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June 9, 2022

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**Testimony of DC Appleseed Center for Law and Justice
on B24-0760,
"Omnibus Firearm and Ghost Gun Clarification Amendment Act
of 2022"**

**Submitted to the DC Council Committee on the Judiciary and
Public Safety pursuant to the Public Hearing on May 26, 2022**

Dear Chairman Charles Allen and other members of the Committee on
the Judiciary and Public Safety,

The DC Appleseed Center for Law and Justice ("DC Appleseed") is a
non-profit, non-partisan organization that aims to make the District a
better place to live and work for all through teamwork, advocacy and,
when necessary, litigation. For over a decade, DC Appleseed has
supported the District in defending local gun safety laws in the courts
and against Congressional interference.

Our testimony today addresses three key issues:

1. The role ghost guns play in the gun-violence epidemic in the
District;
2. The need for proposed law B24-0760 titled the "Omnibus
Firearm and Ghost Gun Clarification Amendment Act of 2022"
(the "Ghost Gun Act"); and
3. The law's constitutionality under the Second Amendment.

DC Appleseed strongly supports the enactment of the Ghost Gun Act
because it is an important tool to protect public safety and does not
infringe upon rights protected by the Second Amendment.

Gun Violence is Epidemic in the District

Like many cities across the United States, over the last few years the
District of Columbia has faced a substantial increase in gun violence
generally, and gun-related homicides in particular. *See, e.g.,* Martin
Austermuhle, *D.C. Surpasses 2020 Homicide Tally with 199 Killings So
Far This Year*, DCist (Nov. 16, 2021). Recognizing this growing crisis,
Mayor Bowser, Chief of Police Contee, and other District leaders have
announced several new initiatives to coordinate the city government's
response to the increase in shootings. *See, e.g.,* Paul Duggan, *D.C.*

mayor declares gun violence a 'public health crisis,' proposes new solutions, The Washington Post (Feb. 17, 2021). District leadership has correctly realized that gun violence in D.C. is a serious threat to public health. As Mayor Bowser stated, “We know that gun violence is a public health emergency.” Gigi Barnett, *DC expands safety programs amid spike in gun violence*, WTOP (Dec. 9, 2021).

Despite the District government’s various initiatives, gun violence continues to increase. In 2021 there were 227 gun-related homicides in the District—the most since 2003. *See* D.C. Metropolitan Police Department, District Crime Data at a Glance, <https://mpdc.dc.gov/page/district-crime-data-glance>; *see also* Peter Hermann, *Homicides soar in District, Maryland suburbs in 2021*, The Washington Post (Dec. 31, 2021). In 2022, homicides in D.C. are further on the rise, increasing 7% year to date over 2021. *Id.*

Ghost Guns Represent a Unique and Urgent Risk to Public Health and Safety

An important component of this threat to the health and safety of District residents is the rising prevalence of “ghost guns” in the District. Ghost guns are firearms that are not detectible or traceable. Typically, these guns can be made at home—assembled from kits or individually purchased parts, or printed on a 3D printer. These firearms do not have a serial number, as normally added by manufacturers, and thus are largely untraceable. As a result, when ghost guns are discovered on the scene of a crime, law enforcement cannot easily track back to their point of origin. Some ghost guns are made from nonferrous material and thus do not trigger metal detectors. Some do not have a recognizable firearm shape and are not detectable by imaging equipment used to ensure the security of airports, government and other public buildings, and other places that present high security risks. *See* Giffords Law Center, *Ghost Guns*, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns/>.

In just a few years, the presence of ghost guns has escalated into a serious public safety issue in the District. D.C. law enforcement seized 439 ghost guns in 2021, a staggering increase compared to the 25 seized in 2018. *See* Matt Gregory, Ruth Morton, Brielle Ashford, *Without a trace: How the DOJ plans to track 'ghost guns' and keep communities safer*, WUSA9 (May 23, 2022); Jodie Fleischer, Rick Yarborough, Jeff Piper and Skye Witley, *Record Number of Ghost Guns Found in DC in 2021*, NBC Washington (November 19, 2021). In addition, the accessibility of unserialized firearms from ghost gun kits online disproportionately impacts area youth. Teenagers comprised nearly 100 of the more than 280 ghost gun arrests in the District between January and November 2021. *Id.* Ghost guns have been seized from D.C. teenagers as young as thirteen. *Id.* Schools in both Maryland and Virginia have suffered school shootings perpetrated by students with ghost guns. *See* Stephanie Ramirez, *Magruder High School shooter charged as an adult*, FOX 5 DC, (May 26, 2022); Justin Jouvenal, *Fatal shooting of Fairfax County teens began with a challenge to fight, prosecutor says*, Washington Post (April 28, 2021). Ghost guns have entered the mainstream in DC, with profound consequences for public safety and the ability of Metropolitan Police to solve crime. If unregulated, ghost guns can easily be transferred to individuals otherwise banned from possessing or purchasing weapons legally.

Congress has acknowledged the dangers posed by ghost guns. The House Homeland Security Committee reported in 2019 that ghost guns “pose a challenge on the front end, enabling prohibited buyers to purchase deadly weapons with just a few clicks online, but also on the back end, hamstringing law enforcement’s ability to investigate crimes committed with untraceable

weapons.” H.R. Rep. No. 116-88, pt. 1, at 2 (2019). The report specifically cited the potential for such guns to be used in acts of terrorism, creating “an urgent and evolving threat to the homeland, particularly in the hands of ideologically motivated lone wolf actors.” *Id.*

The proposed Ghost Gun Act recognizes the dangers of these undetectable, unserialized, and untraceable ghost guns while allowing lawful gun owners to continue purchasing kits and components and constructing their own firearms. The proposed law permits the sale and possession of such gun components and gun kits but requires the finished guns to be registered, detectable by metal detectors and security imaging equipment, and engraved with a unique serial number. By requiring the same serial number process used by gun manufacturers, this bill would allow law enforcement to catalog the origination of ghost guns, which will aid enforcement if those guns are subsequently used in crimes or sold unlawfully. This reform is badly needed: current investigations of such crimes are severely hampered by the inability to trace the weapons. *See* H.R. Rep. No. 116-88, pt. 1, at 2 (2019). The proposed Ghost Gun Act also would help ensure the security of high-risk venues by hampering would-be terrorists and other assailants from bypassing standard detection measures.

The Constitutionality of the Legislation’s Restrictions on Ghost Guns

Enacting this law is critical for keeping D.C. residents safe. In the absence of laws regulating ghost guns in the District, prohibited buyers, including felons, can easily purchase deadly weapons online. *Id.* The proposed Ghost Gun Act strikes the right balance between safety and protecting the rights of law-abiding citizens by imposing reasonable restrictions on these most dangerous undetectable and untraceable weapons, while also allowing a path for hobbyists to register firearms lawfully constructed at home.

The proposed law does not infringe upon rights protected by the Second Amendment to the U.S. Constitution. The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects the “individual right to keep and bear arms.” 554 U.S. 570, 622 (2008). The Court further held that the “central component” of that right to bear arms is for self-defense, particularly defense of the home. *Id.* at 599. However, the Court also cautioned that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited” and historically speaking “the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. The Court in *Heller* also provided a list of “presumptively lawful regulatory measures” including “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27.

In 2011, the United States Court of Appeals for the District of Columbia followed other circuits in adopting a two-step approach to evaluate the constitutionality of a law under the Second Amendment. *See Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011). Under this analysis, courts first ask “whether a particular provision impinges upon a right protected by the Second Amendment.” *Id.* If the court finds that the law regulates conduct outside the Second Amendment’s protections, the “inquiry ends, and only rational basis scrutiny applies.” *Medina v. Whitaker*, 913 F.3d 152, 156 (D.C. Cir. 2019) (citing *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013)). However, if the law regulates activity protected by the Second Amendment, courts “go on to determine whether the provision passes muster under the appropriate level of

constitutional scrutiny.” *Heller*, 670 F.3d at 1252.

To analyze whether the proposed Ghost Gun Act regulates conduct protected by the Second Amendment, a court would first examine the impact of the law. As it relates to ghost guns, the proposed law clarifies that: (1) ghost guns are prohibited only to the extent that they are undetectable or untraceable and; (2) the District’s existing prohibition on the commercial manufacture of firearms does not prevent an individual from making a gun for personal use so long as the individual builds a properly detectable weapon, embeds the firearm with a unique serial number, and properly registers the gun with the D.C. Metropolitan Police Department in accordance with existing D.C. law applicable to all handguns. In *Heller*, the D.C. Circuit concluded that D.C.’s basic requirement to register a handgun was part of longstanding tradition in American law, and therefore did not impinge on the rights protected by the Second Amendment. *See Heller*, 670 F.3d at 1254–55.

The ghost gun provisions of B24-0760 impose no greater restrictions on a citizen’s right to bear arms than the District’s basic handgun registration scheme, and thus (under *Heller*) do not implicate the Second Amendment. *See Heller*, 670 F.3d at 1254–55. Accordingly, there is no need to proceed to the second prong of the *Heller* test, and the only issue is whether there is a rational basis for the provision. *See U.S. v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (holding that the ban on firearms on U.S. Capitol grounds does not impinge upon a right protected by the Second Amendment and declining to evaluate second prong of the test). The proposed Ghost Gun Act unquestionably is rationally related to the legitimate government interest in protecting the health and safety of individuals from gun violence in D.C.

However, even assuming, *arguendo*, that these measures do regulate conduct protected by the Second Amendment, intermediate scrutiny would apply, and the law would still pass constitutional muster. *See Heller*, 670 F.3d at 1257–58 (“[W]e conclude [intermediate scrutiny] is the more appropriate standard for review of gun registration laws. As the Third Circuit reasoned . . . with regard to a prohibition on possession of a firearm with the serial numbers obliterated, registration requirements “do[] not severely limit the possession of firearms.”) (quoting *U.S. v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010)).

Under intermediate scrutiny, the District will be able to show that the ghost gun provisions of B24-0760 are “substantially related to an important governmental objective.” *Heller*, 670 F.3d at 1258 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). In *Marzzarella*, the Third Circuit held that the arrest of the defendant for possession of a handgun with an obliterated serial number did not violate his Second Amendment rights. 614 F.3d. 85 (3rd Cir. 2010). The court of appeals concluded that neither the district court nor the defendant could provide a “lawful purpose” for the obliterated serial number. *Id.* at 95. The court observed that “a firearm with a serial number is equally effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm.” *Id.* The Third Circuit found that the law in question, Section 922(k) enacted by the Gun Control Act of 1968, served a law enforcement purpose by “reserving the ability of law enforcement to conduct serial number tracing—effectuated by limiting the availability of untraceable firearms—[which] constitutes a substantial or important interest.” *Id.* at 98.

The only two courts to evaluate the Second Amendment constitutionality of ghost gun laws similar

to B24-0760 have upheld the laws on the basis of intermediate scrutiny. In *Palmer v. Sisolak*, No. 3:21-cv-00268-MMD-CSD, 2022 WL 960594, at *4 (D. Nev. Mar. 29, 2022), the court upheld a Nevada state law prohibiting self-manufacturing of unserialized firearms because the law was a reasonable fit to the important government interest in the ability of law enforcement to conduct serial number tracing of firearms. The *Palmer* court determined that Nevada’s interests were important based on statistics showing rising levels of unserialized firearms found at crime scenes and based on a “congressional report that concludes unserialized firearms are a present and increasing threat to public safety because they present a ‘homeland security challenge’ and they ‘hamstring[] law enforcement’s ability to investigate crimes committed with untraceable weapons.’” *Id.* at *5 (quoting H.R. Rep. No. 116-88, pt. 1, at 2 (2019)).

Similarly, in *Fahr v. City of San Diego*, No. 21-cv-01676-BAS-BGS, 2021 WL 4895974, at *9–10 (S.D. Cal. Oct. 20, 2021), the court held that in passing a city ordinance regulating ghost guns, the city “undoubtedly” had an important governmental interest in promoting and protecting the public health, safety, and general welfare of residents and in crime prevention. In finding the city ordinance substantially furthered these important interests, the court relied on the same Congressional report as in *Palmer* as well as ATF’s reasoning for a proposed rule to bring unfinished frames and receivers under existing federal serialization requirements. *Id.* at *10. The court further found that:

Because the Ordinance targets only non-serialized firearms and unfinished frames and unfinished receivers that are not within a categorical exception, that bypass background checks by virtue of self-assembly, and that are untraceable for lacking a serial number, this Court finds that the Ordinance is a reasonable fit for achieving the City’s objectives of decreasing the threat that ghost guns pose to the City’s stated substantial and important interests. In so holding, this Court observes that it joins other courts in concluding that broad regulation of non-serialized firearms fit closely with governments’ interests in crime prevention and investigation. *See, e.g., Pena [v. Lindley]*, 898 F.3d [969,] 987[(9th Cir. 2018)]; *Marzzarella*, 614 F.3d at 99 (holding “[r]egulating the possession of [non-serialized] firearms” fits “closely with the interest in ensuring traceability of weapons”); *Palmer*[, 2022 WL 960594] at [*]8–10.

Id.

As with the Nevada and San Diego laws, this proposed D.C. measure is substantially related to several important government interests. As discussed above, D.C. faces a similar growing threat from unserialized, untraceable, undetectable ghost guns. The District government has unquestionably important interests in serial number tracing, protecting the health and safety of residents, crime prevention and investigation, and securing transportation hubs and public buildings, especially in light of the increase in homicides and other crime involving ghost guns. Self-evidently, the proposed law is closely related to these important interests. The D.C. law allows for the self-manufacture of firearms, but simply requires that firearms be detectable, serialized, and traceable—just like any other firearm in the District. Indeed, the District’s Ghost Gun Act would not go as far in restricting self-manufactured guns as do the Nevada and San Diego

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laws upheld in *Palmer* and *Fahr*, which prohibit outright the self-manufacture of guns in those jurisdictions. To ensure the Ghost Gun Act withstands any constitutional scrutiny, we encourage the Council to make explicit findings about the dangers it aims to address in this legislation and its analysis that the legislation is narrowly tailored to meet Second Amendment requirements.

The proposed Ghost Gun Act is a much-needed permanent update to the firearm laws of the District. The measure helps to protect District residents from the increasing threat of gun violence, enhances the security of public buildings by mandating that guns be detectable, and helps law enforcement solve crimes by requiring that self-manufactured firearms be traceable. And it does so without impinging on anyone's Second Amendment rights. For the foregoing reasons, we urge the Council to enact (and the Mayor to sign) the proposed legislation.

Respectfully,



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