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**United States Court of Appeals**  
*for the*  
**Sixth Circuit**

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Case No. 19-1298

GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION;  
VIRGINIA CITIZENS DEFENSE LEAGUE; MATT WATKINS;  
TIM HARMSSEN; RACHEL MALONE,  
*Plaintiffs-Appellants,*  
GUN OWNERS OF CALIFORNIA, INC.,  
*Movant,*

– v. –

MERRICK B. GARLAND, U.S. Attorney General, in his  
official capacity as Acting Attorney General of the United States; U.S.  
DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO,  
FIREARMS AND EXPLOSIVES; REGINA LOMBARDO,  
in her official capacity as Acting Director, Bureau of Alcohol,  
Tobacco, Firearms, and Explosives,  
*Defendants-Appellees.*

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ON APPEAL FROM AN ORDER ENTERED IN THE WESTERN DISTRICT  
OF MICHIGAN AT GRAND RAPIDS IN NO. 1:18-CV-01429,  
HONORABLE PAUL LEWIS MALONEY, U.S. DISTRICT JUDGE

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**BRIEF FOR AMICI CURIAE GIFFORDS LAW CENTER TO PREVENT  
GUN VIOLENCE, BRADY, AND EVERYTOWN FOR GUN SAFETY  
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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Prevent Gun Violence, Brady, and Everytown for Gun Safety*

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 19-1298

Case Name: Gun Owners of America, Inc. v. Garland

Name of counsel: Ian Simmons

Pursuant to 6th Cir. R. 26.1, Giffords Law Center to Prevent Gun Violence

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

## CERTIFICATE OF SERVICE

I certify that on September 1, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Ian Simmons

O'Melveny & Myers LLP

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 19-1298

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Name of counsel: Ian Simmons

Pursuant to 6th Cir. R. 26.1, Brady United Against Gun Violence

*Name of Party*

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 19-1298

Case Name: Gun Owners of America, Inc. v. Garland

Name of counsel: Ian Simmons

Pursuant to 6th Cir. R. 26.1, Everytown for Gun Safety  
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus curiae* Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit policy organization serving lawmakers, advocates, legal professionals, gun violence survivors, gun owners, and others who seek to reduce gun violence and improve the safety of their communities. The organization was founded more than a quarter-century ago, and through key partnerships, Giffords Law Center researches, drafts, and defends the laws, policies, and programs proven to effectively reduce gun violence. With its partner organization Giffords, Giffords Law Center also advocates for the interests of gun owners and law enforcement officials who understand that Second Amendment rights have always been consistent with gun safety legislation and community violence prevention strategies.

*Amicus curiae* Brady United Against Gun Violence (“Brady”) is the nation’s longest-standing nonpartisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Brady has a substantial interest in ensuring Americans’ fundamental right to live, and in public policies that protect individuals, families, and communities from the effects of gun

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<sup>1</sup> *Amici* submit this brief under Federal Rule of Appellate Procedure 29(a), and all parties have consented to the filing of this brief. Undersigned counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or a party’s counsel contributed money for the brief; and no one other than *amici curiae* has contributed money for this brief.

violence. Brady has filed amicus briefs in numerous high-profile cases involving firearm regulations, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

*Amicus curiae* Everytown for Gun Safety (“Everytown”) is the nation’s largest gun-violence-prevention organization, with nearly six million supporters across the country. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after 20 children and six adults were murdered in an elementary school in Newtown, Connecticut, by a gunman with an AR-15 rifle. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws. Everytown’s mission includes defending common-sense gun safety laws by filing amicus briefs, including in numerous Second Amendment cases.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

When Congress banned machineguns, it crafted a broad definition whose ordinary meaning captures efforts to circumvent the ban, including mechanisms that convert semi-automatic weapons into automatic weapons. Taking advantage of a then-unregulated workaround, a gunman used devices known as “bump

stocks” to fire over a thousand rounds in just minutes into a crowd of some 20,000 concertgoers from the 32nd floor of a Las Vegas hotel, killing 60 and wounding hundreds more. The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) realized that manufacturers had gotten out ahead of it and issued a rule classifying bump stock technology as a banned machinegun. *See* Bump-Stock Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018).

*Amici* agree with the government’s statutory analysis. They write separately to (i) provide additional technical explanation of why a bump stock is properly understood as a fully automatic weapon, and (ii) rebut Appellants’ invitation for courts to replace ATF as the country’s principal regulators of guns simply because many laws designed to combat gun violence may have criminal implications.

## **ARGUMENT**

### **I. BUMP STOCKS TRANSFORM SEMI-AUTOMATIC RIFLES INTO AUTOMATIC RIFLES**

Bump stocks exist for one reason: to convert semi-automatic rifles into machineguns. They are thus “designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun” under the plain meaning of the machinegun statute. 26 U.S.C. § 5845(b). Indeed, bump stocks lack any lawful civilian purpose—tragically illustrated by the 2017 Las Vegas shooter firing more than 1,000 rounds from bump-stock-equipped rifles in under 10 minutes, killing 60 concertgoers and wounding hundreds more. *See* S. Rep. No. 73-1444, at 2 (1934)

(“[T]here is no reason why anyone except a law officer should have a machine gun . . . .”); H.R. Rep. No. 73-1780, at 1 (1934) (same).

Automatic and semi-automatic weapons primarily differ in whether the firing process is controlled by a “disconnecter,” which requires each shot to be fired manually, or an “auto-sear,” which harnesses the gun’s combustion reaction to fire without additional operator intervention. See David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 *Cumb. L. Rev.* 585, 668 n.454 (1987). A bump stock re-tools the disconnecter to mimic an auto-sear, “converting” a semi-automatic weapon into an automatic one.

#### A. Automatic Versus Semi-Automatic Weapons

Most automatic and semi-automatic guns use an “internal piston” system to eject and reload rounds after firing. ArmaLite, Inc., Technical Note 54: Direct Impingement Versus Piston Drive (July 3, 2010 Rev. 2).<sup>2</sup> Take the military’s M16 automatic rifle and its civilian counterpart, the AR-15 semi-automatic rifle:

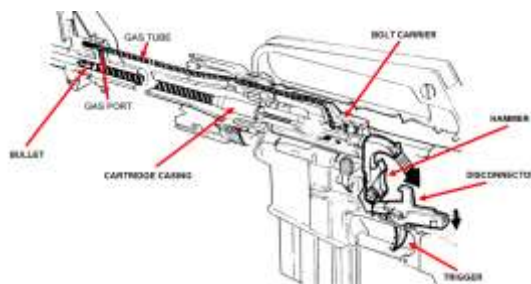


Figure 1: Internal Piston System of M16- and AR-15-style rifles<sup>3</sup>

<sup>2</sup> <https://tinyurl.com/ys3b9eav>.

<sup>3</sup> U.S. Dep’t of Army, Field Manual 23-9, *Rifle Marksmanship M16A1, M16A2/3*,

To prepare these guns to fire, the bolt locks a cartridge into firing position. FM 23-9 ¶ 4-2. Pulling the trigger releases the hammer to strike the firing pin, igniting gunpowder in the cartridge; the resulting explosion causes rapidly expanding gas to propel the bullet forward. *Id.* The gun diverts some of the gas through a tube to push the bolt carrier backward, ejecting the spent casing and resetting the hammer. *Id.* A spring at the back of the gun then propels the bolt carrier forward to collect a new cartridge and lock it into firing position, completing the cycle. *Id.*



Figure 2: Post-fire forward motion of bolt carrier<sup>4</sup>

The primary difference between automatic and semi-automatic rifles is the firing mechanism. For both, the initial pull of the trigger releases the hammer to fire a round. *See* FM 23-9 ¶¶ 4-2, 4-3. The internal piston system then cocks the hammer back, readying it for the next shot. *See id.* ¶ 4-2. In a semi-automatic rifle, the disconnecter catches the returning hammer, *id.*, disrupting the otherwise

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*M16A4, and M4 Carbine*, ¶ 4-2 (Sep. 13, 2006) (“FM 23-9”).

<sup>4</sup> 45Snipers, *How An AR-15 Rifle Works: Part 2, Function*, YouTube (Jan. 11, 2017), <https://youtu.be/wAqE-KLbiYc>.

“automatic[.]” cycle of firing, requiring another “function of the trigger” by the operator to fire again, 26 U.S.C. § 5845(b).

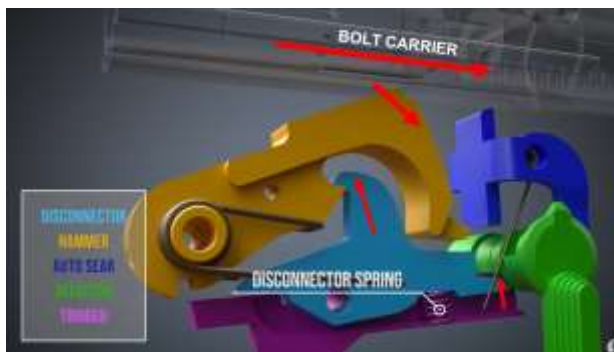


Figure 3: Post-Fire Mechanism: M16 In Semi-Automatic Mode<sup>5</sup>

In automatic guns, the auto-sear catches the hammer as it is re-cocked by the bolt carrier. *See* FM 23-9 ¶ 4-3. When the bolt carrier rebounds forward, it engages the auto-sear, releasing the hammer and firing another round. *Id.* Thus, the auto-sear harnesses the combustion-propelled, back-and-forth motion of the bolt carrier to cause continuous fire until the trigger is released.



Figure 4: Fully Automatic Mode: Bolt Carrier Engaging Auto-Sear<sup>6</sup>

<sup>5</sup> Thomas Schwenke, M16 and AR-15 – How firearms work!, YouTube (Feb. 23, 2019), <https://youtu.be/wMIBUIN30yU>.

<sup>6</sup> Thomas Schwenke, M16 and AR-15 – How firearms work!

The first trigger “function” in an automatic weapon thereby initiates “automatically” “more than one shot.” 26 U.S.C. § 5845(b).

## B. Bump Stocks

A bump stock effectively converts a semi-automatic gun’s disconnector into an auto-sear, employing recoil from the combustion reaction—like traditional automatic guns—to re-engage the hammer after each round is fired. The bump stock propels the gun back and forth, “bumping” the trigger against the shooter’s stationary finger, releasing the disconnector, and allowing the hammer to strike and fire another round.<sup>7</sup>

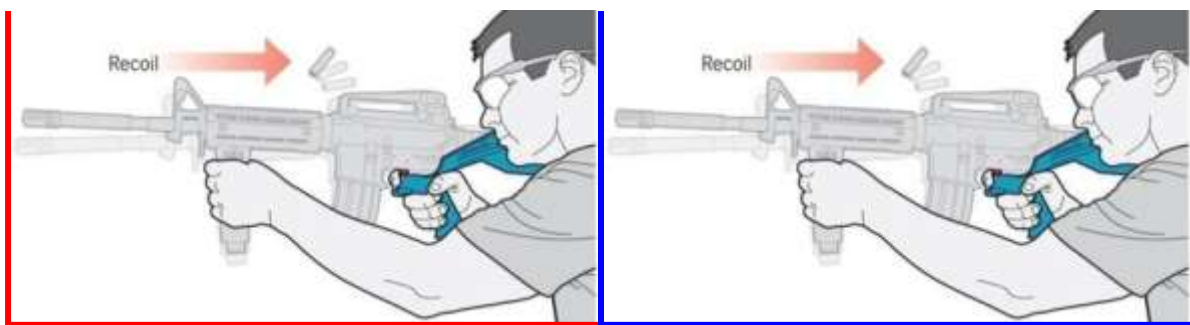


Figure 5: Bump Stock Firing<sup>8</sup>

Like other automatic guns, bump stocks link the firing of each round to the back-and-forth motion caused by firing, rather than individual pulls of the trigger. The only difference is how the back-and-forth energy is harnessed: by the bolt

<sup>7</sup> Nicole Chavez, *What are the ‘bump stocks’ on the Las Vegas shooter’s guns?*, CNN, (Oct. 5, 2017), <https://tinyurl.com/4cf6a5wh>.

<sup>8</sup> *Powerful US gun lobby group backs new curbs on rapid-fire accessories*, The Straits Times (Oct. 6, 2017), <https://tinyurl.com/b8jrkvfu>.

carrier in a traditional automatic weapon or the entire gun in bump-stock-equipped weapon. In the plain language of the statute, bump stocks allow a “single function of the trigger” to initiate “automatically” “more than one shot.”

### C. Rate of Fire

Bump stocks’ conversion of semi-automatic weapons into automatic ones is illustrated by the rate of fire they allow, which makes them just as dangerous as the machineguns that Congress has long kept out of civilian hands. The military’s M16A4 machinegun is capable of a cyclic fire rate of 800 rounds per minute (RPM). FM 23-9 ¶ 2-1. Limited by the shooter’s trigger finger, semi-automatic guns cannot achieve this rate—estimates place the maximum firing rate of top competitive shooters at 180 RPM. Steven Koff, *Assault weapons, semi-automatic rifles and the AR-15: Defining the debate*, Cleveland.com (Jan. 30, 2019).<sup>9</sup> Estimates peg the cyclic rate of fire of bump-stock-outfitted rifles between 400 and 800 RPM. See *The “bump stocks” used in the Las Vegas shooting may soon be banned*, The Economist (Oct. 6, 2017).<sup>10</sup> Thus, the least-skilled gun operators can use bump stocks to rival military weapon firing rates—440% faster than the most skilled operator of an unmodified semi-automatic rifle.

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<sup>9</sup> <https://tinyurl.com/ymnex35n>.

<sup>10</sup> <https://tinyurl.com/96esb4x9>.



The increased firing speed of automatic weapons generally sacrifices accuracy and carries no civilian advantage. *See* James Clark, *These Marines Explain Why They Only Use Fully Automatic Fire During the Most Intense Firefights*, National Interest (Mar. 6, 2020).<sup>11</sup> Bump-stock-equipped rifles are even less accurate than the military's traditional automatic weapons—further proof they lack any legitimate civilian purpose. *See* Shooting Range Industries, LLC, *How Effective is Full Auto? Do Soldiers Use Fully or Semi Automatic Rifles & Weapons?*<sup>12</sup>

## **II. THE COURT SHOULD DEFER TO ATF'S INTERPRETATION UNDER *CHEVRON***

For the reasons explained above and in the government's brief, ATF has correctly classified bump stocks as devices that convert semi-automatic weapons into automatic ones based on the statute's plain language. But ATF's interpretation should also be upheld as a routine application of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).<sup>13</sup>

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<sup>11</sup> <https://tinyurl.com/kvpzzkkj>.

<sup>12</sup> <https://tinyurl.com/2sk59fak>.

<sup>13</sup> For the reasons explained by the Tenth and D.C. Circuits, the government's failure to rely on *Chevron* in its brief does not result in forfeiture. *See Guedes v. ATF*, 920 F.3d 1, 22-23 (D.C. Cir. 2019); *Aposhian v. Barr*, 958 F.3d 969, 981-82 (10th Cir. 2020).

In passing the National Firearms Act and the Gun Control Act, Congress did not simply criminalize machinegun possession, but rather enacted a regulatory scheme supported by criminal penalties in which it expressly delegated rulemaking authority to ATF. *See* 26 U.S.C. § 7805(a); 18 U.S.C. § 926(a). When originally passing the NFA in 1934, for example, Congress set up a national registration regime for certain firearms and criminalized any failure to register them. Pub. L. No. 73-474 §§ 9, 14. Like other legislation passed around this time, Congress delegated rulemaking authority to an agency, here ATF's predecessor agency in the Internal Revenue Commission. *See id.* § 12. Congress never contemplated, however, that its express delegation of authority was impliedly circumscribed because the agency's interpretations may carry criminal penalties. To the contrary, Congress expressly contemplated that agency licensing decisions would be subject to the same judicial review as "in any other case where the [agency] is delegated with a discretionary power." *See* Hearings Before The Committee on Ways and Means, House of Representatives on H.R. 9066, at 131 (1934). This is no surprise. Courts at the time did not recognize Appellants' novel line between agency rulemaking carrying criminal sanctions and those carrying civil penalties. *See, e.g., Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 187 (1938) (court deferred to agency's classification of a railroad, despite possible criminal implications).

This mode of delegation has not changed since 1934. As Congress added to the regulatory apparatus, it not only retained its express delegation of interpretative authority to ATF, but reaffirmed it in the GCA. *See* 26 U.S.C. § 7805(a); 18 U.S.C. § 926(a). This Court should therefore respect that delegation and not substitute its judgment for that of the agency. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989).

This sort of technical determination is not a morality assessment—that assessment was made by Congress—nor is it a statement of “what the law is” any more than in the usual *Chevron* case. Deference to ATF is in fact particularly appropriate here, where, as Judge Wilkinson explained, ATF’s “technical expertise [is] essential to determinations of statutory enforcement,” making the agency “better equipped than the courts” to interpret these laws. *See Nat’l Rifle Ass’n v. Brady*, 914 F.2d 475, 479 & n.3 (4th Cir. 1990) (quotation omitted). After all, this is not the first device—nor will it be the last—designed to increase the rate of fire or otherwise manipulate the function of a firearm. *See, e.g., Akins v. United States*, 2008 WL 11455059, at \*6 (M.D. Fla. Sept. 23, 2008), *aff’d*, 312 F. App’x 197 (11th Cir. 2009). Whether these manipulations take a particular gun into the realm of “machinegun” will depend on a technical understanding of how the firearm operates—a decision ATF specialists are far better equipped to make than

generalist judges. *See* 83 Fed. Reg. at 66,517 (ATF determined device in *Akins* was semi-automatic through the agency testing the device itself); *see also Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 602 (1st Cir. 2016) (deferring to ATF’s conclusion that a device designed to avoid GCA provisions relating to gun silencers “was identical” to a silencer); *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 717 (5th Cir. 2013) (“review[ing] ATF’s interpretation of the GCA under *Chevron*” (quotation omitted)); *Guedes*, 920 F.3d at 25; *Aposhian*, 958 F.3d at 984.

Indeed, the Supreme Court has already foreclosed Appellants’ argument that *Chevron* cannot apply to a facial challenge to ATF’s prospective rule. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court explained that it has “never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.” *Id.* at 704 n.18; *cf. Abramski v. United States*, 573 U.S. 169 (2014) (refusing to defer to ATF interpretation in specific criminal prosecution). Because Appellants make just such a facial challenge to an administrative regulation, *Babbitt* controls. *See Aposhian*, 958 F.3d at 984; *Guedes*, 920 F.3d at 24. Indeed, the panel’s contrary rule would not stop with ATF; it would sweep in drug laws, financial regulations,

and environmental regulations<sup>14</sup>—and would invalidate *Chevron* itself, as the EPA statute in *Chevron* has criminal implications.

Of course, even if the Court declines to apply *Chevron*, it should take the uncontroversial step of finding ATF’s interpretation persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See United States v. One Harrington & Richardson Rifle*, 378 F.3d 533, 534-35 (6th Cir. 2004) (deferring to ATF under *Skidmore*).

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<sup>14</sup> *See also* 7 U.S.C. § 13(a)(3) (criminalizing willful violations of the Commodities Exchange Act or “any rule or regulation thereunder”); 15 U.S.C. § 78ff(a) (criminalizing willful violations of Securities and Exchange Act “or any rule or regulation thereunder”); 16 U.S.C. § 825o (criminalizing willful violations of Federal Power Act); 15 U.S.C. § 717t (criminalizing willful violations of Federal Power Commission regulations); 42 U.S.C. § 6928(d)(7) (criminalizing willful “violation of any material condition or requirement of any applicable . . . regulations or standards” under Resource Conservation and Recovery Act of 1976).

Dated: September 1, 2021

Respectfully submitted,

s/ Ian Simmons

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Everytown for Gun Safety*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(b)(4). This brief contains 2,600 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in fourteen (14) point Times New Roman font.

Dated: September 1, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 1, 2021, an electronic copy of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the foregoing will be accomplished by the CM/ECF system.

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