

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1089 (Gipson)
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Fiscal: Yes
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ID

SUBJECT

Firearms

DIGEST

This bill would prohibit the sale, purchase, possession, or receipt of a three-dimensional printer that has the sole or primary function of manufacturing firearms to or by any person in the state other than a state-licensed firearms manufacturer, as specified, and create two new causes of action available to an Attorney General, city or county attorney, or person harmed against a firearm manufacturer who distributes any digital instructions for the manufacture of a firearm or violates specified provisions relating to the use, sale, marketing, advertising, transfer, possession, purchase, or receipt of a Computer Numerical Control (CNC) milling machine or three-dimensional printer.

EXECUTIVE SUMMARY

Gun violence is a significant problem in California that results in harm and death of thousands of people every year. As California has attempted to hold firearm manufacturers responsible when they do not take reasonable precautions to prevent such violence, the specter of “ghost guns” and the machines that can be used to manufacture them have proliferated. When the state passed AB 1621 (Gipson, Ch. 76, Stats. 2022) in 2022, it took major steps to rein in the “ghost gun” manufacturers and computer numerical control (CNC) milling machines and 3-D printers used to manufacture them. However, sellers of such manufacturing machines continue to promote the unlawful use of their machines to manufacture unlicensed ghost guns. To strengthen the law and hold such sellers accountable, AB 1089 will amend the laws to include 3-D printers and CNC milling machines, will create two new causes of action against persons who knowingly distribute a digital firearm manufacturing code or commits an act that violates the Penal Code on unlawfully using or selling CNC milling machines and 3-D printers, and holds the person strictly liable for any personal injury or property damage from such acts. AB 1089 also prohibits a person from selling, offering to sell, transferring, advertising, or marketing a CNC milling machine or 3-D

printing machine in a manner that knowingly or recklessly causes another person in California to engage in conduct prohibited by the Penal Code.

AB 1089 is sponsored by the Giffords Law Center to Prevent Gun Violence and is supported by Everytown for Gun Safety Action Fund and the Consumer Attorneys of California. It is opposed by the California Rifle & Pistol Association. The bill passed out of the Senate Committee on Public Safety with a 4 to 1 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines a “firearm,” in certain provisions of the Penal Code, such as those relating to firearm enhancements and requirements related to lost and stolen firearms, as, “a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion.” (Pen. Code, § 16520(a).)
- 2) Defines a firearm, for other specified provisions of the Penal Code, such as those relating to prohibitions on possession and transfer, among others, as the frame or receiver of the weapon, including both a completed frame or receiver or a firearm precursor part. (Pen. Code, §16520(b).)
- 3) Defines a “firearm precursor part” as “any forging, casting, printing, extrusion, machined body, or similar 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, or 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.” (Pen. Code, § 16531(a).)
- 4) Prohibits any person or corporation from manufacturing more than three firearms in this state over the course of a year unless they are licensees. (Pen. Code, § 29010(a).)
- 5) Prohibits a person, firm or corporation from using a 3-D printer to manufacture any firearm, including a frame or receiver, or any firearm precursor part, unless that person, firm or corporation has a manufacturer’s license. (Pen. Code, § 29010(b).)
- 6) Defines “three-dimensional printer, for the purposes of the prohibition above, as a computer-aided manufacturing device capable of producing a three-dimensional object from a three-dimensional digital model through an additive manufacturing process that involves the layering of two-dimensional cross sections formed of a resin or similar material that are fused together to form a three-dimensional object. (Pen. Code, § 29010(b).)

- 7) Provides that violations of the prohibitions above are misdemeanors. (Pen. Code, § 29010(d).)
- 8) Provides that the Department of Justice (DOJ) shall accept applications for, and shall grant licenses permitting, the manufacture of firearms within this state. (Pen. Code § 29050(a).)
- 9) Prohibits the DOJ from granting a license unless and until the applicant presents proof of all of the following:
 - a) a valid license to manufacture firearms issued by the Federal Government;
 - b) any regulatory or business license required by local government;
 - c) a valid seller's permit or resale certificate issued by the State Board of Equalization, if applicable; and,
 - d) a certificate of eligibility issued by the DOJ. (Pen. Code, § 29050(b).)
- 10) Makes it a misdemeanor for a person to knowingly possess a firearm without a valid state or federal serial number. (Pen. Code, § 23920.)
- 11) Requires that within 10 days of manufacturing or assembling a firearm (not including precursor parts), they must engrave or permanently affix the serial number previously provided to them by the DOJ and notify the DOJ of such. (Pen. Code, §§ 29180(b)(2)-(3).)
- 12) Prohibits persons or corporations from using a CNC milling machine to manufacture a firearm or firearm precursor part unless they are a federally licensed firearms manufacturer or importer. (Pen. Code, § 29185(a).)
- 13) States that it is unlawful to sell, offer to sell, or transfer a CNC milling machine that has the sole or primary function of manufacturing firearms to any person aside from a federally licensed firearms manufacturer or importer. (Pen. Code, § 29185(b).)
- 14) Provides that it is unlawful to possess, purchase, or receive a CNC milling machine that has the sole or primary function of manufacturing firearms unless a person is a federally licensed firearms manufacturer or importer. (Pen. Code, § 29185(c).)
- 15) Existing law exempts air carriers, certain business persons, and other specified persons from the prohibition on possessing, purchasing, transferring or selling specified CNC milling machines. (Pen. Code, § 29185(d).)
- 16) Existing law provides that violation of the above prohibitions regarding CNC milling machines is punishable as a misdemeanor. (Pen. Code, § 29185(f).)

- 17) Establishes the "Firearm Industry Responsibility Act" (FIRA) which allows for civil actions to be brought against firearm industry members who deal in abnormally dangerous firearm-related products. (Civ. Code, § 3273.50 et seq.)
- 18) Defines, for the purposes of FIRA, a "firearm-related product" as a firearm, ammunition, a firearm precursor part, a firearm component, firearm manufacturing machine, and a firearm accessory that meets any of several specified conditions. (Civ. Code, §3273.50(d).)
- 19) Authorizes any resident of, or visitor to, California, other than an officer or employee of a state or local governmental entity in this state, to bring a civil action against any person who knowingly traffics in illegal firearms and in firearm parts in the state. Also requires persons who bring lawsuits against enforcement of firearms laws to pay for the attorney's fees of the state if the state prevails. (Bus. & Prof. Code, § 22949.60 et seq.; Civ. Code, § 1021.11)

This bill:

- 1) Includes a "firearm manufacturing machine" in the definition of a "firearm-related product" for purposes of Firearm Industry Responsibility Act (FIRA), and defines the term as a 3D printer, as defined in Section 29185 of the Penal Code, or CNC milling machine that is marketed or sold as, or reasonably designed or intended to be used to manufacture or produce a firearm.
- 2) This bill provides that a civil action may be brought against a person who knowingly:
 - a) distributes or causes to be distributed, by any means including the internet, any digital firearm manufacturing code to any person in California who is not a federally licensed firearm manufacturer, member of the Armed Forces of the United States or the National Guard while on duty and acting in the scope of their employment, or any law enforcement agency or forensic laboratory; or
 - b) commits an act that violates Penal Code section 29185, such as by unlawfully using, selling, offering to sell, or otherwise transferring specified CNC milling machines or 3D printers, or possessing, purchasing, or receiving such a machine that has the sole or primary function of manufacturing firearms, even if such conduct does not result in a conviction under section 29185.
- 3) Provides that a person who commits one of the above acts shall be strictly liable for any personal injury or property damage inflicted by the use of a firearm that is manufactured or produced using the digital firearm manufacturing code that they distributed or caused to be distributed, or that is manufactured by means of a CNC milling machine, a 3D printer, or a similar machine.

- 4) Specifies that such strict liability does not include any injury or property damage sustained by a person who commits the unlawful act that subjects them to strict liability.
- 5) Provides that the Attorney General, county counsel, or city attorney may bring an action in any court of competent jurisdiction to establish that a person has violated these provisions, and that they may seek a civil penalty not to exceed \$25,000 for each violation, as well as injunctive relief sufficient to prevent the person and any other defendant from further violating the law.
- 6) Specifies that the remedies provided above are cumulative and shall not be construed as restricting any other rights, causes of action, claims, or defenses available under any other law.
- 7) Provides that a prevailing plaintiff in the civil actions set forth above is entitled to recover reasonable attorney's fees and costs.
- 8) Defines the terms "digital firearm manufacturing code," "federally licensed firearms manufacturer," "firearm," and "three-dimensional printer" for the purposes of the civil liability provisions above.
- 9) Prohibits a person from selling, offering to sell, transferring, advertising, or marketing a CNC milling machine or 3-D printing machine in a manner that knowingly or recklessly causes another person in California to engage in conduct prohibited by Penal Code section 29185, or in a manner that otherwise knowingly or recklessly aids, abets, promotes, or facilitates conduct prohibited by that section.
- 10) Creates a rebuttable presumption that a person has violated this prohibition if both of the following are true:
 - a) The person offers to sell, advertises, or markets a CNC milling machine or 3-D printer in a manner that, under the totality of the circumstances, is targeted at purchasers seeking to manufacture firearms or that otherwise affirmatively promotes the machine or printer's utility in manufacturing firearms, regardless of whether the machine or printer is otherwise described or classified as having any other capabilities; and
 - b) The person sells or transfers the CNC milling machine or 3-D printer as described without verifying that the purchaser or transferee in California is a federally licensed firearms manufacturer or not otherwise prohibited from purchasing or using the machine or printer to manufacture firearms under Penal Code Section 29185.
- 11) Provides that a person who has suffered harm because of conduct in violation of these provisions, including conduct in violation of Penal Code Section 29185 that

was precipitated by a violation of the above Civil Code sections, may bring a suit in a court of competent jurisdiction to seek appropriate relief.

- 12) Provides that such appropriate relief may include injunctive relief sufficient to prevent the person and any other defendant from further violating the law, compensatory or statutory damages, punitive damages, reasonable attorney's fees and costs, and any other appropriate relief necessary to enforce the title and remedy the harm caused by the violation.
- 13) Allows the Attorney General or any county counsel or city attorney, in the name of the people of California, to bring an action in an court of competent jurisdiction to establish that a person has violated these provisions or Penal Code Section 29185, and seek a civil penalty not more than \$25,000 for each violation, as well as injunctive relief sufficient to prevent the person and any other defendant from further violating the law.
- 14) Prohibits under the Penal Code any person, other than a state-licensed firearms manufacturer, from using a CNC milling machine or 3D printer to manufacture a firearm, and makes such conduct punishable as a misdemeanor.
- 15) Makes it crime punishable as a misdemeanor to sell, offer to sell, transfer, possess, purchase, or receive a CNC milling machine or 3D printer that has a sole or primary function of manufacturing firearms, unless it is done by a state-licensed manufacturer.
- 16) Exempts from the above Penal Code provisions the following:
 - a) a person who is engaged in the business of selling manufacturing equipment to a state-licensed firearms manufacturer, and who possesses a CNC milling machine or 3-D printer with the intent to sell or transfer the CNC milling machine or 3-D printer to a state-licensed firearms manufacturer;
 - b) a common carrier licensed under state law, or a motor carrier, air carrier or carrier affiliated with an air carrier as specified, or an authorized agent of any such carrier, when acting in the course and scope of duties incident to the receipt, processing, transportation, or delivery of property;
 - c) a person who possessed a CNC milling machine or 3-D printer that has the sole or primary function of manufacturing firearms before June 30, 2022, and who, within 90 days of that date, does one of the following:
 - i. sells or transfers the machine to a federally licensed firearms manufacturer or importer;
 - ii. sells or transfers the machine to such a person described in subdivision a) above;
 - iii. removes the machine from California;
 - iv. relinquishes the machine to a law enforcement agency;
 - v. otherwise lawfully terminates possession of the machine.

- d) a person who possesses, before July 1, 2024, a 3-D printer that has the sole or primary function of manufacturing firearms, and who does one of the following within 90 days of that date:
 - i. sells or transfers the machine to a state-licensed firearms manufacturer;
 - ii. sells or transfers the machine to a person described in subdivision a) above;
 - iii. removes the machine from California;
 - iv. relinquishes the machine to a law enforcement agency; or
 - v. otherwise lawfully terminates possession of the machine.
- 17) Exempts from these Penal Code sections any member of the Armed Forces of the United States or the National Guard, while on duty and acting within the scope and course of their employment, or any law enforcement agency or forensic laboratory.
- 18) Defines “state-licensed firearms manufacturer” for the purposes of these Penal Code sections as a person licensed to manufacture firearms under California state law, consistent with the definition of the term in other provisions of existing law.
- 19) Defines “three-dimensional printer” for the purposes of these Penal Code sections as a computer-aided manufacturing device capable of producing a three-dimensional object from a three-dimensional model through additive manufacturing process that involves the layering of two-dimensional cross sections formed of a resin or similar material that are fused together to form a three-dimensional object.
- 20) Contains a severability clause.

COMMENTS

1. Author’s statement

According to the author:

Assembly Bill 1089 seeks to build on California’s recently enacted ghost gun reforms by closing additional gaps and creating a civil cause of action to assist in accountability and enforcement against companies whose sale or advertising practices unfairly and deceptively induce California buyers to illegally obtain and use ghost gun manufacturing machines without a manufacturer’s license.

2. The epidemic of gun violence, and the rise of “ghost guns”

The United States has seen a record number of mass shootings so far in 2023, with more than 330 mass shooting through June.¹ That means there have been nearly two mass shootings in the United States every day of the year. There have now been 21,042 deaths so far from all gun-related events in the United States. While these statistics are alarming, they are in line with the record numbers of the last few years. In 2021, there were 686 mass shootings in total, and 2022 witnessed 636 mass shootings.² In just a two-year period from 2020 through 2021, there were over 88,000 gun violence deaths in this country.³ Considering these statistics, combating gun violence and mass shootings is of the most importance for the safety of Californians.

3. The current regulatory environment of firearms in California

Part of this overwhelming epidemic of gun violence is the ubiquitous prevalence of firearms in the United States. Some estimates place the current number of firearms in civilian possession in the United States at 433.9 million, and both possession and production have been growing in recent years.⁴ In 2019 and 2020, 40 million guns were sold in the United States.

Historically, firearms have been produced by licensed manufacturers in factories and sold through licensed gun dealers. Federal law requires all guns manufactured in the United States and imported from abroad to have serial numbers, typically displayed on the back of the frame. Serial numbers and extensive regulations on manufacturers help ensure firearms can be traceable, and are only sold to those legally able to possess them. Thus, those intending to avoid the licensing of firearms or to evade firearms being traced back to the owner have historically attempted to file off the serial number from a firearm’s frame.

However, “ghost guns” have provided an incredibly easy avenue for such individuals to evade the firearm licensing and other regulations. Such “ghost guns” can be manufactured by an unlicensed buyer with parts that can be acquired without a background check or manufacturing license. Because of this, ghost guns are also unserialized and therefore untraceable by law enforcement. One way in which “ghost

¹ Ana Faguy, “U.S. Sees Record Number of Mass Shootings Halfway Through 2023,” Forbes (Jul. 3, 2023), available at <https://www.forbes.com/sites/anafaguy/2023/07/03/us-sees-record-number-of-mass-shootings-halfway-through-2023/?sh=5e3a9f68360f>.

² “Mass Shootings in the United States,” Everytown for Gun Safety Support Fund (Mar. 2023), available at <https://everytownresearch.org/mass-shootings-in-america/>.

³ “Past Summary Ledgers,” Gun Violence Archive (Jul. 4, 2023), available at <https://www.gunviolencearchive.org/past-tolls>.

⁴ Jennifer Mascia, “How Many Guns are Circulating in the U.S.?” The Trace (Mar. 6, 2023), available at <https://www.thetrace.org/2023/03/guns-america-data-atf-total/#:~:text=In%202020%2C%20the%20group%20reported,civilian%20possession%20is%20433.9%20million.%E2%80%9D>.

guns” are produced is through computer numerical control (CNC) milling machines. CNC milling machines are machines capable of automatically processing raw materials such as metal, plastic, wood or composite into digitally modeled shapes based solely on programmed instructions, without the need for a human operator. CNC milling machines use subtractive manufacturing: essentially breaking down a raw material until the desired product is created. 3-D printers, by contrast, use an additive manufacturing process that lays down consecutive layers of material to generate various products. 3-D printers have grown significantly in popularity in recent years, with the designs for guns built through 3-D printers becoming widely available online. One company known as “Ghost Gunner” is currently marketing its latest CNC milling machine, the Ghost Gunner 3, which costs only \$2,500 and comes with programmed code to complete several fully functional assault-style weapons.⁵

There has been an explosion in the use and proliferation of such ghost guns. In Los Angeles alone, the LAPD recovered 1,921 ghost guns in 2021, more than double the amount recovered in 2020.⁶ Since 2017, the department has seen a 400% increase in ghost gun seizures. Just last year, in Sacramento, a man used an unregistered homemade automatic rifle to kill his three daughters, a chaperone, and himself in a local church.⁷ At the time of the shooting, the killer was under a restraining order prohibiting him from possessing a firearm.

Until recently, California law only imposed restrictions on parties that manufactured or assembled firearm components, or “firearm precursor parts,” and parties that knowingly possessed unserialized firearms, but it did not regulate the sale of such parts. In 2019, the Legislature adopted AB 879 (Gipson, Ch. 730, Stats. of 2019), which established a new regulatory framework for firearm precursor parts, and required, among other things, that all such parts to be sold in-person through a licensed vendor.⁸ Under AB 879, the sale of precursor parts is regulated in much the same manner as the sale of ammunition.⁹

However, AB 879 did not specifically regulate or reach CNC milling machines or 3-D printers. Thus, in 2022 the Legislature passed AB 1621 (Gipson, Ch. 76, Stats. of 2022), a comprehensive measure aimed at curbing the ghost gun epidemic, in large part via revising state regulations regarding firearm “precursor parts,” or components that may be readily convertible into usable firearms. The bill also established several provisions of law limiting the acquisition, possession, purchase and use of CNC milling machines

⁵ <https://ghostgunner.net/product/ghost-gunner-3-deposit/>

⁶ “Ghost Guns in California,” Giffords Law Center (Jun. 30, 2023), available at <https://giffords.org/lawcenter/state-laws/ghost-guns-in-california/>.

⁷ Don Thompson, “Man Used ‘ghost gun’ to kill 3 daughters in church,” NBC Bay Area (Mar. 6, 2022 at 6:11 pm), available at <https://www.nbcbayarea.com/news/california/man-used-ghost-gun-to-kill-3-daughters-in-church/2829422/>.

⁸ Cal. Pen. Code §§ 30400 et seq., 30412.

⁹ Compare Cal. Pen. Code §§ 16531-16532 and Cal. Pen. Code §§ 30210-30395.

that have the sole or primary function of manufacturing firearms by any entity except for a federally licensed firearms manufacturer or importer, subject to various exceptions. One exemption applied to persons who possessed a CNC milling machine before the effective date of those restrictions (June 30, 2022), and within 90 days of that date terminated possession of the machine in one of several specified manners.

4. This bill would address “ghost guns” by holding manufacturers and those who aim to manufacture such guns liable

To strengthen California’s laws regulating the manufacture of firearms by CNC milling machines and 3-D printers and prevent manufacturers from marketing their products for illegal uses like manufacturing unlicensed firearms, AB 1089 makes a number of changes to the current statutory scheme and establishes two new civil causes of action. It extends the CNC restrictions established by AB 1621 to 3-D printers that have the sole or primary function of manufacturing firearms, and modifies the exemptions related to federally licensed firearms manufacturers to instead refer to state licensed firearms manufacturers. The bill also adopts AB 1621’s CNC machine relinquishment provisions for 3-D printers, and provides that a person who possesses a 3-D printer before July 1, 2024, and within 90 days of that date relinquishes possession of the printer in a manner provided, is exempt from the above restrictions and liability. While there may be some constitutional concerns relating to just compensation and the Takings Clause with the relinquishment provisions, those issues were addressed by the Senate Public Safety Committee that appropriately has jurisdiction over the Penal Code; thus, this analysis will not re-examine these questions here.

AB 1089 also creates two causes of action. The first, added to the Civil Code as section 3273.60, against a person who either knowingly distributes or causes to be distributed a digital firearm manufacturing code. This first cause of action also is available if a person uses, sells, offers to sell, or otherwise transfers a CNC milling machine or 3-D printer, or possesses, purchases, or receives a CNC milling machine or 3-D printer that has the sole or primary function of manufacturing firearms. If an individual has committed one of these covered acts, they will be held strictly liable for any personal injury or property damage inflicted by the use of a firearm created through their liable actions. A claim under this first cause of action could be brought in a court of competent jurisdiction by the Attorney General, a county counsel, or city attorney, who can seek injunctive relief to prevent further violations of the law as well as a civil penalty of up to \$25,000.

The second cause of action, added to the Civil Code as section 3273.62, targets those who sell, offer to sell, transfer, advertise, or market a CNC milling machine or 3-D printer that causes another person to engage in conduct that would be illegal under Penal Code 29185. Conduct illegal under that Penal Code is the use, sale, offer to sell, transfer of a CNC milling machine or 3-D printer, or the possession, purchase, or receiving of such a machine whose sole or primary function is to manufacture firearms by a person not a state-licensed firearms manufacturer. To be liable the individual must

have sold, offered to sell, transferred, advertised, or marketed the CNC milling machine or 3-D printer in a manner that recklessly causes the other person to engage in such conduct prohibited by Penal Code section 29185.

However, this second cause of action also includes a rebuttable presumption. Under its provisions, a rebuttable presumption applies if a person offers to sell, advertises, or markets the CNC milling machine or 3-D printer in a manner that, in the totality of the circumstances, is targeted at purchasers seeking to manufacture firearms, or that otherwise affirmatively promotes the machine's utility in manufacturing firearms, and if the person sells or transfers the machine without verifying that the purchaser is a federally-licensed firearms manufacturer or other person permitted to possess such a machine.

This second cause of action can be brought by the Attorney General, a county counsel or city attorney, but also can be brought by any person who has suffered harm because of the conduct that violates the bill's provisions, or because of illegal conduct by someone whose actions were precipitated by a violation of the bill's civil code sections. A person who suffered harm may request injunctive relief, compensatory or statutory damages, punitive damages, reasonable attorney's fees and costs, and any other appropriate relief necessary to enforce the bill's provisions and remedy the harm caused.

In addition to these two new civil causes of action, AB 1089 amends sections of the Penal Code related to crimes stemming from the use, sale, possession, or similar actions of a CNC milling machine or 3-D printer without a license or appropriate exception. Because the criminal code is beyond the jurisdiction of this committee, the bill's amendments to the Penal Code will not be substantially covered in this analysis.¹⁰

5. This law is not violative of the Second Amendment

The Second Amendment to the United States Constitution states that "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.) For 217 years after the Second Amendment's ratification, no law regulating the possession of firearms was found by the United States Supreme Court to violate the amendment's provisions. However, that changed in 2008 with the case *D.C. v. Heller*. In that case, the Supreme Court ruled along ideological lines that a District of Columbia law banning the possession of handguns violated the Second Amendment. (*District of Columbia v. Heller*, 554 U.S. 570 (2008).) The Court held for the first time that the Second Amendment protected an individual right to possess a firearm unconnected with service in a militia for use of that firearm for traditionally lawful purposes like self-defense within the home. Two years later, the Supreme Court reaffirmed, again along ideological lines,

¹⁰ For a detailed analysis of the penal code provisions of this bill, please see the Senate Committee on Public Safety analysis of AB 1089 (Gipson) prepared for the June 27, 2023 hearing.

that the Second Amendment protected the right to keep and bear arms for the purpose of self-defense, and further held that the Second Amendment was fully applicable to the states. (*McDonald v. City of Chicago*, 561 U.S. 742 (2010).)

In *D.C. v. Heller*, the Supreme Court devised a two-step analysis. The analysis required that first it must be determined whether the law at issue regulates activity that falls within the scope of the Second Amendment right as originally understood, and if so, then the court is to determine how close the law comes to the core of the Second Amendment right, and the severity of the law's burden on that right. However, the Court also stated in *Heller* that its opinion should "not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (*Heller*, 554 U.S. at 626.) The Court further notes in a footnote that these "presumptively lawful regulatory measures" are examples not meant to be exhaustive. (*Id.*, at 626, n. 26.) Under this precedent, the Tenth Circuit Court of Appeal determined that the National Firearms Act's requirements that firearms dealers and manufacturers register and pay taxes annually was constitutional under this category of "presumptively lawful regulatory measures." (*U.S. v. Cox*, 906 F.3d 1170 (10th Cir. 2018).)

The Supreme Court revisited its Second Amendment jurisprudence in the case *New York State Rifle & Pistol Association v. Bruen*. In that case, the Court determined that the two-step analysis it had previously outlined in *Heller* was "one step too many." (*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 U.S. 2111 (2022).) Instead, the Court created a new standard: if the Second Amendment's plain text covers the individual's conduct, it is presumptively protected, and the government must demonstrate that the regulation is consistent with the nation's historical tradition of firearm regulation. (*N.Y. State Rifle & Pistol Ass'n*, 142 U.S. at 2126.)

The Court's assertions in *Heller* that its decisions should not cast doubt on the legality of conditions and qualifications on the commercial sale of arms was not disturbed by the Court's *New York State Rifle & Pistol Association* decision. That case does not mention regulations on the sale of arms at all. Thus, as a threshold matter, the restrictions set by AB 1089 on the manufacture and sale of firearm manufacturing machines relate solely to the commercial sale and production of arms, and the Supreme Court's jurisprudence casts no doubt on the constitutionality of the bill's provisions. Its provisions are analogous to the provisions of the National Firearms Act that were upheld as constitutional under *U.S. v. Cox*. Unlike the laws at issue in *Heller* or *New York State Rifle & Pistol Association*, the laws created by AB 1089 deal with the machines that can be used to manufacture firearms, and not specifically with firearms themselves.

If this is not probative enough of AB 1089's constitutionality, an analysis of the law through *New York State Rifle & Pistol Association's* standard certainly is. The Second

Amendment's terms relate to the bearing and keeping of arms, not to producing them. The plain text of its clauses and a traditional understanding of those terms clearly do not encompass the production or sale of firearms. To require "keep and bear arms" to include the production and commercial sale of arms would be to create a right wholly nonexistent in Second Amendment case law to date. Even if the Second Amendment were to be reinvented to cover regulations on firearm manufacturing, the regulation in AB 1089 prohibiting the unlicensed use, possession, sale, or transfer of manufacturing equipment is consistent with the nation's historical tradition of regulation of firearm manufacturing. All variety of laws throughout all of the states of the nation place limits on the manufacture and commercial sale of firearms. The federal government itself also has a variety of laws regulating the sale, import, and production of firearms. Thus, it has long been historical tradition in the United States and all of its states to regulate firearm manufacturing and commercial sales.

Moreover, AB 1089's prohibitions are meant to ensure that the state's existing laws requiring that producers of firearms are licensed can be enforced in the complex context of highly-mobile CNC milling machines and 3-D printers; they are not about banning altogether the manufacture of guns through such machines. If AB 1089 were to become law, CNC milling machines will continue to be legal, as long as the users and possessors of such machines are licensed to use them. Such regulation is incredibly necessary, as the author has pointed out, as CNC milling machines and 3-D printers can be used to circumvent the state's regulation of firearms and produce extremely deadly firearms untraceable to their seller or manufacturer. As such, AB 1089 is ultimately a bill about enforcement of the state's existing regulations on firearms manufacturing, and does not prohibit the possession or licensed manufacture of firearms. Thus, while opponents may attempt to argue that it violates the Second Amendment of the United States Constitution, an examination of the bill and Second Amendment case law clearly debunks such arguments.

6. This bill is not violative of the Protection of Lawful Commerce of Arms Act (PLCAA)

Another potential challenge to AB 1089 is the Protection of Lawful Commerce in Arms Act of 2005 (PLCAA). The PLCAA prohibits a "qualified civil liability action" in federal or state court against a manufacturer or seller of a qualified product for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties or other relief resulting from the criminal misuse of a firearm. (15 U.S.C. §§ 7902-7903.) The PLCAA aims to preempt state laws that impose liability on manufacturers, sellers, and trade associations for the misuse of firearms by third parties.

However, the PLCAA includes multiple exceptions that are applicable here. First, the law does not preempt "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for

which relief is sought.” (15 U.S.C. § 7903(5)(A)(iii).) That exception includes instances where the manufacturer or seller aided, abetted, or conspired with another person to sell or dispose of the firearm knowing, or having reasonable cause to believe, that the actual buyer of the firearm was prohibited from possessing or receiving the firearm under subdivisions (g) and (n) of section 922 of Chapter 18 of the United States Code. The PLCAA also includes an exception for when a manufacturer or seller engages in negligence per se or negligent entrustment, which occurs when the seller knows, or reasonably should know, the person to whom the seller is providing the product is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

The PLCAA likely would not apply to AB 1089 for a variety of reasons. First, under the standards set out in AB 1089, most acts violative of the bill’s provisions would likely also fall within the exceptions to the PLCAA’s preemption. AB 1089’s liability attaches when a seller or manufacturer knowingly sells the CNC milling machine or 3-D printer, firearm manufacturing code, or components to another that is not licensed or otherwise authorized to have such devices. AB 1089’s other liability provisions providing for liability when a manufacturer has acted recklessly can likely fit within the PLCAA’s negligent entrustment exception as well.

Moreover, the PLCAA is designed to address the manufacturers and sellers of firearms, ammunition, or a component part of a firearm or ammunition, and thus arguably does not reach the selling of CNC milling machines and 3-D printers. These machines, while used to produce firearms, are not the firearm or a component part of a firearm. Because the PLCAA is a federal law, it also requires that the acts involved in its provisions happen through interstate commerce, such that the United States Congress has authority to regulate it. However, AB 1089 is not exclusive to transactions that take place across state lines; so even if the PLCAA was applicable to AB 1089 suits, it could only be applicable to suits that involve interstate commerce.

7. Arguments in support

According to the Giffords Law Center to Prevent Gun Violence, the sponsor of the bill:

This bill will build on the strong ghost gun reforms enacted last year by strengthening, standardizing, and further clarifying California laws governing the sale, purchase, use, and possession of digitally programmable ghost gun manufacturing machines and to limit the distribution of the digital code blueprints used in conjunction with these ghost gun manufacturing machines to produce firearms and firearm components without background checks, serial numbers, safety tests, sale records, or other gun safety requirements.

With your leadership last year, California took strong action to comprehensively address the ghost gun crisis, especially through passage of AB 1621 (Gipson) and

AB 2156 (Wicks). Most of AB 1621's provisions took effect immediately upon receiving the Governor's signature on June 30, 2022. This vital law now ensures, among other things, that the sale of key ghost gun components in California are subject to the same gun safety laws as the sale of fully assembled firearms, including background checks, sale records, serial numbers, and dealer licensing requirements.

AB 1621 (Gipson) and AB 2156 (Wicks) also included complementary provisions to limit the number of firearms private individuals could assemble or manufacture without obtaining a manufacturer's license, require unlicensed firearm manufacturers to keep any firearms they manufacture only for personal use instead of subsequent distribution or sale, and to prohibit unlicensed manufacturers from using digitally programmable machines, such as 3-D printers and computerized numerical control (CNC) milling machines, to manufacture firearms.

Since enactment, these reforms have had immediate impacts in driving leading ghost gun companies to reform their business practices and/or stop selling unregulated ghost gun products into California. Public safety is far stronger today than it was last year, thanks to these reforms.

Despite the enormous positive impact California's ghost gun reform legislation has had in reforming most ghost gun product sellers' business practices, certain companies have openly declared, including in court filings, that they are continuing to sell ghost gun manufacturing machines as an effort to circumvent California's regulations on ghost gun kits and components. These digitally programmable machines are designed to enable untrained amateurs to produce firearm frames or receivers with the press of a button, either by additive manufacturing (from a 3-D printer) or subtractive manufacturing (from a CNC milling machine that carves the product out of metal or other material). Instead of selling ghost gun kits, these sellers claim that they are selling merely the machines, unformed material, and digital files for use in those machines.

We believe they are very clearly violating both the spirit and letter of California law. For instance, AB 1621 (Gipson) already enacted some important restrictions on the sale, purchase, and use of digitally programmable CNC milling machines that have the sole or primary function of manufacturing firearms. AB 1621 (Gipson) also unambiguously prohibited any person who does not have a federal firearm manufacturer's license from using such machines to produce any number of firearms. AB 2156 (Wicks) similarly prohibited using 3-D printers to produce any number of firearms without both a California and federal manufacturer's license. Nonetheless, irresponsible companies have continued to sell machines that are explicitly designed and marketed as ghost gun manufacturing machines (including a CNC milling machine called "the Ghost Gunner" sold by Defense Distributed) while dubiously and deceptively claiming that these same machines do not have

the "primary" purpose of manufacturing firearms. The seller of the Ghost Gunner machine describes it as "the most popular way of finishing unserialized rifles and pistols in the comfort and privacy of home" and informs California buyers only that they buy ghost gun manufacturing machines "at their own risk." Similarly, sellers on "Ghostguns.com" market a 3D printing ghost gun manufacturing machine called "The Ender" along with files for printing plastic components of undetectable firearms. Companies like these marketing ghost gun manufacturing machines continue to fail to inform unlicensed customers that it is now unambiguously unlawful in California to use either a CNC milling or a 3-D printer to manufacture or in any way produce firearms (including completed or unfinished frames and receivers) without a firearm manufacturer's license.

Additionally, there is need to consolidate and standardize provisions that were separately enacted by AB 1621 and AB 2156 which separately regulated CNC milling machines and 3-D printers, respectively. For instance, while California law now prohibits unlicensed manufacturers from *using* a 3-D printer to produce firearms, state law does not regulate the purchase, possession, or sale of 3-D printers that are designed or marketed as ghost gun manufacturing 3-D printers; only AB 1621 included purchase, possession, and sale restrictions on CNC milling ghost gun machines. Additionally, while AB 1621 (Gipson) required a *federal* firearm manufacturer license to use CNC milling machines to produce firearms, AB 2156 (Wicks) required both a federal and state firearm manufacturer license to use a 3-D printer to produce firearms. (The federal license is a prerequisite under state law for a California firearm manufacturer license). Consolidating and standardizing these statutes will promote compliance and public safety.

8. Arguments in opposition

According to the California Rifle & Pistol Association, which opposes AB 1089:

The author is bringing forth legislation that is doubtful of reaching its purported goals. The use of 3D printers and CNC milling machines have tremendous applications throughout our lives ranging from current needs in medicine, science, exploration, entertainment, housing, and more. Law-abiding citizens utilize these technologies daily without causing issues. The author is focusing on a criminal element and chooses to punish the law-abiding while not addressing the criminal element.

The CRPA is in support of getting firearms out of the hands of criminals but does not support criminalizing the law-abiding. According to the Assembly Appropriation Committee's fiscal impacts report, there are unknown costs that will directly impact court costs, workload, and prioritization of cases. The report highlights that the Department of Justice (CADOJ) could need additional financial resources into the millions if this bill is enacted. CADOJ has repeatedly fallen short

of legislative expectations in implementing laws passed by the legislature over several years. CADOJ has numerous current projects they seem to be unable to meet general performance standards to keep Californians safe.

The increase to the Department of Corrections is unknown currently and is in stark contrast to the Legislature's direction of lowering the number of inmates through early release programs and repeatedly voting against extending incarceration terms.

CRPA will continue to support sound legislation to reduce crime and get criminals off our streets and out of our communities. Our motto for 150 years has been "Be Safe" and we will support sound legislation that does so. For the foregoing reasons, the California Rifle & Pistol Association strongly opposes AB 1089.

SUPPORT

Giffords Law Center to Prevent Gun Violence (sponsor)
Everytown for Gun Safety Action Fund
Consumer Attorneys of California
Peace Officers' Research Association of California (PORAC)
Brady Campaign
Brady California

OPPOSITION

California Rifle & Pistol Association

RELATED LEGISLATION

Pending Legislation:

SB 241 (Min, 2023) requires a licensee and any employees that handle firearms to annually complete specified training. The bill requires the Department of Justice to develop and implement a training course, as specified, including a testing certification component. The bill authorizes the department to adopt regulations to carry out its provisions. SB 241 is currently before the Assembly Appropriations Committee.

AB 97 (Rodriguez, 2023) requires the Department of Justice (DOJ) to report data on arrests and prosecutions of specified misdemeanor offenses related to unserialized firearms. This bill is pending before the Senate Appropriations Committee.

Prior Legislation:

SB 1327 (Hertzberg, Ch. 146, Stats. 2022) established privately-enforced civil causes of action against any person who manufactures or causes to be manufactured, distributes, transports, or imports into the state, or causes to be distributed or transported or imported into the state, keeps for sale or offers or exposes for sale, or gives or lends any firearm lacking a required serial number, assault weapon, .50 BMG rifle, or firearm precursor part, as specified.

AB 2571 (Bauer-Kahan, Ch. 77, Stats. 2022) prohibited firearm industry members from advertising or marketing, as defined, firearm-related products to minors. The bill restricts the use of minors' personal information in connection with marketing or advertising firearm-related products to those minors.

AB 1621 (Gipson, Ch. 76, Stats. 2022), among other things, prohibited the sale, transfer, or possession of an unserialized firearm precursor part, except as specified, and explicitly prohibits the possession or transfer of a firearm without a serial number or mark of identification.

AB 1594 (Ting, Ch. 98, Stats. 2022) established a firearm industry standard of conduct, and would prohibit a firearm industry member from manufacturing, marketing, importing, offering for wholesale sale, or offering for retail sale a firearm-related product that is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety. Also authorized a person harmed in California, the Attorney General, or city or county attorneys to bring civil action against firearm industry member for an act or omission in violation of the firearm industry standard of conduct.

AB 452 (Friedman, Ch. 199, Stats. 2022) required local educational agencies to inform parents, through a notice, of California's child access prevention laws and other firearm laws.

SB 118 (Committee on Budget, Ch. 29, Stats. 2020), adjusted the timeline for implementation of AB 879 (Gipson, Ch. 730, Stats. 2019).

AB 879 (Gipson, Ch. 730, Stats. 2019) required, commencing July 1, 2022, that the sale of a firearm precursor part by any party be conducted by or processed through a licensed firearm precursor part vendor. (Pen. Code § 30412.) It also prohibited certain persons from owning or possessing firearm precursor parts and provides other limitations on such parts. (Pen. Code § 30400 et seq.)

AB 2156 (Wicks, Ch. 142, Stats. 2022) expanded the prohibitions on the manufacture of firearms without a state license including reducing the number of guns a person may manufacture without a license and prohibiting the use of a three-dimensional printer to

manufacture any firearm without a license from the California Department of Justice. Chaptered.

AB 857 (Cooper, Ch. 60, Stats. 2016) required (1) a person, commencing July 1, 2018, to apply to and obtain from the Department of Justice (DOJ) a unique serial number or other mark of identification prior to manufacturing or assembling a firearm, as specified; and (2) by January 1, 2019, any person who, as of July 1, 2018, owns a firearm that does not bear a serial number assigned to it to obtain a unique serial number or other mark of identification prior to manufacturing or assembling a firearm, as specified. Chaptered.

PRIOR VOTES:

Senate Public Safety Committee (Ayes 4, Noes 1)
Assembly Floor (Ayes 64, Noes 8)
Assembly Appropriations Committee (Ayes 11, Noes 2)
Assembly Judiciary Committee (Ayes 8, Noes 0)
Assembly Public Safety Committee (Ayes 7, Noes 1)
