**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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| **MICHAEL CARGILL,** | ) | |
| **Plaintiff-Appellant,** | ) | **Docket No. 20-51016** |
| **v.** | ) | |
| **MERRICK GARLAND, *ET AL.*,** | ) | |
| **Defendants-Appellees.** | ) | |

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA, TENNESSEE FIREARMS ASSOCIATION, VIRGINIA CITIZENS DEFENSE LEAGUE, ARIZONA CITIZENS DEFENSE LEAGUE, GRASS ROOTS NORTH CAROLINA, RIGHTS WATCH INTERNATIONAL, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, AND THE HELLER FOUNDATION, IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC***

The movants, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Conservative Legal Defense and Education Fund, and The Heller Foundation, through their undersigned counsel, hereby request leave of this Court to file their Brief *Amicus Curiae* in Support of Plaintiff-Appellant Michael Cargill's Petition for Rehearing *En Banc* in the above-captioned action.

The grounds in support of this motion are as follows:

1. Gun Owners of America, Inc. ("GOA") is a nonprofit social welfare organization, founded in 1976 and exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation ("GOF") is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). GOA and GOF were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Together, GOA and GOF have more than two million members and supporters nationwide, and routinely litigate in support of the right to keep and bear arms in both state and federal courts. GOA and GOF have numerous members and supporters who were affected by the ATF's reinterpretation of the definition of "machinegun" at issue in this case, and were deprived of their right to own bump stocks as a result.

2. Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Conservative Legal Defense and Education Fund, and The Heller Foundation, are nonprofit organizations, exempt from federal income tax under the IRC. Collectively, they have members and supporters numbering in the tens of thousands throughout the country. These organizations

exist in order to promote and support the right to keep and bear arms under federal and state constitutional provisions, as well as to provide and promote training and education to both the public and government officials regarding technical and legal aspects of firearms. Each organization has members and supporters who were affected by the ATF's reinterpretation of the definition of "machinegun" at issue in this case, and were deprived of their right to own bump stocks as a result.

3. Gun Owners of America, Inc., *et al*.'s *Amicus Curiae* Brief is timely. Rule 29(b)(5) of the Federal Rules of Appellate Procedure provides that an *amicus curiae* brief must be filed "no later than 7 days after the petition is filed." In all other respects, Gun Owners of America, Inc., *et al*.'s *Amicus Curiae* Brief complies with the Federal Rules of Appellate Procedure, as well as the applicable Internal Operating Procedures of this Court, including with respect to content and form and with respect to length, F.R.A.P. 29(b)(4), as the brief is no more than 2,600 words.

4. Counsel for the movants have contacted counsel for both the Petitioner and Respondents, all of whom have consented to the filing of this *amicus curiae* brief.

5. This case raises broad and important issues, with implications far beyond bump stocks, for the millions of members and supporters of *amici* organizations. The ability of the ATF (or any executive branch agency) to reinterpret and

effectively re-write statutory definitions of entire categories of firearms puts all members of these organizations – and all law-abiding firearm owners – in a state of continuous and ongoing confusion and peril. The ramifications of ATF's actions here already can be seen on the horizon, as ATF now moves toward reinterpreting definitions that apply to hundreds of millions of commonly owned firearms.[1] *Amici*'s members have a strong interest in the legal questions at issue in this case and their application to these broader issues, given the severe criminal penalties for violations of federal firearms laws, the arbitrary administrative reclassification of lawfully owned firearms and accessories as contraband, and the effects of the same on the enumerated constitutional right to keep and bear arms. The *amicus curiae* brief that movants seek leave to submit addresses several of the important aspects of this case, and identifies specific reasons why the district court's conclusions, affirmed by the panel of the Court, should be re-examined by this Court.

6. Some of these *amici* are plaintiffs-appellants in a case challenging the bump stocks regulation at issue in this case in a case recently decided by the Sixth Circuit *En Banc*.

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1 *See*, *e.g.,* ATF's Notice of Proposed Rulemaking issued in May of 2021 (86 *Fed. Reg.* 27720), proposing to reinterpret numerous foundational definitions of the Gun Control Act as to what constitutes a "firearm" under federal law, including by drastically broadening the meaning of the terms "frame" and "receiver" that have existed unmolested for decades.

WHEREFORE, the movants, *amici curiae* Gun Owners of America, Inc., *et al*., pray that their motion be granted and that they be given leave to file their Brief *Amicus Curiae* in Support of Plaintiff-Appellant's Petition for Rehearing *En Banc* in this matter.

Respectfully submitted,

*/s/ William J. Olson*

William J. Olson
Robert J. Olson
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue W, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Attorneys for Movants*, Amici Curiae* Gun Owners of America, Inc., *et al*.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(g)**

IT IS HEREBY CERTIFIED:

1. That the foregoing Motion for Leave to File Brief *Amici Curiae* of Gun Owners of America, Inc., *et al*., in Support of Plaintiff-Appellant and Rehearing *En Banc*, complies with the type-volume limitation of Rule 27(d)(2)(A), Federal Rules of Appellate Procedure, because this motion contains 797 words, excluding the parts of the petition exempted by Rule 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Counsel for Appellants

Dated: February 4, 2022

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Motion for Leave to File Brief *Amici Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiff-Appellant and Reversal, was made, this 4th day of February, 2022, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

*/s/ William J. Olson*

_____

William J. Olson
Attorney for *Amici Curiae*

**No. 20-51016**

**In the**
**United States Court of Appeals for the Fifth Circuit**

MICHAEL CARGILL,

*Plaintiff-Appellant*,

v.

MERRICK B. GARLAND, U.S. Attorney General; U.S. DEPARTMENT OF JUSTICE; MARVIN RICHARDSON, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

*Defendants-Appellees*,

**On Appeal from the United States District Court**
**for the Western District of Texas**
No. 1-19-cv-349
Hon. David A. Ezra, Judge

# Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Conservative Legal Defense and Education Fund, and The Heller Foundation in Support of Plaintiff-Appellant and Rehearing *En Banc*

DAVID BROWNE
SPIRO & BROWNE, PLC
Glen Allen, VA 23060

JOHN I HARRIS III
SCHULMAN, LEROY & BENNETT PC
Nashville, TN 37203

WILLIAM J. OLSON*
ROBERT J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
*Counsel for Amici Curiae*
*Attorney of Record
February 4, 2022

Case No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

MERRICK B. GARLAND, *et al.*,

Defendants-Appellees,

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Michael Cargill, Plaintiff-Appellant

Merrick B. Garland, *et al.*, Defendants-Appellees

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch

International, Conservative Legal Defense and Education Fund, and The Heller Foundation, *Amici Curiae*.

William J. Olson, Robert J. Olson, Jeremiah L. Morgan, David G. Browne, and John I. Harris III, counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Conservative Legal Defense and Education Fund, and The Heller Foundation are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson
Attorney of Record for *Amici Curiae*

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## TABLE OF AUTHORITIES

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Conservative Legal Defense and Education Fund, and The Heller Foundation, are nonprofit organizations, exempt from federal income tax under the Internal Revenue Code. Collectively, they have more than two million members and supporters throughout the country, and exist in order to promote and support the right to keep and bear arms under federal and state constitutional provisions. Each organization has members and supporters who were affected by ATF's Bump Stock Rule's[2] reinterpretation of the definition of "machinegun," were deprived of their right to own bump stocks as a result, and have grave concern regarding the implications of allowing ATF to broadly redefine firearms-related definitions in ways that have serious criminal implications.

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[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici*, their members or their counsel contributed money intended to fund preparing or submitting this brief.

[2] In this Brief, the term "Bump Stock Rule" refers to the regulation at issue, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018).

## STATEMENT OF THE CASE

On March 25, 2019, Petitioner filed an action in United States District Court for the Western District of Texas seeking to enjoin enforcement of the Bump Stock Rule. Following a bench trial, the district court denied injunctive relief and dismissed the case, finding that the Bump Stock Rule was consistent with the "best reading" of the relevant statutory language defining a machinegun, and was within the authority of ATF to promulgate.

On appeal, a panel of this Court unanimously upheld the district court's decision, affirming and essentially adopting its relevant findings of fact. Petitioner now seeks review *en banc* by this Court to address the following questions: (1) do bump stocks meet the statutory definition of "machinegun"; and (2) if § 5845(b) is ambiguous on initial reading (as two circuits have held), do either the rule of lenity or *Chevron* deference have a role to play in construing the statute? *See id*. at ii. Because both the Petition and extensive briefing in other cases have adequately addressed the second question, this *amicus* brief will focus on the first question and on relevant elements of the record in the district court as affirmed by the panel.

## ARGUMENT

### A. Introduction.

Until ATF was ordered by the Department of Justice to reverse its classification of bump stocks, its firearms "experts" repeatedly recognized that firearms equipped with bump stocks are not machineguns because they require "*continuous multiple inputs by the user* for each successive shot," in addition to continuous multiple "function[s] of the trigger," in order to operate. Then, in early 2018, under political pressure following the October 1, 2017 Las Vegas incident, President Trump unilaterally declared that bump stocks *should be* machineguns. ATF immediately began to claim that bump stocks *are* machineguns.

That is not the rule of law, but rather "'the King [creating an] offence by ... proclamation, which was not an offence before.'" *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., dissenting from denial of certiorari). An agency should not be permitted to "reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Nor may an agency "rewrit[e] ...unambiguous statutory terms" to suit "bureaucratic policy goals." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325-26 (2014). Rather,

"[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

Equally troubling is that, after claiming it would "place no 'thumb on the scale in favor of the government'" (*Cargill v. Barr*, 502 F. Supp. 3d 1163, 1190 (W.D. Tx. 2021)) ("Dist. Ct. Op."), the district court engaged in a herculean effort to support ATF's ability to reverse itself. The agency's volte-face, and the district court's justifications for allowing it, are belied at every turn by the district court's own references to the record. The only witness at trial – an ATF expert in firearms mechanics – gave testimony on numerous **critical** points which contradict the district court's own findings. The fact that the panel, with precious little analysis, adopted wholesale the district court's flawed findings and legal conclusions necessitates this Court's rehearing *en banc*.

### B. Bump Stocks Cannot Be Machineguns under the Best Reading of 26 U.S.C. § 5845(b).

As the district court correctly noted, Congress has revisited and revised the definition of a "machinegun" more than once. Dist. Ct. Op. ¶¶14-29. As a result, the definition of a machinegun is precisely crafted. A machinegun, as defined by §5845(b), must (1) fire "more than one shot," and (2) it must do so (a) "automatically," (b) and it must do that "without manual reloading," **and** (c) "by a

single function of the trigger." **All** of these elements must exist for a firearm to be a machinegun.

"Our analysis begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). As the Supreme Court recently explained in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), Congress generally defines devices in statutes by setting forth (1) what the device must do and (2) how it must do it, in order to be that device. *Id.* at 1169 ("Congress defined an autodialer in terms of what it must do ('store or produce telephone numbers to be called') and how it must do it ('using a random or sequential number generator')."). Yet the district court and panel permitted the government to reimagine both what a firearm must do and how it must do it, in order to constitute a machinegun, seemingly irrespective of the text.

The district court and panel erroneously focused on a shooter's "pull" of the trigger, despite the statute's clear focus on the trigger's "function." *Cargill v. Garland*, 20 F.4th 1004 (2021) ("Panel Op.") at *9-10. Yet "pull" implies the discrete action of a human, whereas "function" implies the mechanical operation of a device. *See id.* at *9. The trigger of a firearm is a self-contained mechanical

system, which functions in a defined and repeatable manner.[3] A "pull" by a human being, however, is a vague and indeterminate concept that can be longer or shorter, harder or softer, and vary from one "pull" to the next. There is no reasonable way to read the statute and conclude that Congress meant its mechanical terminology to revolve around the physical input by a shooter, particularly when a device rather than human action is being defined.

Ultimately, however, the distinction between "pull" and "function" is one without a difference. On a semiautomatic firearm, a single round is fired for each "function" or "pull" of a trigger, regardless of whether a "bump stock" is utilized. *See* 18 U.S.C. § 921(a)(28) ("'semiautomatic rifle' means any repeating rifle … **which requires a separate pull of the trigger to fire each cartridge**") (emphasis added). Since a trigger on a firearm with a bump stock must be pulled, released, and reset (completing one "function") for each shot, then the mere fact that a bump stock allows the user to perform this function more rapidly does not a machinegun make. Indeed, the trigger of a semi-automatic firearm cannot "reset" and "function" again until any "pull" on it is released.

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[3] *See* "How an AR-15 Trigger Works," animated GIF *available at* https://imgur.com/WzRuu5t (*last accessed February 2, 2022*).

Expanding the definition of "machinegun" to include any semiautomatic firearm configured to be rapidly fired semi-automatically via a bump stock is no different from "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers," and "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." *Duguid* at 1171. In effect, ATF's interpretation of § 5845(b) would reclassify every semiautomatic rifle in the nation as a machinegun, just as "Duguid's interpretation of an autodialer would capture virtually all modern cell phones, which ... 'store ... telephone numbers to be called' and 'dial such numbers.'" *Id*. Such an interpretation would not merely miss the mark of being "the best" – it would border on absurd, and have far-reaching consequences.

**C. Only Congress May Revise the Statutory Text.**

The immediate politics of a tragedy do not – and should not – allow an agency to rewrite a statutory definition that has been carefully weighed and revised by Congress. Indeed, the district court correctly pointed out that, in the immediate aftermath of the October 1, 2017 Las Vegas events, ATF immediately examined and reaffirmed its previous and correct interpretation that bump stocks are not machineguns. Thereafter, Congress – the only entity which can change a statutory definition – took up proposed legislation regarding bump stocks, but did

not pass these bills. *See* Dist. Ct. Op. at 1179. Likewise, the panel openly acknowledged that Congress ought to revisit this definition if it wants devices such as bump stocks to be machineguns (Panel Op. at *21, n.11), but expressed no reservations about ATF legislating bump stocks into machineguns in the meantime.

Yet in its later conclusions of law, the district court criticizes and dismisses the fact that Congress repeatedly failed to act following the Las Vegas events, indicating that a court should not infer any meaning of a current statute based upon proposed but un-enacted legislation. *See* Dist. Ct. Op. 1191. It is certainly true that the contents of failed legislation should not be relied upon to interpret existing law. But the district court missed the simpler point – members of Congress on both sides of the aisle recognized that agency regulation could not redefine a bump stock into a machinegun. At the time Congress considered changes to existing law, ATF already had **reaffirmed** its prior view that bump stocks were not machineguns. ATF issued the Bump Stock Rule only **after** Congress **failed** to enact legislation, and only then because of enormous political pressure. The district court misinterpreted this sequence of events and their significance. Yet "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in

light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Central v. United States*, 138 S. Ct. 2067, 2074 (2018).

### D. The District Court's Legal Conclusions and Opinion Are Directly Contradicted by Its Own Findings of Facts.

The district court's opinion, as affirmed in full by the panel, is rife with additional, fatal inconsistencies, and seeming internal disregard for its own findings of fact and recitations of testimony. For example, the district court noted the ATF expert's testimony that, even with his extensive experience, firing a weapon equipped with a bump stock did not come naturally, and required practice. *Id*. at 1176. Yet a device cannot be **self**-acting and **self**-regulating (*i.e.*, automatic) if it needs practiced and precise input from **someone else** to make it operate. Indeed, a bump stock equipped firearm stands in stark contrast to a true machinegun, which employs a self-contained mechanism (such as an autosear) within the trigger group to effortlessly create true automatic operation, wherein the trigger is simply held down and does not reset for each shot. Indeed, the statute tells just how much "input" is permissible, making clear that a weapon must fire "automatically … by a single function of the trigger." Nothing more is permitted, and thus a bump stock (which requires much more) is not a machinegun.

The district court also relied erroneously on a shooter's mental state when using a bump stock, a concept that cannot coexist with the plain words of the statute. The district court and panel both relied upon the ATF expert's testimony about the shooter pushing the firearm forward to conclude that the shooter's mental state of pushing an entire firearm forward was legally equivalent to a pull on, or function of, the trigger. *Id*. at 1194; Panel Op. at *19. Of course, what is occurring with the shooter "mentally" is irrelevant – it is the **function of the trigger** that matters, because that is what the statute provides. There is no *mens rea* or other mental element to be found or implied in the statutory definition of a machinegun. It is, by necessity, a purely mechanical definition.

Relatedly, the district court adopted the expert's testimony that "basically the pressing forward on the [bump stock-equipped semi-automatic weapon] is the equivalent of pulling the trigger on the [weapon] in full automatic. If the shooter stops pressing forward with a bump stock-equipped firearm or stops pulling the trigger with a fully automatic firearm, firing ceases." *Id*. at 1176; *see also* Panel Op. at *19. But neither ATF nor any court can simply declare and criminalize – in defiance of the plain text, basic mechanics, and common sense – that **pushing forward on a gun** is the same as **pulling its trigger**. *See* Panel Op. at *4-5, 14 ("the shooter pushes forward [with the non-shooting hand] to engage the trigger

finger with the trigger, which causes a single trigger pull"). Words have no meaning if pushing an entire gun forward with a hand that is nowhere near a trigger is now a "function" or "pull" of a trigger. Moreover, government counsel at *en banc* oral argument in the Sixth Circuit rejected that very idea. *See* audio of oral argument in 19-1298, *GOA v. Merrick Garland, et al.*, at 35:40, https://bit.ly/3GrvBTq (When asked if "[y]ou concede that the trigger within the meaning of the statute [on a firearm equipped with a bump stock] is still the trigger on the AR-15?" government counsel replied, "[y]eah, we're not disputing that.").

Finally, ATF's expert testified that constant forward pressure "**brings [the trigger] back in contact with your trigger finger and fires again**." Dist. Ct. Op. 1175 (emphasis added). The district court likewise explained that "the rifle slides back and forth and its recoil energy bumps the trigger finger into the trigger to continue firing…." *Id*. ATF's own testimony and the district court's findings thus confirm that the trigger is touched once, pulled once, and functions once for each shot when a bump stock is used. The district court further found that "[b]y comparison, manufactured automatic firearms continue to fire if 'you continue to keep your finger down on the trigger.'" *Id*. at 1176. Yet according to the district court, when using a bump stock, there somehow is still a "single pull" of the

trigger, even though "a shooter's finger unconsciously disconnect[s] from the trigger" between shots. *Id*. at 1194. The district court bridges this gap by repeating its error of focusing on the mental state of the shooter instead of the physical movement of the trigger (and trigger finger). *Id*. The end result is a blatant disregard for the statutory focus on the "function of the trigger," alleging that "[i]t does not matter that the trigger mechanically resets to 'function' again when the shooter only takes one 'function' to initiate the firing of multiple rounds." *Id*. at 1195. But **of course** it matters how many times the trigger functions, because the number of trigger functions is the entire focus of the statute.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, the Court should grant the Petition for Rehearing *en banc*.

Respectfully submitted,

/s/ William J. Olson

DAVID BROWNE
SPIRO & BROWNE, PLC
Glen Allen, VA 23060
JOHN I HARRIS III
SCHULMAN, LEROY & BENNETT PC
Nashville, TN 37203
*Attorney of Record
February 4, 2022

WILLIAM J. OLSON*
ROBERT J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
*Counsel for Amici Curiae*

## CERTIFICATE OF SERVICE

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/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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1. That the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al*. in Support of Plaintiff-Appellant and Rehearing *En Banc* complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.81 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*
Dated: February 4, 2022