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PERSPECTIVE

Proposed ghost gun rules would leave room for state regulation

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On May 7, the Justice Department released a proposed rule that adds teeth to President Joe Biden's promise to crack down on "ghost guns" — homemade firearms that lack serial numbers. Ghost guns are hard to trace, and are often traded outside of the federal government's system of regulations surrounding the manufacture, sale, and transfer of firearms. The proposed rule is a welcome and necessary step toward reducing the harms that flow from the proliferation of "ghost guns." However, the rule also leaves room for states to continue enacting and enforcing their own laws aimed at vanquishing the specter of these unregistered, untraceable, and unregulated firearms — especially with respect to the sale and regulation of 3D-printed ghost guns.

"Ghost guns" is not a technical term. Rather, the term is broad enough to include both firearms assembled through physical gun-making kits or other physical parts and firearms that are created from scratch through the process of 3D printing, made possible by the transfer and distribution of technical data in the form of 3D-printing files. The Justice Department's proposed rule is largely aimed at tackling this first category of ghost guns: those assembled through physical gun-making kits or other physical parts. Primarily, the rule amends federal regulations to clarify that regulated "firearms" include weapon part kits that are "designed to or may readily be converted to expel a projectile by the action of an explosive." Accordingly, amongst other re-

quirements, retailers would now have to run background checks before selling these gun kits. Additionally, for any "privately made firearms" including polymer firearms that are produced using 3D printing, the new rule clarifies that federally licensed firearms dealers must have a serial number added to these privately made firearms that are taken into their inventory.

However, with respect to 3D-printed guns, the rule does not regulate the transfer of 3D-printing files themselves, or the use of these files by individuals to produce their own firearms. Moreover, the proposed rule leaves in place the Trump administration's prior rulemaking efforts to deregulate the transfer and distribution of the actual 3D-printing files through federal export control regulations, rules that the 9th U.S. Circuit Court of Appeals recently immunized from judicial review. See *State of Washington v. U.S. Dept. of State*, 2021 DJDAR 3881 (April 27, 2021).

Because the proposed rule does not go so far as to fully regulate 3D-printed ghost guns, states have the opportunity to take up

this mantle and enact their own laws to complement the federal regulatory system. In fact, the Justice Department's notice of proposed rulemaking expressly directs individuals to consult the "laws and officials in their own States and localities to determine the lawfulness of" privately manufactured firearms. Encouragingly, a number of states have already taken up this baton.

For one, New Jersey has enacted a law that makes it a crime to distribute "digital instructions" that may be used to program a 3D printer to manufacture or produce a firearm or firearm component to any person who is "not registered or licensed as a manufacturer." Accordingly, while the Justice Department's new rule only regulates the transfer of 3D-printed guns after they have been manufactured, New Jersey attempts to stop the problem at the gate by regulating the very transfer of the 3D files that make these "ghost guns" even possible.

Closer to home, California has also enacted laws intended to regulate 3D-printed "ghost guns." Unlike in New Jersey, the California law does not regulate the

per se transfer and distribution of 3D-printing files. Instead, it requires that anyone who makes a weapon, including through 3D printing, apply for a serial number or other mark of identification. By imposing this registration requirement at the point of production, and not just where the gun is transferred to a federally licensed firearms dealer, the California law thus goes further than the proposed federal rule.

The New Jersey and California laws provide some examples for how state regulations can help to fill the gaps when it comes to regulating 3D-printed guns. Of course, these state efforts at curbing the indiscriminate sharing and use of 3D-printed files are unlikely to go unchallenged in courts. Parties intent on distributing these dangerous materials have already asserted that regulation of the digital files and 3D-printed guns, apart from violating the Second Amendment, also violate their rights under the First Amendment. Their theory is that the dissemination of 3D-printing files is protected speech. But importantly, not a single court has thus far held that regulation

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of ghost guns and any underlying technical files is categorically prohibited. In fact, the few courts that have broached the issue have left significant play in the joints for states to come up with a wide range of legislative solutions regarding 3D-printed guns.

For example, when distributors of this 3D-printed file technology challenged a prior Obama-era administration action that required pre-publication approval of these files, a Texas district court reasoned that even if 3D-printed files

were a form of protected speech, such regulations passed the requisite level of intermediate scrutiny. And even though a dissenting member of the 5th Circuit panel disagreed with this analysis, that dissent focused on the perceived over-inclusiveness of requiring pre-publication approval of all public sharing of the digital files. By that logic, neither the First nor Second Amendment ought to be seen as a categorical bar to common-sense state laws that restrict the classes of person

to which these digital files may be disseminated or that put in place registration requirements for 3D-printed guns at their time of manufacture.

As the Supreme Court has repeatedly promised, the Second Amendment by no means eliminates the ability of States to “devise solutions to social problems that suit local needs and values.” This deference and room for legislative innovation should be highest at the technological frontier of “ghost guns”

and 3D-printing regulation. The Biden administration’s proposed rule — while a welcome and positive step — expressly leaves room for state-level action, and states should continue enacting regulations on ghost guns that complement any proposed federal regulatory framework. ■

The authors serve as pro bono counsel in a number of cases defending the constitutionality of gun control legislation.