control (CNC) milling carves raw material to produce a desired form. 3D printing is an additive method, while CNC is a subtractive one).

94 Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 513 (2014) (the author considers that regulating the materials used in 3D printing is equivalent to imposing a tax on newspaper ink and paper, which the Supreme Court has deemed unconstitutional).

ii. New York

As the second state with the most restrictive gun laws in the nation,⁹⁵ New York began regulating ghost guns in 2021 with the *Jose Webster Untraceable Firearms Act*,⁹⁶ and the *Scott J. Beigel Unfinished Receiver Act*.⁹⁷ The *Webster Act* defined a ghost gun as an unserialized firearm not in compliance with the serialization and registration requisites of the act.⁹⁸ The law also provides for the registration and serialization of frames and receivers whether finished or unfinished,⁹⁹ criminalizes the possession of a ghost gun by any person other than a licensed gunsmith,¹⁰⁰ and criminalizes the sale, exchange or disposal of a ghost gun as a felony.¹⁰¹ Similarly, the *Beigel Act* was enacted to define an unfinished frame or receiver as “any . . . material . . . that has been shaped or formed in any way for the purpose of becoming the frame or receiver of a firearm, rifle or shotgun, and which may readily be made into a functional frame or receiver through milling, drilling or other means.”¹⁰² The law also states that a person is guilty of criminal possession of a weapon, when in possession of a major component of a firearm such as an unfinished frame or receiver, when such a person is legally prohibited from possessing a shotgun or rifle pursuant to state law and the GCA.¹⁰³ The Act also makes it a crime to sell, exchange, give or dispose of an unfinished frame or receiver.¹⁰⁴

In terms of implementation, New York’s Attorney General announced in December of 2022 a 438-count indictment, charging three individuals with various counts of criminal sale of a ghost gun and criminal possession of a weapon.¹⁰⁵ The investigation led to the recovery of 51 PMFs, of a total of 57 firearms retrieved, which were allegedly bought online and shipped to Pennsylvania, then assembled and sold in New York.¹⁰⁶ Additionally, the Attorney General and the Mayor of New York City simultaneously filed lawsuits against national gun distributors for, among other things, shipping unfinished frames and receivers to NY addresses without running background checks.¹⁰⁷ The New York Police Depart-

95 *Gun Laws in New York*, EVERYTOWN FOR GUN SAFETY (2023) <https://everytownresearch.org/rankings/state/new-york/>.

96 *Jose Webster Untraceable Firearms Act*, 2021 N.Y. Laws 520 (named in remembrance of a 16-year-old boy killed by a ghost gun).

97 *Scott J. Beigel Unfinished Receiver Act*, 2021 N.Y. Laws 519 (named after a teacher killed in a school shooting).

98 N.Y. Penal Law §§265.00 (32), 265.07(2) (McKinney 2022).

99 *Id.* §265.07.

100 *Id.* §265.01(9).

101 *Id.* §§265.60, 265.61.

102 *Id.* §265.00 (32.1).

103 *Id.* §265.01(9-10).

104 *Id.* §§ 265.63, 265.64 (second degree) (first degree, when someone disposes of 10 or more frames or receivers in a year).

105 Leticia James, *Attorney General James and NY Drug Enforcement Task Force Take Down Ghost Gun Trafficking Ring*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (2022) <https://ag.ny.gov/press-release/2022/attorney-general-james-and-ny-drug-enforcement-task-force-take-down-ghost-gun>.

106 *Id.*

107 Letitia James, *Attorney General James Sues National Gun Distributors for Fueling Gun Violence Crisis and Endangering New Yorkers*, OFFICE OF THE NEW YORK STATE ATTORNEY (2022) <https://ag.ny.gov/press-release/2022/attorney-general-james-sues-national-gun-distributors-fueling-gun-violence-crisis>.

ment has also attempted to crack down on ghost guns with the launching of what they consider to be the country's first ghost gun squad, dedicated to investigating unserialized firearms, and with its Deputy Inspector reporting that recoveries were up 300 percent in the first months of 2022.¹⁰⁸

iii. Nevada

Although Nevada is a more lenient firearm regulator compared to California or New York, it has seen more regulation initiatives in recent years, including a ghost gun legislation passed in 2021.¹⁰⁹ The law regulated PMFs by defining *unfinished frame or receiver*,¹¹⁰ and providing that “a person shall not sell, offer to sell or transfer” them,¹¹¹ nor “possess, purchase, transport or receive” them.¹¹² The law also made it illegal for a person to manufacture or assemble an unserialized firearm,¹¹³ and banned their possession, sale, transfer, purchase, and transport.¹¹⁴ However, this total ban was immediately challenged in state court by Polymer80, a Nevada-based company and one of the largest manufacturers of PMF parts and kits in the nation,¹¹⁵ claiming that the criminal statutes were unconstitutionally vague under the Due Process Clause of the Nevada Constitution.¹¹⁶ Subsequently, the Nevada State Court found that the definition of unfinished frame and receiver was unconstitutional because it “fail[ed] to provide a person of ordinary intelligence with fair notice of the conduct which it proscribes” and because it authorizes seriously discriminatory enforcement.¹¹⁷ However, on appeal before the Nevada Supreme Court, the case was dismissed as moot.¹¹⁸

The law was also challenged in the Federal District Court for the District of Nevada when Polymer80 and other pro-firearms groups separately filed requests for injunctive relief. The request was granted to Polymer80, due to the District Court's finding of the text as impermissibly vague,¹¹⁹ but denied to the pro-firearm groups because the District Court understood that plaintiffs did not meet “their burden to show a likelihood of success on the merits of their Second Amendment claim.”¹²⁰ Nevertheless, the rest of the law is still enforceable.

108 Keegan Hamilton and Patricio Matos, *Untraceable ‘Ghost Guns’ Are Surging Across the US, Exclusive Data Shows*, VICE (2022) <https://www.vice.com/en/article/akv5p4/ghost-guns-police-data-surgin>.

109 Assem. Bill 286, 2021-2022 Regular Session (Nev., 2022).

110 Nev. Rev. Stat. Ann. §202.253 (9) (2021).

111 *Id.* § 202.3625 (2021).

112 *Id.* § 202.363 (2022).

113 *Id.* § 202.3635 (2021).

114 *Id.* §202.364 (2022).

115 See Tom Jackman, *D.C. Wins \$4 Million Judgment Against ‘Ghost Gun’ Parts Maker*, THE WASHINGTON POST (August 11, 2022) <https://www.washingtonpost.com/dc-md-va/2022/08/11/dc-ghost-guns-polymer80-judgment/> (the company has been the subject of numerous state and federal lawsuits relating to the sale of these products).

116 Sean Golonka, *State Judge Strikes Down Key Parts of Nevada’s ‘Ghost Gun’ Ban*, THE NEVADA INDEPENDENT (December 13, 2021) <https://thenevadaindependent.com/article/state-judge-strikes-down-key-parts-of-nevadas-ghost-gun-ban>.

117 *Polymer80 v. Sisolak*, No. 21-CV-00690 (3rd District Court Nev., Dec. 10, 2021).

118 *Sisolak v. Polymer80*, 2022 Nev. Unpub. LEXIS 70.

119 *Polymer80 v. Sisolak*, 2021 Nev. Dist. LEXIS 1631, 3-4.

120 *Palmer v. Sisolak*, 2021 US Dist. LEXIS 203547, 14; *Palmer v. Sisolak*, 594 F. Supp. 3d 1215, 1222 (D. Nev., 2022)

III. CONSTITUTIONAL ANALYSIS

A. *New federal regulation faces the Second Amendment*

As mentioned earlier, ATF officials were apprehensive of enforcing the new federal rule for fear of it being struck down, a well-substantiated concern in light of the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*, which now forces the government to demonstrate that a regulation is “consistent with the Second Amendment’s text and historical understanding” in order to uphold it as constitutional.¹²¹ At the time the Final Rule was proposed—and during the open comment period—commenters justified their arguments under the *District of Columbia v. Heller* ruling.¹²² This opinion, which precedes *Bruen*, recognized that the Second Amendment guarantees an individual’s right to keep and bear arms for lawful purposes, and that statutes that work as functional bans on firearm possession in the home are unconstitutional.¹²³

However, the Court failed to establish a standard to evaluate Second Amendment challenges, and as such, most of the Federal Circuit Courts adopted a two-step approach that combined history with means-end scrutiny.¹²⁴ As a first step, Circuit Courts asked whether the law burdened conduct protected by the Second Amendment, which did involve a historical analysis of the right.¹²⁵ If the law was found to burden the right, the Courts would apply either strict scrutiny, which forces the regulator to demonstrate a compelling government interest, or intermediate scrutiny.¹²⁶

As a result, some comments submitted to ATF claimed that post-*Heller*, most gun control laws are examined under a reasonableness standard that requires the regulation to be a sensible method of achieving its objectives.¹²⁷ According to ATF, some commenters argued that the proposed rule could not survive the two-part test since the evidence cited failed to prove that unfinished frames and receivers are significant contributors to gun violence.¹²⁸ ATF disagreed, noting that the Rule does not prohibit individuals from owning PMFs for personal and lawful use, just imposes a minimal burden on firearm possession,¹²⁹ and that a threshold amount of criminal activity is not needed to address a growing problem.¹³⁰ The Agency noted that the Rule “serves the compelling governmental interest of

(failure to demonstrate how the law was not a reasonable fit for the state’s compelling interest).

¹²¹ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

¹²² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹²³ *Id.* at 626-28 (2008) (the Court also recognized that individual self-defense is the central component of the Second Amendment right).

¹²⁴ See *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2019); *Worman v. Healey*, 922 F.3d 26, 33 (1st Cir. 2019).

¹²⁵ See *Silvester v. Harris*, 843 F.3d 816, 820-21 (9th Cir. 2016); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011).

¹²⁶ See *Woollard v. Gallagher*, 712 F.3d 865, 875-76 (4th Cir. 2013).

¹²⁷ Bureau of Alcohol, Tobacco, Firearms and Explosives, 87 Fed. Reg. 80, 24676 (Apr. 26, 2022) (to be codified at 27 C.F.R. pts. 447, 478-79).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 24677.

preventing unserialized firearms from proliferating throughout the country”,¹³¹ claiming that the rule is a “presumptively lawful regulatory measure” under *Heller*.¹³² ATF’s response cited a 3rd Circuit decision that upheld a ban on possession of firearms with obliterated serial numbers after the Court understood that even if strict scrutiny were to apply, the government has a compelling interest in allowing law enforcement to gather vital information via serial number tracing.¹³³ The Agency also cited a case concerning a San Diego City ordinance that imposed a blanket prohibition on unfinished frames and receivers, where the District Court found that the regulation achieved the city’s substantial interest due to the ordinance only targeting unserialized parts.¹³⁴

B. The Bruen test meets technological progression

The previous arguments were formulated in a pre-*Bruen* world, where lower Courts benefited from the Supreme Court’s refusal to provide a standard of review for Second Amendment challenges. This ended when the *Bruen* Court expanded the right to bear arms in public spaces, finding that a show of proper cause for a concealed carry license was unconstitutional,¹³⁵ and declined to adopt the Federal Circuits’ two-step approach to instead develop a text-and-history test which stipulates that “when the second amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”¹³⁶ Yet, the Opinion also acknowledges that “applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins.”¹³⁷ This difficulty is especially pertinent in assessing the constitutionality of ghost gun bans since these regulations were created to address an unprecedented problem of a historically recognized practice, i.e. the self-making of firearms.

Although *Bruen* involves concealed carry licensing requirements, the Court acknowledged that when dealing with cases that implicate “unprecedented societal concerns or dramatic technological changes [it] may require a more nuanced approach [since] [t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders.”¹³⁸ Yet, it clarified that “the Founders created a Constitution —and a Second Amendment— ‘intended to endure for ages to come, and consequently, to be

¹³¹ *Id.*

¹³² *Id.* at 24676; *District of Columbia v. Heller*, 554 U.S. 570 (2008) (the *Heller* Court determined that the right to keep and bear arms is not unlimited since laws prohibiting felons or the mentally ill from possessing firearms or banning these weapons in sensitive places such as schools and government buildings are presumptively lawful regulations).

¹³³ *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010).

¹³⁴ *Fahr v. City of San Diego*, 2021 WL 4895974, at 10 (S.D. Cal. Oct. 20, 2021).

¹³⁵ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (the Court’s super-majority interpreted that the word *bear* “naturally encompasses public carry”).

¹³⁶ *Id.*

¹³⁷ *Bruen*, 142 S. Ct. at 2134; (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, dissenting)).

¹³⁸ *Id.* at 2132 (emphasis added).

adapted to the various crises of human affairs.”¹³⁹ By including this caveat, the Court reiterates its understanding that the Second Amendment’s historically fixed meaning applies to new technologies.¹⁴⁰

This reasoning was first employed in *Heller* when the Court determined that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,”¹⁴¹ and so categorized as frivolous the theory that only firearms that existed in the 18th century were protected by the amendment, exemplified by the fact that the First Amendment protects modern forms of communication and that the Fourth Amendment applies to modern forms of search.¹⁴²

C. *Firearm technology protected by the First Amendment?*

The steadfast belief that the Constitution was designed to contemplate new technologies may bring inconsistencies relating to PMF regulation, since the technologies used to make these firearms are not only unprecedented, but may also require review under other constitutional provisions, such as freedom of speech, and whose results may be contradictory to second amendment jurisprudence.

For example, one irreplaceable aspect of 3D-printed guns and gun parts is the computer-aided design (CAD) files that use source code, which are essentially the blueprints used to 3D print objects. These files have also been the subject of firearm litigation, but unlike physical weapons, their constitutional protection has been argued to stem from the First Amendment’s freedom of speech clause. In *Defense Distributed v. United States Dep’t of State*,¹⁴³ the 5th Circuit Court of Appeals refused to review the case on its merits to decide whether ghost gun blueprints are protected speech under the First Amendment, and on remand, the case settled out of court, leaving a crucial question unanswered.

The issue of whether code is considered speech has been argued for decades.¹⁴⁴ However, there is no legal authority that answers such question or even if CAD files are code, which some argue they are not because they “are purely functional and devoid of commu-

¹³⁹ *Id.* (citing *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)).

¹⁴⁰ *District of Columbia v. Heller*, 554 U.S., at 582.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Defense Distributed v. U.S. Dept. of State*, 838 F.3d 451 (5th Cir. 2016) (when *Defense Distributed*, a non-profit focused on promoting access to firearms, first designed and made a 3D-printed gun, it posted the blueprints online. Afterward, the U.S. Department of State requested that the files be taken down, claiming that prior approval was needed since the files were technical data relating to items on the U.S. munitions lists and that posting them on the internet for foreign nationals to download constituted exportation. While awaiting approval, *Defense Distributed* filed suit and sought a preliminary injunction to enjoin the enforcement of the pre-approval requirements by claiming that the pre-approval scheme was an unconstitutional prior restraint on speech. The District Court denied the motion finding no substantial likelihood of success on the merits, and while the Circuit Court affirmed, it turned to a balance of harm inquiry to conclude that the public’s safety interest outweighed the plaintiff’s interest in defending its First Amendment rights).

¹⁴⁴ *Bernstein v. U.S. Dept. of Justice*, 192 F.3d 1308 (9th Cir. 1999) (this case met a similar fate to that of *Defense Distributed* when the Court determined that code was in fact speech, but the opinion was later withdrawn); *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000) (the Court found code to be protected by the First Amendment because it was an expressive means to exchange information and ideas about computer programming).

nicative and expressive qualities characteristic of speech”.¹⁴⁵ Others believe that CAD files should warrant First Amendment protection. Some —like Defense Distributed— argue that they should be treated equally as any other protected speech, while others believe that since the right to keep and bear arms embodies the complimentary guarantee of making arms,¹⁴⁶ regulating information used to manufacture them is also unconstitutional.¹⁴⁷ This theory is partially based on the belief that “the derivative First Amendment right to speak freely about keeping and bearing arms bolsters the primary Second Amendment right.”¹⁴⁸

However, these theories may never be solved since CAD files represent a doctrinal clash between the right to disseminate speech, the right to keep and bear arms, and the government’s compelling interest relating to national security. A clash that policymakers have surely anticipated and wish to avoid, evidenced by the DoJ’s decades-long insistence on keeping these issues outside of the courts and even by the Supreme Court when it denied Defense Distributed petition for *certiorari*.

D. *The problem with analogical reasoning*

Currently, to survive constitutional muster, governments must provide an analogous regulation that is *relevantly similar*.¹⁴⁹ To determine what constitutes a relevant similarity, the Court deems necessary some metrics to facilitate the analysis,¹⁵⁰ and although the Court does not provide an exhaustive list, it does “think that *Heller* and *McDonald* point toward at least two metrics: *how* and *why* the regulations burden a law-abiding citizen’s right to armed self-defense.”¹⁵¹ In other words, for current regulations to be constitutional, they have to align with the methods and objectives of past regulations. According to the Court, this analogical reasoning “requires only that the government identify a well-established and representative historical analogue, not a historical twin.”¹⁵²

Even if throughout its Second Amendment interpretations the Court has been adamant that the amendment shelters new technological advances,¹⁵³ 3D printing, build-your-own gun kits, and the threats they represent pose further unprecedented issues that may muddle the application of analogical reasoning under a history-based test. Even before the *Bruen* opinion, when a history-based test was only brewing in the lower courts,¹⁵⁴

¹⁴⁵ First Amendment - Technology - Fifth Circuit Declines to Enjoin Regulation of Online Publication of 3D-Printing Files - Defense Distributed v. United States Department of State, 838 F.3d 451 (5th Cir. 2016), 130 HARV. L. REV. 1744, 1749 (2017) (when compared with decryption software code that can convey information comprehensible by a human).

¹⁴⁶ Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 490 (2014).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 507.

¹⁴⁹ New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2132-33 (2022).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (emphasis added).

¹⁵² *Id.*

¹⁵³ See Caetano v. Massachusetts, 577 U.S. 411 (2016) (stun guns are bearable arms as interpreted in *Heller*).

¹⁵⁴ See *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Circuit, 2011) (Kavanaugh, Dissenting) (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny”).

concerns were raised regarding 3D-printed guns and how likely it was for them to elude regulation if some kind of historical test were adopted. In an article advocating for the circuit's two-part test to be adopted by the Supreme Court, its authors argued that "some technologies, namely 3D-printed ghost guns, stretch judicial analogies beyond the breaking point" and emphasized that a balancing of burden and benefit was necessary in determining a regulation's constitutionality.¹⁵⁵

The problem with employing analogical reasoning that is limited by a showing of tradition is that when faced with regulations that tackle new technologies, meeting metrics like the previously mentioned *why* and *how*, could be a grueling task, even if courts do not expect a historical twin. If we take ghost gun regulations as an example, a skilled researcher may find a superficially comparable historical regulation, but will have a challenging time justifying a similarity in how these types of weapons were regulated and why the regulation was needed, because never in the history of gun ownership in the United States could a person make a functional plastic firearm from scratch or order an untraceable one online without any sort of background check, assemble it in minutes, use it to commit a crime, and then melt it to erase its existence.

In defending analogical reasoning, the *Bruen* Opinion references a Professor Cass R. Sunstein article that sets forth the *relevantly similar* requirement mentioned before,¹⁵⁶ yet the Court chooses to ignore that the same article specifies that "[f]or analogical reasoning to operate properly, we have to know that *A* and *B* are 'relevantly' similar, and that *there are not 'relevant' differences between them.*"¹⁵⁷ The article clearly considers what the Supreme Court overlooks, that relevant differences are an integral part of the analysis that reviewers must consider if their goal is to apply this method correctly. Ultimately, in the absence of a rigorous standard of review such as means-end scrutiny that considers the state's compelling interests in the safety and health of its citizens, the finding of analogous laws based on relevant similarities will always be subjective. Reviewers will be left to apply analogical reasoning to something that lacks precedent, which can and will result in arbitrary or ideologically based decisions.¹⁵⁸

E. *The future of gun regulation*

Bruen left several unanswered questions regarding the history-based test that has resulted in its erratic application in lower courts,¹⁵⁹ which could be indicative of the varying

¹⁵⁵ Thaddeus Talbot & Adam Skaggs, *Regulating 3D-Printed Guns Post-Heller: Why Two Steps Are Better Than One*, THE JOURNAL OF LAW, MEDICINE & ETHICS, 48 S2, 98-104 (2020).

¹⁵⁶ *Bruen*, 142 S. Ct. at 2132-33.

¹⁵⁷ Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) (emphasis added).

¹⁵⁸ In *Bruen*, the state and numerous amici presented what could be considered by many *sufficiently longstanding* regulations in defense of their proper cause requirement, yet none of them satisfied the Court; See Saul Cornell, *Cherry-picked history and ideology-driven outcomes: Bruen's originalist distortions*, SCOTUSBLOG (June 27th, 2022, 5:05PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> for an analysis of how the Court cherry-picked history to conform the *Bruen* decision to its ever-evolving firearm veneration.

¹⁵⁹ Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 38, 44-45) (available at <https://ssrn.com/abstract=4335545>).

treatment ghost gun laws will be subjected to. As these regulations keep facing constitutional and statutory challenges, statutes like the Nevada and New York laws that act as total bans on unregistered and/or unserialized firearms, frames and receivers will likely be struck down as they prohibit the mere possession of these weapons. And naturally, these prohibitions—that do not create specific provisions for the sensitive places exception set forth in *Heller*—are unconstitutional under *Heller* and *McDonald* because they infringe on the fundamental right to *keep* arms.

A similar analysis was employed by the District Court of Delaware when it granted a partial preliminary injunction to enjoin the enforcement of recent amendments to the *Criminal Code Relating to Firearms* which criminalized the possession and manufacture of unserialized firearms and unfinished firearm components,¹⁶⁰ as well as the distribution of CAD files or any code used to instruct a 3D printer to produce a firearm or its components.¹⁶¹ The Court applied the *Bruen* history test to determine that the Second Amendment presumptively extends to the conduct prohibited by the statutes and that in the absence of any longstanding analogous firearm regulation, the Plaintiffs successfully demonstrated a likelihood of success on the merits that the statutes violate their Second Amendment rights.¹⁶² Conversely, the Court found that the prohibition on distributing CAD files was constitutional due to it being of narrow scope and in pursuance of the government's substantial interest.¹⁶³ An analysis that demonstrates what we anticipated, that is, rulings rife with contradictions due to the significant differences between the Second Amendment history-based test and the First Amendment means-end scrutiny test. Here, the Court understands that the state can regulate how guns are made, and by whom, but cannot regulate who can own them, which seems illogical to the free exercise of a fundamental right.

Perhaps in time these inconsistencies will force the Supreme Court to provide a broader interpretation of the Second Amendment, to recognize the manufacture of firearms as a complimentary guarantee of keeping and bearing arms.

Meanwhile, regulations like California's and the new ATF Rule do not prohibit PMF possession; instead, they require their registration.¹⁶⁴ As a result, lower courts may take a different approach towards these regulations by recognizing their validity considering that firearm registration is a historically recognized practice, even if the CGA has never required PMF registration. Which sounds rational and in line with the State's interest in the safety of its citizens.

¹⁶⁰ 11 Del. C. § 1459(b), 1463(a), 1463(b), 1463(c)(1).

¹⁶¹ *Id.* § 1463(c)(2).

¹⁶² *Rigby v. Jennings*, No. CV 21-1523 (MN), 2022 WL 4448220 (D. Del. Sept. 23, 2022) (the Court also determined that the regulation on distribution of unfinished frames and receivers was constitutional because the conditions imposed on the sale and transfer of firearms do not burden Plaintiff's Second Amendment rights since traceable firearms are easily accessible).

¹⁶³ *Id.*

¹⁶⁴ Definition of "Frame or Receiver" and Identification of Firearms, 27 C.F.R. § 478.12 (2022) (according to ATF, the new "definitions do not ban the private making of a firearm nor the unregulated possession of non-frame or non-receiver firearms parts nor do the definitions ban the possession of a frame or receiver, but only require that a frame or receiver be marked").

However, the Supreme Court will condemn regulators to attempt to meet the requirements of the *Bruen* test because an individual's right to privately make firearms for personal and lawful use is now presumptively protected by the Second Amendment. Regulations will only pass constitutional muster if the allusive historical analog miraculously persuades the Court. As it stands, new technologies may evade regulation now that regulators cannot bring forward longstanding equivalencies to meet the Court's standards. Meaning that, essentially, firearm regulation aimed at novel threats has been paralyzed until further notice, an outcome that feels paradoxical by design.

The key to surviving a constitutional challenge may lie in regulating PMFs like any other firearm and merely requiring their registration, not by banning their possession completely, even if this approach has little impact on criminal activity. After all, considering that people can manufacture guns in the privacy of their homes, owning a firearm has shifted away from governmental interference. And the regrettable reality is that more gun regulation has not proven effective in lowering crime rates, on the contrary, when such initiatives are not directed at dealing with the root causes, more regulation just leads to over-policing which ultimately results in more violence.

IV. PUERTO RICO

A. *Constitutional basis*

Unlike the U.S. Constitution, Puerto Rico's Constitution does not recognize the right to keep and bear arms. Such right was unequivocally rejected in the 1952 Constitutional Convention when the motion to include "the right of the individual to possess a weapon in his home for his own defense shall not be restricted" was quickly struck down without any debate.¹⁶⁵ Because of this, and our unorthodox relationship with the U.S., any discussion regarding the fundamental right to keep and bear arms in Puerto Rico is bound by Second Amendment jurisprudence and congressional action.

In *McDonald v. City of Chicago*, the United States Supreme Court made the Second Amendment fully applicable to the states through the Due Process Clause of the Fourteenth Amendment.¹⁶⁶ However, since Puerto Rico is not a state, but rather an unincorporated territory of the United States, the U.S. Constitution is not fully applicable to the Island.¹⁶⁷ Nevertheless, because *McDonald* determined that the right to keep and bear arms for self-defense is fundamental due to it being essential to the nation's scheme of ordered liberty,¹⁶⁸ the Second Amendment is arguably applicable to Puerto Rico under the territorial incorporation doctrine since unincorporated territories enjoy fundamental rights guaranteed by the US Constitution.¹⁶⁹ Regardless, residents of Puerto Rico have

¹⁶⁵ 3 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO 1529 (1952) (translation supplied) (the political climate at the time following an insurrection attempt was surely a rationale to not enshrine such a right in our constitution).

¹⁶⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

¹⁶⁷ *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922).

¹⁶⁸ 561 U.S. 742, 778 (2010).

¹⁶⁹ 258 U.S. 298, 312-13 (1922).

the right to keep and bear arms because Congress provided for the rights, privileges, and immunities of U.S. citizens to be respected in Puerto Rico “to the same extent as though Puerto Rico were a State of the Union.”¹⁷⁰ Federal firearm regulations likewise apply to Puerto Rico as if it were a state.¹⁷¹

The Puerto Rico Supreme Court recognized in *Pueblo v. Colón González* that, in light of the *Heller* and *McDonald* rulings, to keep and bear arms in Puerto Rico constitutes a fundamental right and not a privilege as understood throughout our legislative history.¹⁷² Recently, the Court had the opportunity in *Pueblo v. Rodríguez López* to apply the *Bruen* test to the licensing requirement of the Puerto Rico Weapons Act of 2000.¹⁷³ The appellees, who were charged with, among other things, carrying and operating a firearm without a license, argued that the law was unconstitutional because in its application it became a total ban on firearm possession and exposed them to incarceration for simply exercising their Second Amendment rights.¹⁷⁴ The Court hurriedly dispatched the constitutional argument by finding that the limitation on gun ownership survives *Bruen’s* test considering that “there is a historical understanding regarding the validity of the requirement” evidenced by longstanding laws in Puerto Rico and other US jurisdictions,¹⁷⁵ and reasoned that such a prerequisite does not forbid law-abiding citizens from legally owning a firearm.¹⁷⁶ Yet, to come to its decision, the Opinion fails to analyze the Weapons Act’s specific licensing requirements which means that by merely reiterating that these schemes are constitutionally valid, the Court never subjected the Act to *Bruen’s* test.

This superficial analysis may suggest that the Court recognized the unconstitutionality of the licensing regime considering its proper-cause requirement. Let’s remember that in *Bruen*, the U.S. Supreme Court found that a showing of proper cause for a concealed carry license was inconsistent with the fundamental right to bear arms, a qualifying condition that seems quite similar to the prerequisites of the apparently constitutional Puerto Rican statute that forced the applicant to prove to a court of law that they feared for their safety.¹⁷⁷ A further indicator of why the Puerto Rico Supreme Court never examined the licensing scheme can be found in the *Bruen* opinion when the Court stated that nothing in their “analysis should be interpreted to suggest the unconstitutionality of the 43 States’ shall-issue licensing regimes, under which ‘a general desire for self-defense is sufficient to obtain a [permit]’”,¹⁷⁸ due to the fact that the opinion goes on to specify that the Court does “not rule out constitutional challenges to shall-issue regimes where, for example, lengthy

¹⁷⁰ 48 U.S.C. § 737; *Examining Bd. of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 600 (1976) (“It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and the Fourteenth Amendment apply to residents of Puerto Rico”).

¹⁷¹ 27 C.F.R. § 478.12 (2022) (the term State shall include the Commonwealth of Puerto Rico).

¹⁷² *Pueblo v. Colón González*, 2022 PRSC 83, at 12.

¹⁷³ *Pueblo v. Rodríguez López*, 2022 PRSC 128.

¹⁷⁴ *Rodríguez López*, 2022 PRSC 128, at 5.

¹⁷⁵ *Id.* at 29-32 (translation supplied).

¹⁷⁶ *Id.*

¹⁷⁷ *Ley de armas de Puerto Rico*, Ley Núm. 404 de 11 de septiembre de 2000, 25 LPRA § 456d (2000) (repealed 2020).

¹⁷⁸ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2138, n.9 (2022) (citation omitted).

wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.”¹⁷⁹ Examples that resemble the reality of obtaining a concealed carry license under the Weapons Act of 2000. However, even if constitutional, the 2000 law was repealed in 2020 making way for a less burdensome licensing scheme that can survive the *Bruen* test if eventually submitted to it.

B. Data

Although Puerto Rico is a strict gun regulator, there has been very limited reporting relating to PMF usage, which is contrary to the correlative effect seen in California and New York, where the stricter the gun laws, the more people seek out alternatives. The only PMF case that we could identify was the result of a grand jury indictment of a Puerto Rican man on charges of conspiracy to manufacture and deal PMFs.¹⁸⁰ However, the Attorney assigned to the case informed us that although the DOJ press release mentioned that PMF parts were seized on the Island, the District of Puerto Rico was only the arresting jurisdiction and that the charging jurisdiction was the Middle District of Pennsylvania.¹⁸¹ The Attorney further explained that to her knowledge, the Public Defender’s office has not seen any other ghost gun case, which she reasons is a result of a well-run black market.¹⁸²

The lack of cases and reports could be an indicator of law enforcement’s failure to implement recovery protocols as seen in other jurisdictions—or even a general lack of record keeping—or alternatively, it could be the result of a lack of awareness or disinterest from the public regarding these weapons. This last conjecture can be justified by noting that Puerto Rico’s gun culture is incomparable to other U.S. jurisdictions. In fact, due to cultural and social differences, there is no history of political discord surrounding Second Amendment rights, no problems with school shootings, nor a sense of entitlement regarding the ownership of firearms. In reality, gun violence and trafficking on the island are rampant but are mainly connected to drug trafficking and organized crime.¹⁸³ A reality that has forced agreements between federal and local authorities to prosecute cases in federal court due to the local government’s inability to deal with the increase in cases, an outcome of the state’s tough-on-crime policies that apparently failed to properly contemplate resources and budgetary matters.¹⁸⁴

¹⁷⁹ *Id.*

¹⁸⁰ John C. Gurganus, *Two Men Indicted for Manufacturing and Selling 28 Ghost Guns*, DEPARTMENT OF JUSTICE (January 12, 2022), <https://www.atf.gov/news/pr/two-men-indicted-manufacturing-and-selling-28-ghost-guns>.

¹⁸¹ Telephone interview with Joanna LeRoy, Esq. (February 17, 2023).

¹⁸² *Id.*

¹⁸³ INSTITUTO DE ESTADÍSTICAS DE PUERTO RICO, SISTEMA DE NOTIFICACIÓN DE MUERTES VIOLENTAS DE PUERTO RICO 29-30 (2019); U.S. DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION, 2017 NATIONAL DRUG THREAT ASSESSMENT 134 (2017) (Puerto Rico is a major transportation hub for cocaine trafficking in the U.S.); VICE News, *Guns in Puerto Rico: Locked and loaded in the tropics*, VICE (January 7, 2015), <https://www.youtube.com/watch?v=47gxiK6U5CQ&t=630s>.

¹⁸⁴ See Microjuris, *Puerto Rico y el Gobierno federal firman acuerdo para reforzar la lucha contra el crimen*, MICROJURIS (February 1, 2017), <https://aldia.microjuris.com/2017/02/01/puerto-rico-y-el-gobierno-federal-firman-acuerdo-para-reforzar-la-lucha-contra-el-crimen/#:~:text=Este%20acuerdo%20suscrito%20por%20la,evasi%C3%B3n%20contributiva%20y%20corrupci%C3%B3n%20gubernamental>); Emmanuel Hiram Arnaud, *Llegaron los Federales: The Federal Government’s Prosecution of Local Criminal Activity in Puerto Rico*, 53 COLUM. HUM. RTS. L. REV. 882, 889-893 (2022).

Before the *Weapons Act of 2020*, which was enacted to facilitate the possession of firearms, legally obtaining a firearm was a lengthy process that included an *ex parte* judicial process for a concealed carry license.¹⁸⁵ Because of this, and our violence-ridden history, firearm possession for the layperson had been a means of protection, not an exercise of a fundamental right. Even if the process of obtaining a gun is currently easier and license issuance has increased, the well-established black-market channels are not changing overnight or in a few years, which explains why most firearms recovered on the island are still trafficked from Florida and Texas.¹⁸⁶ Recently, amendments to the Weapons Act have been proposed to lessen restrictions.¹⁸⁷ Gun rights activists have been more vocal, including women's groups advocating for armed self-defense resulting in a growing population of women with firearm licenses.¹⁸⁸ Because of this newfound interest in firearms, we asked ourselves if hobbyists, or even people involved in criminal activity, have begun experimenting with ghost guns.

To understand if this phenomenon is present on the island, we contacted both the Puerto Rico Justice Department and the Police Department. The Police Department's Statistics Division shared via phone call that they do not keep data on PMFs, but since the Weapons Act Regulation mandates the Director of the Arms Depository to keep records of seized firearms, we deduce that PMF data can be extracted from these records.¹⁸⁹ Therefore, we requested the documents under the provisions of the *Transparency and Expedited Procedure for Public Records Act*.¹⁹⁰ The same procedure was followed to request from the Justice Department data on charges filed under the Weapons Act provisions for unlicensed manufacturing of firearms.

The Justice Department informed us that between January 1, 2020, and January 26, 2023, nine charges were filed under article 6.02 of the Weapons Act, which criminalizes the manufacture, import, sale, and distribution of firearms without a dealer license, with only one resulting in a conviction.¹⁹¹ During the same period, two charges were filed under ar-

¹⁸⁵ Statement of Motives, Puerto Rico Weapons Act of 2020, Law No. 168 of December 11, 2019, 2019 LPR 2123; 25 LPRA § 456d (repealed 2020).

¹⁸⁶ Bureau of Alcohol, Tobacco, Firearms and Explosives, *Firearms Trace Data: Puerto Rico 2021*, DEPARTMENT OF JUSTICE (September 15, 2022), <https://www.atf.gov/resource-center/firearms-trace-data-puerto-rico-2021#disclaimer>; ALEX NGUYEN, GUN VIOLENCE IN US TERRITORIES REPORT (2022) ("the firearm homicide rate in Puerto Rico was four times higher than that of the 50 states in 2018"); Federal Bureau of Investigation, *NICS Firearm Background Checks: Month/Year by State*, FBI, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state.pdf/view (last visit April 5, 2023) (NICS firearm checks by year: 2019: 28,635; 2020: 31,671; 2021: 74,381; 2022: 76,841).

¹⁸⁷ P. de la C. 575 de 10 de marzo de 2021, 11a Ses. Ord., 19na Asam. Leg.; P. de la C. 382 de 12 de enero de 2021, 11a Ses. Ord., 19na Asam. Leg.

¹⁸⁸ Wapa TV, *Mujeres buscan armarse debido a la inseguridad en Puerto Rico*, WAPA, (November 9, 2022), <https://www.youtube.com/watch?v=yey5HMJOTMQ> (the director of the Puerto Rico Police Department's Arms Registry informed local news that in 2020, almost 6,000 women requested a firearm license and that the following year there were twice as many requests); Microjuris, *Reclaman reecho a no ser registrados durante la SanSe 2023*, MICROJURIS (January 18, 2023), <https://aldia.microjuris.com/2023/01/18/reclaman-derecho-a-no-ser-registrados-durante-la-sanse/>.

¹⁸⁹ Negociado de la Policía de Puerto Rico, *Reglamento para administrar la ley de armas de Puerto Rico de 2020*, Núm. 9172 (17 de marzo de 2020), <http://app.estado.gobierno.pr/ReglamentosOnLine/ReglOnLine.aspx>.

¹⁹⁰ 3 LPRA §§ 9911-23.

¹⁹¹ 25 LPRA § 466a.

title 2.16, which criminalizes an array of conduct —carried out without a dealer license— relating to automatic or semi-automatic assault weapons and machine guns, including the manufacture of these weapons, yet no convictions were made.¹⁹² These numbers are indicative of gun violence and trafficking centered around commercially manufactured firearms, behavior that is commonly penalized under articles prohibiting the possession of firearms without a license.¹⁹³

In contrast, the Police Department was less than forthcoming with its response. Unlike the Justice Department which provided the data within the time specified by law, the Police Department spent months delaying the production of information. Emails went unanswered and responsibilities were relegated until an in-person meeting was held where we were notified that a significant amount of the data requested was not collected. We were promised the data they apparently collect and negative certifications accrediting the lack of data, but it was never delivered, and unfortunately, due to this article's deadline we were unable to continue with the subsequent stage in the process which was suing the Department.¹⁹⁴

However, based on conversations with the Department's Counsel, we understood that similar to other jurisdictions, the Police Department does not recognize PMFs as firearms if and when they are found at crime scenes because the only firearms entered into evidence are those with serial numbers. Due to this oversight, we cannot conclusively say that ghost guns are commonly used on the Island for criminal activity, and as we mentioned before, the illegal firearm trade is so well established that circumventing legal ownership of firearms means illegally buying serialized weapons, not building unserialized ones. Perhaps if we look beyond criminal activity, we can find an emerging interest in this new technology but even hobbyists have been silent regarding PMFs, possibly due to the over-policing and overzealousness of our legislature.

C. Regulation

According to the statute's statement of motives, the Puerto Rico legislature enacted the Weapons Act of 2020 to safeguard the rights of U.S. citizens who reside on the island due to its understanding that "to keep and bear arms in Puerto Rico constitutes a fundamental and individual right just as in the rest of the Nation."¹⁹⁵ To accomplish this, the Act lowered restrictions and provided for a simpler and speedier licensing process, which we saw in the earlier section resulted in an increase in applicants and licenses issued. However, the law is incredibly punitive and arguably one of the most retaliatory gun laws in the United States,¹⁹⁶ seeing as the law establishes lengthy and disproportionate prison

¹⁹² *Id.* § 4620.

¹⁹³ *Id.* § 466g (violation constitutes a felony with a 10-year sentence if aggravating factors are considered).

¹⁹⁴ The author would like to express her gratitude to the Access to Information Project of the Legal Aid Clinic of the Inter-American University of Puerto Rico School of Law, especially Attorneys Carlos Ramos Hernández and Jeffrey Martínez Aguiar, for their instrumental help during this process.

¹⁹⁵ Statement of Motives, Puerto Rico Weapons Act of 2020, Law No. 168 of December 11, 2019, 2019 LPR 2123.

¹⁹⁶ When compared to California and New York, which have the strictest gun laws in the nation; *See Id.* § 466g (in Puerto Rico, possession of a firearm without a license constitutes a felony punishable by a five-year

sentences that cannot be served concurrently,¹⁹⁷ and prohibits probation or any kind of deferred sentencing,¹⁹⁸ which seems contrary to the free exercise of a fundamental right. Although this incongruity is unfortunately outside of this article's scope, it is necessary to contemplate since the dilemma serves as an additional example of how our cultural differences obfuscate the exercise of balancing federal and local law.

Even if cultural and social differences are prevalent, an unavoidable reality is that guns in Puerto Rico—whether legal or illegal—are imported from the Continental U.S., which means that firearm trends in the states are bound to affect firearm practices on the Island.

Based on what has been reported in other jurisdictions and their regulation attempts, we asked ourselves: if ghost guns were to become a priority for law enforcement on the island, does the Weapons Act, as it stands, regulate any aspects of PMFs?

We begin the analysis by examining the Weapons Act's firearm definition, which is "any weapon, regardless of the name, that has the capacity to expel a projectile or projectiles by the action of an explosive."¹⁹⁹ The definition also specifies that the term "includes, but is not limited to . . . the frame or receiver where the manufacturer sets the serial number of such weapons."²⁰⁰ The first half of the definition offers a broad description of what a firearm is, and when referring to a fully functional PMF, it may be straightforward to determine that such a weapon is a regulated firearm under the Act as long as it has the capacity to expel a projectile by the action of an explosive. But as we have seen, regulating complete PMFs has not been the primary focus for states and the federal government since companies and individuals can easily sidestep those regulations. Like other jurisdictions, we can turn to frames and receivers to ask whether ghost guns are or could be regulated.

When reading the second half of the definition, we see that the Act does recognize frames and receivers as firearms, yet when compared with other gun laws, the Act does not explicitly define them. Not only does it not define them, but it also describes them as the part "where the manufacturer sets the serial number," possibly indicating that only commercially manufactured frames and receivers are within the statute's scope.²⁰¹ Other sections also allow us to infer that the law only regulates frames and receivers that have been serialized by their manufacturers. For example, the act's section regarding a firearm's serial number specifies that "all firearms, except for antique firearms, as defined in this Act, shall bear in a way so as not to be easily altered or effaced . . . the serial number engraved thereon."²⁰²

sentence. If mitigating circumstances are present, the term may be reduced to one year and if aggravating circumstances are present, it can be extended to ten years); *Cf.* Cal. Penal Code. § 25400 (possession of a firearm without a license is a misdemeanor punishable by a one-year sentence); *Cf.* NY Penal Law §265.01-b (possession of a firearm without a license is classified as a class E felony, punishable by a maximum of four years).

¹⁹⁷ 25 LPRC § 466.

¹⁹⁸ *Id.* §§ 466a -466e.

¹⁹⁹ 25 LPRC § 461a(e) (translation supplied).

²⁰⁰ *Id.* (spanish version reads: "Arma de fuego' es cualquier arma que, sin importar el nombre, sea capaz de lanzar un proyectil o proyectiles por acción de una explosión. El término arma de fuego incluye, pero no se limita a . . . el marco, armazón o el receptor donde el fabricante coloca el número de serie de tales armas").

²⁰¹ *Id.*

²⁰² *Id.* § 466k (violation of this section is punishable by a fixed fifteen-year term of imprisonment).

Even though the section criminalizes the possession of a firearm “with no serial number,” this text comes from the translated version.²⁰³ When compared with a literal translation of the official Spanish text, the law reads a “firearm . . . that does not have *its* serial number,” and given the context and title of the section —Removal or Defacement—, it is not illogical to assume that the Spanish text does not refer to privately made firearms.²⁰⁴ Additionally, the original version of the bill submitted to the Senate read “a firearm . . . that does not have a serial,” but was later amended to its approved version of “firearm . . . that does not have *its* serial number” further indicating that lawmakers only intended to regulate serialized firearms.²⁰⁵

The Act also mentions the manufacture of firearms, or according to the Spanish version, the fabrication. The law requires a dealer license to manufacture a firearm or the “part of a firearm on which the manufacturer places the firearm’s serial number,” yet it fails to provide a definition to clarify what the term *manufacture* entails.²⁰⁶ The only clue as to what the term means is found in the “dealer” definition which states that dealers are allowed to perform “any mechanical or cosmetic work for a third party on any firearm.”²⁰⁷ Similarly, a dealer’s license is also required to manufacture automatic or semi-automatic assault weapons and machine guns, but the manufacturing is only permissible if the weapon is intended for law enforcement use.²⁰⁸ Thus, we believe that the manufacturing of firearms under the statute only includes work on an existing serialized firearm and not the making of PMFs or assembly of a weapons part kit. Consequently, we theorize that unlike a finished and functional PMF, unfinished frames and receivers, and any kind of PMF parts or kits, are outside of the statute’s scope.

CONCLUSION

While the *Bruen* test has empowered Second Amendment defenders and paved the way for new constitutional challenges, law enforcement and legislators are racing to curb the increase of privately made firearms and the technology used to make them. This dissonance, coupled with the ever-increasing gun violence crisis, makes the future of gun regulation in the US riddled with uncertainty.

As technology continues to redefine the firearm, regulators, and adjudicators will have to look beyond the Second Amendment, a reality that will, and already has resulted in in-

²⁰³ P. del S. 1050 de 16 de agosto de 2018, 4ta Ses. Ord., 18va Asam. Leg. (the article was first introduced as: “*Posea un arma de fuego, salvo armas de fuego antiguas, que no tenga serie*”; and was later amended to: *posea un arma de fuego, salvo armas de fuego antiguas, según definidas en esta Ley, que no tenga su número de serie*. And finally enacted as: *posea un arma de fuego, salvo armas de fuego antiguas, según definidas en esta Ley, que no tenga su número de serie*).

²⁰⁴ *Id.* (emphasis added) (translation supplied).

²⁰⁵ *Id.* (no evidence of legislative intent was found to indicate if the change was due to a grammatical error in the bill) (emphasis added) (translation supplied); P. del S. 1050 de 16 de agosto de 2018, 4ta Ses. Ord., 18va Asam. Leg. (translation supplied).

²⁰⁶ 25 LPRC § 466a (violation of this section constitutes a felony, punishable by imprisonment for a fixed term of fifteen years).

²⁰⁷ *Id.* § 461a(i).

²⁰⁸ *Id.* § 4620 (punishable by imprisonment for a fixed term of twenty-four (24) years, and if aggravating circumstances are present, thirty-six (36) years).

consistent rulings. These contradictions will challenge whether the right to keep and bear arms is a fundamental and virtually absolute right as allegedly viewed by the forefathers, or if the state has a compelling interest in safeguarding the safety of its citizens. After all, the Court has upheld for years the sensitive places exception, which is kept alive in *Bruen*, that recognizes the government's compelling interest in banning firearms in schools and public buildings.

We have seen lower courts uphold bans on the distribution of information regarding the manufacturing of these weapons—cases that the Supreme Court has refused to review—while declaring ghost gun bans as unconstitutional, which raises the question of would the Supreme Court entertain an expansion of the Second Amendment that recognizes a complementary right of making arms and concede that CAD files are protected speech. This expansion would bring consistency to the regulatory world of PMFs but would undoubtedly depart from the status quo of firearm regulation and its constitutional analysis beyond the *Bruen* test. However, due to the substantial consequences, the Court will surely avoid a new firearm regulation case, especially a ghost gun case, in the foreseeable future. For now, States will continue to regulate and litigate while shackled to a history-based test that was designed to strip them of their powers.

Since these regulations responded to a PMF increase in jurisdictions with strict gun laws, we asked ourselves if ghost guns were being built and/or used in Puerto Rico and whether current legislation could regulate them. However, due to significant cultural differences, this question cannot be answered by extrapolating factors from other US jurisdictions, considering that gun ownership on the island has not evolved around the right to keep and bear arms. Instead, its irreversibly connected to drug trafficking, which is not conducive to cultivating a constitutional right, until recently with the influence of the American rhetoric permeating the issue. For this reason, we hypothesize that if these weapons become more politicized in the US, local legislators would likely introduce laws to regulate them, even if most trafficked firearms are serialized.

If PMFs do make their way to Puerto Rico, the sensible approach would be to regulate their sale and possession, at least the commercially sold ones, but to steer away from punitive sentences. After all, if the government recognizes that keeping and bearing arms is a fundamental right, people should not receive life sentences for exercising such right.